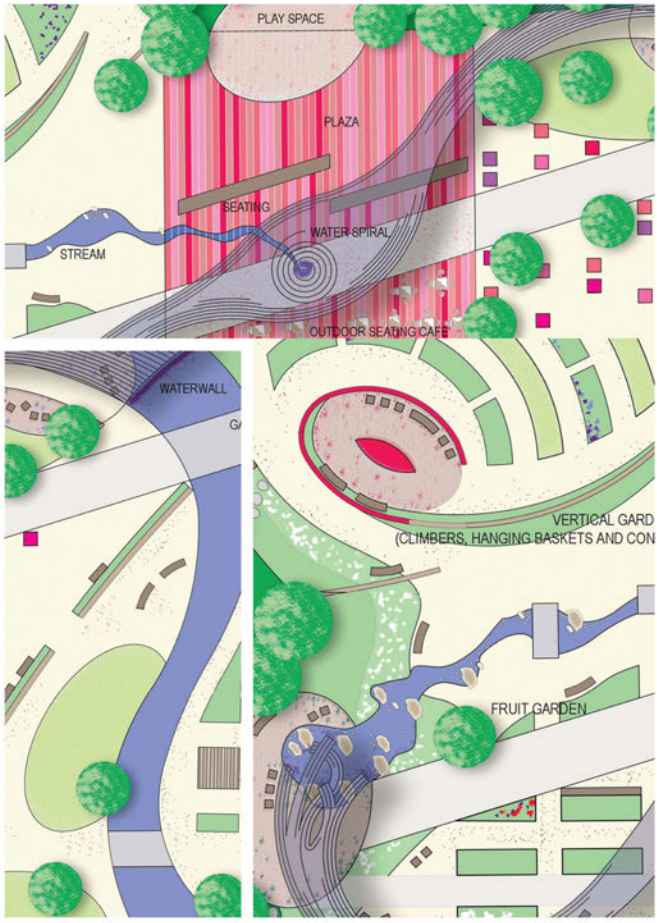
THIRD EDITION

PROFESSIONAL PRACTICE FOR LANDSCAPE ARCHITECTS



Nicola Garmory, Rachel Tennant and Clare Winsch

ROUTLEDGE

Professional Practice for Landscape Architects

Professional Practice for Landscape Architects deals with the practical issues of being a successful landscape architect professional.

This book is an indispensable guide for licentiate members of the Institute on their Pathway to Chartership. It follows the revised 2013 syllabus covering all aspects of professional judgement, ethics and values, the legal system, organisation and management, legislation and the planning system, environmental policy and control, procurement and implementation. It also serves as a reminder and reference for landscape students and for fully qualified professionals in their everyday practice.

Valuable information is presented in an easy to follow manner with diagrams and schedules, key acts, professional documents and contracts clearly explained and made easy to understand.

A handy list of questions are included to aid with P2C revision, answers to which are found within the text.

Nicola Garmory has gained a varied work experience in both private and public sectors over the past 30 years. She joined Rachel Tennant in 1994 forming TGP Landscape Architects. Nicola is a Fellow of the Landscape Institute and qualified as a Chartered Member in 1986 and has taught landscape professional practice since. She is joint author of the previous two editions of this book as well as *The Landscape Architect's Pocket Book.*

Rachel Tennant has over 30 years' experience as a landscape architect working in both private and public sectors. In 1994 she set up TGP Landscape Architects in association with Nicola Garmory. Rachel is a Fellow of the Landscape Institute and qualified as a Chartered Member in 1986. She has taught landscape professional practice since then in both the UK and in Hong Kong. She is joint author of the previous two editions of this book as well as *The Landscape Architect's Pocket Book* also by the same publisher.

Clare Winsch practised as a landscape architect in local government for over 20 years, working in design, landscape management, landscape characterisation and planning, including representing local councils in planning inquiries. She qualified as a Chartered Member of the Landscape Institute in 1987 and has taught professional practice since then, acquiring extensive knowledge of common, land and statutory law and the work of government environment and conservation agencies for the four home nations of the United Kingdom. Clare is joint author of the previous two editions of this book. She now works as a private consultant**.**

'Since the first edition was published in 2002, *Professional Practice for Landscape Architects* has been an invaluable resource for many in professional practice. This revised edition continues to offer excellent guidance for many landscape professionals on the Pathway to Chartership, and is a useful tool for chartered practitioners wanting to refresh their knowledge on contracts, planning or practice law.'

Chris Sheridan, Head of Education and Membership, Landscape Institute

Professional Practice for Landscape Architects

Third edition

Nicola Garmory, Rachel Tennant and Clare Winsch

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Contents

Tables

Introduction

The third edition of this book provides essential guidance for all levels of landscape architects from students to seasoned practitioners and is a point of reference for every day professional landscape life. It covers the fundamental principles of successful professional practice.

Topics covered include professional ethics, professional appointment, legislation, practice management, planning and environmental law, tendering, forms of contracts and contract administration. It has been written to reflect the Key Topics set out in the Landscape Institute's Pathway to Chartership (P2C) syllabus and will be a useful and easy to follow guide for students of the Landscape Institute's P2C programme.

Environmental and planning legislation are ever changing areas of professional practice and the authors have included website addresses in the text to enable readers to keep up to date with these areas of change.

Nicola Garmory, Rachel Tennant, Clare Winsch

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In memory of John Coultas
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1 Professional judgement, ethics and values

CHAPTER CONTENTS

WHAT IS A PROFESSIONAL?

There are many definitions available of the terms 'professional' and 'professionalism' but the following is a comprehensive definition in relation to the provision of professional services:

> *'A professional person is one who offers competence and integrity of service based upon a skilled intellectual technique and an agreed code of conduct.'*
> Report of the Monopolies Commission on the Supply of Professional Services, 1970

A professional person enables a client to undertake work which they are unable to carry out themselves. A client will employ a professional on the basis of their:

- *Qualifications* – through which they have been accepted as a member of a profession.
- *Skills* – including the application of their knowledge, experience and intellectual technique.
- *Ethics and trust* – there is a special relationship between professionals and their clients which is based on trust. This distinguishes them from others in

the marketplace. Acting ethically is at the heart of a professional's behaviour in accordance with their professional codes.

A profession has a professional institute or body that protects the status of its membership and governs its members. The Landscape Institute (www.landscapeinstitute.org.uk), founded in 1929 as the Institute of Landscape Architects, is the professional body for landscape architects in the United Kingdom. The Institute aims to promote landscape architecture, and to regulate the profession with a code of conduct that members must abide by.

> ***The Landscape Institute's membership declaration***
>
> *When you join the Landscape Institute you agree to terms of the Royal Charter, by-laws and the Code of Conduct of the Institute. This continued commitment to the development of the profession, to high standards of education and conduct, to your own development and to the support of fellow professionals remains while you are a current Landscape Institute member.*

The Institute controls who enters the profession by safeguarding the first basis of professionalism: the qualification of 'landscape architect'. This is reinforced by determining standards and criteria for education and experience, and also by setting out the requirements for ongoing training and professional conduct (refer to 'The Objects of the Landscape Institute' under the Royal Charter of Incorporation).

CODE OF STANDARDS OF CONDUCT AND PRACTICE FOR LANDSCAPE PROFESSIONALS

(Refer to the Landscape Institute's website for the full text and guidance on the Code of Standards of Conduct and Practice for Landscape Professionals – www.landscapeinstitute.org.uk.)

The codes of conduct of a professional body are devised to protect the interests of the clients of the profession, to maintain the status of the profession in the eyes of society, and to protect the public and the profession.

The Landscape Institute controls the standard of work and professional and business ethics via the Code of Standards of Conduct and Practice for Landscape Professionals (2012).

Members are governed by and are obliged to conduct themselves in accordance with the Code in their business and professional life. The Code places a strong emphasis on the integrity, competence and professionalism of its members and takes on aspects of the Bribery Act 2010. It applies to all members irrespective of grade or level of membership.

'The Code should be considered central to the professional life of a Landscape Professional not only as a source of ethical guidance, but also as a commonsense indicator to principles of good practice. It is only through the maintenance of high standards by individuals that landscape architecture as a whole will be served, the public will be protected and the profession as a whole will thrive.'

This means that all members must meet the high standards set by the profession in terms of qualifications, ongoing training and ethical standards. Meeting those standards and enforcing those standards is the profession's promise of trust to the public.

The importance of professional ethics

Professional ethics set out appropriate behaviour by professional members and ensure both that a professional will always do the best for their client and that they recognise and respect the wider public interest.

Ethical standards provide confidence to the public and others about the reliability and high standards they can expect when using the services of a professional.

The Landscape Institute can enforce a breach of the Code through disciplinary proceedings for unacceptable professional conduct or competence, and also if a member is convicted of a criminal offence.

HOW ARE LANDSCAPE ARCHITECTS GOVERNED BY THEIR CODE?

When undertaking work a landscape architect should always have the standards of the Code at heart. The 13 standards can be grouped under three overarching themes:

- *Promoting professional attitudes* – acting impartially, with integrity and honesty.
- *Promoting professional competence* – carrying out their work competently and conscientiously with due skill and care, and providing the necessary knowledge, skills and resources to undertake their work in a business-like manner.
- *Promoting trust in professional relationships* – acting responsibly and ethically, respecting the rights and interests of their clients and all parties who are likely to be affected by their work.

The following scenarios will help interpret the Code in the day-to-day working life of the landscape architect.

Promoting professional attitudes

The removal of a well-loved public park could be the result of your client's brief for an extension to a residential development. Would you simply follow the brief or advise the client on the importance of the park and show how it could still be incorporated as part of the development?

> ***Standard 1*: *The Landscape Institute expects members who are carrying out professional work to have regard to the interest of those who may be reasonably expected to use or enjoy the products of their work.***
>
> *You have responsibilities to the character and quality of the environment. You should seek to manage change in the landscape for the benefit of both this and future generations, and should seek to enhance the diversity of the natural environment, to enrich the human environment and to improve them both in a sustainable manner.*

Your business partner is considering sending an email to a previous client advising them never to use another landscape practice as their work is of poor quality, the senior personnel never tell the truth and financially they are unstable. Is this acceptable?

> ***Standard 2: The Landscape Institute expects members to uphold the reputation and dignity of their profession and their professional organisation.***
>
> *You should not be party to any action or statement that is likely to bring the profession into disrepute.*
>
> *In addition to complying with legislation, you should not be party to any communication that is likely to be construed as defamatory by the profession, the public or others, or which may be considered discriminatory in any form.*
>
> ***Standard 5: The Landscape Institute expects members to act at all times with integrity and avoid any action or situations which are inconsistent with their professional obligations.***
>
> *You should not be party to any statement, written or otherwise, which is contrary to your professional opinion, or which you know to be misleading, unfair to others, or otherwise discreditable to the profession.*

You are aware that your friend, a practising landscape architect and Chartered Member of the Landscape Institute, has taken on a partner that has been expelled from the Institute. Should you take any action?

> ***Standard 3: The Landscape Institute expects members to actively and positively promote the standards set out in this Code of Conduct.***
>
> *You are expected not only to order your own professional life in accordance with the Standards of the Code, but also to do whatever can reasonably be done to ensure their observance generally by other members. You should also report to the Chief Executive any serious falling short of these Standards on the part of any other member of which you are aware.*
>
> *You shall not take as a partner/co-director an unsuitable person, such as a person who has been expelled from membership of the Landscape Institute for disciplinary reasons, or has been disqualified or expelled from membership of another profession.*

If your employer asked you to attend the local Landscape Institute Branch meeting would you avoid it and meet your friends in the pub instead?

> ***Standard 4: The Landscape Institute also expects members to actively and positively promote and further the aims and objectives of the Landscape Institute, as set down in its Charter, and to contribute to the work and activities of the Institute.***
>
> *You should also actively promote participation in the Institute's activities to your staff.*

You have been asked to advise two separate clients (large retail operator and local campaign group) opposed on the same potentially contentious matter – what do you do?

> ***Standard 5: The Landscape Institute expects members to act at all times with integrity and avoid any action or situations which are inconsistent with their professional obligations.***
>
> *You should, when finding that your personal or professional interests conflict with those of the client or of other relevant parties, inform all parties and either withdraw from the situation, remove the source of conflict, or obtain the agreement of the parties concerned to the continuance of the engagement. However, some conflicts of interest are so extreme as to prevent*

you from entering into or continuing work, even with the client's knowledge or consent. You should also consider the business and commercial interests of your partners or co-directors.

When two or more clients whose interests may be in conflict each require your services, you should manage this to ensure that the interests of one client do not adversely affect the others.

Your friend is a landscape architect and has been writing on their blog about a sensitive project they are working on. Is this acceptable?

Standard 5: The Landscape Institute expects members to act at all times with integrity and avoid any action or situations which are inconsistent with their professional obligations.

You should observe the confidentiality of your clients' affairs and the privacy of others, and should only disclose confidential information with their prior consent or other lawful authority.

A contractor offers you a trip to Ascot races for you and your family in return for a recommendation to your private client to negotiate only with them as sole contractor for a luxury hotel project. Do you accept?

Standard 5: The Landscape Institute expects members to act at all times with integrity and avoid any action or situations which are inconsistent with their professional obligations.

You should not offer or accept bribes to/from anyone, and should maintain a register of hospitality as required by law. If you give or receive any introductory or referral fees you should disclose this arrangement to the prospective client.

Promoting professional competence

Part of the brief for a new project includes large-scale engineering work. Your practice has no engineering qualifications or skills. How do you advise your client?

> ***Standard 6: Landscape Professionals should only undertake professional work for which they are able to provide proper professional and technical competence, and resources.***
>
> *You are expected to be competent to carry out work for which you have been engaged, and if you engage others, you are responsible for ensuring that they are competent to perform the task and are adequately supervised. You are expected to accurately represent your professional status and qualifications as well as those of anyone working for you in any capacity.*

A member of staff has suggested an extended lunch-time office outing to review an exhibition on place making which is about to close that day. Would you allow all your landscape architectural team to attend or say they cannot go because the office is too busy?

> ***Standard 7: The Landscape Institute expects members to maintain their professional competence in areas relevant to their professional work and to provide educational and training support to less experienced members or students of the profession over whom they have a professional or employment responsibility.***
>
> *You are also expected to actively promote CPD for all your staff, and to ensure that an appropriate amount of time is devoted to such activities.*

Promoting trust in professional relationships

Can you commence working on a project based on a verbal agreement with your client?

> ***Standard 8: The Landscape Institute expects members to organise and manage their professional work responsibly and with integrity and with regard to the interests of their clients.***
>
> *You should not undertake professional work unless the terms of the contract have been recorded in writing.*

As a partner in a practice you have been thinking of putting a quality management process in place for a number of years but it seems more hassle than it's worth. Is it required?

> ***Standard 8: The Landscape Institute expects members to organise and manage their professional work responsibly and with integrity and with regard to the interests of their clients.***
>
> *You should ensure that you have appropriate and effective internal procedures, including monitoring and review procedures, and sufficient suitably qualified and supervised staff to enable you to function efficiently.*

Half way through a contract on site your client is disputing the contractor's ability to complete on time, and the contractor is accusing the client of instructing changes to the works without following proper procedures. Do you ignore the contractor and support your client's claims?

> ***Standard 9: The Landscape Institute expects members to carry out their professional work with care, conscientiously and with proper regard to relevant technical and professional standards.***
>
> *When you are acting between parties or giving advice, you should exercise impartial and independent professional judgement to the best of your ability and understanding.*

Could you advise a potential client who was seeking quotes for a project from yourself and another practice that that you would provide a higher-quality service with greater design flair than the other landscape practice?

> ***Standard 10: Members of the Landscape Institute should only promote their professional services in a truthful and responsible manner and such promotion shall not be an attempt to subvert professional work from another member.***
>
> *When advertising your services you should not make untruthful or misleading statements, nor claim to be better than other professional members. Special expertise, however, may properly be claimed and referred to.*
>
> *If you are aware that a client already has a contract for services provided by another member, you should not attempt to gain that contract.*

If your client provides you with a cheque for £20,000 in advance for planning application fees how would you deal with the money prior to the application being submitted?

Standard 11: The Landscape Institute requires member to ensure that their personal and professional finances are managed prudently and to preserve the security of monies entrusted to their care in the course of practice or business.

When you hold monies belonging to a client or third party, you should arrange for its receipt to be recorded and for it to be kept (where possible) in an interest-bearing account in a bank or similar institution separate from any personal or business account.

You should keep such money in a designated 'client account' and you should give the bank written instructions that all money held in it is held as clients' money and that the bank is not entitled to combine the account with any other account or to exercise any right of set-off or counterclaim.

You may only withdraw money from a client account to make a payment to or on behalf of a client, or on the client's written instructions. Unless otherwise agreed by the client, you should pay any interest (or other benefit) accruing to the client.

As an employee of a large landscape practice are you covered for professional mistakes? What are you required to do?

Standard 12: The Landscape Institute expects members to have adequate and appropriate Professional Indemnity Insurance.

The need for cover extends to professional work undertaken outside your main professional practice or employment and to work undertaken by employees, subcontractors or consultants.

You and third parties are expected to have an appropriate level of cover commensurate with the work undertaken and to ensure that it includes run-off cover.

If you are employed, you shall ensure as far as possible that Professional Indemnity Insurance cover, or other appropriate cover, is provided by your employer.

A client sends in a complaint about a staff member in your practice. What are you required to do?

Standard 13: The Landscape Institute expects that any complaints concerning the professional work of individual members or their practice should be dealt with promptly and appropriately.

ROYAL CHARTER OF INCORPORATION

The Landscape Institute was granted Royal Charter status in July 1997. The title 'Member of the Landscape Institute' is protected by Charter in the UK, which has the following effects:

- Only Members and Fellows are classified as Corporate Members and are entitled to use the protected title of Chartered Member or Fellow of the Landscape Institute.
- The Government has a statutory duty to consult with the Landscape Institute on landscape issues.

The Royal Charter of Incorporation sets out the objects of the Landscape Institute.

> ***Paragraph 5(1): Objects of the Landscape Institute***
>
> *'To protect, conserve and enhance the natural and built environment for the benefit of the public by promoting the arts and sciences of Landscape Architecture (as such expression is hereinafter defined) and its several applications and for that purpose to foster and encourage the dissemination of knowledge relating to Landscape Architecture and the promotion of research and education therein, and in particular to establish, uphold and advance the standards of education, qualification, competence and conduct of those who practice Landscape Architecture as a profession, and to determine standards and criteria for education, training and experience.'*

It also defines the profession of landscape architecture.

> ***Paragraph 5(2)***
>
> *'"Landscape Architecture" shall mean all aspects of the science, planning, design, implementation and management of landscapes and their environment in urban and rural areas and the assessment, conservation, development, creation and sustainability of landscapes with a view to promoting landscapes which are aesthetically pleasing, functional and ecologically and biologically healthy and which when required are able to accommodate the built environment in all its forms …'*

The Charter was revised in March 2008 and allows for transfer of parts of the old by-laws into a new set of regulations. (Refer to the Landscape Institute website for Governance, Structure, Regulations and By-Laws: www.landscapeinstitute.co.uk.) Note: at the time of going to press the Landscape Institute's governance structure was proposed to be charged through an EGM.

The current membership grades are:

Corporate Members:

- Fellows (FLI)
- Chartered Members of the LI (CMLI)

Non-Corporate Members:

- Academic Members and Fellows
- Licentiate Members
- Students
- Honorary Fellows
- Supporters
- Retired and Affiliate Members

Corporate Members are entitled to use a description of the area of work in which they are qualified and choose to practise stated as follows:

- Landscape Design – 'Design'.
- Landscape Management – 'Management'.
- Landscape Science – 'Science'.

Following the changes introduced by the revision of the Landscape Institute's Royal Charter, a new Board of Trustees took office in July 2009. The Board has ultimate responsibility for what the Landscape Institute does, consistent with Section 97(1) of the Charities Act 1993, which states that charity trustees are 'the persons that have the general control and management of the administration of a charity'. In addition a new Advisory Council took office in July 2009. The Advisory Council is the guardian of the Landscape Institute's Charter and of its long-term objectives.

To become a Chartered Member, the Landscape Institute has introduced the 'Pathway to Chartership'. The system focuses on the accumulation of knowledge and understanding required to practice as a landscape architect with a chosen mentor which culminates in an oral exam.

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

The Institute has issued guidelines on this subject which are available on its website. It defines continuous professional development (CPD) as:

> *'The systematic maintenance, improvement and broadening of knowledge and skill, and the development of personal qualities necessary for the execution of professional and technical duties throughout your working life.'*

CPD is referred to in the Code of Standards of Conduct and Practice under Standard 7, which states:

> *'The Landscape Institute expects members to maintain their professional competence in areas relevant to their professional work and to provide educational and training support to less experienced members or students of the profession over which they have a professional or employment responsibility.'*

All members of the Institute are asked to complete 25 hours of CPD per year.

The Landscape Institute recognises that many members gain great benefits in personal development from a range of general and specialised activities. CPD activities can take place in many different situations and may encompass one or more of the following list:

- Attendance at conferences, workshops, seminars and lectures organised by the Institute or the Branches and similar events organised by other professional institutes, official and voluntary bodies, or commercial organisations with similar interests.
- Talks, discussions and visits organised by practices and other organisations.
- Short courses and lectures organised by academic bodies.
- Researching information gathered for office projects.
- Individual study: reading, visits, open and distance learning.
- Service on Branch committees or similar technical and professional working groups.
- Preparing and giving occasional lectures and tutorials to students or peers.
- For academics, time spent as above but on topics concerned with teaching problems and techniques.

Why is CPD important to landscape architects?

- Landscape architects are obliged by the Code of Standards of Conduct and Practice to carry out continuing professional development.
- The Objects of the Landscape Institute state: *'CPD is essential to the maintenance of a high standard of professional qualification and the promotion of the highest standard of professional service'*.
- CPD ensures improved efficiency and consistency. Good management practices reduce unproductive time which means greater gains in revenue – getting things right first time.
- A well-managed and up-to-date office is less likely to experience claims. A well-educated office is likely to be more innovative with the backup of technical know-how.
- Time dedicated to staff education means greater commitment to your practice and reduced staff turnover.

THE LANDSCAPE ARCHITECT'S RESPONSIBILITIES AND OBLIGATIONS

That of a skilled professional person

Landscape architects are obliged to conduct themselves in accordance with the Code of Standards of Conduct and Practice. The Code lays down the standards of professional conduct and practice expected of landscape architects.

- *'The Landscape Architect will use reasonable skill, care and diligence in fulfilling their services to the client in accordance with the normal standards of the profession'* (Landscape Consultant's Appointment: Clause 3.2 Duty of Care).
- Refer also to Standard 9 of the Code of Standards of Conduct and Practice – *'perform your work with due skill, care and diligence'*.

That of a responsible agent

(See Chapter 5 for the law of agency.)

The landscape architect is the client's representative and will act on behalf of the client on matters set out in the terms of their appointment. In this capacity, the landscape architect must act in the client's interest and must always remember that acts done by him on behalf of the client will be deemed to be the acts of the client.

That of an impartial professional

The landscape architect will be impartial in administering the terms of a contract between client and contractor. Under the JCLI Conditions of Contract, the landscape architect as contract administrator is named as agent, which allows for a quasi-judicial function in resolving issues on a fair and reasonable basis.

(Refer to Standard 9 of the Code of Standards of Conduct and Practice – *'acting between parties or giving advice, you should exercise impartial and independent professional judgement to the best of your ability and understanding'*.)

CATEGORIES OF RESPONSIBILITY

Landscape architects have a responsibility to:

- society,
- the environment,
- the client,
- the landscape profession,
- their own organisation and their colleagues,
- contracting and other professional organisations.

These responsibilities are expressed in various ways.

Professional judgement, ethics and values

- Understand the ethical dimensions to their actions and impact on society, and the wider contexts of their practice including environmental, social, political, cultural and economic.
- Act in accordance with the Landscape Institute's Charter and Code of Standards of Conduct and Practice.
- Take responsibility in their work for protecting, conserving and enhancing the natural and built environment within their influence.
- Recognise the limits of their own understanding and abilities, and practise within them.
- Act as ambassadors for the profession in all their activities.
- Recognise the expertise of fellow professionals in other disciplines.

Professional skills, practice and advice

- Undertake work in accordance with the normal standards of the profession and provide professional advice and practice to the client in all areas of service.
- Maintain and develop their professional knowledge.
- Recommend appropriate sources of further information or technical input where these lie outside their remit or area of expertise.

Legal knowledge and compliance

- Observe all relevant legal requirements and obligations including compliance with relevant Health and Safety regulations.
- Keep up to date to ensure the relevant knowledge of statutory laws and other legal controls.

Organisation and office management

- Follow the Code of Standards of Conduct and Practice in relation to financial and business practice.
- Provide the right conditions and procedures including monitoring and review for the effective running of the office and projects.
- Ensure that adequate, accessible and secure records are maintained.
- Adhere to good management practice.
- Represent and promote services offered by the department, practice or agency.
- Prepare fee proposals to set out the scope of work and contractual arrangements between parties.

