



**National Association
Rural Housing Enablers**

Training & Professional Development
Bulletin 1: February 2010

Guidance for RHEs on the implementation of rural exception sites

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The National Association of Rural Housing Enablers

Introduction

The National Association of Rural Housing Enablers has been set-up in order to provide national representation for rural housing enablers across England, Wales and Scotland. It is hoped that through this group we can share knowledge and expertise and provide better access to training and information.

Membership of this group is open to all Rural Housing Enablers in England, Wales and Scotland regardless of host organisation. Development of Terms of Reference for the association is ongoing.

Following-on from discussions at the South East Rural Community Council (SERCC) RHE Training provided in August 2007 and the Action for Communities in Rural England (ACRE) training in June 2009, there have been repeat calls for a dedicated RHE group. RHEs currently have Regional Networks that meet throughout the year, however national coverage is sporadic. A number of RHEs regularly take part in national representation. Arlene Kersley was appointed to the HCA Rural Housing Advisory Group at its inception in May 2007. As a member she regularly provides information regarding the funding and coverage of RHEs nationally and raises any issues that RHEs are facing in delivering rural exceptions sites.

Prior to the September 2009 meeting of HCA RHAG, John Lancaster, RHE for Hampshire, asked whether Arlene might request some specialist training for RHEs regarding the legal issues around rural exception sites.

As a result of the request the Department of Communities and Local Government agreed to provide a specialist session for representatives from each of the English Regions.

Those representatives are:

- Arlene Kersley from CCB in Berkshire representing RHEs nationally
- John Lancaster from Hampshire / HARAHA representing the South East
- Moira Groborz from Essex representing the East
- Nigel Potter for Worcestershire representing all of the Midlands
- Emily Grogan from North Yorkshire representing all of the North including the North East and North West
- Martin Hutchings from Gloucestershire representing the South West

This took place on the 15th of December 2009.

This initial training would not have been possible without the significant time and resource provided by CLG. We are particularly grateful to Helen Kelly for organising the event and to her colleagues:

Helen Keen, PPS3 Team
Linda Rowles, Legal Planning Division
Carole Wendland, Low cost homeownership unit
Chris Meader, Right to Buy

This Bulletin is a result of that meeting and is the vehicle for disseminating the guidance given at that meeting. It was unanimously agreed by the RHE representatives to take this opportunity to establish the National Association of Rural Housing Enablers for this purpose.

It is hoped that this exercise may form the basis for establishing a particular body of

information and knowledge which may prove useful for established, new and future RHEs so that our practice becomes better and perhaps more uniformly informed. If it triggers requests for similar responses or clarification on other issues, please let us know.

Whilst RHEs collectively have a wide and extensive knowledge and experience of affordable housing, there are few opportunities for formal training available to them whilst in post. In order to perform the role effectively the RHE requires a more detailed knowledge in wide-ranging areas of subjects of affordable housing, planning, funding etc. Hence the decision was taken to approach CLG with the following questions.

The following are legal questions the Rural Housing Enablers (RHEs) posed to CLG as there is a need for specific guidance in these areas. They are all directly relevant to rural exception development and involve detailed legal information that will help to make negotiations easier with Local Authorities, Parish Councils and RSLs on schemes. Some of these questions come up time and time again from residents at public events, and having proactive responses can help to counter NIMBY attitudes.

Where are Exceptions Sites Acceptable

The Statutory Instrument and the Rural Gazetteer and PPS3

- 1. Clarify the difference between the Statutory Instrument and the Rural Gazetteer, i.e. can exception sites only be developed in those villages identified in the Statutory Instrument? Is the gazetteer strictly for funding guidance? Many RHEs understand that villages identified as rural in the gazetteer qualify for exception sites, however if they are not also in the SI can this be legally possible?***

The **Rural Gazetteer** was established by the Housing Corporation, and is now in use by the HCA to identify rural settlements strictly in terms of funding the delivery of its Rural Affordable Housing Programme. See note on the Gazetteer in 11 below.

The **Statutory Instruments** are secondary legislation (made under powers conferred by various Housing Acts). These SIs protect affordable housing in the 13,000 designated rural areas identified in the Instruments, generally settlements with a population of 3,000 or less where replacement of affordable homes would be difficult, including National Parks and Areas of Outstanding Natural Beauty.