Project management and coordination

- Provide and communicate information for the project to all parties (client, design team and contractor) ensuring the work is brought together in the right order, at the right time, and to the right specification.

The Landscape Institute's Charter of Incorporation, para. 5(2) also states clearly the professional responsibilities of landscape architects.

OBLIGATIONS OF THE LANDSCAPE ARCHITECT BEYOND THE UK

European Landscape Convention (ELC)

The European Landscape Convention was adopted on 20 October 2000 in Florence and was signed by the UK government on 24 February 2006; it became binding in this country on 1 March 2007. It grew out of the concern that local landscapes across Europe were losing their distinctiveness. The European Landscape Convention is part of the Council of Europe's (CoE) work on natural and cultural heritage, spatial planning and the environment and is dedicated exclusively to the protection, management and planning of all landscapes as a common European resource, cherished and valued beyond national borders.

Each signing party to the convention undertakes:

- To recognise landscapes in law as an essential component of people's surroundings, an expression of the diversity of their shared cultural and natural heritage, and a foundation of their identity.
- To establish and implement landscape policies aimed at landscape protection, management and planning.
- To establish procedures for the participation of the general public, local and regional authorities, and other parties.
- To integrate landscape into its regional and town planning policies and into its cultural, environmental, agricultural, social and economic policies, as well as into any other policies with possible direct or indirect impact on landscape.

The ELC considers that every landscape forms the setting for the lives of the population concerned; the quality of those landscapes affects everyone's lives. Consequently, the ELC seeks a democratic approach, with citizens taking an active role in the decision-making process.

A Council of Europe Landscape Award has been set up to recognise quality stewardship of landscapes that demonstrates:

- sustainable development;
- environmental, economic and cultural sustainability;
- remedies of past damage;
- enhancement of the existing landscape.

The Landscape Institute's Policy Committee is currently preparing a European Landscape Convention Action Plan.

In the UK Natural England, Scottish Natural Heritage, Natural Resources Wales and the NI Council for Nature Conservation and Countryside manage the implementation of the ELC.

International Federation of Landscape Architects (IFLA World)

The International Federation of Landscape Architects is the body representing landscape architects worldwide. It is a democratic, non-profit, non-political and non-governmental organisation representing national landscape associations and individual landscape architects globally. Its purpose is to coordinate the activities of member associations when dealing with global issues, and to ensure that the profession of landscape architecture continues to prosper as it continues to effect the design and management of our environment.

The main objectives of the Federation are:

- The development and promotion of the profession of landscape architecture, together with its related arts and sciences, throughout the world.
- The understanding of landscape architecture as physical and cultural phenomena concerned with environmental heritage and ecological and social sustainability.
- The establishment of high standards of professional practice in the design of the landscape, its management, conservation and development.

International Federation of Landscape Architects Europe (IFLA Europe)

Membership of IFLA Europe (formerly the European Federation of Landscape Architects (EFLA)) is open to national associations of landscape architects in the European Union, the European Economic Area, Switzerland and the Associate Countries (those countries formally applying to join the EU). In 2006, following decisions by EFLA's General Assembly and IFLA's Central Region delegates, the two representative organisations were merged on 1 January 2007.

The Mission of IFLA Europe

To establish, support, and promote the Landscape Architectural profession across Europe, contributing to international discourse, shaping and disseminating European initiatives, facilitating the exchange of information, whilst promoting excellence in professional practice, education and research culminating in a culturally rich, diverse and sustainable Europe.

PROFESSIONAL JUDGEMENT: TOP 10 QUESTIONS

1. What differentiates a landscape architect from a landscape contractor?
2. What are the Objects of the Landscape Institute?
3. How does being a professional affect the public's enjoyment of your work?
4. How are landscape architects obliged to conduct themselves?
5. What ethics should landscape architects abide by?
6. The Code of Professional Conduct and Practice: what can you & can't you do?
7. Why is CPD important and how would it benefit a practice?
8. What are the responsibilities/duties of a landscape architect?
9. Who do you owe those responsibilities to?
10. What are the obligations of the landscape architect beyond the UK?

2 Professional duties

CHAPTER CONTENTS

In the UK, landscape architects, like ordinary citizens and other professionals, act within the context of the laws of England, Northern Ireland, Scotland and Wales. This chapter is about what the home nations' legal frameworks and courts regard as reasonable behaviour from citizens and professionals.

LIABILITIES

Introduction

'Liability' refers to the obligation to pay damages when things go wrong. There are several types of liability which may concern the landscape architect, including liability in contract, liability as a member of a practice, an employer or employee, statutory liability, liability as an occupier, vicarious liability, liability as a professional, and liability in tort (negligence, libel, nuisance, trespass and strict liability).

Tort is to do with civil liberty in the absence of a contract and applies to all citizens. It is concerned with three elements, all of which need to be recognised in law for a claim to be valid:

- Infringement of a right, which often is a judgement that people have a legally enforceable duty of care towards others. These rights include a right to have work done with reasonable care, to have other people keep off your land and that people should not blacken your name.
- A loss recognised in law.
- Remedy in a form that the courts are able to deliver.

The law of tort is formed from individual cases brought to court on which judges have made lasting assessments about what level of responsibility it is reasonable to expect and the normal standards of behaviour that are a consequence of those judgements. In general terms tort is concerned with where and how liability can be attached and the re-allocation of the burden of losses suffered. Clearly, notions of reasonable behaviour may change and also what was once just civil law may also become criminal law. For example, careless driving was once regarded only as a negligent act, but now the state may prosecute offenders under criminal law.

Tort is called *delict* in Scotland. The legal principles are slightly different, with Scottish delict concentrating more on general theory and less on specific wrongs. Most actions based in delict arise out of negligence.

In assessing a claim in contract or tort, depending on the circumstances of the case, courts will examine:

- the likelihood of injury or damage occurring;
- the seriousness of injury or damage;
- precedents established through case law (previous examples);
- obligations established under contract between the parties including implied and explicit terms;
- statutory rules and penalties.

In assessing liability for a claim concerning landscape work, adjudicators and courts will look for evidence that landscape architects had thought about the nature of the site, the process of working on the site and the likely consequences of any change to the site resulting from landscape works. Clearly, thoughtful and well-documented risk assessment, quality assurance schemes and the duties stipulated under the CDM Regulations are relevant office practices in this context.

> If a dispute arises in the landscape profession, it is possible and even probable that a landscape architect could be simultaneously liable both in tort and contract (and indeed other forms of liability) for a single offence. For example, incompetent design could be in breach of contract and constitute negligence (e.g. subsequent defects) and say, implicate the practice as a whole.

Liability for breach of contract

For this to apply there must be a contractual relationship with another party. Breach of contract is committed when a party without lawful excuse refuses or *fails to perform*, performs defectively or incapacitates her/himself from performing the contract.

When a landscape architect enters an agreement with a client, he or she makes a commitment to exercise professional skills competently and with care for the

client's interests. So if the landscape architect neglects to do what he or she undertook to do, or bungles it, she or he commits a breach of contract which makes her or him liable to the person who engaged her or him.

Duties of care and strict duties

Specifically, duties in contract are of two kinds: duties of care and strict duties (duties of result). A *duty of care* is a duty to make reasonable efforts to produce the desired result. A duty of care in contract can be implied rather than expressly stated. There are five conditions that need to be satisfied for incorporation of an implied term:

- It must be reasonable and equitable.
- It must be necessary to give business efficacy to the contract; so that no terms will be implied if the contract is effective without it (i.e. it must make good business sense).
- It must be so obvious that 'it goes without saying'.
- It must be capable of clear expression (i.e. not a vague concept or open to interpretation).
- It must not contradict any express terms of the contract.

An example of an implied term in contract is provided by the case *CFW Architects v Cowlin Construction Ltd* (2006). The court held that there was an implied term in the consultant's appointment that the consultant would deliver drawings on time to enable the contractor to procure materials and build on programme.

A *strict duty* (or duty of result) is a guarantee that the desired result will be produced, making the promiser liable even if the failure to produce it cannot be shown to be his or her fault. Usually a landscape architect's duties are duties of care, but liability may be strict either when:

- He or she delegates part of his work to someone else.
- He or she is brought in to solve a particular problem.

Specific aspects of the landscape architect's work that may give rise to liability claims if not carried out with reasonable care include:

- Negligent survey.
- Incompetent design, i.e. errors or omissions in plans, drawings or specification, also inadequate choice of materials, 'build-ability' and 'supervisability'.

- Inadequate inspection: the landscape architect is required to inspect the works to ensure that the standard is that originally conceived. Reasonable inspection does not mean a 24-hour presence, but it does mean overseeing the principal parts of the works especially if these will subsequently be hidden, e.g. drains and foundations.
- Negligent financial advice, e.g. on likely building costs.
- Negligent legal advice, e.g. on aspects of the law relevant to the business of landscape architecture.
- Negligence in certifying payments, e.g. overcertifying or issuing certificates for work inadequately done.

Case law in 2004 established that people providing services to an organisation owe a duty of skill and care to that organisation to give it a warning about harmful situations or potentially harmful consequences of actions of which they are aware.

A duty of care agreement or a collateral warranty refers to an agreement that is adjunct to another or principal agreement, i.e. the agreement between an architect and a client. The purpose of a collateral warranty is to bind a third party (usually a developer or financial institution which is backing the client) in contract where no contract would otherwise exist. Without a warranty the third party would have to establish a claim in tort.

A claim for contributory negligence is not available to a defendant to a contractual claim which does not depend on any negligence on its part. If the defendant is found negligent, its action will amount to breach of contract.

Liability as a member of a practice

Partnerships (unlimited)

In addition to all their normal individual liabilities, each partner has added responsibilities as a member of a partnership. The nature of the liability for the contract debts and torts (including professional negligence) is defined by sections 9 and 12 of the Partnership Act 1890.

Essentially every partner in a partnership (in England) who makes any admission, representation or action in the course of carrying out the firm's business binds the firm and his fellow partners, unless it is outside his authority to act for the firm in that particular matter. Similarly any torts, for example, acts of professional negligence and negligent statements where it may be construed that the partner was speaking as a member of the firm, are regarded as being committed by all in the partnership.

Limited liability partnerships (LLP)

LLPs are governed by their members (Limited Liability Partnerships Act 2000). For an LLP to be incorporated, two or more persons associated for carrying on a lawful business with a view to profit must be named in the incorporation

document. These are classified as designated members and are not employed by the LLP which is a separate legal entity.

- Every member of an LLP is the agent of the partnership. The LLP is bound by what a member has agreed unless he acted outwith the scope of his authority.
- A member is not liable for the torts or obligations incurred by the LLP, other than in tort for their own negligence. Therefore it is only possible to sue the LLP in contract and not the member. However the member can be sued under the law of tort.
- A member is liable for the debts of the LLP in the event of it being wound up to the amount which he has contributed to the LLP as capital.

Companies

A company is owned by its members or shareholders and is governed by its directors or managing director with the supervision of its shareholders.

Shareholders

- Shareholders are not liable personally for the torts or obligations incurred by the company or by other shareholders (other than in tort for their own negligence).
- Shareholders are only liable for the debts of the company to the amount unpaid on their shares if the company is limited.
- Shareholders are fully liable for torts and obligations if the company is unlimited *only* on the winding up of the company, otherwise it rests with the company itself.
- If a company is dissolved by winding up, both members and past members (within past 12 months) will be liable to contribute towards the assets of a company so it can meet its liabilities.

Directors

A director is not a servant/agent of the company and cannot be liable for the company's debts or torts. However they are liable for their own torts.

Personal liability of employees

An employee may be sued personally in negligence. Usually a claimant does not do so because they know that the employer is likely to carry professional indemnity insurance (PII), and as an individual is unlikely to have sufficient funds to meet a claim, most commercial organisations would prefer not to sue individuals. Therefore, a problem is only likely to arise if the employer or previous employer does not carry PII.

The controlling mind

Case law in 2003 established that the concept of 'controlling mind' applies to both private companies and public practice. The concept was developed in the context of 'corporate manslaughter'. For this charge to apply it is necessary to prove that the defendant is a company or corporate body rather than a partnership or other form of enterprise; an individual within the organisation is of such seniority that they can be said to be the 'controlling mind' or 'directing mind'; and the individual is guilty of manslaughter through gross negligence. The controlling mind will usually be a senior manager or, if the task has been delegated to an individual with full discretion to act independently, that delegate may also be regarded as a controlling mind. In this context, others engaged to provide services to the organisation who see that a situation is clearly dangerous have a duty to warn as part of the skill and duty they owe to that organisation.

Liability in a local authority

In law the 'corporation' is like an individual and can be sued. Liability in a local authority is based on a statutory duty to safeguard public health and safety and consequently to succeed in a claim against a local authority the claimant must establish imminent danger to health and safety.

In the case of local authorities, identifying a risk and having the power to do something about it does not necessarily create a duty, but each case would be assessed individually. Were such a duty to exist, it would place a heavy burden on authorities in staffing, training and budgets (*Sandhar & Anor v Dept. of Transport,* 1994). This seemingly undefined situation was addressed by the Compensation Act 2005 which was designed to allow desirable activities to take place without incurring an unduly onerous duty of care. The Act includes provisions that, in claims of negligence or breach of statutory duty, apology, offer of treatment or other redress would not of itself amount as an admission of liability.

As a claim against a local authority may be difficult to prove, a claimant is more likely to sue the individual professional. Legal actions relating to civil wrongs committed by a 'servant' (officer) can be raised against the officer and authority. Local authorities specify the area of decision-making delegated to specific officers: an officer may only make a decision on behalf of the authority or council if clearly delegated to do so, otherwise he/she is acting *ultra vires* (outwith his/her or the authority's powers laid down by Parliament). The local authority will be held liable for the act of an employee if the act was committed by a 'servant' engaged in the work of the authority and during the course of their employment. However an authority cannot be sued if the officer acted outwith the scope of his/her authority.

An officer has a duty to take care in giving advice. If an officer is negligent and loss is suffered due to faulty advice, both the authority and the officer may be sued for damages. A negligent though honest mistake may still lead to legal action as

the officer is held to be in possession of specific skills (i.e. a professional) and that officer should know that reliance is being placed on his/her skills.

What are the differences in liability between a partner or principal in private practice and a senior landscape architect in a local authority?

Depending on the form of practice, a partner or principal in private practice may have legal responsibility for the actions and debts of the practice as a business in addition to responsibility as a landscape professional, whereas a senior landscape architect in a local authority is liable only for the actions related to his or her profession and any delegated authority they may have, not for the local authority as a whole.

Vicarious liability

A person is liable for his/her own torts. He or she may also be liable for those of another. The situation of vicarious liability arises from the master/servant relationship rather than that of the employer/independent contractor.

The distinction between these is that, while an independent contractor undertakes to perform service or work, he has discretion as to the way he does it. In the master/servant relationship, the employer directs how work should be done. The difference is the degree of control which the employer is entitled to exercise over the acts of the employee.

Generally the employer is not liable for the torts of an independent contractor (though he is liable if he interferes and assumes control, because by doing so, the master/servant relationship arises). An employee (servant) is always liable for his own torts, and his employer is also jointly and severally liable if the tort is committed in the course of his employment.

Statutory liability

This liability refers to duties imposed upon landscape architects and others by Act of Parliament. It includes:

The statutory liabilities of suppliers of services

The Defective Premises Act 1972

'A person taking on work for or in connection with the provision of a dwelling ... owes a duty ... to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials, and so that... the dwelling will be fit for habitation when completed'. This does not apply to factories, offices and warehouses.

The Supply of Goods and Services Act 1982

This Act (section 13) says that in a contract to supply services (such as those provided by an architect for an employer) there is an implied term that the architect will carry out the service with reasonable skill and care.

Construction (Design and Management) Regulations

These Regulations were a reaction to the unacceptably high rates of death, injury and ill-health associated with all types of project, ranging from new works through to subsequent maintenance repairs, refurbishment and demolition. Infringement may be a criminal offence.

Employer's liability

This stems from a mixture of rules developed in common law and those laid down by Parliament. The basic relationship between employer and employee is defined by the contract of employment. This is the base point for determining the rights and liabilities of employer and employee but during the last 30 years statutory rights have developed concerning unfair dismissal, redundancy and maternity rights. These rights have been brought together into the Employment Protection (Consolidation) Act 1978 amended by the Employment Act 1980 and the Employment Rights Act 1996 and the Employment Act 2002. These statutory rights are mostly to do with fairness and are enforced in industrial tribunals, not courts as in the normal way.

Also binding on employers are the Equal Pay Act 1970; National Minimum Wage Act 1998; the Race Relations Act 1976; Sex Discrimination Act 1975; Employment Relations Act 1999; the Health and Safety at Work Act 1974, the Offices, Shops and Railway Premises Act 1963, Employer's Liability (Compulsory Insurance) Act 1969; the Disability Discrimination Act 1995, the Asylum and Immigration Act 1997 and the Employment Relations Act 1999.

Employer's Liability (Compulsory Insurance) Act 1969

This Act requires that all employers carry employer's liability insurance to cover risk of injury and disease arising out of or in the course of employment.

Occupier's liability

Occupiers (and employers) also have liabilities for health and safety laid down under:

- Health and Safety at Work Act 1974: This concerns the general responsibility of employers, employees and the self-employed with respect to both each other and third parties. Infringement is a criminal offence. The COSHH Regulations and Control of Pesticides are related issues.

- Offices, Shops and Railway Premises Act 1963: This Act is concerned with the obligations of the occupier for health and safety. Infringement is a criminal offence.
- Occupier's Liability Act 1954/Occupier's Liability (Scotland) Act 1960. These impose a duty of care on occupiers of premises to all those lawfully entering their premises (public liability).

LIABILITY IN THE TORT OF NEGLIGENCE

The tort of negligence in its current form is a relatively recent concept clarified by the famous judgment in 1932 of *Donoghue v Stevenson*. Mrs Donoghue drank from a bottle of ginger beer bought for her by her friend in the Wellmeadow Café in Paisley, Scotland, and found a partly dissolved snail in the bottle. She claimed she was made unwell and distressed as a result. The beer had been manufactured by Mr Stevenson. Mrs Donoghue had no contract with the manufacturer or with the café owner and, as a result, sued the manufacturer in tort. Mrs Donoghue doggedly pursued her case to the House of Lords where a majority decision of law lords ruled in her favour. However the issues of the case had been very carefully evaluated by the law lords because they recognised that a judgment in Mrs Donoghue's favour would effect a fundamental change to British law.

The fundamental principle of the law of tort, which applies to every adult in the UK, is that you shall not injure your neighbour. More precisely,

> *'you owe a duty to all persons you can reasonably foresee would be directly or closely affected by your actions, for it is assumed that you ought reasonably to have them in mind when you commit your acts'.*

Negligence is the omission to do what a reasonable person would do or to do what a reasonable person would not do.

Courts will assess the facts of each case to verify first that a duty of care exists: this is a matter of fairness and involves weighing up the relationship of the parties and the nature of the risk to the public. In assessing breach of duty of care, the courts consider two main factors: the likelihood of injury or damage and its seriousness. A civil claim may become a criminal matter if a breach was so grossly negligent that it constituted a criminal disregard for human life.

A statutory defence of 'contributory negligence' can be used against claims in tort. For example, a defendant, sued by the victim of a car crash who was not wearing a seat belt at the time of the accident, would probably plead contributory negligence on the part of the claimant.

Professional negligence

Professional designers including landscape architects have a wider responsibility than the general case described above (and which is in addition to any simultaneous contractual obligations) and that is to all those who will use that which he or she

designs, though this may include others than the client. A test whether a duty of care will exist is based on the following criteria:

- Was the damage foreseeable? (A reasonable professional person should foresee that carelessness on his part could result in loss or damage to a third party.)
- Is there proximity of relationship? (Is there a particular relationship between the parties?)
- Is it fair, just and reasonable to impose a duty? (Based on ordinary reason and common sense.)

Specific aspects of the landscape architect's activity which may give rise to liability claims if not carried out with reasonable care (failure to perform) include:

- Personal Injury: A landscape architect may be liable if his negligence causes foreseeable personal injury to any foreseeable victim, for example, where he orders something to be done which is dangerous and causes injury (*Clay v Crump & Sons Ltd,* 1963). Note that the landscape architect is not liable if he orders something to be done which is dangerous only if done in the wrong way (e.g. on the contractor's mistaken direction).
- Liability to subsequent purchasers for defects in the building works arising out of faulty design or inspection of construction works, but only if the defect could not have been known about at the time of purchase (Latent Damage Act 1986 and Defective Premises Act 1972).
- Liability to the builder and subsequent owners for economic loss which is the direct result of the professional's advice (*Payne et al v J Setchell Ltd*, 2001). Economic loss as a result of negligent misstatement is of direct relevance to landscape architects giving professional advice. If no express disclaimer of responsibility is made, a person will be liable for the consequences of a statement which he makes in circumstances where he or she is deemed to have assumed responsibility for the outcome.

For ordinary citizens the standard of care is that of the 'reasonable man'. The standard of care for professional people is that of the ordinarily skilled person exercising and claiming to have those special skills. This requirement is restated in the Landscape Architect's Appointment and in Standard 9 of the Code of Standards of Conduct and Practice. Professional negligence is a failure to perform to the normal standards of the profession.

Professional landscape architects should also be aware of the tort of libel which is the publication of a false statement which may injure the reputation of another. The libel must be published and written to a third party to be valid. Practitioners are particularly advised to take great care when using electronic media (email, Twitter, Facebook) not to send anything at any time that may injure the reputation of another.

What is the difference between suing in tort or in contract?

Tort refers to duty of care, breach of duty and damage and is not limited to two parties. Contract refers to implied and express terms of a specific agreement between two named parties, unless a collateral warranty exists.

Limitations on actions

Does a client have redress against a landscape architect after two or three years if something goes wrong?
How long are you liable for in contract and in tort?

England and Wales

The general rule is that liability in contract and tort lasts for six years (Limitations Act 1980). However in actions for contracts 'under seal' and 'deed', which tend to be major non-standard contracts, the period for action is 12 years. For actions about personal injury (this applies UK-wide) it is three years from the date at which the cause of action accrued or the date at which the person injured knew that they were injured. (A problem of ill-health may not arise immediately from its cause.) Actions for latent damage have a limitation period of 15 years (except personal injury). Claims of libel, slander or malicious falsehood have a limitation period of one year (also UK-wide).

Contracts under seal

These contracts receive special treatment because of three factors: presence of a seal is regarded as firm evidence of a contract; it indicates definite intent to form a legal relationship; and it is a sign of deliberation, giving force to 'donative promises'.

Successive owners and latent damage

The Latent Damage Act 1986 extended the time within which a claim could be brought to three years from when the damage was known about rather than when the damage ought to have been discovered. The Defective Premises Act 1972 gave subsequent owners a statutory right of action against bad designers and builders. In *Payne v Setchell,* 2001, the judge made no distinction between builders and designers since they both create a product. In that case, an engineer was found liable not because the building was faulty (a claim under the Defective Premises Act 1972) but because he had breached the duty of care in certifying

that the foundations had been prepared with reasonable care (Latent Damage Act 1986). Note then that certification liability is more onerous than design liability.

However the Latent Damage Act 1986 also inserted a 'long stop' into the 1980 Act, such that actions shall not be brought after the expiration of 15 years from the date on which there occurred any act or omission (except for personal injury).

Limitations in Northern Ireland

The rules are set out in the Limitation (Northern Ireland) Order 1989. Liability in tort and normal contracts runs for six years, 12 years for contracts under seal, three years for personal injury and 10 years for defective products. There is an overriding time limit for negligence actions not involving personal injuries of 15 years.

Limitations in Scotland

The rules are set out in the Prescription and Limitations (Scotland) Act 1973 (which replaced the Prescription Acts of 1469, 1474 and 1617) as amended by the 1984 Act. The time limit for actions under contract is five years and 10 years for defective products. There is a 'long stop' prescription period of 20 years but also a list of obligations which are not prescriptable. The right to sue for damages deriving from reparation ('tort' in England) is three years generally starting from the date of the accident.

HEALTH AND SAFETY LEGISLATION

Background

The Health and Safety at Work Act 1974 (HASAW) is the foundation of all related legislation. It is a general document which places duties on employers, the self-employed, people in control of premises, and designers, manufacturers, importers and suppliers of articles for use at work.

> **The general duty is:**
> '*To ensure as far as reasonably practical that the article is so designed and constructed that it will be safe and without risks to health at all times when it is being set, used, cleaned or maintained by a person at work.*'

Specific legislation covering construction sites is numerous. The most radical increase resulted from the European Union's Construction Directive 1992 which led to a raft of UK-based regulations being implemented:

- Management of Health and Safety at Work Regs, 1992 (amended 1999);
- Workplace (Health, Safety and Welfare) Regs, 1992 (not applicable to construction sites);
- Provision and Use of Work Equipment Regs, 1992;
- Personal Protective Equipment at Work Regs, 1992;
- Manual Handling Operations Regs, 1992;
- Health and Safety (Display Screen Equipment) Regs, 1992;
- The Construction (Health, Safety & Welfare) Regs, 1996 (now updated by CDM Regulations 2007) and subsequently CDM 2015;
- The Provision and Use of Work Equipment Regs, 1998;
- The Lifting Operations and Lifting Equipment Regs, 1998;
- The Control of Asbestos at Work Regs, 2006.

In all these Regulations the emphasis is on good management.

Roles of Health and Safety Commission (HSC) and Health and Safety Executive (HSE)

(Refer to www.hse.gov.uk.) The HSC and HSE are statutory non-departmental public bodies funded by the Department for Work and Pensions which carry out their functions on behalf of the Crown. The founding legislation of both bodies is the Health and Safety at Work Act 1974.
HSC is the prime mover in relation to the Regulations of HASAW 1974 and its statutory provisions are set out in that Act.

HSE has specific powers, functions and duties set out under the Health and Safety at Work Act 1974. It has to:

- make adequate arrangements for enforcement of relevant statutory provisions of HASAW;
- appoint inspectors;
- carry out any HSC functions as required by HSC.

HSE Fee for Intervention (FFI) is a cost-recovery scheme introduced in 2012 whereby HSE can recover costs from those who break health and safety laws. This is intended to recover costs for the time HSE spends investigating and taking enforcement action.

THE CONSTRUCTION (DESIGN AND MANAGEMENT) REGULATIONS 2015

Introduction to the changes

The new regulations came into force on 6 April 2015. At the time of going to press the Draft Regulations were available prior to receiving Parliamentary approval and may be subject to change. (Refer to www.hse.gov.uk). The new regulations

replaced CDM Regulations 2007 from 6 April 2015 and also the Approved Code of Practice (ACOP) which provided supporting guidance on CDM 2007.

Summary of changes to the regulations – 2015

The update to the CDM Regulations 2007 is intended to bring the UK's health and safety management system fully into line with the EU Directive 92/57/EEC on 'Temporary & Mobile Construction Sites', first published in 1992. Significant changes include:

- Structural simplification of the Regulations.
- The replacement of the Approved Code of Practice with targeted guidance.
- Replacing the role of the CDM Co-ordinator with Principal Designer. Removal of explicit competence requirements and their replacement by a specific requirement for appropriate skills.
- Addressing areas of the European Temporary or Mobile Construction Sites Directive (TMCSD) relating to domestic clients, due to the increase of accidents on smaller sites.
- The threshold for appointment of co-ordinators and notification.

The transition arrangements

Schedule 4 provides transitional arrangements for projects which span 6 April 2015. For projects involving more than one contractor which started before 6 April 2015, where by that date the client *has not* appointed a CDM co-ordinator, the client;

- *must* appoint a principal designer, as soon as practicable, if the construction phase *has not* started;
- is *not required* to appoint a principal designer if the construction phase *has* started, but may do so if they wish. If they choose *not* to appoint a principal designer, the principal contractor takes on the responsibility for the health and safety file (see Appendix 4 of the regulations).

Where on 6 April 2015 the client *has* appointed a CDM co-ordinator, they must appoint a principal designer within six months. The CDM co-ordinator must then comply with the duties listed in paragraph 5 of Schedule 4 for the duration of their appointment. These duties broadly reflect duties of a CDM co-ordinator under CDM 2007, but also reflect the arrangements under CDM 2015 which relate to the construction phase plan (see Appendix 3 of the Regulations), and the health and safety file (see Appendix 4 of the Regulations).

HSE Guidance

The HSE have prepared 'Guidance on the Construction (Design and Management) Regulations 2015' (refer to www.hse.gov.uk) which replaces previous Codes of Practice.

HSE key elements to securing construction health and safety

- Managing the risks to health and safety by applying the *general principles of prevention.*
- *Appointing* the right people and organisations at the right time.
- Making sure everyone has the *information, instruction, training and supervision* they need to carry out their jobs in a way that secures health and safety.
- Dutyholders *co-operating and communicating* with each other and *co-ordinating* their work.
- *Consulting workers and engaging* with them to promote and develop effective measures to secure health, safety and welfare.

Content of the CDM Regulations 2015

The Regulations are divided into five parts and cover:

- Part 1: Commencement, interpretation and application of the Regulations.
- Part 2: Client duties including domestic clients.
- Part 3: Health and safety duties and roles.
- Part 4: General requirements for all construction sites.
- Part 5: Fire provisions and Transitional arrangements.

There are associated Schedules:

- Schedule 1 – Particulars to be notified to the HSE. (Form F10)
- Schedule 2 – Minimum welfare facilities.
- Schedule 3 – Work types involving particular risks.
- Schedules 4 and 5 – Transitional provisions and amendments.

There are associated Appendices:

- Appendix 1 – The general principles of prevention.
- Appendix 2 – Pre-Construction Information.
- Appendix 3 – Construction Phase Plan.
- Appendix 4 – Health and Safety File.
- Appendix 5 – Working for domestic clients.

Definitions and application of the Regulations

CDM 2015 applies to *all* construction projects in Great Britain as a whole, from concept to completion, including works carried out in the territorial sea and the renewable energy zone (Refer to Regulations glossary for definitions of these areas).

Part 4 of the Regulations only apply to work carried out on the construction site.

What is construction?

Construction is defined in the regulations and is intended to be all encompassing:

'Construction work' means the carrying out of any building, civil engineering or engineering construction work. This includes demolition, dismantling or decommissioning works.

Notification to the HSE

A project is notifiable to the HSE if the construction work on a construction site is scheduled to:

- last longer than 30 working days and have more than 20 workers working simultaneously at any point on the project, ***or***
- exceed 500 person days.

Notification takes place using form F10 from the HSE website and can be carried out on line. Refer to Schedule 1 of the Regulations for information required to be set out to the HSE.

The requirements of CDM 2015 apply whether or not the project is notifiable

Summary of roles and duties

Organisations or individuals can carry out the role of more than one dutyholder, provided they have the skills, knowledge, experience and (if an organisation) the organisational capability necessary to carry out those roles in a way that secures health and safety.

Table 2.1 CDM 2015: Roles of duty holders

Dutyholders	*Summary of role / main duties*
Clients Organisations or individuals for whom a construction project is carried out.	Make suitable arrangements for managing a project. This includes making sure: • other duty holders are appointed; • sufficient time and resources are allocated. Making sure: • relevant information is prepared and provided to other duty holders; • the principal designer and principal contractor carry out their duties; • welfare facilities are provided. See also HSE Guidance on CDM Regulations paragraphs 23-52.
Domestic clients People who have construction work carried out on their own home, or the home of a family member that is *not* done as part of a business, whether for profit or not.	Domestic clients are in the scope of CDM 2015, but their duties as a client are normally transferred to: • the contractor on a single contractor project or; • the principal contractor on a project involving more than one contractor. The domestic client can choose to have a written agreement with the principal designer to carry out the client duties. See also HSE Guidance on CDM Regulations paragraphs 53-56.
Designers Those, who as part of a business, prepare or modify designs for a building, product or system relating to construction work.	When preparing or modifying designs, to eliminate, reduce or control foreseeable risks that may arise during: • construction; and • the maintenance and use of a building once it is built. Provide information to other members of the project team to help them fulfil their duties. See also HSE Guidance on CDM Regulations paragraphs 72-93.
Principal designers Designers appointed by the client in projects involving more than one contractor. They can be an organisation or an individual with sufficient knowledge, experience and ability to carry out the role.	Plan, manage, monitor and coordinate health and safety in the pre-construction phase of a project. This includes: • identifying, eliminating or controlling foreseeable risks; • ensuring designers carry out their duties; • prepare and provide relevant information to other dutyholders. Liaise with the principal contractor to help in the planning, management, monitoring and coordination of the construction phase. See also HSE Guidance on CDM Regulations paragraphs 94-115.

Dutyholders	*Summary of role / main duties*
Principal contractors Contractors appointed by the client to coordinate the construction phase of a project where it involves more than one contractor.	Plan, manage, monitor and coordinate the construction phase of a project. This includes: • liaising with the client and principal designer; • preparing the construction phase plan; • organising cooperation between contractors and coordinating their work. Ensure: • suitable site inductions are provided; • reasonable steps are taken to prevent unauthorised access; • workers are consulted and engaged in securing their health and safety; and • welfare facilities are provided. See also HSE Guidance on CDM Regulations paragraphs 110-146 for more guidance.
Contractors Contractors who do the actual construction work and can be either an individual or a company	• Plan, manage and monitor construction work under their control so that it is carried out without risks to health and safety; • for projects involving more than one contractor, coordinate their activities with others in the project team – in particular, comply with directions given to them by the principal designer or principal contractor; • for single-contractor projects, prepare a construction phase plan. See also HSE Guidance on CDM Regulations paragraphs 147-179 for more guidance.
Workers People who work for or under the control of contractors on a construction site	They must: • be consulted about matters which affect their health, safety and welfare; • take care of their own health and safety and others who may be affected by their actions; • report anything they see which is likely to endanger either their own or others' health and safety; • cooperate with their employer, fellow workers, contractors and other dutyholders.

Extracted from HSE : 'Guidance on the Construction (Design and Management) Regulations 2015' (refer to www.hse.gov.uk).

What is design and who is a designer?

- The term 'design' includes drawings, design details, specifications, bills of quantity and calculations prepared for the purpose of a design.
- Designers include architects, consulting engineers, quantity surveyors, interior designers, temporary work engineers, chartered surveyors, technicians or anyone who specifies or alters a design.
- They can include others if they carry out design work such as principal contractors, specialist contractors and commercial clients who have an active role in the design process of their project.

Duties of designers (Regs 9 and 10)

These include the duty to eliminate, reduce or control foreseeable health and safety risks through the design process such as those that may arise during construction, maintaining and using the building once it is built.

Designers must:

- not commence work on a project unless satisfied that the client is aware of their duties under the Regulations;
- take into account the general principles of prevention and any pre-construction information to eliminate, as far as is reasonably practicable, foreseeable risks to the health or safety of any person:
  - carrying out or liable to be affected by construction work;
  - maintaining or cleaning a structure; or
  - using a structure designed as a workplace.
- if it is not possible to eliminate these risks:
  - take steps to reduce or control risks through the design process;
  - provide information about those risks to the principal designer;
  - ensure appropriate information is included in the health and safety file.
- take all reasonable steps to provide sufficient information about the design, construction or maintenance of the structure, to adequately assist the client, other designers and contractors to comply with their duties under the Regulations.

When do the designer's duties apply?

As soon as designs are prepared which may be used in construction work in Great Britain including concept design, competitions, bids for grants, modification of existing designs and relevant work carried out as part of feasibility studies.

Who is a principal designer?

A principal designer has control over the pre-construction phase of the project from concept design through to planning the delivery of the construction work. They must be appointed in writing by the client to carry out their duties. They may also have separate duties as designers.A principal designer may be an organisation or an individual on a small project with:

- technical knowledge of the construction industry relevant to the project;
- the understanding and skills to manage and coordinate the pre-construction phase, including any design work carried out after construction begins.

Duties of a principal designer – pre-construction phase (Reg. 11)

- To plan, manage and monitor the pre-construction phase and coordinate matters relating to health and safety during the pre-construction phase to ensure that the project is carried out without risks to health or safety.
- This includes ensuring the timing and planning of the design, technical and organisational aspects of the various work stages which are to take place simultaneously or in succession.
- To take into account the general principles of prevention and the content of any construction phase plan and health and safety file where relevant.
- To identify and eliminate or control, so far as is reasonably practicable, foreseeable risks to the health or safety of any person:
  - carrying out or liable to be affected by construction work;
  - maintaining or cleaning a structure; or
  - using a structure designed as a workplace.
- Ensure all designers comply with their duties in Regulation 9.
- Ensure that all persons working in relation to the pre-construction phase cooperate with the client, the principal designer and each other.
- Assist the client in the provision of the pre-construction information and provide promptly and in a convenient form, to every designer and contractor where feasible.
- Liaise with the principal contractor and provide information relevant to the planning, management and monitoring of the construction phase and the coordination of health and safety matters during the construction phase.

Appointment

Ensuring appropriate skills

Anyone responsible for appointing designers (including principal designers) or contractors (including principal contractors) to work on a project must ensure *before* making the appointment that they have the skills, knowledge and experience to carry out the work in a way that secures health and safety as well as appropriate organisational capability.

Timing of appointment

Dutyholders should be appointed at the right time. For example, clients must appoint principal designers and principal contractors as soon as practicable and *before* the start of the construction phase, so they have enough time to carry out their duties to plan and manage the pre-construction and construction phases respectively.

Documentation required by the CDM Regulations 2015

Pre-construction information

Pre-construction information is defined as information about the project that is already in the client's possession or which is reasonably obtainable by or on behalf of the client.

The information must:

- be relevant to the particular project;
- have an appropriate level of detail; and
- be proportionate given the health or safety risks involved.

Pre–construction information – typical content (Appendix 2 of the Regulations)

The information should be in a convenient form and be clear, concise and easily understandable to help other duty holders involved in the project to carry out their duties and should include information on:

- project details, the client brief, and key dates of the construction phase;
- the planning and management of the project including resources and time allocated to each stage of the project and the arrangements to ensure there is cooperation between duty holders and that the work is coordinated;
- the health and safety hazards of the site, including design and construction hazards and how they will be addressed;
- any relevant information in an existing health and safety file.

Construction Phase Plan (Regulation 12)

The Construction Phase Plan is prepared by the principal contractor during the pre-construction phase and prior to construction site set up using information provided by the principal designer including pre-construction and any information obtained from designers under Regulation 9.

The plan sets out the health and safety arrangements and site rules and includes specific measures for any work categories set out in Schedule 3. The principal contractor must ensure that the construction phase plan is appropriately reviewed, updated and revised.

Construction Phase Plan – typical content (Appendix 3 of the Regulations)

A description of the project such as key dates and details of key members of the project team, the control of any of the specific Schedule 3 work categories and the management of the work including:

- the health and safety aims for the project;
- the site rules;
- arrangements to ensure cooperation between project team members and coordination of their work e.g. regular site meetings;
- arrangements for involving workers;
- site induction;
- welfare facilities; and
- fire and emergency procedures.

Health and Safety File (Regulation 12)

The Health and Safety File is prepared by the principal designer and contains information relating to the project which is likely to be needed during any subsequent construction, repair, maintenance or demolition work to ensure the health and safety of any person carrying out that work. The file is only required for projects involving more than one contractor:

- It must be appropriately reviewed, updated and revised from time to time to take account of the work and any changes that have occurred.
- During the project, the principal contractor must provide the principal designer with any information in the principal contractor's possession relevant to the health and safety file, for inclusion in the health and safety file.
- At the end of the project, the principal designer, or where there is no principal designer the principal contractor, must pass the health and safety file to the client.

The Health and Safety File – typical contents (Appendix 4 of the Regulations)

- Brief description of the work carried out;
- any hazards that have not been eliminated through the design and construction processes, and how they have been addressed;
- key structural principles;
- hazardous materials used (e.g. lead paints and special coatings);
- information regarding the removal or dismantling of installed plant and equipment (e.g. any special arrangements for lifting such equipment);
- health and safety information about equipment provided for cleaning or maintaining the structure;
- the nature, location and markings of significant services, including underground cables, gas supply equipment, fire-fighting services etc.;
- information and as-built drawings of the building, its plant and equipment (e.g. the means of safe access to and from service voids and fire doors).

CDM Regulations: breach and prosecution

There are three principal areas of potential liability for the landscape architect in failing to comply with obligations relating to health and safety.

Criminal law

The Health and Safety at Work Act and its associated legislation are criminal law. Failure to comply therefore is regarded as a crime, and may result in criminal prosecution with unlimited fines and/or a maximum of two years' imprisonment.

Civil law

Civil action based on a breach of a statutory duty (in limited circumstances) or based upon the tort of negligence by injured workers.

Breach of contract

Contractual claims regarding health and safety are dealt with under civil law, and failure to comply with a contract can only be redressed by an action for breach of contract. This may occur when the regulations are incorporated into the Landscape Architect's appointment or referred to in a collateral warranty.

In addition, amendments have been produced to the various versions of the standard forms of contract to ensure that compliance with the regulations is a contractual obligation. Failure to comply therefore can also be a breach of contract.

For the same accident on site it is possible for there to be a prosecution under criminal law for failure to comply with statutory law, and a separate action under civil law for breach of contract and/or negligence.

The Management of Health and Safety at Work Regulations 1999

These Regulations came into force in December 1999 and re-enact the 1992 Regulations in respect of employer's and employee's obligations regarding minimum health and safety requirements in the workplace. The Regulations require:

- Employers/self-employed people to carry out an assessment of risks that employees are exposed to while at work, and any people affected by their operations.
- Employers of more than five employees to record the findings of the assessment, identifying any groups of employees who are especially at risk.
- Employers to implement preventive and protective measures on the basis of the schedules contained within the Regulations.
- Employers to provide employees (including temporary employees) with relevant information on risk assessment and preventive and protective measures, and also to provide adequate health and safety training.
- Employees to comply with the training and inform employers of any situations that are dangerous to health and safety or any shortcoming in existing protection arrangements.

Special provisions apply to new or expectant mothers and also to young people. The Regulations amend a number of other health and safety regulations, the most relevant being Construction (Health, Safety and Welfare) Regulations 1996.

INSURANCE

Employers are required by law or by their own professional institutes to carry a number of insurance policies to protect their employees, their clients and third parties. These include:

- Professional indemnity insurance.
- Employer's liability insurance.
- Public liability (third party) insurance.
- Motor insurance and building and office contents insurance.

Professional Indemnity Insurance (PII)

Duty of care

Every professional owes a 'duty of care' to anybody who might reasonably rely on their service or advice. The same duty of care is owed whether or not a fee is charged, even if it is for an obviously secondary function or service.

What is PII?

A typical general liability insurance policy will only respond to a bodily injury, property damage, personal injury or advertising injury claim. Other forms of insurance cover employer's, public and product liability. But various professional services and products can give rise to legal claims without causing any of the specific types of harm covered by such policies. Common claims covered by professional liability insurance are negligence, misrepresentation, violation of good faith and fair dealing, and inaccurate advice.

PI insurance is a cover against allegations of breach of duty of care. Should legal liabilities be established against a professional, PI insurance will, subject to its terms and conditions, pay for the damages together with any costs awarded against the defendant.

Why insurance?

The Landscape Institute requires registered practices to take out PII (as do local authorities). This insurance ensures that practices have sufficient funds to meet their financial obligations should an action for negligence be brought against them.

It is a Landscape Institute rule that, to be registered with the Institute, practices must have evidence of adequate PI insurance.

> ***Standard 12: The Landscape Institute expects members to have adequate and appropriate Professional Indemnity Insurance.***
>
> *The need for cover extends to professional work undertaken outside your main professional practice or employment and to work undertaken by employees, subcontractors or consultants.*
>
> *It is expected that both you and third parties shall have a level of cover commensurate with the work undertaken and shall ensure that it includes run-off cover.*
>
> *If you are employed, you shall ensure as far as possible that Professional Indemnity Insurance cover, or other appropriate cover, is provided by your employer.*

Employees also have a duty under the Code of Standards of Practice for Landscape Professionals. This responds directly to the case *Merrett v Babb,* 2001,

where a former employee of a surveying company was sued personally for work carried out during the course of his employment.

> ***Merrett* v *Babb* (2001)**
> **EGLR 145 (English Court of Appeal – Civil Division)**
>
> *Mr Babb was employed by a firm of chartered surveyors, Clive Walker Associates, which was instructed to carry out a survey for a building society. Mr Babb prepared the report, signed it and returned it to the building society, which deleted references to Mr Babb and Clive Walker Associates, and passed the report on to the purchaser, Miss Merrett.*
>
> *After Miss Merrett had moved in, settlement cracks appeared which had not been identified in the report. By this time Mr Walker, the sole principal of the firm, had become bankrupt and the trustee in bankruptcy had cancelled the PI insurance. Mr Babb had left the firm some time before but nevertheless Miss Merrett sued him personally.*
>
> *The court found that Mr Babb had been negligent and he had to pay the damages and costs himself as he was not covered by insurance. The PI insurers of his current employer were not liable because Mr Babb was not an employee of the firm when the report was written. This is not new law, however it does highlight a risk for employees, albeit not one which is likely to happen very often.*

Claims made policy

The majority of PI insurance policies are written on a 'claims made' basis. This means that the policy will respond to claims first made within its duration, even though the work which caused the loss may have been undertaken beforehand.

An insurer for a client who has not previously held PI insurance may not be willing to cover claims that arise from work undertaken prior to the issue of the policy. Retroactive cover may need to be secured for past work done by a firm.

Other extensions to policies

Multidisciplinary practices

Insurance is required for each profession.

Collateral liabilities, collateral warranties, duty of care agreements, etc.

Recently, contract wordings have placed additional or increased responsibilities assumed under contract. You must notify your insurers to ensure that your cover extends to some or all of the additional responsibilities assumed under contract, providing that these are fully disclosed.

Pollution

Additional insurance cover is required in relation to pollution and contaminated land. Most PII policies carry a full/partial exclusion for pollution.

Construction Design and Management Regulations

PII will cover the obligations of the designer set by CDM Regulations under civil law for breach of contract or negligence. However, as it is not possible to insure against a breach of criminal law, or against fines or imprisonment, PII companies may require the designer to take out additional insurance to cover the cost of defending a criminal prosecution. This prevents designers avoiding set fines by pleading guilty and claiming against PII.

At the time of going to press the implications of CDM 2015 and the new role of principal designer on a professionals PII had not been established landscape architects should check with their own insurers.

Fidelity

Policy wordings provide cover for liability to third parties arising from a negligent 'act or omission'. However, one aspect not encompassed within the cover is a loss incurred through deliberate act or omission. A fidelity extension fills this gap by providing indemnity against losses resulting from dishonesty, fraud or misappropriation by an employee, partner or director.

Loss of documents

Loss of documents is another common extension to PII policies. It pays for costs arising from the loss of paper and computer records, maps, certificates, etc.

Libel and slander

This is a prudent extension to the PII policy for any professional who needs to be open in his views and comments. Libel and slander are written and verbal statements of a defamatory nature which misrepresent and harm the reputation of another.

How is the premium calculated?

Each year before renewal of the policy insurers send out a questionnaire asking a range of questions which will determine the premium due. These can include:

- largest commission in the past five years,
- projected schemes in detail, including the nature of the work (home and abroad),

- conditions of appointment,
- forms of construction contract used,
- turnover of practice,
- number of employees,
- whether the practice deals with pollution, as an additional premium is levied for pollution liability,
- any claims/actions made against the practice.

The larger the organisation, the greater the chance of failure or number of claims, therefore the higher the premium.

For how long does insurance have to be taken out?

The practice will continue to indemnify a landscape architect after they have left or retired. If the practice ceases, for example, due to the retirement or death of partners, PII is paid generally for a maximum of 12–15 years after the completion of the last project, on a decreasing scale.

Claims

It is essential that the insurers are notified as soon as possible of any claim or incident likely to lead to a claim, in order to determine whether or not any action needs to be taken. The insurers will instruct you how to proceed and you must follow their instructions. If issued with a writ, do not answer it immediately but consult your insurers.

Information required

You should make sure that your insurers have the following information:

- Brief details of the allegations made against you, or which you anticipate may be made, and your own views on those allegations.
- Details about when you first became aware of these allegations.
- Any indication of the amounts which could be at issue.

Discussion of liability with the claimant

As a rule you should not discuss your liability with claimants or their representatives (legal or other). If a discussion is inevitable, make it clear that your further participation in the discussion is without prejudice to your position. Do not admit liability, either orally or in writing. This would be a breach of your policy and could also prejudice the insurers so that your entitlement to indemnity is affected.

Employer's liability insurance

Under the Employer's Liability (Compulsory Insurance) Act 1969:

> *All employers in the UK are required to take out specific insurance to meet their obligations for liability against bodily injury or disease sustained by employees and arising out of and in the course of their employment.*

This includes work abroad for a continuous period of 14 days.

Employer's liability insurance is a legal requirement to protect an employer against any claim brought by its employees due to the employer's breach of his duty to protect them against death, injury, disease, etc. arising out of their employment. The minimum cover level is £5 million. It is a statutory requirement to display prominently in the workplace a certificate confirming that the employer has this insurance.

Public liability (third party) insurance

The Occupiers' Liability Act 1957 and common law cover duties owed by occupiers to visitors on their premises. An occupier is anyone who owns or occupies premises, or has a 'sufficient degree of control' over an area; they might be a local authority, a company, or an individual. The occupier is responsible for ensuring the safety of those premises, or that area, for other people. 'Other people' can include trespassers, as covered by the Occupiers' Liability Act 1984.