There are 2 Statutory Instruments that have direct relevance to Affordable Housing in the Designated Rural Areas:

- 1. The Statutory Instrument 1997 Nos. 620-625 the Housing (Right to Acquire or Enfranchise)** – This lists the areas (parishes by list and part parishes by map) where there is an exemption from 'Right to Acquire' on Social rented properties in these areas. This ensures that there can be no loss of rented affordable housing as a result of 'Right to Acquire' in the designated areas, absolutely at the core of preserving properties as affordable in perpetuity on rural exception sites, but also on any new build social rented properties as a result of S106 delivery in these areas.
- 2. Statutory Instruments 2009 No. 2098 Housing, England The Housing (Right to Enfranchise) (Designated Protected Areas) (England) Order 2009 and The Housing (Shared Ownership Leases) (Exclusion from Leasehold Reform Act 1967) (England) Regulations 2009** –The former defines the same areas as above including rural exception sites, as protected areas for the purpose of retaining shared ownership houses. The latter sets out that shared ownership houses in these protected areas must be retained in perpetuity by either limiting the staircasing to

80% of the equity or by allowing 100% staircasing but imposing a “First Right of Refusal” on the landlord so that at the time of resale of the property the former shared owner must sell back to the landlord and the landlords must be prepared to repurchase the equity in full and resell it at a reduced shared equity to ensure future affordability. This closes some previous loopholes in leasehold legislation whereby a shared owner of a non-RSL provider could acquire the full freehold on a property without actually having purchased all of the equity and clarifies the legislation in respect of RSLs thereby enabling an RSL to restrict staircasing to 80% without running a similar risk. The provisions ensure that Shared Ownership properties are maintained as “leasehold” by the RSL or other provider. The same difficulty does not apply to flats as providers can already restrict staircasing to ensure the homes are retained in perpetuity within leasehold legislation. The designated Rural areas were not extended in the 2009SE because the case around difficulties for replacement was not as strong in the wider arena.

3. Only those areas identified in the Statutory Instruments as designated rural – regardless of population, are eligible for rural exception site development as indicated in Planning Policy Statement 3. Planning Policy Statement 3 (PPS3) superseded Planning Policy Guidance 3 from April 2007. PPS3 sets out the role of ‘rural exception sites’ for the provision of affordable housing in rural communities. The Planning Policy Statements provide guidance to Planning Authorities and are a material consideration for planning permission. Following is the relevant excerpt of PPS3 :

Planning Policy Statement 3 (PPS3) – Housing, November 2006,

Following is the specific excerpt relevant to rural exception sites:

Item 30: In providing for affordable housing in rural communities, where opportunities for delivering affordable housing tend to be more limited, the aim should be to deliver high quality housing that contributes to the creation and maintenance of sustainable rural communities in market towns and villages. This requires planning at local and regional level adopting a positive and pro-active approach, which is informed by evidence, with clear targets for the delivery of rural affordable housing. Where viable and practical, Local Planning Authorities should consider allocating and releasing sites solely for affordable housing, including using a **Rural Exception Site Policy**. This enables small sites to be used, specifically for affordable housing in small rural communities that would not normally be used for housing because, for example, they are subject to policies of restraint. **(Footnote 20. Small rural settlements have been designated for enfranchisement and right to acquire purposes (under Section 17 of the Housing Act 1996) by SI 1997 620-625 inclusive and 19999/1307)**

Rural exception sites should only be used for affordable housing in perpetuity. A Rural Exception Site policy should seek to address the needs of the local community by accommodating households who are either current residents or have an existing family or employment connection, whilst also ensuring that rural areas continue to develop as sustainable, mixed, inclusive communities.

2. ***Do Planning Authorities have any flexibility to designate their own rural settlements, where exceptions can be developed outside of those listed in the Statutory Instrument? If so can perpetuity be secured on such sites?***

Planning Authorities cannot designate their own rural areas; however they can identify areas where special circumstances prevail where affordable housing may need to be

retained within their Local Plans, provided it is set within policy. Strictly speaking these would not be 'rural exception sites'. Perpetuity can be retained on such properties through planning obligations, however these restrictions cannot exclude any statutory rights in the same way as the exceptions contained within the *Right to Acquire and Leasehold Enfranchisement* as noted previously. The HCA will not (should not) give grant funding for a restricted staircasing scheme if it is not in a designated protected area.