For a practice of landscape architects, public liability insurance covers third parties in the event of injury when visiting the practice offices or for damage to third party property caused by its employees when visiting sites/other premises, among other things. Increasingly, clients are requiring a practice to have this cover, and seek confirmation of it prior to approving the practice.

An owner or lessee of premises or occupier may be legally liable for personal injury or damage to property of third parties caused by his negligence or that of his staff. Cover must be:

- Appropriate to the status of owner, lessee or occupier.
- Extended to cover the actions of employers and employees anywhere while on business.
- Extended to cover overseas if employees are likely to be on business abroad.

Example of occupiers' liability case law

(England and Wales High Court – Queens Bench)

Bowen *v* National Trust *[2011] EWHC (QB) 1992 was an occupiers' liability case which arose after a large branch from a beech tree fractured and fell on a group of school children. The case against the defendant was that its tree inspectors, for whom it is vicariously liable, failed to exercise reasonable care in their task. It was held that the Bolam test* was applicable and, on the facts, a breach had not arisen.*

* *The Bolam test refers to the case* Bolam *v* Friern Hospital Management *Committee [1957] 1 WLR 582 and is used to apply the standard of an ordinary skilled person professing to have the skill in question.*

Motor insurance

Third party insurance is a legal requirement under the Road Traffic Act 2006 in respect of death or personal injury to third parties or damage to a third party's property. Cars owned and operated by a practice must be covered for business use and cars owed by employees and used by them in the course of their duties must be covered for occasional business use.

Buildings and office contents insurance

A practice should have insurance to cover:

- Damage to buildings, fixtures and fittings (from fire, theft, etc.). This is likely to be a requirement of the building's lease, and may be provided by the landlord and charged with the rent.
- Damage or theft to property/contents.
- Computers, data and business interruption. This will require an additional premium or a separate insurance policy, and evidence of alarm systems, disaster recovery plans and back-up procedures.
- Terrorism cover can also be included if considered appropriate for the business.

Such cover may also be required by the tendering procedures of public authorities.

PROFESSIONAL DUTIES: TOP 10 QUESTIONS

1 When is a project notifiable to the Health and Safety Executive?
2 What documentation is required under the Construction Design and Management Regulations?

3 What types of insurances should a landscape practice carry?
4 How is Professional Indemnity Insurance premium calculated?
5 What is professional negligence?
6 What is a strict duty of care?
7 What specific aspects of a landscape architect's activity may give rise to claims if done in a wrong way**?**
8 What are the differences in liability between a partner or principal in private practice and a senior landscape architect in a local authority?
9 What is the difference between suing in tort or in contract?
10 How does the principle of vicarious liability affect the behaviour of a landscape architect on a construction site?

3 The legal system

CHAPTER CONTENTS

OUTLINE OF UK LAW

The importance of the law

Ignorance of the law is no excuse!

- Everyone who offers a service to others and claims expertise to do what he offers has a responsibility to society in general, and to his clients in particular, to know the law.
- Professional people are under a special obligation to have a sound working knowledge of the law in every aspect of the services they provide.
- Standard 6 of the Landscape Institute's 'Code of Standards of Conduct and Practice for Landscape Professionals' (2012) states, '*Chartered Landscape Architects shall carry out their professional work with care and conscientiously and with proper regard to relevant technical and professional standards*'.

The legal systems of the United Kingdom

The UK has two traditions of law and three principal legal jurisdictions. English law prevails in England and Wales. The basis of the legal system in Northern

Ireland is English common law but it has its own law courts and its own statutory provisions. Scotland has both its own courts and legal traditions, which were preserved under the Treaty of Union in 1707. This results in the Scottish legal system being entirely different from English law, particularly in the fields of property, constitutional and administrative law, and criminal law. The main sources of Scots law are legislation (including EC law), and judicial decisions and 'institutional writings' which together make up the Scots common law.

It is not the intention of this book to describe in detail the variances between the legal systems of the UK but to establish the broad principles. Scotland is highlighted separately as it varies substantially from the three other countries of the UK. (For further detail refer to *Architect's Legal Handbook: The Law for Architects,* 10th edition, 2010, published by Taylor & Francis.)

The Supreme Court of the United Kingdom (which took over the judicial function of the House of Lords in 2009) is the unifying legal system of the UK. It is the supreme court of appeal (the court of last resort) for all three jurisdictions: England and Wales, Northern Ireland, and Scotland. The twelve lords of appeal include Scottish and Northern Ireland judges. Its main role is to hear appeals focusing on cases that raise points of law of general public importance.

Current Court Structure

Court of Justice of the European Communities
↑
Supreme Court of the United Kingdom
↑
Court of Appeal
↑

Criminal Division	Civil Division
Crown Court	High Court
↑	↑
Magistrates' Court	County Court

Sources of the law

English law may be divided into:
- The unwritten or common law.
- The written or enacted law.

Common law: the unwritten law

Common law includes the early customary laws assembled and formulated by judges. It means all other than enacted or written law. Rules derived solely from

custom and precedent are rules of common law. It is the 'unwritten' law of the land because there is no official codification of it. It is based on the principles on which judges in the superior courts (High Court of Justice/Court of Appeal/Supreme Court) make decisions. Where a case is considered to have further developed a particular principle of law, the decision is recorded and published in law reports and hence forms part of common law.

Legislation: the written or enacted law (statute law)

Legislation comprises the Statutes, Acts and Edicts of the Sovereign and her advisers. Legislation by Acts of Parliament takes precedence over all other sources of law and is absolutely binding while it remains in the statute books. All legislation derives its authority directly or indirectly from Parliament; in most cases Parliament delegates authority for carrying out the provisions of statutes to non-parliamentary bodies.

Acts of Parliament can be initiated by the Secretary of State, a Minister, the Cabinet, a private Member of Parliament or could be prompted by European laws. The proposed Act needs to pass through readings in the House of Commons and House of Lords before receiving Royal Assent and becoming law.

Under the authority of the Acts are forms of subordinate legislation which provide the details. These are known as Statutory Instruments, and include Regulations, Orders and Rules, for example:

- Hedgerow Regulations 1997;
- Town and Country Planning Act (General Development Procedure) Order 1997;
- Insolvency (Amendment) Rules 2008.

Sources of the law (Scotland)

In Scotland legislation and case or judge-made law are the principal sources of law. European Court of Justice decisions are binding in Scotland and institutional writings from the seventeenth and eighteenth centuries can also be binding in the courts today.

Legislation is the principal source of law and this is created by the UK Parliament or, since 1999, the Scottish Parliament. Legislation passed by the UK Parliament may apply in Scotland in whole or in part, or in some cases not at all. If it has been passed by the Scottish Parliament, or is UK legislation that applies solely to Scotland, it is denoted in the title, for example, The Planning etc. (Scotland) Act 2006.

European Union law

Since 1973 there has been an additional source of law – the law of the European Community – which is enacted under the European Communities Act 1972.

This grants that all directly applicable provisions of the treaties establishing the European Communities become part of English law, along with all existing and future community secondary legislation. European law is now of great significance as it takes precedence over domestic law where the two conflict.

Most main decisions are taken in the form of 'Directives', 'Regulations' and 'Decisions'; these require member states to achieve stated results, but leave it to each member state to choose the form and method of implementation. Today there is an ever-growing body of EC Decisions incorporated into UK law that have an impact on landscape architects, for example, Environmental Impact Assessment Regulations and CDM Regulations.

The European Convention on Human Rights

The Human Rights Act 1988 became part of the law for all parts of the UK when it came fully into effect in October 2000. It accorded some standing in English law to the European Court of Human Rights without derogating from the supremacy of Parliament. This allows enacted legislation to be interpreted in accordance with Convention rights where possible. If not, it can be declared incompatible with UK law.

Scotland

The European Charter of Rights and Fundamental Freedoms was incorporated into domestic law by the Scotland Act 1998. The Scottish Ministers and, through the Lord Advocate, the prosecuting authorities cannot act in a way that is contrary to the rights set out in the Charter.

Branches of the law

Civil and criminal law are the branches of the law with greatest general effect.

Civil law

Civil law is related to the rights, duties and obligations of individual members of the community to each other. It embraces all law concerning family, property, contract, commerce, partnerships, insurance, copyright and the law of torts. Civil law determines the liabilities which exist between parties. The sanctions of civil law are not punishments but rather remedies.

Criminal law

Criminal law sets out limitations on people's behaviour. It deals with wrongful acts harmful to the community and punishable by the state. A criminal legal action is between the state and an individual.

Branches of the law (Scotland)

The division in Scots law is primarily between public and private law.

Public law concerns the relationships between individuals and the state. It includes criminal law and incorporates statutory breaches of health and safety, judicial review, immigration and administrative law.

Private law is often referred to as 'civil law', and concerns relationships with legal status between individuals and other organisations/people, for example, companies and partnerships. Branches of private law affecting landscape architects include contract, delict, property, trusts, intellectual property, the law of agency and partnership, family law, company law, and bankruptcy/insolvency.

THE LAW OF CONTRACT

Two of the biggest areas of civil law are contract and tort. For the law of contract to be relevant a contract must be in existence and the parties must have agreed what their obligations are to each other. This is distinctly different from the law of tort where no contract exists between the parties.

What is a contract?

- A contract is an agreement between individuals.
- It is the legal relationship between the parties which can be enforced by law if it is breached by either party.

Landscape architects can have direct contract obligations such as:

- contracts for services to clients (employers),
- partnership agreements,
- contracts of employment (between employers and employees).

However, they are not directly party to construction contracts which are between the client and the contractor unless a collateral warranty is in place (refer to Chapter 5).

Essentials of a valid contract

There are three main essential criteria when determining if a contract exists:

- intention to create legal relations,
- consideration,
- agreement.

Intention to create legal relations

The parties must intend their promises to be legally binding; a moral obligation is not enough.

Consideration

(Not applicable in Scotland.) A one-way promise is not a contract because there is no element of bargain; there must be some 'consideration' involved to bind the parties. This means that something must be paid or exchanged for the contract to be binding and enforceable in law. It can be money or a service or some other benefit. A party must have provided that consideration to enable them to enforce their rights in the event of a dispute.

Scots law does not require 'consideration' except in business contracts (Requirements of Writing (Scotland) Act 1995).

Agreement

The courts apply the simple formulae of offer and acceptance to determine if an 'agreement' has occurred.

Agreement

Offer

An offer is a promise made by one party to be bound by a contract if the other party accepts the terms of the offer. The offer matures into a contract when the other party accepts it. An offer can be made to an individual, a group of people or to the world at large (*Louisa Carlill v Carbolic Smoke Ball Company*. Decided, 7 December 1892. Citation(s), [1892] EWCA Civ 1, [1893] 1 QB 256).

Acceptance

The acceptance of the offer must be communicated – silence is not sufficient to accept an offer. The acceptance must be unequivocal and unqualified and it must be a complete acceptance of every term of the offer.

Revocation

An offer may be withdrawn or revoked up until such time as it is accepted. An acceptance is effective when it is received by the offering party; if it is made by letter and posted the acceptance takes effect when it is posted. Revocation by post takes effect when the party receives the letter.

Lapse of offer

Offers are not indefinite. If a time for acceptance is stipulated then the offer must be accepted within that time. If no time is stipulated, the offer remains open for acceptance within a 'reasonable' time – except in the case of death, bankruptcy or insanity.

Other criteria which automatically apply for a contract to be considered valid

Capacity to contract

The parties must have proper capacity to enter into legal relations. This condition offers protection to infants (in law under 18), the mentally disordered, and persons under the influence of drink/drugs, against committing themselves to binding agreements.

Consent

Consent to the agreement must be genuine and freely given. It must not be obtained by fraud, misrepresentation of fact or under duress.

Legality of object

The object of the contract must not be for any purpose which contravenes the law, such as agreements to commit crimes or torts. If an agreement occurred between two parties to commit a murder, and one party failed to perform his obligations by not paying for the crime once it was committed, the courts would not accept an action for breach of contract as the contract was unenforceable in the first place.

Object of the contract

The object of the contract must be possible. For example, a contract to manufacture pills for immortality would not be considered a possible object.

Necessary formality

The necessary formality must be carried out. Sometimes the law requires that a contract has to be written in a certain order for it to be enforceable, e.g. contracts for the sale of land, contracts of carriage (air, land or sea).

In the absence of the above a contract may be considered invalid – either void, voidable or unenforceable.

Discharge of contracts

Contracts may be discharged by:

Agreement

A mutual decision by both parties to bring their relationships to an end.

Performance

Each party has fulfilled their obligations under the contract. Refusal or failure to perform is classified as a breach of contract.

Breach

Either because one party had failed to perform his part of the agreement or repudiates his liability. The injured party may request damages or treat the contract as discharged.

Frustration

When performance of the agreement proves to have been impossible after its inception and it is therefore a discharged contract, for example, illness of one party.

Contractual stipulation

The parties may expressly stipulate the circumstances which extinguish their obligations, for example, when a contract is entered into for a specified period of time it is discharged at the end of that period.

Lapse of time

Parties who have contracts of indeterminate duration (employment or partnerships) have a 'contract at will'. Either party may determine such contracts by giving reasonable notice. The contract is discharged by the lapse of this time.

Terms of contract

Terms of a contract establish the extent of the parties' obligations by which they have agreed to be bound. Terms are either express or implied.

Express terms

The terms of a contract are those which the parties expressly agreed. With written contracts the terms are the written evidence within the document and each party is bound by what is recorded and signed, save in exceptional circumstances.

Implied terms

Three types of implied terms exist:

Terms implied by the court:

The courts will imply into established categories of contract (employment, agency, partnership, etc.) standard terms which have been established in precedents as normal, unless express agreement exists to the contrary.

Terms implied by custom:

If a custom in a particular trade or profession is reasonable, certain and well known, it is binding upon the parties whether or not they knew of it. Examples include Trade Fairs, and the obligation on employees to maintain confidentiality. Local or regional as well as general customs may be so implied, but not if the custom conflicts with the express terms of the contract. Landscape architects have a duty to familiarise themselves with the idiosyncrasies of the location they are working in, and to keep up to date with changes in law that affect their area of practice.

Terms implied by statute:

Many terms are implied directly by statute without any express statements by the parties, however these can be excluded by express statements of the parties to the contract. Two statutes exist which may automatically incorporate terms into a landscape architect's contract:

- The Sale of Goods Act 1979 and the Sale and Supply of Goods Act 1994;
- Supply of Goods and Services Act 1982 – in a contract for the supply of a service, where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service 'with reasonable care and skill' and 'within a reasonable time'.

Standard Term Contracts (STCs)

The use of Standard Term Contracts ensures that misunderstandings over the interpretation of terms are avoided as case law has definitively settled

their meaning. Examples of Standard Term Contracts include The Landscape Consultant's Appointment and the JCLI Form of Agreement. Insurance companies will be familiar with STCs and extra premiums on uncertain risks will be avoided. Modifications to STCs should be avoided as often clauses are interlinked and one modification can affect many clauses.

NUISANCE

Nuisance is concerned with the protection of the environment and the protection of a person's use of his/her own land and land over which there is public right of way. In England and Wales there are two types of nuisance.

Public nuisance

A public nuisance may be defined as an act or omission that inflicts damage, injury or inconvenience on all members of the public. The activities covered by public nuisance range from operation of rubbish tips, disorganised festivals, oil pollution or emissions of noxious fumes. A landscape example could be mud brought onto a public road by a contractor's vehicles leaving a site.

It is a *crime* to cause such a nuisance and it is not actionable by the public, but is generally dealt with by criminal prosecution, which is considered to be sufficient deterrent and punishment. Moreover, the Attorney-General has the right to bring a civil action for an injunction to prevent the nuisance from continuing or re-occurring. Definition of nuisance was sharpened through the Environmental Protection Act 1990.

However, if a person has suffered some special damage over and above that suffered by members of the public as a whole he is able to bring and action in nuisance to recover that damage (*Halsey v Esso Petroleum*). Nuisance claims may also be pursued under the Human Rights Act 1998. In *Marcic v Thames Water* 2002, the public authority had to pay compensation to an individual adversely affected by its carrying out of its tasks, even though those tasks were properly carried out for the benefit of the community as a whole.

Private nuisance

Private nuisance can be described as 'unlawful interference with a person's use of his land, or enjoyment of some right over or in connection with it'. The object of tort of nuisance is to preserve a balance between the right of the occupier to use his land as he thinks fit and that of his neighbour not to be interfered with.

There are three essential requirements for an action for nuisance: there must be interference, which is unreasonable, and there must be damage.

Interference

Interference may take two forms:

- physical injury – material damage to property;
- substantial interference with property – i.e. interference that would be a discomfort to normal modes and habits of living among the general public.

Unreasonable interference

Not every kind of interference with use or enjoyment will constitute a nuisance. Only if the act becomes unreasonable will it be classified as a nuisance. The test whether an act becomes unreasonable is objective: courts consider the view that a disinterested member of the public would take of the situation. A number of factors are taken into account when deciding on the nature of unreasonableness to distinguish between valid and frivolous claims.

- Community benefit – Does the nuisance benefit the community? E.g. emergency sirens.
- Suitability of locality – Where substantial interference with enjoyment of the land is alleged, then the suitability of the locality of the defendants' use of the land is relevant.

> Case law: *St Helens Smelting Co. v Tipping* 1865: '*if a man lives in a town it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality*'.

- Temporary nature of the injury – A temporary interference arising out of a normal user of land will not normally amount to unreasonable interference in the absence of reasonable and proper care. However, if the injury in itself is serious it may be sufficient to establish a nuisance regardless of whether it is only temporary.
- Malice – If a defendant deliberately bangs on his wall, shouts and generally makes a noise in order to annoy his next door neighbour, it will be construe d a nuisance because it has been done deliberately. If it is done without malice and totally innocently it would not be classified as a nuisance. The Police Reform Act 2002 gives magistrates the right to impose an order to prohibit nuisance caused by anti-social behaviour towards another household.
- Damage – Nuisance is not enforceable *per se* and actual damage must be demonstrated.

Nuisance in Scotland

A distinction between public and private nuisance is not made in Scotland. Anything noxious, obstructive and unsafe or which makes life uncomfortable can be a nuisance. Any affected person may act in the interest of all. The remedy is 'interdict' with or without damages. Local authorities have a duty to seek out and

deal with 'statutory nuisances', for example, noise, or a member of the public can complain to the relevant agency, requiring it to use its powers.

TRESPASS

Trespass to land may be defined as the intentional or negligent entering or remaining on or directly causing any physical matter to come into contact with land in the possession of another. The tort of trespass may therefore be committed in three ways:

- entering upon land,
- remaining on land,
- placing or projecting any material object upon land.

For the purposes of the tort of trespass, 'land' is given a wide meaning and covers not merely the surface of the land but extends to the subsoil and to the air space above the land. In England and Wales trespass is actionable *per se*, i.e. without proof of actual damage. In Scotland trespass is called 'interdict' and may occur only if damage takes place.

> Case law: In *Anchor Brewhouse Developments v Berkley House (Docklands Developments Ltd)* 1987. Scott J. granted an injunction restraining the defendants and or their contractors from operating tower cranes the booms or jibs of which swung over the plaintiff's land.

However, the tort of trespass is limited by the fact that the interference with the land must be 'direct' and not 'indirect'. Thus in *Esso Petroleum v Southport Corporation* (1956) the court of Appeal held that the discharge of oil from a ship which was carried onto the plaintiff's foreshore did not amount to trespass because the interference was consequential and not direct. Again for the same reason in *Lemmon v Webb* (1895) the House of Lords held that the growth of overhanging branches from a neighbour's tree did not amount to trespass.

It is no defence that the trespasser intended no harm or did not know that he was trespassing as you must not violate an occupier's rights. A trespass is only a civil wrong; it becomes a crime if something accompanies it, i.e. damage.

Strict liability

This tort developed from the tort of negligence but is now regarded as a sub-tort of nuisance related to trespass. It is valid in England and Wales where, partly as a result of its historic source, for strict liability to be confirmed the normal standards of proof may not apply, as proof of negligence and wrongful intention

may not be necessary. The concept of strict liability is not well regarded in Scottish jurisprudence: in Scotland fault must be both alleged and proved.

The principle was established in *Rylands v Fletcher* 1868. The defendant (Rylands) employed independent contractors to build a reservoir on his land. The independent contractor discovered disused shafts upon the site which were not properly blocked up, but he carried on working without resealing the shafts. On the filling of the reservoir, the water escaped down the shafts and flooded the mine of the plaintiffs. The House of Lords held that the defendants were liable. Blackburn J. said:

> '*we think that the true rule of law is, that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not, is* prima facie *answerable for all the damage which is the natural consequence of its escape*'

For a plaintiff to come within the rule he must establish:

- An accumulation – i.e. that the defendant has artificially brought onto his land and accumulated something.
- A non-natural user – the defendant's action must be of a non-natural user of the land in the sense that it must be a special use bringing with it danger to others and not merely the ordinary use of man. The combination of an 'accumulation' and the non-natural use are deemed to create a duty of care on the part of the land-user.
- An 'escape' from the defendant's land.

> Case law: *Read v J. Lyons and Co*. 1947. The plaintiff, who was employed as an inspector of munitions was injured when the defendant's munitions factory exploded. The House of Lords held that the defendants were not liable to the plaintiff because there had been no escape of any dangerous thing from their premises. It would have been otherwise had the plaintiff been injured while walking along the highway.

- Damage.

In recent case law it was established that the accused is not liable if the 'escape' could not reasonably have been foreseen. Note that, for a designer, the CDM Regulations are relevant here. For instance, a landscape architect would need to be able to demonstrate that he or she made an assessment of risk during design, construction and maintenance. Assessing risk means evaluating the *likelihood* of injury and damage and the *seriousness* of such harm. This assessment would have been recorded in the CDM documentation.

Landscape architects may ask about the implications of plant species 'escaping' from the land where they were planted. In addition to any strict liability that may arise, the Natural Environment and Rural Communities Act 2006 (England and Wales) and the Wildlife and Natural Environment (Scotland) Act 2011 created an offence of allowing invasive non-native species to spread. This is criminal law and sentences may include fines up to £40,000 on summary conviction and 12 months in prison.

EASEMENTS, WAYLEAVES AND CONVENANTS

Easements

Easements are rights which one landowner may acquire over the land of another. Examples are rights of way, rights to light, and profits, such as a right to fish on another's land. Easements are also known as wayleaves, and in Scotland they are similar to 'servitudes'.

If construction work is likely to involve necessary incursion into a neighbour's land (e.g. scaffolding or jib cranes), the client would normally need a contractual licence from the other landowner. This usually involves a consideration (normally, money). If an incursion is permanent, the neighbours would negotiate an easement, for example, for the overhanging eaves of a building.

A licence is permission to do something which is otherwise unlawful. Easements may be positive or negative. A positive easement is when a 'dominant' owner has the right to do something on someone else's land. A negative easement allows a dominant owner to prevent the 'servient' owner from doing something on the servient's land, for example, a right to light which prevents the servient from building on his own land.

If a landowner has an easement over adjacent land and someone interferes with the easement and prevents enjoyment of the easement (e.g. right of way) that interference is classed as a nuisance, not as trespass. If the easement is negative, then interference is actionable only if the interference is substantial.

Essentials of easement

- There must be a dominant and servient tenement. (A tenement is a plot held by a freeholder or leaseholder.)
- The easement must benefit the dominant tenement. The servient bears the burden of the easement.
- The two plots need not be contiguous, but they must be close enough for the dominant tenement to benefit from the easement.
- The two tenements cannot be owned and occupied by the same person.
- Easement must be capable of forming the subject matter of a grant.

There are some well-defined categories of easement including rights of way, right to light (there is no right to light generally, but only for a specific opening, for example a window or skylight), right of support (for buildings), use of a neighbour's

WC, use of an airfield, a letter box and use of paths in a park for leisure (not simply to go from one place to another). Some rights cannot be easements, for example, rights to a view, public rights such as over a highway, privacy, general flow of air, right of support of land (not buildings). Easements are not restrictive covenants or licences.

Acquisition of easements

Easements are acquired by:

- Express grant or reservation of an easement over his land to his neighbour.
- Implied grant or reservation: the easement is a necessity and perhaps required to allow the common intentions of the parties.
- Easement of necessity: without which the land cannot be used at all for the purpose for which the grantor intended.
- Easement as in the rule in *Wheeldon v Burrows* 1879: where the previous use required use of both parcels of land, the new owner of the sold parcel will acquire an easement over the unsold part if this quasi-easement was 'continuous or apparent' (discernible by careful inspection of the land) and was necessary for the reasonable enjoyment of the plot and being used as such at the time of sale.
- By statute, i.e. the Law of Property Act 1925, section 62.
- By prescription: generally this means by continuous use over 20 years. Technically this is 'from time immemorial' but in England this means something has been in place since 1189!

Easements are usually extinguished by the dominant and servient tenements coming into a single ownership, or by express deed.

Restrictive covenants

A restrictive covenant restricts the servient owner's use and enjoyment of his own land. This must benefit the dominant owner's land, for example, a covenant not to build above a certain height in a given place, or a restricting use of land. In essence it is

- negative;
- it benefits the covenantee;
- and the burden is on the covenantor and runs with the land to bind successors in title.

Landscape architects should ask their clients to provide confirmation that there are no restrictive covenants applying to a site which could restrict proposals. If a landscape architect proceeds with the project despite contravening a restrictive covenant, both client and landscape architect may be jointly liable for the tort of conspiracy. i.e. agreeing to do an unlawful act.

Discharge of a restrictive covenant

The Lands Tribunal may discharge a restrictive covenant under the Law of Property Act 1925 (section 84) and 1969 (section 28) if changes in the neighbourhood make the restrictive covenant obsolete; or the covenant no longer secures practical advantages to the covenantee; or is contrary to public benefit (e.g. planning policy). Compensation may be paid.

Mortgages

Alteration of a site may alter its value and the value of the mortgagee's security; therefore most mortgages contain covenants requiring the mortgagee's consent to do works. An architect should ask the client whether the property is mortgaged and, if it is, request the owner to obtain the necessary consents.

RIGHTS OF WAY

Historic rights of access

Historic rights of access in England and Wales are restricted to specific locations:

The Queen's Highway

The Crown has always given the ordinary citizen the freedom to travel the Queen's Highway. This includes all scales from motorway to footpath. Public rights here are confined to passing to and from and to reasonably incidental purposes such as pausing to tie a shoe-lace.

The foreshore

The public has the right to use water covering the foreshore for fishing and navigation.

Village greens

Village greens are available for 'public recreation'.

Common land

This was land over which a number of people shared rights, for example, for grazing. Often greens were also used for recreational purposes. The Commons Registration Act 1965 required all commons to be registered and failure to do so meant all rights over it were extinguished. Until the Countryside and Rights of Way Act (CROW) 2000 there was no general right of public access to common land.

Other defined access

Under the Law of Property Act 1925, the general public was granted rights to air and exercise over any London Metropolitan common or manorial waste, and large areas of the Lake District and South Wales.

Water courses

Public access is also permitted on most towpaths on canals and rivers.

Other access

There is public access to some woodlands (most Woodland Trust and all Forestry Commission sites), the National Trust's open country and coastline, the National Cycle Network, National Parks and Heritage Coasts.

Public rights of way in England and Wales

Legislation about public rights of way is in the National Parks and Access to Countryside Act 1949, Countryside Act 1968, Wildlife and Countryside Act 1981, Highways Act 1980 (sections 25–6), Rights of Way Act 1990 and the Countryside and Rights of Way Act 2000 (CROW 2000).

Definitions

The Wildlife and Countryside Act 1981 defined three types of route: footpath, bridleway and 'byway open to all traffic' (BOAT) (the latter where there are vehicular rights over a route). The Countryside and Rights of Way Act 2000 created a new category of highway called 'restricted byway', which replaces 'Roads Used as Public Paths'. Restricted byways will be open only to pedestrians, horse riders, cyclists and horse-drawn vehicles.

Definitive maps

Initially required under the National Park and Access to Countryside Act 1949 and reinforced by the Wildlife and Countryside Act 1981 and CROW 2000, County Councils have to survey and record public footpaths, bridleways and roads used as public paths. These routes are recorded on 'definitive maps' with a 'statement' describing the route. These maps and statements are legally valid records and have to be kept up to date. The distinction between the different types of access (paths, bridleways, etc.) is not determined by their widths and the definitive maps and statements should be consulted to determine the type of route.

Legal consequences of definitive maps:

- If the map indicates a public footpath or bridleway or byway, that designation is conclusive evidence that right exists (but does not preclude the possibility that a greater public right may exist).
- The written statement is conclusive for the position and width of the right of way.

Under the Countryside and Rights of Way Act 2000, Highway Authorities have until January 2026 to record historic rights of way. Routes not recorded by that date would be extinguished, though there may be exceptions.

Changes to routes

Before new paths are created or existing ones are stopped up or diverted there must be publicity, objections and representations may be made and affected owners and occupiers informed. Copies of maps and statements must be available for public viewing. If there are no objections the county confirms the Order. If objections are not withdrawn, there will be a public local inquiry, private hearing or inquiry through written representations. The Order and objections will be submitted to the Secretary of State and DEFRA who will appoint an inspector.

Diversion of routes: diversion Orders

Diversion Orders (DO) are made under the Highways Act 1980 S119. A DO can be made either '*in the interest of the owner/occupier – provided that the new route is not substantially less convenient to the public*' or '*in the interests of the public*'. Before an Order is confirmed, the County Council (or District or Borough Council) must also be satisfied with:

- the effect which the diversion would have on public enjoyment of the way as a whole;
- the effect which the Order would have on other land served by the public right of way;
- the effect of the Order over the land over which the new right is granted and any land held with it.

The council officers may consider:

- Physical features including distance and direction of travel, path widths and gradients, level and condition, convenience and future maintenance of surfaces and structures.
- Assessment of the public's enjoyment of the path which requires subjective judgements to be made about views, amenity value and quality of experience offered to users of the path.

- The possible impact of any new path on other properties: e.g. it would be unreasonable to divert a path in order to improve the applicant's privacy or security if the new route would have an adverse impact on the property of neighbours.
- The proposed route would have to compare reasonably favourably with the length of path to be stopped up by the DO in distance, other physical characteristics and amenity value.
- The needs of disabled people will also be taken into account, especially in view of the Disability Discrimination Act 1995. Separate application by the landowner would be required under the Highways Act 1980, sections 66 or 147, if a gate, stile or barrier is required by the DO applicant, rather than open access.

Other issues

- Applicants need to make clear if any other landowner affected by the proposed diversion.
- A site visit may be required.
- The Council may stipulate route widths.
- District and Parish Councils, the police and any amenity groups concerned with public rights of way will be consulted about the proposal.
- The applicant will be required to submit details of the works required for the new route.
- The Council Rights of Way Committee or other designated committee will make the decision to approve or refuse the application.
- A decision to approve the Order will be published in the local press, giving the public 28 days in which to make objection. If there are no objections, the Order is capable of being confirmed. The applicant is responsible for all costs involved in closing the old route and making the new route useable, including the provision of signs and the Council's advertisement and administration costs. This is authorised through the Local Authorities (Recovery of Costs for Public Path Orders) Regulations 1993 and The Local Authorities (Charges for Overseas assistance and Public Path Orders) Regulations 1996.
- If there are objections, which are not withdrawn after discussion, the Order is sent to the Secretary of State who may appoint an inspector to hold a public local inquiry before reaching a decision.
- If an Order is not confirmed by either the Council or the Secretary of State, the applicant will normally and nevertheless have to pay all costs associated with the application, unless the Council has been at fault in dealing with the process of the application.

Temporary Diversion Orders

Temporary diversion for necessary work is not open to objection. Paths are often closed for work to take place. A Temporary Closure Order will be required from the Council.

New routes

New routes can be created in several ways:

- The public can request that a route be added to the map and statement if they are able to prove that a defined route (i.e. not wandering at large) has been used by right for 20 years of uninterrupted use. If the County Council refuses, there is appeal to the Secretary of State (Highways Act 1980, section 31, and Wildlife and Countryside Act 1981, section 53).
- Public path creation agreement – an agreement between the local authority and the landowner. (See later.)
- Public Path Order – compulsory powers used by a local authority. (See details later.)

Extinguishment of routes

In law, an Extinguishment Order to stop up a public path or part of its width may only be made if the path (or part) 'is not required for public use' and applicants are required to supply detailed reasons to the County Council explaining the extinguishment request. The considerations and process described above about Diversion Orders will apply to Extinguishment Orders also, including the right of appeal to the Secretary of State through local public inquiry.

Bulls

It is a criminal offence to keep a bull at large in a field or enclosure crossed by a public right of way. This law used to apply only in Scotland and certain counties, but from 1981 applies nationwide. It is not an offence if the bull is not a recognised dairy breed run at large with cows or heifers.

Ploughing

Occupiers are obliged to restore a footpath or bridleway that crosses a field as soon as possible after ploughing it and in any case within two weeks. It is an offence to plough footpaths, byways or bridleways along the side or headland of a field. Local authorities are empowered to restore unlawfully ploughed routes.

Wardens

Local authorities may appoint wardens to advise and assist the public in their use of public routes.

Signposting

Local authorities are required to erect signs at every point where a public footpath, bridleway or byway leaves a metalled road (unless agreed to be unnecessary).

Signs may also be erected within the width of the public right of way without the consent of the landowner or occupier, but they are normally informed as a matter of courtesy.

Improvement plans

Under the Countryside and Rights of Way Act 2000, Highway Authorities had to publish a rights of way 'improvement plan' by 2005. The plan would reflect an assessment of whether or not existing routes meet the current and future needs of the public, opportunities for open-air recreation and access for blind and partially sighted people or others with mobility difficulties.

Paths for communities

Volunteer groups were invited to bid to Natural England for a share of £2m to create new rights of way or to increase the accessibility of existing routes. The scheme operated from May 2012 to March 2014 and was part of the Rural Development Programme.

Cycle tracks

Cyclists may use bridleways. However cycle paths are not recorded on definitive maps and statements. An Order may be made to turn a public footpath into a cycle track. The Order is open to public objection and tends to be contentious. Consultation is necessary. The Natural Environment and Rural Communities Act 2006, section 66, indicates that use by a non-mechanically propelled vehicle (such as a bicycle) may give rise to a right of way for non-mechanically propelled vehicles (a restricted byway). However, carriageway rights cannot be acquired on footpaths or bridleways through the use of bicycles (Planning Inspectorate Rights of Way Note 17).

Motorised vehicles

Use of footpaths or bridleways by mechanically propelled vehicles has been illegal since the 1930s. In *Bakewell Management Ltd v Brandwood* (2004) the House of Lords decided that a right of way may arise where mechanically propelled vehicles have been using a route for more than 20 years even though that use is illegal. Under the law then current, the use of a route by non-mechanically propelled vehicles for more than 20 years was deemed to create a right for *all* vehicles. However, the Natural Environment and Rural Communities Act 2006 prevented the implied creation of new rights of way for mechanised vehicles and extinguishes rights created since the 1930s, unless these have already been recorded in definitive maps and statements. There are exceptions. Private vehicular access may be allowed.

Public rights of way in Scotland

Duties of local authorities

In Scotland under the Countryside (Scotland) Act 1967, local authorities have a duty to keep public rights of way open. They may facilitate access by installing gates, stiles and signs. They do NOT have a duty to maintain routes; that is the responsibility of the landowner.

Identification of public rights of way

The system of definitive maps and statements used in England and Wales to establish legal authority to public rights of way does not exist in Scotland. To have such legal certainty in Scotland, each route has to be surveyed and tested individually in court. However, four criteria may be used to identify likely public rights of way:

- Routes must connect two public places to which the public resort for some definite or intelligible purpose.
- Routes must be reasonably well defined and capable of being followed from end to end.
- The route must have been used by the general public, 'openly', peaceably and without judicial interruption', for a continuous period of not less than 20 years if the use is for a period ending after 25 July 1976 (Prescription & Limitations (Scotland) Act 1973).
- Use of public right of way must be as a matter of right and not merely a matter of tolerance or licence on the part of the proprietor of the land over which the right of way runs.

New access rights

The Countryside and Rights of Way Act 2000

The Countryside and Rights of Way Act 2000 applies only to England and Wales except in reference to off-the-road use of vehicles and in making clear the relevant legislation for SSSIs in Scotland. The Act did not repeal existing Access Orders but no new Access Agreements may be made to open country or registered common land.

The Act allows any person to enter and remain on any 'access land' (mainly mountain, moor, heath and down) for the purposes of open air recreation such as walking, climbing and bird-watching, provided that this does not lead to damage to walls, fences, hedges, stiles or gates or contravene restrictions, or lead to actions deemed to be inappropriate and unlawful. Fishing and camping are not included in the Act. Restrictions are listed in Schedule 2 of the Act – see examples below. The new right of access was introduced England in regional stages between September 2004 and December 2005. Access land is shown on Ordnance Survey maps.

Under this Act, landowners may not obstruct access, but neither were they invested with more onerous responsibilities in relation to occupier's liability or risk in general. The Countryside Agency and the Countryside Council for Wales (now Natural England and Natural Resources Wales) are required to produce maps showing all access land and common land. Local authorities put the draft maps on deposit for public inspection and to allow consultation and appeal against designation. Maps must be reviewed within 10 years of confirmation. Bylaws, wardens and notices indicating boundaries may be established.

'Access land'

This includes:

- open country (mountain, moor, heath or down);
- registered common land;
- land 600m above sea level;
- especially dedicated land;
- coastal land may be included by Order.

'Excepted land'

This includes:

- land ploughed or drilled in the last 12 months for planting or sowing crops or trees;
- land covered by buildings including the curtilage;
- land within 20m of a dwelling;
- parks and gardens;
- quarries, surface working of minerals and active mineral workings;
- railways and tramways, airports or aerodromes;
- golf courses or race courses;
- utility structures such as electricity substations and telecommunications masts;
- land being developed in accordance with the Town and Country Planning Acts;
- land within 20m of a permanent building or temporary pens holding livestock;
- land regularly used for training race horses (gallops);
- military land where bylaws apply.

Restrictions on access

These include:

- vehicles other than invalid carriages;
- bathing or using a vessel or sailboard on non-tidal river or lake;

- access with animals other than dogs (dogs must be on a short lead between 1 March and 31 July and at all times when near livestock);
- criminal acts or intimidation of persons engaged in lawful activity;
- lighting fires;
- taking or disturbing flora, fauna or fish, eggs or nests, stones or fallen wood;
- hunting, shooting or fishing or carrying the apparatus thereof;
- metal detecting;
- interference of drains or watercourses;
- organised games, camping, hang- or para-gliding;
- commercial activity;
- advertising.

Landowners may exclude or *restrict* access, for example, for land management, nature conservation, shooting, agricultural works, fire risk, national security or other emergency, but generally for a maximum of 28 days in a year. Excluded days must not include Bank Holidays, Good Friday, Christmas Day, more than four days which are either Saturday or Sunday; or any Saturday between 1 June and 11 August or any Sunday between 1 June and 30 September.

The Countryside Code

The Country Code was originally published in the 1950s and was updated and republished in 2012 as the Countryside Code. It sets out advice and an outline of the law for visitors and landowners.

Land Reform (Scotland) Act 2003

This Act deals with access, a community right to buy and crofters' right to buy. These notes deal with access. Scotland has never had a trespass law, but the Land Reform Act clarifies where people have a right to be on land and water for recreation and education purposes, and for crossing over land and water. Access rights are intended to help people enjoy and appreciate the outdoors more, thus providing health benefits, and economic gain for rural communities. The Land Reform (Scotland) Act 2003 is more accommodating than the CROW Act as it allows for most forms of recreation on, over and under land and inland water. Although motorised activity is not allowed, horse-riding, caving, canoeing, para-scending, camping and lighting fires are.

Scottish Natural Heritage has emphasised responsible behaviour by the public and land managers through the Scottish Outdoor Access Code. The Code is based on three principles: respecting the interests of other people; caring for the environment; and taking responsibility for your own actions. It has been devised to guide the public and land managers to make informed decisions. See www.outdooraccess-scotland.com for details.

Public rights of way continue to exist. The statutory right to access began on 9 February 2005.

Marine and Coastal Access Act 2009

There are two objectives for access, Subsection (2) states the first objective, which is that there is a route around the whole of the English coast consisting of one or more long-distance routes and available to the public for recreational journeys on foot or by ferry ('the English coastal route'). Subsection (3) states the second objective, which is that there is a margin of land along the length of the coast which the public may enjoy. It requires a margin to exist 'in association with' the coastal route, but although the route and the margin are linked objectives, the margin does not have to be accessed directly from the route. It may be accessed from another part of the margin (e.g. by walking along the foreshore to reach an isolated beach) or using a right of access under other legislation, such as a public right of way, or by other means.

Under the provisions of the Marine and Coastal Access Act 2009, it was envisaged that if any new right of access needed to be created to provide the coastal margin, the principle means of creating it was by way of an Order under section 3 of the CROW Act 2000 which gave a power to the Secretary of State for England and the then Welsh National Assembly (now Welsh Government) to amend the CROW Act's definition of 'open land' to include coastal land or coastal margin (defined as the foreshore and any cliff, bank, barrier, dune, beach or flat adjacent to the foreshore). This amendment (adding the coastal margin to 'open land') was actually made by section 303 of the Marine and Coastal Access Act 2009.

Under the CROW Act 2000 there was an exception to the requirement for the margin to be accessible to the public where the land was within any category of 'excepted land' listed in Schedule 1 to the Countryside and Rights of Way Act 2000. This formulation enabled the margin to be proposed and established without the need to describe individually every area which is not accessible to the public. (Excepted land is land to which there is no general public access. The categories of land defined as 'excepted' may be modified by government order.) By redefining the coastal margin as 'open land' the Marine and Coastal Access Act 2009 changed the assumption of privacy and public exclusion from private land to an assumption of public access. However government guidance indicates that this will be closely controlled by careful negotiation and agreement between Natural England (or Natural Resources Wales) and land owners affected and all access to what would otherwise have been private land has to be approved by the Secretary of State (or Welsh Government).

Access agreement and access order

The legislation for these measures is in the National Parks and Access to the Countryside Act 1949, Countryside (Scotland) Act 1967, the Countryside Act 1968 and Land Reform (Scotland) Act 2003.

The CROW Act made creation of new access agreements unnecessary in England and Wales although existing ones still exist. However, these agreements may still be created in Scotland. Local authorities create access by acquiring land

themselves, by access agreements with landowners or by compulsory access orders in consultation with Scottish Natural Heritage (SNH).

Access agreements and access orders enable the public to have access for open-air recreation to open country, consisting wholly or predominantly of mountain, moor, heath, down, cliff or foreshore (including banks, barriers, dune, beach, flat or other land adjacent to the foreshore (1949 Act). The 1968 Act extended this to include rivers, canals and expanses of water through which these run and adjacent land sufficient for access on foot, using boats and picnicking.

Consequences

- A landowner is not responsible to the public using such rights of access to the same extent as he would be to other authorised visitors.
- The public becomes trespassers if they abuse these rights, e.g. by damaging property, lighting fires, harming wildlife or stock, depositing rubbish, holding political meetings or generally annoying other people (Schedule 2).
- Local authorities are required to keep maps showing land in their area open for public access including areas covered by access agreements.
- Access agreements may include payment incurred in implementing an agreement.
- Bylaws can be made and wardens appointed by the local planning authority.

Excepted land

- Agricultural land other than livestock grazing.
- Land covered by buildings or curtilage of such.
- Land plus curtilage for surface mineral extraction, golf courses, sports grounds, race courses, airfields.
- Land undergoing development for any of the above.

Access orders

These are made by local planning authorities and must be confirmed by the Secretary of State. They can be recommended by SNH or required by Scottish Ministers.

- The order must include a map defining the land concerned.
- An order may specify work or other things on the land to facilitate recreational use.

Public path orders and agreements

The legislation for these is in the Countryside (Scotland) Act 1967, Highways Act 1980, Wildlife and Countryside Act 1981 and Countryside and Rights of Way Act 2000. This applies in England, Wales and Scotland.

Public path agreement

These are made by agreement between a local planning authority and a landowner or tenant. Payment may be involved. There is no set format for the document. Under the Countryside and Rights of Way Act 2000 public paths may be designated only after an improvement plan has been published.

Public path creation orders

This is where the local planning authority compulsory creates a path. It may be created with or without special conditions. When creating a path, local planning authorities must consider the extent of benefit to a substantial section of the public or to the convenience of persons living in the area and the effect on the landowner or occupier. A formal public consultation period is required. Disagreement may be taken to the relevant Minister or Secretary of State and compensation may be made.

Other provisions

Public path extinguishment orders

Paths may be closed without compensation as long as closure does not adversely affect land adjoining the path.

Public path diversion order

An owner can apply for diversion if he or she can demonstrate that there is a more convenient or direct route or prove that such a diversion will result in more efficient use of land.

Maintenance of public paths

Local planning authorities are responsible for maintenance of all paths created by order or agreement. They can appeal to the Secretary of State or to Scottish Ministers if they consider the maintenance requirements are unreasonable.

National trails (formerly 'long distance paths') and long distance routes (Scotland)

Legislation for these is in the National Parks and Access to the Countryside Act 1949 and the Countryside (Scotland) Act 1981. This law applies in Scotland, England and Wales. These are high-quality routes connecting the UK's finest landscapes, designed to allow long-distance off-road journeys on foot. Several routes may be followed by cyclists or on horseback. There are 12 in England, three in Wales and four in Scotland.

Conservancies can recommend to the Secretary of State a particular route on which in the Conservancy's opinion the public should be allowed to make

extensive journeys on foot, pedal cycles or horseback. The routes should be, for the greater part of its length, not along roads used mainly by vehicles. Detailed proposals are drawn up which have to be approved.

In England and Wales each route is looked after by a National Trail Officer. Maintenance is paid for by Natural England, Natural Resources Wales, local authorities and highway agencies.

Disability Discrimination Act 1995

The Act made it unlawful to discriminate against disabled people in normal day-to-day activities. 'Disabled' includes physical and mental disability and facial disfigurement. Under this Act by the end of 1999, service providers had to amend policies, procedures and practices that prevented service uptake and provide additional help (e.g. audiotape for interpretation). By 2000, where reasonable, physical boundaries that prevent access should have been removed or physical access provided in another way.

The final part of the Act came into force in October 2004. By then, reasonable adjustments to physical features or accommodation of disabled people became the legal responsibility of public service providers. This includes play areas and new sports and play facilities. There are exemptions including:

- If there is a risk to health and safety.
- There is only one way to provide services to everyone else.
- A less favourable service may be given only if it is otherwise impossible to serve disabled people at all.
- There is a legal duty under other legislation, e.g. listed buildings; national security.

Enforcement of the Act is through magistrate or sheriff court or industrial tribunal; or the National Disability Council (advises government not individuals) (Disability Rights Commission Act 1999).

In countryside provision, total access to all may be very expensive to provide. The next best option is *total information* so that people may make informed choices, for example, about steepness, steps, route length, transport possibilities, etc. as well as physical provision of route options. The Fieldfare Trust has useful information on provision for disability. www.fieldfare.org.uk

THE LEGAL SYSTEM: TOP 10 QUESTIONS

1 What are the principal sources of law that landscape architects should be aware of?
2 What are the essentials of a valid contract?
3 What are standard term contracts?
4 How does criminal law affect the work of landscape architects?
5 Why is the case *Rylands v Fletcher* relevant to landscape architects?
6 Explain why strict liability may be relevant in a contract.

7 What legislation covers the establishment of rights of way across land?
8 What would a landowner do if she wanted to change a right of way across her land?
9 What is the law regarding trees overgrowing someone else's land?
10 What would you do if a retaining wall collapsed on your site?

4 Professional appointment

CHAPTER CONTENTS

HOW IS A LANDSCAPE CONSULTANT SELECTED?

There are many different ways of selecting and appointing a landscape architect. A client's method of selection is dictated by a number of factors. Good selection procedures will define the project and services required and lead to the appointment of a landscape practice able to meet those requirements. Employers' choices may be restricted or driven either by their own internal procedures or by strict regulations in the case of public sector appointments where transparency is paramount.

A variety of factors govern methods of selection:

- Whether the client is public or private sector – this will dictate any procurement rule restrictions.
- Financing of the project – funding organisations may require a certain selection procedure.
- Scale of project – the larger the project the greater the risk, which therefore may dictate a more complex procurement process.
- Nature of the work and stages of the project that the consultant will be involved in – is it a stand-alone project or is the landscape part of a larger building project?
- Specific quality or expertise of the consultant – selection is not dictated by the cost.
- Certainty as to the brief and services to be provided.

- The speed of appointment required may restrict lengthier selection options.
- Cost of the selection process – the simpler the procurement route the cheaper the cost.
- Whether any other consultants are required and how they will be appointed.

Whatever the chosen procurement method, it is important that the basis for selection is clear and the method of assessment is set out. The Landscape Institute's publication *Landscape Architecture: A Guide for Clients* sets out selection criteria and processes.

Landscape architecture: a guide for clients

Quality and fee-based submissions: a percentage split in assessment marks between quality and cost may be advised. Sometimes a 'two-envelope' system is used. In this case the price envelope is only opened after the assessment of quality is completed.

Fee and design submissions request an initial or detailed design proposal as part of the bid. A small number of invited practices and an honorarium are likely to make it more attractive. It will be more time-consuming to organise.

Quality-based submissions or interviews based selection on relevant experience and qualities required for the particular project, with no reference initially to fee. Project and services are then developed jointly between client and landscape architect and fees are concluded by negotiation.

What alternative methods of selection exist?