S106 Conditions & Contributions

- 3. *Can/do S106 conditions provide the same legal protection as the SI regarding local connection and perpetuity? What is the relationship of the S106 conditions in law? What is the exact definition of a S106 Agreement, what do they allow for and what can they prevent? Do they override other legal considerations and do they expire?***

Restrictions on the use and development of land set out in a planning obligation made under S106 of the Act of 1990 can be imposed either for a specific period or indefinitely. They will usually cease to affect the land only if the obligation is fulfilled or any time limit expires. However, a planning obligation can be modified or discharged by agreement between the landowner(s) and the planning authority at any time. It is also possible for the landowner to make an application to the authority requesting modification or discharge of a planning obligation provided it has been in force for at least 5 years. This is only likely to be successful if there is evidence that material changes in circumstances have occurred so that the planning obligation is no longer relevant or required. If an obligation is modified by agreement this is done by a deed of variation.

There is a difference between planning conditions and obligations. For example it is not possible to impose a condition requiring the payment of a financial contribution. This must be secured by a planning obligation.

Local connection criteria including appropriate cascades and timescales should be set-out in the S106. (Affordability cannot be modified / challenged as it is covered in Statute in the SI, the Local connection however is not protected in the same way and can be modified and challenged)¹.

- 4. *With regard to financial contributions in a S106 and off site contributions, what is the legislative authority behind these demands? Is there discretion as to their application and are there time limits on them when they must be applied?***

CLG provides guidance *only* with respect of contributions². Local discretion is applied in respect of application and time limits. Increasingly they are applied according to a formulated viability as set-out in Local Policy. There has been recent guidance provided in a letter from CLG to Chief Planning Officers entitled Planning for Economic Recovery this refers to Planning Circular. This advises avoiding unrealistic charges in the current economic environment. (See link below)

<http://www.communities.gov.uk/documents/planningandbuilding/pdf/letterhousingeconomic.pdf>

¹Affordable housing in planning terms is defined in Annex B to PPS3. Other types of housing although "affordable" may not comply with the planning definition.

² PPS3 does advise that robust justification is required if financial contributions or off site provision is to be accepted in lieu of on site affordable housing and that this must be of equal value.

Policy Hierarchy

5. What is the supremacy of [changes in] local, regional and national policy over pre-existing S106 conditions on historic sites? Which has more legal weight an existing legal agreement (S106) or new policy³? Does Primary Legislation (i.e. the Housing Act) override existing Secondary legislation like a S106 or Local Policy?

- An Act (e.g. the Housing Act) is Primary legislation,
- The SI is secondary legislation
- PPS Guidance is a material planning consideration in the formulation of local policy and in determining planning applications.
- A planning obligation (which can be made either by agreement or unilaterally under S106 of the Act of 1990) is a legal document that binds the owner of the land but can be modified or discharged after 5 years (see number 3 above). Purpose is to regulate/restrict land use and/or its development and it must be relevant to planning and the proposed development.

Third parties may make challenges to a grant of planning permission by making an application for judicial review. Applicants have a statutory right of appeal to the Secretary of State if they wish to challenge the authority's decision.

Local Policy must consider National and Regional Policy and Guidance and interpretation of all policy documents is ultimately a matter to be determined by the Courts. Primary Legislation must be taken into consideration when setting out local Policy. Anything in a S106 agreement or Local Policy is open to challenge and judicial review.

Perpetuity

6. What is the legal definition of 'perpetuity' as it applies to rural exception sites?

Perpetuity as it applies to those areas identified in the SI actually means "Continues without limitation". The current legal position is that a planning obligation is not subject to the rule against perpetuities where its provisions regulate the use and development of land. However, if, for example, an obligation also grants rights to buy back affordable properties or creates nomination rights in respect of those properties these rights would be regarded as a form of option and therefore subject to a perpetuity period of 25 years. From 6 April 2010 the provisions of the Perpetuities Act 2009 will come into force and this will introduce a single perpetuity period of 125 years. Options including nomination rights will not be subject to the rule at all.

The Statutory Instruments continue without limitation unless amended by a subsequent instrument or there is a change in primary legislation. Therefore unless Government revokes the SI, the Perpetuity Act 2009 will not have any application to those rural areas identified within the SI.