Direct appointment and negotiation – private sector

Direct appointment is often the least costly method of appointment and generally consultants are willing to discuss a potential appointment with a prospective client without obligation. Many clients build an established working relationship with one or more landscape practices to their mutual benefit; this is based on trust and a good understanding and knowledge of each other's working methods. Direct appointment is generally only available to the private sector where there are no procurement rules that restrict negotiations with a single organisation. Public sector clients are governed by strict procurement regulations unless the negotiated procedure is permitted under EU Public Contract Regulations.

Design competition and technical proposal

Design competitions are a way of discovering the range of design options available on major projects. To enable a consultant to be selected on the basis of a design competition or technical proposal the client has to ensure that adequate information

is available to competitors, including the basis of remuneration. The criteria and methods used to assess and select from the competition entries must be determined in advance by the client, for example, on the basis of the design or on the fee proposal. This often is the most costly method of appointing a consultant because of the administration involved in running a competition, judging and selecting.

Competitive fee tendering

Fee tendering enables a client to seek competitive fees from a number of consultants on the basis of a defined brief or scope of services, and select the preferred consultant on the basis of specific criteria such as price or price/quality ratio. Public sector clients are strictly governed by EU procurement rules. For private sector tendering a suitable basis is set out in the Landscape Institute's *Guide to Procedure for Competitive Tendering* although this has now been withdrawn by the Landscape Institute.

COMPETITIVE TENDERING PROCESSES

Fee tendering and public procurement

Primary legislation

- The European Public Contracts Directive (2014/24/EC)
- The Public Contracts Regulations 2014

Major or complex public sector projects are procured in accordance with rules contained within the Public Contracts Regulations. These require contracts for services over a certain project size/value threshold to be advertised in the *Official Journal of the European Union* (*OJEU*). The threshold value is stated in euros excluding VAT and is subject to regular amendment.

The legislation covers organisations and projects which receive public money. Local authorities, NHS trusts, central government departments, and port authorities are all covered by the legislation and must advertise in *OJEU* if their contract meets the criteria. Some privately funded/managed contracts will also be covered, and if a project is in receipt of more than 50 per cent public funds, it would also be covered by the EU legislation.

The general principle is to ensure that equal and transparent treatment of all prevails regardless of the financial threshold.

Four procedures are provided for in the Regulations:

- *Open procedure* – under which all those interested may respond to the advertisement in the *OJEU* by tendering for the contract.
- *Restricted procedure* – this is a two-stage process. In the first stage a Pre-Qualification Questionnaire (PQQ) is completed by those who respond to an

advertisement. A shortlist is then selected based on their financial standing and technical or professional capability; this narrows the number invited to submit a final tender for the contract. In the second stage, the shortlisted suppliers are invited to respond to an Invitation to Tender (ITT) which has the detailed brief and contract requirements as well as assessment criteria in terms of price/quality ratio. The tenders are then evaluated in accordance with the stated award criteria, and the contract awarded.

- *Competitive dialogue procedure* – following an *OJEU* Contract Notice and a selection process through PQQ, the authority enters into dialogue with potential bidders to develop one or more suitable solutions for its requirements on which chosen bidders will be invited to tender. This procedure is usually used for complex contracts and the award criteria is on the basis of best value, not lowest price.
- *Negotiated procedure* – under which a purchaser may select one or more potential bidders with whom to negotiate the terms of the contract. It uses a pre-qualification stage prior to negotiation with the preferred bidder.

Each procedure has specific requirements (including time frames) which must be followed otherwise they are open to legal challenge.

Public authorities have a free choice between open and restricted procedures. The competitive dialogue procedure is available where the contract cannot be awarded under open or restricted procedures. The negotiated procedure may only be used in exceptional circumstances, for example, when the supplier is the sole source of the service or goods required, in cases of extreme urgency or when the precise specification of the works can only be determined by negotiation.

Award criteria

The Regulations set out criteria designed to ensure that all suppliers or contractors established in countries covered by the rules are treated on equal terms, to avoid discrimination on the grounds of origin in a particular Member State. The award of contract is either on the basis of either lowest price or Most Economically Advantageous Tender (MEAT) to the purchaser. Various criteria apply in the latter case: quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, completion date. The contracting authority should specify the relative weighting it gives to each of the criteria.

The Landscape Institute's Guide to Procedure for Competitive Tendering (2003)

This document advised landscape consultants and their clients in the commissioning of landscape consultancy by tender; it was last updated in 2003. It has now been withdrawn by the Landscape Institute.

Other tendering procedures

Often there is no standard brief issued by a client and so the landscape consultant should clearly set out their understanding of the requirements of the project, what they will be undertaking as part of the submission, a methodology, and the terms and conditions of their appointment if successful, to avoid misunderstandings.

Typical competitive non-standard tender procedure

The key principles of tendering are that the process should be logical, fair (all competing on an equal basis) and that the effort involved is proportionate to the potential reward. All stages in the selection process should be useful, and ideally not involve more than the following:

- Prepare list of suitable tenderers.
- Send out an invitation to express interest in tendering.
- Prepare tender package including necessary documents, instructions for tenderers on information to be provided, scoring system used for evaluation of tenders returned.
- Issue tender.
- Review and score tender returns.
- Interview and appoint selected consultant.

Irrespective of how the landscape architect has come to be considered, there is usually a series of stages in responding to an enquiry:

- Receive enquiry.
- Verify that the practice wishes, in principle, to accept the commission.
- Verify that the requirements are complete and understood.
- Ascertain how the practice will meet these requirements.
- Establish the basis for making a fee proposal and prepare necessary fee calculations.
- Establish the additional information (if any) to be submitted with the fee bid.
- Prepare and submit the proposal.

What information should a client look for from a consultant in a tender?

Regardless of whether the project is public or private sector a client should be looking for the following information from the landscape consultant:

- Previous experience in work of the same nature and scale (relevant projects).
- Their capacity to take on the work (current projects).

- Staffing – their professionals have the required skills and qualities to undertake the work (key staff CVs).
- Staff are available to be committed to the project and the necessary resources are in place to support the professional staff (staff deployment).
- Knowledge as to how to undertake the type of work (methodology).
- Knowledge of the site (response to the brief).
- Ability to undertake the work in a cost-effective manner (approach to cost-effectiveness).
- Quality management systems (QA).
- Financial standing (three years' accounts).
- Health and safety procedures.

What information should the consultant have from the client to enable them to tender for the project?

- Size and likely value of the project.
- Nature of the work (hard and soft landscape?).
- Level of appointment (sub-consultant or main consultant).
- The client and other consultants.
- Stages and requirements of the selection process.
- Criteria for selection.

What should a fee submission contain when there is a non-standard brief?

Where public projects are of a small nature and under the EU threshold, or it is a private project, a standard brief may not be available. Fee submissions can be made in the form of a report which could contain the following information:

- Technical submission
  - Response to the brief.
  - Relevant experience (project lists and illustrations of past projects).
  - Proposed design team – key staff (CVs), resources and deployment.
  - Proposed methodology and possibly schematic design showing initial design approach.
  - Scope of services.
  - Conditions of appointment.
- Fee Proposal
  - Usually as a lump sum (with payment stages).
  - Breakdown of anticipated stages of work, time allocated and fees.
  - Programme.
- Terms and conditions of contract and form of agreement.

Following the submission there may be an interview.

Fee calculation

When calculating fees on a competitive basis there are a number of points to take into consideration concerning:

- The project
  - project type;
  - project value;
  - stages of work and services required;
  - additional services required (level of BIM compliance/Breeam/Risk Workshops);
  - level of appointment (main or sub-consultant);
  - sub-consultants required as part of your fee bid.
- The landscape architect's organisation
  - overhead costs: including premises, heat, light, etc.;
  - salary costs: pay, pensions, etc.;
  - finance costs: loans/interest payments/insurance;
  - general office supplies etc.;
  - profit margin.

$$\frac{\text{Overhead costs + salary costs / person}}{\text{No. of hours available for work (e.g. hours per year minus holidays)}}$$

= hourly rate for a member of staff

+ Profit

Hours required on project × hourly rate × grade of staff = Fee

NB: The profit margin is the only flexible aspect in calculating your fee in a tender.

APPROACH AND OFFER OF WORK

Factors to be considered by the landscape architect

When an offer of an appointment is made by a client the landscape architect must consider a number of factors before entering into a legal commitment to undertake the commission.

The client

Does the client have the authority and resources to commission the landscape architect? If the client is new there may be a need for extensive enquiries into their financial standing and integrity.

Conflicts

Will the appointment conflict with the landscape architect's Code of Standards of Conduct and Practice and/or the policy of the practice? The landscape architect must ensure that the client is made aware of any restrictions placed by professional codes, including their position in relation to previous landscape consultants that may have been appointed by the client for the same project.

Competence

Does the landscape architect have the relevant experience and competence to deal with the type of work required? Landscape architects should only undertake professional work for which they are able to provide '*proper professional, technical competence and resources*'. (Refer to Standard 6 of the Code of Standards and Practice.)

Resource and finance commitments

Will present commitments permit the landscape architect to devote adequate time and staff to the work? Landscape architects should only undertake professional work for which they are able to provide proper '*professional, technical competence and resources*'. (Refer to Standard 6 of the Code of Standards and Practice.)

Can the office can carry the job financially? If there are long payment provisions associated with the project (e.g. Hubco projects in Scotland) this may stretch the finances of the practice. Landscape architects are required to manage their finances prudently. (Refer to Standard 11 of the Code of Standards and Practice.)

Legal and insurance considerations

If the client requires the landscape consultant to enter Collateral Warranties, will potential liabilities be covered by the practice's professional indemnity insurance cover?

Acceptance and confirmation of appointment

The Landscape Institute's Code of Standards of Conduct and Practice requires the landscape architect to record the terms and conditions of any appointment before undertaking any work, and to have the necessary competence and resources. A written agreement is essential and must define and set out the services to be provided, the obligations of each party including terms and conditions, and set out the fee basis and method of payment.

Formalising the appointment in this way creates a clearly identifiable legal basis for the commission and establishes a sound business approach to the relationship between the architect and the employer. Oral agreements may be accepted in law as the basis of a contract but this would not comply with the Institute's requirements under the Code of Standards of Conduct and Practice.

Methods

Acceptance and confirmation of appointment can be made in the following ways:

Standard Appointment Document

To avoid any misunderstandings in appointment between the client and consultant the Landscape Institute recommends the use of the 'Landscape Consultant's Appointment' standard document which has been prepared by the Institute's Technical Committee with input from their legal advisers. It includes the Conditions of Appointment, Scopes of Services, Schedules of Fees and Expenses, and the Memorandum of Agreement between the parties.

Other standard appointment documents relevant for landscape consultants include:

- ***Consultant's Contract (CIC ConsCon): Contract for the Appointment of Consultants on Major Construction Projects 2011*** – intended for experienced clients working with experienced consultants in multidisciplinary contracts on major commercial property development projects, primarily in the UK. It can be used by either employers or Design and Build contractors, with any discipline (known as role) of consultant, and used on any procurement route. It has been drafted with the aim of striking a fair balance between the interests of the client and the consultant. The objective is to make available a contract which is acceptable in the institutional market, but with which consultants and their insurers are comfortable.
- ***JCLI Consultancy Agreement for a Home Owner/Occupier, published for JCLI by the Society of Garden Designers*** – a simple agreement for a home owner appointing a consultant to provide services in relation to landscape work associated with garden design/improvements. It is not suitable for use in Scotland or Northern Ireland, and it is not suitable if the consultant will not be dealing directly with a contractor unless the appointment is only for initial design stages.

Client's Standard Appointment Document

Many clients have their own standard forms of appointment. They are normally prepared by their legal advisers who wish to protect the interest of their clients, which often will increase liability on the landscape architect. The landscape architect can suggest the benefits of using the Landscape Institute's standard appointment document as it is likely to be comprehensive, recognised in the industry and represent both parties in an equitable manner. Any client standard form must be reviewed carefully with appropriate advice from the landscape architect's professional indemnity insurers and legal advisers. Common areas of change or additions include:

- The standard of care expected in the performance of the services – 'reasonable skill and care' is defined in law as exercising the skill and care to be expected of an ordinary landscape architect. Higher standards of service should be avoided as this will fall outside the scope of professional indemnity insurance cover.
- The provision of guarantees or indemnities – these would not be covered by the professional indemnity insurance.
- The inclusion of services that do not fall within the landscape architect's expertise, e.g. engineering.

Exchange of Letters

An informal exchange of letters can be used but it is not recommended by the Landscape Institute. Letters of appointment are liable to misinterpretation and can often lead to disagreements between the parties. If a letter is being used it must cover as a minimum the relevant information set out below:

- Parties to the agreement (name, address and signatures).
- Client's representative for day-to-day instructions.
- Project description and address.
- Scope of services and any exclusion.
- Conditions of appointment (allocation and limitation of responsibilities, duty of care, insurances, assignment and copyright).
- Fees and expenses – method of calculation, payment and time of payment and any exclusions.
- Other consultants – methods of appointment and responsibilities.
- Disputes – options for dealing with differences or disputes that may arise.
- Provisions for termination.

The client should be asked to sign and return a copy of the landscape architect's letter to signify their agreement to it. Lack of response to the letter does not signify the client's acceptance to proceed.

The letter should be sent by registered post or recorded delivery as, should litigation arise, it may be necessary to produce evidence of the client's receipt.

Under Seal (Deed)

Contracts may be executed under seal (also called contracts by deed or specialty). They have to be signed by the parties, witnessed and most importantly make clear that it is executed as a deed. The formal requirements for making a 'deed' are now contained in the Law of Property (Miscellaneous Provisions) Act 1989 and the Companies Act 1985. There is no longer any requirement that the document should be formally sealed or embossed.

There is no requirement for 'consideration' for a contract under seal/by deed because of its formality. However deeds may be used even where the contract includes consideration, particularly in relation to complex engineering and construction contracts for large values. This is as a result of the Limitation Act 1980 which extends the period within which an action for breach of an obligation contained in a deed can be taken to 12 years, whereas for a 'simple' contract it is only six years.

The contract: what are the legal implications of an agreement between the landscape architect and the client?

The basis of the landscape architect's appointment is the formation of a contract with the client. A contract is a legal agreement between individuals, which can be enforced by law if it is breached by either party to the contract.

Once there has been an agreed acceptance and confirmation it signifies the commencement of a contractual relationship. This is reinforced by an assurance of special professional competence and the Code of Conduct of the professional's Institute.

If this relationship breaks down (i.e. the contract is breached), the client can sue the landscape architect for:

Professional negligence (error and omission)

For example:

- lack of reasonable inspection;
- issuing a certificate for work improperly done;
- negligent design.

Tortuous negligence

- Breach of duty of reasonable care.

The landscape architect can sue the client for breach of contract, i.e. unpaid fees.

THE LANDSCAPE CONSULTANT'S APPOINTMENT 2013

(Refer to the Landscape Institute's website for the full text and guidance on the use of the Landscape Consultant's Appointment – www.landscapeinstitute.org.uk.) The Landscape Consultant's Appointment is published by the Landscape Institute. Its principal aims are to:

- Enable the landscape consultant and the client to achieve a clear understanding of the services required by the client.

- Define the conditions concerning the provision of those services including dispute resolution and termination.
- Set out the payment provisions relating to those services.

Under the Institute's Code of Standards of Conduct and Practice for Landscape Professionals members must not undertake professional work unless the terms of the contract have been recorded in writing. The Landscape Consultant's Appointment comprises a suite of documents that include conditions applicable to the appointment, the signed agreement that forms the contract between the parties, the scopes of services offered by the landscape consultant and the fees and expenses agreed for those services. Together these and any other attached documents form the contract between the parties.

The Landscape Consultant's Appointment includes the following elements:

- Conditions of Appointment;
- Memorandum of Agreement;
- Scopes of Services;
- Schedules of Fees and Expenses associated with the Scopes of Services.

Conditions of appointment

The conditions must clearly set out the obligations of the parties, the allocation of responsibilities and any limitation of responsibilities, the method of fee calculation and payment provisions, and provisions for termination or dispute resolution. The document is available from the Landscape Institute website and is not editable as all the conditions will apply to each appointment and as summarised under the following headings.

The landscape consultant's authority and obligations

- duty of care;
- Code of Standards of Conduct and Practice for Landscape Professionals;
- landscape consultant's authority;
- the landscape consultant's representative;
- duty to inform and collaborate (advise on changes to programme/information or decision required from the client/advise on appointment and liaising with other consultants);
- duty to comply with statutory requirements;
- confidentiality and publicity.

The client's authority and obligations

- client's representative;
- provision of information, decisions and instructions;
- appointment of others (liabilities);

- confidentiality and publicity.

Assignment and subcontracting

- Assignment (Assignation in Scotland);
- Subcontracting.

Fees and expenses

- Calculation of Fees;
- Percentage Fees;
- Time Charges;
- Lump Sum Fees;
- Other Fees;
- Additional Fees or Fee Adjustments;
- Expenses and Disbursements.

Payment

The Landscape Consultant's Appointment has been updated to take account of the payment provisions of the Local Democracy, Economic Development and Construction Act 2009, the Construction part of which came into force on 1 October 2011 and amends the Construction part of the Housing Grants, Construction and Regeneration Act 1996. The following boxed text appears within the Landscape Consultant's Appointment as standard conditions that apply to every contract the landscape consultant enters into.

Landscape Consultant's Appointment: conditions of appointment – payment

Payment notices

The Landscape Consultant shall issue payment notices to the Client or the Client's Representative on the last day of each month unless otherwise specified in the Schedule of Fees and Expenses.

Each payment notice shall set out the sum the Landscape Consultant considers to be due, less any amounts previously paid, and state the basis of the calculation. The sum set out in the payment notice shall be the 'notified sum' and the payment due date shall be the date of the Landscape Consultant's payment notice.

Payment of notified sum

The Client shall pay the notified sum within 14 days of the date of issue of the payment notice, which shall be the final date for payment, unless:

- *The Landscape Consultant becomes insolvent, or*
- *The Client issues a Pay Less Notice.*

The Client shall not delay payment of any undisputed part of the notified sum.

Pay Less Notice

If the Client intends to pay less than the amount specified in the payment notice the Client shall issue a written notice to the Landscape Consultant not later than five days before the final date for payment.

The Pay Less Notice shall set out the sum that the Client considers to be due to the Landscape Consultant on the date the notice is served, the basis on which that sum has been calculated and, if any sum is intended to be withheld, the grounds for doing so.

The Client shall on or before the final date for payment make payment to the Landscape Consultant of the amount, if any, specified in the written notice.

Final account

When the Landscape Consultant reasonably considers that the Services have been completed the Landscape Consultant shall submit the final account for fees and any other amounts due. This sum shall be payable within 30 days unless the Client serves a Pay Less Notice.

Late payment

If the Client does not pay the agreed amounts when properly due the Landscape Consultant can apply interest on the full payment due in accordance with the Late Payment of Commercial Debts (Interest) Act 1998 at a daily rate of 8% per year above the Bank of England base rate until payment is received.

Copyright and entitlement

- Copyright (of landscape consultant).
- Entitlement (of client to use material).

Copyright, Designs and Patents Act 1988

Works of architecture are included in the definition of 'artistic works' for copyright purposes and are protected under the Copyright, Designs and Patents Act 1988. This restricts the following acts:

- *Copying the whole or a substantial part of the work.*
- *Issuing copies of the work to the public.*

Duration of copyright in an artistic work extends for the lifetime of the artist/author and a further 70 years from the end of the year in which they died. Ownership of artistic copyright in drawings lies with the landscape architect who drew the work but if undertaken by an employee copyright remains with the employer. The client is entitled to the drawings prepared for his project on payment of the architect's fees. If all copyright is assigned to the client he may make such use of it as he wishes.

Landscape Consultant's Appointment: conditions of appointment – copyright and entitlement

Under the Registered Designs Regulations 2001 the Client may not register any part of the design by the Landscape Consultant without the written consent of the Landscape Consultant.

Under the Copyright, Designs and Patents Act 1988 copyright in all original material prepared by the Landscape Consultant in the undertaking of the services shall remain the property of the Landscape Consultant unless otherwise agreed in writing. The Landscape Consultant has the right to be identified as the author of the material.

The Client shall have a licence to copy and use documents and drawings prepared by the Landscape Consultant in performing the Services under this Agreement. This entitlement applies to the construction, operation, maintenance, management, repair, promotion, leasing or sale of the Project provided that all fees due to the Landscape Consultant have been paid.

Entitlement to copy and use documents and drawings prepared by the Landscape Consultant relates only to that site or part of the site for which the design was prepared and does not permit the reproduction of the design to extend the project or for any other project except on payment of an agreed licence fee.

Liability and insurance

- Professional Indemnity Insurance (refer also to Chapter 2);
- Supplementary Agreements (collateral warranties/novation agreements);
- Limit of Liability (NB liabilities of employees).

Landscape Consultant's Appointment: conditions of appointment – insurance and limit of liability

The Landscape Consultant shall maintain professional indemnity insurance with a limit of indemnity not less than as stated in the agreement and for the period specified.

The Landscape Consultant's liability for loss or damage shall not exceed the amount of the Landscape Consultant's professional indemnity insurance specified in the Memorandum of Agreement.

No employee of the Landscape Consultant shall be personally liable to the Client for any negligence, default or other liability arising from the performance of the Services.

Collateral warranties

(Refer to Chapter 5 for further detail.)
A collateral warranty or 'duty of care' is a legal agreement which stands alongside the agreement between the client and the landscape architect. It forms a legal responsibility with a third party who would not normally have any right to claim on the contract. Collateral warranties therefore create direct contractual relationships between parties that would not otherwise exist and could include the funder/tenant/purchaser of a building.

Novation

Novation agreements are used to transfer the rights and obligations of one party under a contract to another party, whilst the other contracting party remains the same. Landscape architects will come across novation agreements typically under Design and Build contracts where the client appoints the landscape architect to prepare initial design information for planning approval purposes, and possibly preparation of employer's requirements for the appointment of a Design and Build contractor. The design team will then be novated to the appointed Design and Build contractor to complete the detail design and implementation package.

Suspension or termination

- Suspension of Obligations: The client by giving a minimum of seven days' notice; the landscape consultant by giving a minimum of seven days' notice with reasons (non-payment/breach of obligations by client/force majeure).
- Resumption of Services.
- Termination.

Dispute resolution

The Landscape Consultant's Appointment: Conditions of Appointment includes two options for dispute resolution: mediation and adjudication, but other options also exist.

Options for dispute resolution

If disagreements happen in the contractual relationship between the landscape architect and the client there are various ways to resolve the dispute.

Litigation

Litigation is the process of dispute resolution before a court, which has cost and time implications. In the construction industry there is now generally a provision for arbitration or adjudication which makes litigation a less common process.

Arbitration

Arbitration is a private dispute resolution mechanism by which the parties agree to be bound by a third-party decision-maker appointed by agreement between the two parties. The process is governed under English law by the Arbitration Act 1996.

The third party or tribunal reviews the evidence in the case and imposes a decision that is legally binding on both sides, although awards are not directly enforceable unlike court judgments. A party seeking to enforce an arbitration award must resort to the courts. There are also limited rights of review and appeal of arbitration awards, and they are not as speedy as adjudication.

Arbitration in Scotland is a completely different procedure from that in English law (refer to the *Architect's Legal Handbook* for more detail).

Adjudication

The right to adjudication is now compulsory in almost all construction contracts since the Housing Grants, Construction and Regeneration Act 1996 (HGCRA), which applies to the whole of the UK, and the Local Democracy, Economic Development and Construction Act 2009 which modifies the HGCRA.

Adjudication is similar to arbitration in that an adjudicator is appointed by agreement between the parties or, failing agreement, by the Construction Industry Council Adjudicator Nominating Body. The procedures are far more summary and the three key features are:

- The appointment of an adjudicator must be made within seven days of notice of intent being given to refer a dispute to adjudication, and the decision must be made by the adjudicator within 28 days unless the parties agree to extend the period.
- The decision may be overturned by a later decision of an arbitrator or the court, which means the decisional is provisional.
- The decision is enforceable.

Mediation

Mediation is an alternative form of dispute resolution where a third party acts as a mediator to resolve the dispute through negotiation. The process is private and confidential and participation is typically voluntary. Compliance with the agreement is usually high as the parties have worked together to gain a mutually agreeable solution. Costs are lower as agreement is usually reached more quickly, and as the parties have been willing to mediate it means they are more amendable to understanding the other party's view which has the added benefit of often preserving the relationship.

Memorandum of agreement

This is the legal agreement between the client and the landscape consultant. It comprises:

- *Names and addresses of the parties* – including client's representatives where applicable.
- *The agreement* – including project details and address and cross-reference to the associated conditions of appointment/scopes of services/schedules of fees and expenses, and any additional agreements/PII cover that form part of the agreement.
- *Signatures and witnesses* of both parties.

Scopes of services

The scopes of services reflect the range of services offered by landscape consultants. The services of design, construction and management have been expanded to allow for flexibility in procurement type. This enables the landscape consultant to be responsible for either design through to contract administration, or design through to non-administrative post-contract services on Design and Build projects. The scopes align with the RIBA Plan of Work 2013, which is based on a set of unified industry stages agreed through the Construction Industry Council (CIC). (Refer to www.ribaplanofwork.com for further details.)

- S1: Landscape Design and Administrative/Post-Contract Services.
- S2: Masterplanning Services.
- S3: Landscape and Visual Impact Assessment Services.
- S4: Landscape Planning Services.
- S5: Landscape Management Plan Services.
- S6: Stakeholder Engagement Service.
- S7: Landscape Maintenance Design and Contract Administration Services.
- S8: Other Services (for where the above Scopes are not applicable to the service being offered by the landscape consultant).

All are fully editable to enable each scope to be tailored to suit the particular project.

Schedules of fees and expenses

A schedule is associated with each scope of services. This enables the landscape architect to set out the chosen method of calculating and charging fees and expenses, and the stages of payment (monthly or stage), as well as alternative methods of charging expenses and disbursements. A time-charge schedule is included for different grades of staff. This is reinforced by the Conditions of Appointment, Clause 4 – Fees and Expenses, to which both parties agree.

FEE CALCULATION

The Landscape Institute's *Engaging a Landscape Consultant: Guidance for Clients on Fees*, which was published 2002, was withdrawn in 2013. The document provided detailed guidance on alternative methods for charging fees, expenses and disbursements. It also included detailed fee graphs for calculating percentage fees; these were removed as alternative procurement methods currently available in the construction industry make the percentage fee scales, associated graphs and complexity ratings obsolete. Other design construction professionals also have removed detailed guidance to their members and clients on fee calculation.

The Landscape Consultant's Appointment recommends using one of the three most common methods of fee calculation adopted by other construction industry design professionals: percentage fees, time charges or lump sum fees.

Percentage fees

Description: Fees are expressed as a percentage of the total construction cost. Before fees can be calculated both the client and landscape architect must establish the services to be provided, the approximate construction budget and the nature of the work.

When best used: Percentage fees are best used for straightforward landscape design and construction projects when the construction cost/budget is known.

How applied: Fees are calculated by applying:

- the specified percentage to the final construction cost, *or*
- the relevant specified percentage for each work stage to the construction cost at the end of the previous stage.

Advantages: If the budget/tender price is high the consultant will achieve a high fee.

Disadvantages: This method is vulnerable to market forces and their influence on contractors' tendering. If the tender figure is lower than estimate the consultant loses out. Working to an agreed figure means cost control is important. There is no flexibility and if the landscape architect budgets incorrectly he loses money.

Time charges

Description: These are calculated by charging all time reasonably expended by relevant personnel on the performance of the services required for the project, including travel time, at previously agreed hourly or daily rates. Rates can be revised at agreed intervals in accordance with changes in the Average Earnings Index.

When best used: This method of charging fees is most appropriate for use where the scope of work cannot reasonably be foreseen or where services cannot be related to the amount of landscape construction costs. Additional or varied services on an otherwise standard service such as open-ended or protracted planning negotiations are examples where time charges are appropriate.

How applied; The rates should be calculated in advance for individuals within the office or bands of staff (e.g. Principals, Associates, Senior Professionals, Junior Professionals, Technicians). The charge-out rate will depend on each individual's wage plus overheads. Often it is calculated at 2.5–3.0 × salary and should include a method of revision to reflect subsequent changes in salaries and costs. The time of secretarial and administrative staff is not usually charged, but there are times when it should be, for example, when staff are directly engaged to do semi-technical work on a specific project.

Advantages: The landscape architect is paid for all the hours worked on the project, including work not anticipated at the outset or abortive work. The client pays only for the work done, as opposed to fees as a percentage of the contract sum regardless of how much work the consultant is involved in.

Disadvantages: From the client's point of view, this method of charging may seem open-ended with uncertainty regarding his total financial commitment until the job is complete. It also may seem that the landscape architect has no incentive to work efficiently.

It is advisable to keep the client informed on the progress of time-charged work, and to agree a figure which is not to be exceeded without prior permission.

Lump-sum fees

Description: Fees calculated on the basis of a total sum of money for a clearly defined package of services and payable in agreed stages. Lump sums can also be revised at agreed intervals in accordance with changes in the Average Earnings Index.

When best used: Lump sums are best used where the scope of work can be clearly defined from the outset but where there is no firm project cost. The parameters of services must be clearly set out, including time, project size and cost where applicable, so that if these are varied more than an agreed amount, the lump sum itself may be varied. It is unwise to agree a lump sum with no provision for variation, except in the case of a highly focused service to be undertaken over a very short period. Time charges are often used for variations.

How applied: Lump-sum fees are applied at agreed payment intervals and at agreed proportions. Time charges are often converted to lump sums when the project becomes sufficiently defined. Percentage fees may similarly be converted to lump sums when a firm budget or contract sum is known.

Advantages: The limit of spend is known by both parties.

Disadvantages: A lump sum is a risk. If anything goes wrong the practice may lose money yet have no justification for revision of the sum unless variations are agreed with the client.

Other methods of charging fees

Incentive/bonus fees

The landscape architect is paid an additional fee if certain criteria, often related to time and approvals, are achieved, for example, planning approvals. This is a risky form of remuneration for the consultant so tends to have correspondingly higher rewards. Quantum is also frequently higher due to the goodwill generated by the success of the project. Conditions of payment and definition of the determining event need to be clearly stated in the agreement. It is usually only a proportion of the fee, with the other part being lump sum, which is paid notwithstanding the result.

Retainer/term commissions

The client retains the services of a consultant for piecemeal work over a period of time at agreed rates or on an ‘as needed basis’. This client has priority over others. This basis is also applicable to term commissions. Fees are calculated as a sum additional to any fees calculated by other methods, or on a time basis. If agreed they may be recalculated on a monthly, quarterly or yearly basis. This could not be used for public/government work as it does not demonstrate best value.

Pro bono work

This is work for community groups and grant aid schemes where services are offered to the client free of charge, or at less than market rates, for charitable purposes.

Charging for expenses and disbursements

Expenses

Items may be added to or deleted from this list, but those usually regarded as recoverable expenses are:

- Reproduction or purchase costs of all documents, drawings, maps, models, photographs and other records, including those used in communication between the landscape architect, client, consultants and contractors, and for enquiries to contractors, subcontractors and suppliers.
- Postage, telephone costs.
- Hotel and travelling expenses, including a mileage allowance for cars at agreed rates, and other payments of this kind.
- Expenses in connection with interviewing and appointing site staff.
- Rental and hire charges for specialised equipment (including computers, video equipment, etc.) where required and agreed by the client.
- Additional charges for time spent travelling where the distance is beyond the agreed limit.
- Management charges for management of suppliers and settlement of bills on the client's behalf.

Disbursements

These are charges properly borne by the client. Examples of disbursements are planning application fees, expenses incurred in advertising for tender and resident site staff, and any fees and charges for specialist professional advice, including legal advice, land surveys and soil testing, which have been incurred by the landscape architect with the specific authority of the client.

Sometimes the client asks the landscape architect to pay these charges and recover the cost later. This should be resisted – landscape architects are not in the business of lending money – but if they are obliged to comply, they should insist on a handling surcharge. It is advisable to explain to the client in advance the position with regard to charges such as those payable to local authorities for planning applications, so that the client is prepared to pay for such disbursements.

If the landscape architect does agree to pay disbursements they should, when determining an appropriate add-on, carefully consider both the cost (of the money, and the administration involved) and the risk of not recovering the charge.

PAYMENT OF FEES

Programmed instalment

To maintain a healthy cash flow a practice must be able to depend on the fees that arise from commissions being paid on a regular, preferably monthly, basis. This can be encouraged by suggesting that the client pays according to a plan of programmed instalments. The Landscape Institute recommends the use of the Landscape Consultant's Appointment Schedules of Fees and Expenses which are associated with the Scopes of Services. This enables the landscape architect to set out the chosen method of calculating and charging fees and expenses and the stages of payment (monthly or stage). This is reinforced by the Conditions of Appointment, Clause 4 – Fees and Expenses, to which both parties agree.

Non-payment of fees – options available to the landscape architect

People expect to be paid for the work they do and the ways of dealing with this assumption vary. The simplest approach is to be clear as to your terms and agree them in writing. The Landscape Institute's 'Code of Standards of Conduct and Practice for Landscape Professionals' Standard 8 states that 'a Landscape Architect shall not undertake professional work unless the terms of the contract have been recorded in writing'.

An offer and acceptance equals an agreement which signifies a contract. If it is breached, for example, through unpaid fees, the landscape architect has options for recovering fees through dispute resolution which will be set out in the Conditions of Appointment. These can include:

- Mediation;
- Adjudication;
- Arbitration;
- Litigation;
- Statutory Demand: This gives a person 21 days to pay the debt. If this period expires and the debt remains unpaid, the demand can be followed by a bankruptcy petition.

There is a statutory right to suspend services for non-payment of fees. If fees are due and unpaid the landscape architect can, with due notice, suspend their services until payment is made. It is possible to terminate the appointment if non-payment is persistent, but the requisite contractual steps must be followed in accordance with the appointment document.

The Housing, Grants, Construction and Regeneration Act 1998 and the Local Democracy, Economic Development and Construction Act 2009 state that, in the absence of a withholding notice, your client is obliged to pay the sum specified in your payment notice (invoice).

'Pay when certified' clauses can now be rejected, i.e. where payment under a sub-consultancy agreement is conditional upon it being certified under the main contract, such as consultants working for Design and Build contractors.

If a landscape architect is forced to take legal proceedings to recover debt they should claim interest on the full payment due. The Late Payments of Commercial Debts (Interest) Act 1998 covers commercial contracts for the supply of goods or services where the supplier is a 'small business' and the purchaser is a 'large business' or a UK public authority.

The Late Payment of Commercial Debts Regulations 2013 implement European Directive 2011/7/EU of 1 February 2011 and came into force in March 2013. The Directive itself essentially mirrors existing UK provisions. The main changes concern limits on agreed payment periods (30 days public sector and 60 days private sector) and compensation for recovery costs.

Even if no contract has been agreed between you and your client you are still entitled to payment of a reasonable fee detailed in Section 15 of the Supply of Goods and Services Act 1982, provided that the work was commissioned by the client and not submitted speculatively.

PROFESSIONAL APPOINTMENT: TOP 10 QUESTIONS

1 What are the alternative methods of selection and appointment of a landscape architect?
2 How could a landscape architect be appointed by a public sector client for consultancy services?
3 What should a fee submission contain when a non-standard brief is being used?
4 What methods exist for acceptance and confirmation of a landscape architects appointment?
5 How are professional fees calculated on a competitive basis?
6 What alternative methods of charging fees exist?
7 How can you ensure you are paid for work undertaken as a landscape consultant?
8 How would you charge for expenses and disbursements?
9 Explain Novation Agreements and their relevance to landscape architects.
10 Explain the relevance of the Copyright Designs and Patents Act 1988 to the work of a landscape architect.

5 Professional relationships

CHAPTER CONTENTS

CONTRACTS WITH PUBLIC AND CORPORATE CLIENTS

A landscape architect may provide professional services to public sector and corporate clients in a variety of forms.

Framework agreements

These arrangements are very common with public sector and corporate clients in the UK. Government and industry initiatives encourage the use of these longer term arrangements as an alternative to single-project tendering, as this fits best with 'Best Value' in construction procurement. (Refer to Chapter 6.)

The aims of framework agreements are to:

- reduce costs;
- provide continuous improvement within long-term relationships;
- provide better value and greater community wealth – sustainable communities.

> '*Public authorities are required to consider overall value, including economic, environmental and social value, when reviewing service provision. As a concept, social value is about seeking to maximise the additional benefit that can be created by procuring or commissioning goods and services, above and beyond the benefit of merely the goods and services themselves.*'

What is a framework agreement?

A framework agreement covers the provision of a generic group of goods, works or services, or a combination, for example:

- goods – office furniture;
- services – design consultancy;
- works – construction of schools.

It covers the terms and conditions that would apply to any order placed during the lifetime of the framework agreement (usually three years). It is not a contract in its own right – the contract is entered into only when the order is placed with a supplier on the framework agreement. Each order is a separate contract.

Frameworks are used when the contracting authority needs to develop a strategic relationship with the supply chain over a long period. Generally they involve high-risk, high-spend construction programmes often found in housing, education and highways.

For consultancy services an *OJEU* notice is issued; candidates for the framework are then selected on the basis of financial and economic standing and technical capacity, including track record and ability. A number of companies are included in the framework, covering the range of consultancy services required. Hourly rates for different grades of staff form part of the agreed terms. If a company needs to call off specific services, the contracting authority holds a mini competition with all providers capable of meeting that need for the category of services required, in order to establish which company provides the 'most economically advantageous' (value for money) offer for the particular mix of grades/rates required.

Term commissions

A term commission can be used by public sector and corporate clients where there is definable and expected repetitive work over a period of time. The recommended duration for term commissions is three years. The principal advantages of term commissions are:

- Three-year terms reduce the cost to the employer of the procurement activity.
- Consultants will bid competitively if they can be assured of a continuous flow of work for a known period.
- Consultants have time to develop a clear understanding of the employer's needs and should be able to work more effectively to satisfy those needs.

Project partnering

In 1998 the Construction Task Force set up by the Government published its report *Rethinking Construction* to reduce the conflict which has led to poor performance, poor profit margins and poor morale in the construction industry. At the heart of

Rethinking Construction is the conviction that an integrated project process will deliver the best value to the client and user. Central to this integrated process is project team partnering – a structured management approach to facilitate working together.

The project partnering team must include the client together with consultants, constructor/construction manager, key specialists and key suppliers. The team members form a 'virtual company', acting cooperatively and making decisions in a blame-free environment of trust. The aim is to raise the collective performance and aid more effective working, with the focus firmly on agreed common goals. Underpinning the successful project partnering team is openness, clearly articulated mutual objectives, a problem-resolving structure, a commitment to continuous improvement – measured against Key Performance Indicators (KPIs) – and a mechanism to manage the risks and fairly share the rewards.

PFI, PPP and Design and Build contracts

These encourage cooperation between designers and contractors and allow the skills of both to be integrated into the design and implementation. It is the contractor who appoints the designer in the case of Design and Build contracts or other procurement options such as PFI or PPP. Often designers are novated from the client to the contractor; the timing of this depends on at what stage the client chooses to hand over risk and responsibility for the project to the contractor. (Refer to Chapter 4 for novation and the Landscape Consultant's Appointment.)

Project Finance Initiatives (PFIs) and Public Private Partnerships (PPPs) are public services or private business ventures funded and operated through a partnership between the Government and one or more private sector companies. They allow the Government to contract out the design, building and operation of an infrastructure asset/facility which benefits the public (such as a road, hospital or bridge) to a private sector company, usually for a period of 25–30 years. In order to do this the Government will invite tenders from private sector contractors who will deliver the asset. There will be back-to-back agreements with subcontractors or sub-consultants that are contained within the contract between the Government and the contractor.

These types of contract will only achieve a good-quality landscape outcome if the relevant component is clearly defined in the contractor's brief and forms part of the assessment of tenders; this may include a specimen design and specification. The importance of the landscape design to the client will determine the level of detail provided on landscape at the tender stage and the level of compliance expected by the contractor.

CONTRACTS WITH PRIVATE CLIENTS AND AGENCY

Private clients may appoint landscape architects to act as their agent in setting up contracts with a third party. This would include preparing a contract between

the client and contractor to undertake the construction work of the landscape architect's approved design proposals.

The term 'agency' implies the relationship which comes into being when one party (the agent) is employed by another (the principal) to make legally binding contracts with a third party on behalf of the principal. The extent of authority is governed by the type of agency. 'Special agency' is usual with landscape architects where the agent and principal contract for one particular commission.

Authorisation and liability

An agent's duty is to apply reasonable skill and diligence to all he has been employed to do. The degree of liability depends on the type of agency. As a rule, the principal is bound only to the extent to which the agent acted within the scope of his authority, whether that authority was express, usual or implied. The agent owes to the principal the following duties:

- To act in the principal's interests (not his own).
- Not to make secret profits or take bribes.
- Not to delegate his authority.

Every act the agent performs on behalf of the principal must be within the scope of his authority and is binding in law on the principal. (NB This is different from a contract of service.)

Within the JCLI Form of Agreement, the agent is named, and the scope and extent of his authority is set out clearly. (Refer to Chapter 10.)

The law of agency has specific relevance to the doctrine of privity of contract, because a common issue is to determine exactly who the parties to a contract are. In general if the landscape architect acts as the client's agent and contracts with a third party (e.g. the contractor) then the resulting contract is a contract between the client and the contractor; the landscape architect as agent is not privy to the contract, and can neither sue or be sued upon it.

COLLATERAL WARRANTIES

A collateral warranty creates a legal agreement or a 'duty of care' which stands alongside the agreement between the client and the consultant. There are many parties who can suffer loss as a result of defective design or negligent administration; obvious examples would be tenants, purchasers or funders of buildings. Collateral warranties create a contractual link with these third parties and therefore place on the consultant a legal responsibility to the client and potentially the funder/tenant/purchaser of a building and associated landscape.

A collateral warranty is one of the ways of overcoming the restriction created by the 'doctrine of privity' under the Contracts (Rights of Third Parties) Act 1929.

Privity of Contract and the Contracts (Rights of Third Parties) Act 1999

The principal feature of contract law is that it defines the rights of and obligations between the parties of a contract. A basic rule is the doctrine of 'privity of contract' which states that only a party to a contract can take the benefits of that contract or is subject to its obligations. This governs whether a person can sue or be sued in respect of that contract.

However, this rule has been changed fundamentally by the Contracts (Rights of Third Parties) Act 1999. The Act, where it applies, gives a third party the right to sue under the original terms of the engagement even though they are not party to the contract. The Act applies to all construction contracts entered into after May 2000 unless expressly excluded.

Standard Forms of Agreement, including JCLI, JCT and the Landscape Consultant's Appointment, have been redrafted to expressly prohibit/exclude the Act from the agreement. They instead provide for the use of traditional common law rules and collateral warranties.

Landscape Consultant's Appointment: Conditions of Appointment – Third Party Rights

Clause 7.4: *'Other than the rights conferred on a third party by Clause 3.1 (assignment, or assignation in Scotland) and Clause 7.2 (collateral warranties) nothing in this Agreement confers or is intended to confer any right to enforce any of its terms on any person who is not a party to it.'*

In 2005 the British Property Federation prepared a form of Consultancy Agreement which adopted the provisions for Third Party Rights used in JCT Major Projects Form of Agreement 2003, which specifically embraces the Contracts (Rights of Third Parties) Act 1999.

Standard forms of collateral warranty

There are standard forms of collateral warranty for both contractors and consultants. The British Property Federation, the Association of Consulting Engineers, the Royal Institute of British Architects, the Royal Institution of Chartered Surveyors and the Association of British Insurers have jointly agreed a Form of Agreement for Collateral Warranty:

- CoWa/F (4th Ed. 2005) – for a funder;
- CoWa/P&T (3rd Ed. 2005) – for a purchaser and/or tenant.

The Construction Industry Council (CIC) also has standard forms of warranty:

- *CIC/Cons Wa/P&T (Consultant – Purchaser/Tenant)* – standard form of agreement for use where a collateral warranty is to be given by a consultant to a purchaser or tenant of the whole or part of a commercial or industrial development.
- *CIC/Cons Wa/F (Consultant – Funder)* – standard form of agreement for use where a collateral warranty is to be given by a consultant to a funder of a commercial or industrial development.
- *CIC/Cons Wa/D&BE (Consultant – Employer)* – standard form of agreement for use where a collateral warranty is to be given by a consultant to an employer in a Design and Build project.

Professional indemnity insurers insist that a designer (landscape architect, etc.) should consult them if a client proposes a collateral warranty which is not of either of the above standard forms or if they propose to vary a standard form of collateral warranty.

Standard warranties that landscape architects are asked to provide should be no more and no less onerous for the consultant than that which legally prevails between them and the client, and should include:

- The exercise of reasonable skill and care of a professional landscape architect, and no changes to this.
- If the client ceases to be involved with the project, i.e. through novation, the necessary safeguards for the landscape architect's fees should be provided.
- A controlled list of deleterious materials which the landscape architect has not used and will not use (be guided by the list in the approved warranty).
- Copyright licence in favour of the warranty subject to the payment of due fees, and only for the purposes of the development.
- The obligation on the landscape architect to maintain professional indemnity insurance cover, in so far as this is available on the market at reasonable terms.
- A right of assignment by the warrantee of the agreement to another, by absolute assignment, but not more than two times.
- An undertaking from the client that collateral warranties in similar terms have been or will be entered into by others involved in the design and construction of the development.

Most professional indemnity insurance policies will contain a specific endorsement about collateral warranties, particularly in relation to the numbers of assignations which may be given and the terms which are insured.

Landscape Consultant's Appointment: Conditions of Appointment – Collateral Warranties

Clause 7.2: *'Landscape Architects will enter collateral warranty agreements where requested in favour of the first funder, first purchaser and first tenant as set out in the Memorandum of Agreement provided that such warranties give no greater benefit to the beneficiaries than is given to the Client.'*

WORKING IN MULTIDISCIPLINARY TEAMS

The landscape architect may be appointed to work within a multidisciplinary team for larger scale projects where the client may be corporate, public (e.g. NHS) or private (a developer). Such projects could be hospitals, either direct for the client (NHS or private), or for the contractor appointed or bidding for the project under PFI/PPP/Framework Agreements. Appointment may be direct with the client but is likely to be coordinated by a project manager. Associated with multidisciplinary appointments are:

- alternative client-based appointment documents;
- collateral warranties;
- novation agreements.

Teams generally will include:

- *Project Manager* – often a client representative and bridges the gap between the design and construction team and the client. They are responsible for accomplishing the client's stated project objectives and managing cost, time, scope and quality.
- *Architect* – prepares feasibility studies, options appraisals, architectural design and detailing, planning applications and building warrants.
- *Quantity Surveyor or Cost Consultant* – provides advice on procurement options, financial appraisals and cost planning; prepares financial reports, interim payments and the final account as required.
- *Civil and Structural Engineer* – arranges for geotechnical, soil and drainage surveys; assesses roads, sewers and water supply; prepares drainage and roads design, structural and foundation calculations and design; liaises with statutory authorities, public utilities and government agencies regarding water, drainage, SUDs (sustainable urban drainage systems) and adopted roads approvals.
- *Planning Consultant* – is appointed to advise on planning application submission, pre-consultation discussions with local planning authorities or other agencies, and discharge of planning conditions.
- *Mechanical and Electrical (M&E) Engineer* – prepares energy management and sustainability reports and solutions; liaises with public utilities and statutory authorities regarding utility supply, design and maintenance costs.

- *Principal Designer* – deals with health and safety in relation to the Construction Design and Management Regulations.
- *Other Specialists* such as ecologists, arborists, educationalists, fire and sound professionals.

APPOINTING AND WORKING WITH SUB-CONSULTANTS

Landscape architects as sub-consultants

Landscape architects may be appointed directly by a design team leader (architect, engineer) to undertake the landscape services aspects of a commission. Appointment documents will generally reflect the lead designer's appointment document with the client in the form of a 'back-to-back' appointment with the sub-consultant.

When would landscape architects appoint sub-consultants?

There will be occasions when a landscape architect will be required to appoint sub-consultants. This could be where the scope of services required by the client exceeds the professional capabilities of the landscape consultant. It is preferable for the client to take on the appointment of sub-consultants but it is recognised that a client often prefers one appointment and one source of contact through a design team leader.

Sub-consultants can vary and may include quantity surveyors, engineers, architects, arborists, ecologists or other professional specialists depending on the nature of the project. The selection of a sub-consultant will not be too dissimilar to the way a client selects a landscape architect. It may be negotiated directly or by fee tender. Each will have its merits dependent on the scope of services required, the project timescale, and the nature of the appointment between client and landscape architect that may allow a freedom of choice.

Selecting and appointing sub-consultants

Often landscape consultants will build up relationships with a variety of other professionals based on mutual trust and cooperation. Regardless of any good relationship between two professionals it is still important to agree terms of appointment in writing to avoid disputes arising. In addition, the conditions of your appointment with your client should always be reflected in the sub-consultant's appointment in the form of a 'back-to-back' arrangement.

Selection procedure

Tendering procedures are only required if the project is of a substantial size or specialist nature. Otherwise a request for cost from preferred sub-consultants based on the project information will suffice.

Project information

This should be set out in the letter of invitation and cover:

- work stages undertaken;
- additional services – BIM, Breeam, etc.;
- schedule of fees;
- programme.

Sub-consultancy agreement

Obligations of the parties

- The main roles of the parties, including parts of the main consultant's brief which require performance by the sub-consultant;
- programme, output required, attendance at meetings;
- copyright requirements.