Preserved Right to Buy & Mutual Exchange

7. Mutual Exchange legislation causes all RHEs tremendous problems. Villages are very concerned about the preservation of the 'Local connection' on rural exception

³ In the case of an old planning obligation it will remain in force unless modified/discharged by agreement or application. If policy no longer supports the restrictions imposed by the obligation then this may support modification/discharge

sites, when a mutual exchange takes place it undermines the entire premise of 'local homes for local people' that has been 'sold' to them. Can Mutual Exchanges and Transfers be prevented on exception sites through the use of S106 conditions? Which takes precedence, the 'right to move' or the local connection?

Within housing legislation mutual exchanges take precedence. A S106 agreement may apply a local connection to a property but this is entirely in the hands of local policy and is open to legal challenge.

Local Authorities must take care that their allocations policy is not challenged on the basis of being discriminatory if they too strongly preserve the rights of local people in general policy.

8. *"Right to Buy" can be transferred on an exception site, is this supported in law? Can we have specific legal reference supporting this?*

The preserved right to buy is available to LA and RSL tenants who have spent at least five years as public sector tenants, whether or not their property has been subject to Large Scale Voluntary Transfer (LSVT). A tenant transferred with their home under a LSVT retains a 'Preserved Right to Buy' and continues to do so if they subsequently transfer into a property managed by the same RSL (or a "connected company") that manages their existing home. Therefore on a rural exception site, should an existing RSL tenant with a Preserved Right to Buy move into a property managed by the same RSL, they can exercise their Preserved Right to Buy.

Also, under section 157 of the Housing Act 1985 social landlords may impose a restrictive covenant on properties located within specified areas that are sold under Right to Buy. The specified areas are National Parks, Areas of Outstanding Natural Beauty, and any of 40 rural areas designated for Right to Buy purposes by the Secretary of State. A list of these areas is available from CLG on request. The practical effect of the restriction is either:

- that the property can only be resold to someone who has lived or worked locally for at least three years ('locally' in this context means 'within a region specified by the Secretary of State' which must, at least partly, be the same as the relevant National Park or area – ie, a County or (for areas designated since 2002) the relevant District.); or
- that if the owner wishes to resell the property within 10 years of the Right to Buy sales, they must first offer it back to the former social landlord at current market value (ie, a 'right of first refusal').

CLG are unaware of any cases in which RTB has caused a problem on a rural exception site, but should be informed if anyone considers that such problems have arisen.⁴

Leasehold Enfranchisement

9. *How do the Leasehold Reform Act amendments on Leasehold and Enfranchisement affect an RSL with a shared ownership property in a rural area built nil grant? Are they treated as private developers? Where there has been*

⁴ This provision restricted the disposal of dwelling houses in national parks AONBs and rural areas designated by the Secretary of State.

grant funding and relevant leasehold and enfranchisement clauses are not included in the lease, does the grant have to be repaid?

The provisions applied within the Act apply to all shared ownership funders regardless of grant. Where an RSL has provided shared ownership properties in a designated rural area without grant funding the HCA will not seek to purchase this property back to prevent it from being lost as an affordable home, should the tenant come to sell on the open market and where the RSL is unable to buy back. For those properties that have been grant funded and are to be sold on the open market the HCA will prioritise their purchase.

CLG are to look into Clause 302 paragraph 4A (f) to confirm if this clause needs to be inserted into a tenant lease to prevent the HCA from requiring grant funding to be returned.

Mortgagee in Possession Clause - Strictly means that the lender to the RSL is able to repossess and sell on the property in the unlikely event of an RSL defaulting on their loan. A mortgagee protection clause in the shared ownership lease means that the lender, who provides a mortgage to the shared owner, can recover the outstanding mortgage and other costs from the RSL's share of the property if the sale proceeds from share owner's share are insufficient. The RSL bears the financial risk should a householder default on their mortgage. On Equity Share schemes the Lender has first charge on the property and therefore first call on the sale proceeds from the property on repossession.

History of Policy & Legislation relating to Exception Sites

10. Can we have a detailed history of the legislation behind exception sites? i.e. a chronology of relevant policy. We are often asked for it by NIMBYS?

What follows in many ways pulls together some of the strands from the previous questions. The key to this is that PPS3 in 2007 drew together the two main tools that we have as RHEs: the exception site (the main planning delivery tool) and the 1996 Housing Act Statutory Instrument (the housing tool which gives perpetuity/no right to acquire for social rented housing built from that date in the listed parishes and those areas defined by map – this applies to all affordable houses built, not just on exception sites). The Protected Areas Statutory Instrument for the 2008 Housing and Regeneration Act enshrines this perpetuity for shared ownership homes and the 80% cap, covering the same geographical areas.

To reiterate the above on the Rural Gazetteer: this carries no material consideration in planning terms nor any legal status in housing terms – it is a list of settlements where the HCA would consider funding RSL affordable housing under its rural programme. In that sense it is of vital importance to the RSL i.e. it would be difficult for an RSL to deliver a scheme on an exception site if the site was in a settlement not in the gazetteer.

The genesis of what we have in PPS3 can be traced back to the early 1980s. The concept of the need for affordable housing in rural areas arose in response to the difficulty faced by 'local people' being outbid by 'migrants/incomers' for housing. Additionally the 1985 Right to Buy legislation resulted in council housing being sold off. So the birth of the problem at the core of RHE work – and still being researched and reported upon without action e.g. ARHC 1986, Taylor Report 2008.

The idea to address the problem grew from the activism of the Rural Housing Trust (RHT) from the late 1970s with early schemes for retiring farm workers. Between 1982 and 1987 the RHT was the main player behind important reports; Inquiry Into Rural Housing 1982 and Village Homes For Village People 1987, which led to the setting up of small rural housing associations to meet general local need in villages. This in turn led to the Rural Development Commission.

In addition to arguing the need for housing, the case for a change in approach as to where this housing should be located was being developed, promoted and lobbied for by some local authorities and the RHT. For example, in the mid 1980s, New Forest District Council was one of the first to adopt a 'local needs' statement in its Local Plan allowing planning permission on sites which otherwise would not be considered – the reason being that any land allocated for residential development within village settlement boundaries would attract open market land values and open market housing unaffordable to local people on low rural incomes. The strict criteria such proposals had to meet were made binding under Section 52 agreements (the predecessor of planning obligations) under then existing planning legislation and which had provisions restricting occupancy in perpetuity to local people on low incomes. So the idea of sites which were an exception to existing planning policy providing there was a proven case was born.

The NFDC/RHT model was picked up by other planning authorities as a way of finding sites for affordable housing in villages. All this was in advance of official/government policy or endorsement, the impetus for this coming from the government's Rural Housing Initiative 1988 which endorsed the use of exception sites and led to the setting up of more rural housing associations.

In February 1989, in answer to a parliamentary question, Secretary of State for the Environment, Nicholas Ridley endorsed the release of exception sites for affordable village housing by announcing his department would not stand in the way of proposals to introduce exception site policies in Local Plans.

The official documentation of this as planning policy came in Planning Policy Guidance 3 (PPG3) 1992 with Annex A giving the detailed criteria and guidelines. The revised PPG3 of 2000, Annex B for details, continued the enshrinement of exception site policy for rural areas: 'the needs of local people for affordable housing may often be best met by the exception policy' (see paras. 69-70). And Planning Circular 6/98 also embodied the principles and endorsed the role of RSLs in delivery also saying that planning conditions and obligations (see S106 below) may legitimately be used to secure the delivery of affordable housing and its occupation 'either initially or in perpetuity (para. 16).

In parallel with the case for exception sites to deliver the housing, the need to strengthen the legality for preventing right to buy/acquire for both rented and shared ownership in order to prevent properties escaping to the open market was being advanced and the 80% cap for shared ownership first appeared in PPG3 1992 as planning policy and the 1996 Act (as above) for social rented homes.

So while PPS3 is the active tool on exception site policy footnoted with reference to the 1996 Statutory Instrument, it is worth remembering that most local authority Exception Site Policy, Affordable Rural Housing Policy, Supplementary Planning Guidance etc (however described) will have been framed in the context of the 1992 and 2000 PPG3s and Circular 6/98.

From 1990, s.106 agreements replaced the old Section 52 agreements and these were in turn substituted by the planning obligation. This allowed local connection criteria to be

imposed indefinitely by a legal deed which was enforceable under Section 106 of the Town and Country Planning Act 1990. This enabled a planning authority to ensure that affordable housing remained available to specified eligible households.

NARHE Foundation Members

The following RHEs are responsible for issuing this initial NARHE Bulletin. It is intended to use the NARHE platform to release further Bulletins with topical guidance for RHEs. Please contact NARHE with any feedback you would like to offer regarding the content of this and future Bulletins.

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