Liabilities, insurance and management

- Professional indemnity and other insurance to be maintained by sub-consultant;
- health and safety policy to be provided by sub-consultant;
- quality management systems – sub-consultant is required either to comply with those of the main consultant, or to provide proof of their own;
- format of outputs and quantity;
- methods of communication;
- agreement of revisions required.

Fees and expenses

- Fees and expenses – basis of calculation;
- additional work and rates;
- basis for paying fees.

Collateral warranties

Whether they are required – take advice from PI insurers/lawyers on the content of the document.

Dispute resolution

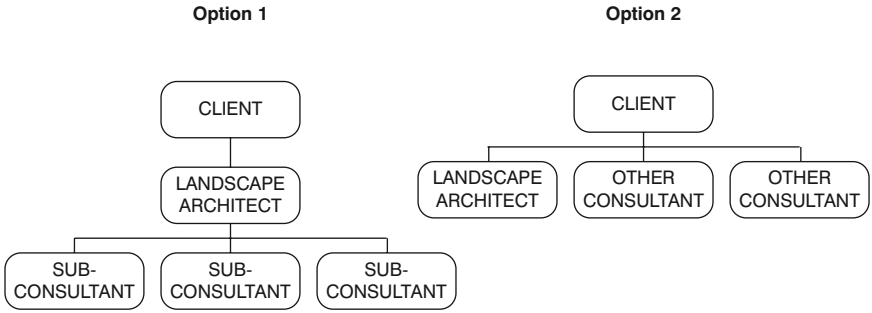
What method will be used.

What is the difference in your legal liabilities between Option 1 and Option 2?

Option 1: The client appoints the landscape architect who in turn appoints all the other consultants. In the case of a dispute or breach of contract the client will seek redress from the landscape architect, regardless of which consultant has failed to perform, as he only has a contract with the landscape architect. The landscape architect will then need to subsequently pursue the negligent sub-consultant.

Option 2: The client appoints all consultants and in the case of a dispute will seek redress from the relevant consultant who has failed to perform.

SHARING OF DATA – BUILDING INFORMATION MODELLING/MANAGEMENT (BIM)



(Refer to the Landscape Institute's website BIM Open Project and their advice notes.) In March 2011 the Government announced through the Construction Strategy Paper that all public projects above a certain value (£5m) must demonstrate Level 2 BIM compliance by the end of 2015. This impacts on all in the construction industry including professionals and contractors.

The key objectives are to:

- achieve 20 per cent reduction in capital costs and the carbon burden from construction projects;
- allow better informed design decisions;
- reduce errors, costs and waste further down the design chain.

The Government's BIM Task Group has defined BIM:

> *'Creating a virtual digital information 3D model that is rich in data that can inform the decision-making process and answer questions throughout the entire project lifecycle. It needs to be implemented in a collaborative environment.'*

BIM is an integrated process built on coordinated, reliable information about a project from design through construction and into operations. It aims to improve coordination, enhance accuracy, reduce waste and enable better informed decisions earlier in the process. A BIM project would typically model all data relating to design, costings, buildability and clash detection, scheduling and procurement, sustainability impact, life-cycle and facilities management factors.

BIM is not just a software technology but a process through which the whole team collaborates and coordinates the design towards a common output. It involves the exchange of 'information' amongst all parties involved in a project and demands real collaborative working and sharing of data, knowledge and costings across project parties.

BIM also represents a change in working methods, as all the design team consultants, contractors and end users share and utilise a single project model. This decreases the potential for coordination errors. BIM will impact business management and operations. It changes the way construction professionals have to work. The key to collaborative working is effective and open communication coupled with trust and, importantly, being comfortable with sharing within a digital environment.

The implications of BIM in relation to professional indemnity insurance, practice quality assurance, management procedures and intellectual property rights are still being assessed.

PROFESSIONAL RELATIONSHIPS: TOP 10 QUESTIONS

1 When would a landscape architect work with other consultants?
2 What factors would you consider when selecting and appointing sub-consultants?
3 What are the landscape architects' responsibilities when acting as the client's agent?
4 What is a framework agreement?
5 What is the difference between a landscape architect appointing an engineer as a sub-consultant and the client appointing the engineer directly?
6 How is the exchange of information dealt with when working in multidisciplinary teams?
7 Explain the principles of Privity of Contract & The Contracts (Rights Of Third Parties) Act 1999.
8 Explain Collateral Warranties and their relevance to landscape architects.
9 What would be covered in a sub-consultancy agreement?
10 What methods of engagement exists to develop team working and strategic relationships between suppliers of services and corporate/public sector clients?

6 Practice management

CHAPTER CONTENTS

Forms or types of practice

- *Public sector* – Government and its departments and associated public bodies/agencies, and local authorities.
- *Private sector* – partnerships, limited liability partnerships, companies.
- *Other forms of organisation/association* – co-operatives, trusts, collaborations, joint ventures.
- *NGOs* – community/environmental/non-profit/voluntary organisations.

THE PUBLIC SECTOR

The main forms of public sector organisation are:

Central government and the devolved nation governments

Governments set the strategic context for the budget, investment and economic strategy of each nation. Some powers are reserved wholly for the UK Government including immigration, the constitution, foreign policy and defence. Government works to performance frameworks which underpin the delivery of their stated agendas and which support an agreed outcomes-based approach to performance.

UK and England – government departments

(See www.gov.uk.)

- Communities and Local Government.
- Transport.
- Environment, Food and Rural Affairs.
- Business Innovation and Skills.
- Energy and Climate Change.
- Culture, Media and Sport.
- Education.
- Health.

Welsh Government (National Assembly for Wales) – Directorates

The National Assembly for Wales (www.wales.gov.uk) is the devolved legislature for Wales. The Welsh Government has a devolved administration which is responsible for the following and other departments:

- Local Government and Communities.
- Sustainable Futures (Environment, Agriculture, Housing and Regeneration, Culture and Sport).
- Economy, Science and Transport.
- Education and Skills.

Scottish Government – Directorates

The devolved government for Scotland (www.scotland.gov.uk) has a devolved administration which is responsible for the following departments under directorates:

- Environment (Climate Change, Countryside and Landscape, Wildlife and Habitats, Pollution and Waste, Water, Environmental Appeals, Funding and Grants, Sustainable Development).
- Built Environment (Planning and Regeneration).
- Arts, Culture and Sport.
- Business, Industry and Energy.
- Education and Training.
- Farming and Rural Issues.
- Marine and Fisheries.
- The Public Sector.

Northern Ireland (Northern Ireland Assembly) – NI Executive and Departments

The Northern Ireland Assembly is the devolved legislature for Northern Ireland (www.northernireland.gov.uk). The Northern Ireland Executive is the devolved administrative branch of the Assembly and is responsible for the following and other departments:

- Agricultural and Rural Development.
- Regional Development.
- Environment (includes planning of the built and natural environments).
- Enterprise, Trade and Investment.

Public bodies

Each government or government department works with and is responsible for various agencies and public bodies with whom it has a direct relationship. These have either regulatory or non-regulatory functions and are dependent on government for funding, though some may manage their own budgets. They are sometimes referred to as QUANGOs (Quasi-Autonomous Non-Governmental Organisations) but this is not an official term.

Public bodies vary depending on whether central or devolved governments are concerned but generally include the following:

- *Executive agencies* – e.g. Planning Inspectorate, Highways Agency, Companies House, Scottish Prison Service, Transport Scotland, Historic Scotland, Scottish National Park Authorities.
- *Non-Ministerial Departments (NMDs)* – e.g. Forestry Commission.
- *Executive Non-Departmental Public Bodies (NDPBs)* – e.g. Architecture and Design Scotland, Natural England, Scottish Natural Heritage, Environment Agency, Joint Nature Conservation Committee (JNCC), English Heritage, Highlands and Islands Executive, Scottish Future Trust.
- *Advisory NDPBs* – e.g. Building Regulations Advisory Committee.
- *Tribunal NDPBs* – e.g. Central Arbitration Committee, Lands Tribunal.
- *Public corporations* – e.g. Architects Registration Board, Civil Aviation Authority, BBC and Channel 4, Scottish Canals, Scottish Water.
- *Other significant national bodies* – e.g. National Park Authorities.
- *Sponsored bodies* – e.g. Royal Commission on the Ancient and Historical Monuments of Wales, Natural Resources Wales.

Local government/local authorities

Local authorities are statutory authorities set up by legislation and their powers are delegated from Parliament. Local authorities have a duty to promote the economic, social and environmental wellbeing of their communities. This is linked to the concept of community planning through partnerships aimed at improving 'community wellbeing'.

Local government is responsible for a large number of services which benefit the local community. Councils either provide services directly to the public or arrange for others to do so. Local government consists of elected councils which provide services such as education, social care, waste management, cultural services and planning for the areas they serve. The Government works with local government and provides funding and the framework for accountability and performance.

Funding

The funding streams and support available to local authorities from the Government enable them to undertake their services. In addition they have the authority to raise finance by other means.

- *Revenue support* – Government provides a block grant to local authorities which amounts to around 85 per cent of their net revenue expenditure, with the remainder funded largely from local taxation.
- *Capital support* – Capital expenditure essentially relates to the provision and improvement of significant fixed assets including land, buildings and equipment (such as schools, new houses and machinery) which will be of use or benefit in providing services for more than one financial year. Capital income is made up mostly from the sale of these assets (known as capital receipts).
- *Others* – Money also comes from business/non-domestic rates, Council Tax and local authority investments.

Structure of local authorities

Committees: The Local Government Acts confer on all local authorities the power to arrange for any of their functions to be discharged by a committee, subcommittee or an officer. Most local authorities conduct their affairs by a committee system, but some have opted for the 'cabinet' format and have an elected mayor. Committees consisting of elected councillors are entrusted with specified functions of the council (e.g. planning committee, finance committee).

In the public sector the client is the council committee (e.g. planning, housing, leisure and recreation). As with private clients, public clients decide priorities and allocate funds. Their approval is necessary before work begins. A committee representative, usually the chairman, also signs tenders once they have been received back from tenderers.

Officers: A decision is recommended to the council or to the relevant committee usually by the corresponding department's director. If approved, it is then the duty of the appropriate officer (e.g. landscape architect) of the council to implement the decision, satisfy the committee's requirements and report back to them if required to do so (e.g. by Standing Order).

Best Value

The Local Government, Planning and Land Act 1980 introduced Compulsory Competitive Tendering (CCT) whereby local authorities had to tender for construction and maintenance work relating to public sector land and buildings in competition with private construction companies. This was extended in 1992 to include professional and 'white collar' services including landscape design.

In 1997, the Labour Government introduced 'Best Value' (BV) as an alternative to CCT. Tendering was no longer compulsory but councils still had to consider competition and 'alternative forms of service delivery'. This included Voluntary Competitive Tendering (VCT), Private Finance Initiatives (PFIs), Public Private Partnership (PPP), Trusts and other forms of partnership. The Local Government Act 1999 still applies and puts Best Value authorities under a general duty to 'make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness'.

The Coalition Government extended the concept of Best Value. Authorities are required to consider overall value, including economic, environmental and social value, when reviewing service provision. Social value is about seeking to maximise the additional benefits that can be created by procuring or commissioning goods and services, above and beyond the benefit of merely the goods and services themselves.

The Scottish Government strongly supports BV and updated its guidance in 2011. The Welsh Assembly also follows published value-for-money principles.

The landscape architect's role in the public sector

Landscape architects can be appointed to a variety of public sector organisations including:

- *Local authorities and their departments,* e.g. Transport, Housing, Planning, Parks. Many of these functions have been contracted out to private sector organisations in an attempt to provide value for money to the tax payer.
- *Public bodies or agencies*: National Park Authorities, Conservancy Councils (e.g. Scottish Natural Heritage), Forestry Commission, National Health Service, Water Authorities.

Work includes design, project management, preparation of policy, research, design review and advice, development control and stakeholder consultation.

PRIVATE SECTOR FORMS OF PRACTICE AND ORGANISATION

Private sector appointment of landscape architects

- Landscape consultants – local and global.
- Consultant architects.
- Consultant engineers.
- Consultant planners/environmentalists.
- Main contractors, landscape contractors.
- Property developers.

Team forms

- Single-discipline practice.
- Multidisciplinary practice – construction professionals (architects, engineers, quantity surveyors and landscape architects) work together in one organisation.
- Multidisciplinary projects – single-discipline construction professionals are appointed to work on one large construction project under a team leader/project manager.

Setting up a private landscape practice

A landscape architect can practise in one of several different forms of legal arrangement/structure, each with its own mode of operation, legal status and administrative requirements. In deciding which form to adopt the following aspects should be considered:

- Ease of establishing the practice (legal and administrative) and amount of documentation required.
- Whether the company's information needs to be private or can be made public.
- Source of start-up capital, need for and access to continued funding/credit (bank loans).
- Cost of running the company.
- Taxation level.
- Sharing of profits and how this is calculated.
- Division of liability – is it personal or corporate?
- Degree to which the actions of one party in the business bind all the other parties.
- Resolution of conflict within the business.
- Ease of passing on (succession), closing or selling the business.

UK Trade and Investment (UKTI), a government department working with UK businesses, gives comprehensive on-line guidance on how to choose the right form of business and details the processes that need to be followed to set it up.

Private sector organisation structures

The main forms of practice or organisation:
- Sole principal.
- Partnership.
- Company.

Partnerships and companies are both governed by different Acts of Parliament; none exists for a sole principal.

Sole principal

A sole principal/proprietorship is a form of company conducted by one person who both owns and runs the business. They receive all the profits of the business, but also take all the risks of the business. Although they do not have to be responsible to any business partners, they are wholly liable for all the debts incurred by the business. Sole proprietorship is a simple business structure appropriate for very small-scale, first-time businesses, where there is already adequate finance to run the business and the business is not risky.

Advantages:
- Simple to set up.
- Easy to make business decisions.
- Efficient to run.
- No requirement to share the profits.
- Close relationship with customers.

Disadvantages:
- Limited sources of finance.
- No one to share the workload.
- Unlimited personal liability, i.e. personally responsible for all the losses.
- Must provide all the capital to start the business.

Partnerships (Unlimited Liability)

Formation: The Partnership Act 1890 sets the terms for these. This is the most common form of association because it is a form of contract, i.e. it is legally binding, and it has the benefits of mutual support and combined resources. There is also a default duty of good faith between partners which creates a 'partnership ethos' which does not exist in companies or Limited Liability Partnerships (LLPs).

Sharing of facilities or ownership of property does not mean two people practise in common, but sharing of net profits is evidence of the existence of a partnership.

The essentials for recognition of a partnership:

The Partnership Act

States that a partnership is a 'relationship which subsists between a collection of persons carrying on a business in common with a view to profit'.

Partnership aggreements; Obligations are borne by the partners as individuals and hence it is very important that their rights and duties are set out in a written

partnership agreement. In the absence of such an agreement the provisions set out in the Partnership Act will apply:

- Property brought into the firm or bought with the firm's funds is partnership property.
- Profits, capital and losses will be shared equally.
- Every partner is entitled to take part in the management of the business and to inspect the accounts.
- There are no rights to remuneration for acting in the partnership business.
- No new partners may be introduced, no fundamental changes can occur to the nature of the partnership and no partner may be expelled, unless majority consent is gained.
- Every partner is entitled to dissolve the partnership at any time by giving notice to the other partners.
- A partnership must indemnify each partner in respect of liabilities.

Management/types of partners: Management is by the partners. The law makes no distinction between junior and senior partners, except in decisions on profit-making, and they will be deemed as equal unless stated otherwise in the partnership agreement.

The title 'associate' is not referred to in the Partnership Act and it has no meaning in law. The title is often used to retain important members of staff while preventing them from having any real responsibility or appreciable share of the profits. If it is not intended that associates be partners and share in the liabilities of the partnership the term 'associate partner' should not be used and it would probably contravene professional codes.

Legal status: A partnership is not a separate legal entity from its partners (except in Scotland), therefore when a third party enters a legal agreement with a partnership, they do so with the partners themselves.

Finance/accounts:

- Partnerships are liable to income tax on their profits whether they are drawn or left in the practice.
- Profits are shared equally, or as stated in the partnership agreement.
- No audit is required of the business accounts.

Size: There are some restrictions on the size of partnerships, however for architects and similar professions this restriction was removed by the Partnerships (Unrestricted Size) No. 4 Regulations 1970, provided that no less than three quarters of the partners are registered.

Liabilities: In addition to all their normal individual liabilities, each partner has added responsibilities as a member of a partnership. The nature of the liability for the contract debts and torts (including professional negligence) is defined by sections 9 and 10 of the Partnership Act and can be summed up as follows:

- Every partner is an agent of the firm.
- If a partnership is sued partners can be proceeded against 'jointly and severally', i.e. together or singly.
- Partners are jointly liable for a partnership's contract debts, in the absence of agreement to the contrary. (Each partner is bound to contribute to the debts in proportion to his share of the profits. This may be to the whole extent of his property.)
- Partners are jointly and severally liable for the partnership's torts (including negligence) and this cannot be avoided by agreement.
- Partners are jointly and severally liable for the partnership's contract debts if they have expressly agreed to be so liable.
- A new partner entering a firm does not normally become liable for debts, obligations or wrongs incurred or committed before his entry. However, if a partner retires or dies he or his estate will still be liable for debts or obligations incurred before his retirement.
- The estate of a deceased partner is also severally liable for the partnership's contracts, subject to the prior payment of his or her private debts.
- Partners are not liable for the criminal actions of other partners unless they contributed to them or had knowledge of them.
- A partner will continue to be treated as a member of the firm and attract associated liability until there is notice of change in the constitution of the partnership.

There is also a default duty of good faith. If the conduct of one partner appears to conspire against another it could be construed as a breach of that duty of good faith. This may give rise to remedies for that breach including damages or dissolution and winding up of the affairs of the partnership (*Blisset v Daniel* 1853).

Dissolution of a partnership:

- If no time is fixed for the duration of a partnership it is termed a 'partnership at will', and may be dissolved at the insistence of any partner i.e. by giving notice.
- At the end of a fixed term or a single commission if it has been so set up.
- By dissolution by the Court through an order on the grounds of insanity, incapacity, misconduct of a partner or of the hopeless state of the business.
- On the death or bankruptcy of any partner unless the agreement makes provision for its continuity.

Scottish partnerships

Differences between the laws of Scotland and England result in the following features in Scotland:

- In Scotland a partnership is a legal persona, distinct in its own right from its partners. This has implications regarding bankruptcy and claims on the firm and the partners by the creditors.
- A partnership itself own the funds of the partnership and the partners are not joint owners of its fund.
- A partnership is the principal debtor in debts owed by the firm.
- A partner may sue or be sued by a firm, and a firm may be either a debtor or a creditor to any of its partners.
- A partnership can be sequestrated (i.e. property or income appropriated to satisfy claims against it) without any of the partners being sequestered.
- When a partner retires or a partner joins the firm the existing partnership comes to an end and a new one is created. The result is that a new partner is not liable for the debts of the firm incurred before his admission; likewise the retiring partner is liable only for the debts of the firm up to his retirement.
- The Statute of Limitations does not apply in Scotland where the distinction between a contract under seal and one under hand is not known. The relevant Act is the Prescription and Limitation (Scotland) Act 1973.

In general

A partnership is less formal than a company, with freedom of action and privacy of its affairs. However, it is subject to unlimited liability with personal assets at risk, it has limited powers to borrow money, and the taxation position is complex.

Advantages of partnerships

- Fairly simple to set up.
- Partners can share the workload and even out fluctuations.
- A partnership ethos exists.
- Liability is shared between partners.

Disadvantages of partnerships

- Unlimited personal liability – each partner is fully liable for business debts.
- The partnership is not a separate legal person.
- Possible conflict between partners.
- Need for discussion with partners before making business decisions.
- Agreement made by one partner is binding on all others.
- If a partner does not want to continue with the business, he cannot transfer his interest in the partnership to another person (there are no shares to transfer), so the partnership has to be dissolved and a new partnership set up.

Limited Liability Partnerships (LLPs)

Formation: Under the Limited Liability Partnership Act 2000, a Limited Liability Partnership can be formed by registration and on obtaining an authenticated certificate of incorporation from the Registrar of Companies House. The Act extends to England, Wales and Scotland. Some provisions of the Act regarding tax, national insurance contributions and commencement extend to Northern Ireland.

Legal status and management: An LLP is a legal person in its own right. It is a body corporate, formed on incorporation. It has unlimited capacity and is able to undertake the full range of business activities which a partnership could undertake.

LLPs are governed by their members. For an LLP to be incorporated, two or more persons associated for carrying on a lawful business with a view to profit must be named in the incorporation document. These are classified as designated members; they are not employed by the LLP which is a separate legal entity.

Members are not obliged to have a formal written agreement but, as with partnerships, it is advantageous to do so to regulate the affairs of the business and avoid disputes. In the absence of a written agreement, regulatory default provisions of the Act apply that cover the rights and duties of the members:

- Entitlement of members to share equally in the capital and profits of the business.
- Every member may take part in the management of the LLP.

These provisions can be expressly excluded within written agreements.

Finance/tax: The profits and property of the business of an LLP will be taxed as if the business were carried out by partners in a partnership rather than by an incorporated body. This ensures that the commercial decision between becoming an LLP or a partnership is a tax-neutral one. Accounts are filed at Companies House.

Size: There are no restrictions on the size of Limited Liability Partnerships.

Liabilities and powers:

- Every member of an LLP is an agent of the partnership and has a duty to the LLP as its agent. (NB: There is no duty of good faith between members.) The LLP is bound by what a member has agreed unless he acted outwith the scope of his authority.
- The LLP's existence as a separate corporate entity with unlimited capacity means it has the ability to enter into contracts, hold property, sue and be sued as with a company.
- A member is not liable for the torts or obligations incurred by the LLP, other than in tort for their own negligence. Therefore it is only possible to sue the LLP in contract. However the member can be sued under the Law of Tort.
- In the event of it being wound up, a member is liable for the debts of the LLP to the amount which he has contributed to the LLP as capital.

Dissolution of an LLP: This can occur

- by agreement between the members;
- by being struck off the register (e.g. for no certificate of incorporation);
- by winding up/insolvency.

General: The essential feature of an LLP is that it allows collective limited liability alongside the mutual, cooperative characteristics of a partnership with its associated organisational flexibility and tax status. This is possible because it is a corporate body – an entity with a legal existence independent of its individual members.

The Act gives powers to apply the provisions of company and insolvency law which safeguard the interests of those dealing with LLPs.

Companies

The commencement of the Companies Act 2006 on 1 October 2009 has provided a single company law regime that applies to the whole of the United Kingdom. Companies are UK companies rather than GB or Northern Ireland companies, and the same legislation applies to all.

Companies are formed by registration under the Companies Act. In order to become registered a company must issue:

- A Memorandum of Association setting out the objects of the company.
- Articles of Association containing the regulations of the company, otherwise the default Model Articles contained within the Companies Act 2006 will apply. (There are three new sets of Model Articles, for: a public company limited by shares; a private company limited by shares; and a private company limited by guarantee.)
- A statement of initial nominal capital.
- Details of the director(s) and secretary. A private company must have a minimum of one director and a public limited company must have at least two directors and a company secretary.
- The intended location of the registered office of the company.
- The prescribed fee.

The Registrar of Companies House will issue a Certificate of Incorporation and give the company a registered number. Without a certificate a company does not exist in law and cannot do business.

Management: A company is controlled by the Companies Act 2006 which covers its formation and operation. It is owned by its members or shareholders and is governed by its directors or managing director with the supervision of its shareholders. A company is a distinct and separate entity in law from its members and directors. It can own property, sue and be sued, and enter into contract in its own right. The company continues whoever leaves or joins; it is not affected

by the death, bankruptcy or retirement of a shareholder or of a director or other employee.

Types of company: There are various types of company: limited or unlimited liability companies, public and private companies.

Limited liability company

This is limited by:

- Type of shares held – shareholders' liability to contribute to the company's assets is limited to the amount unpaid on their shares. Shareholders may have different interest rates, e.g. 40 or 20 per cent, therefore their liability and profits will be different.
- Guarantee – in the event of a company being wound up, shareholders are liable as guarantors for an amount set out in the memorandum.

Unlimited liability company

- An unlimited liability company is subject to the same rules as a limited company except that its shareholders are personally liable for all its debts and obligations on the winding up of the company. This liability is unlimited, although it may be limited by agreement on entering into transactions and with creditors.
- The director's report, balance sheet and accounts need not be filed at Companies House (unless the company is controlled by a limited company) nor does the ownership of shares have to be notified. The state of affairs of the company is therefore not available for public scrutiny; this is useful if there is a need for the company to keep its financial affairs secret.
- It is easier to prepare for conversion to a limited liability company and for flotation than it is for a partnership.

The formalities are more onerous for limited companies than for unlimited. The director's report, balance sheet and accounts must be filed with the Register of Companies. However, in the case of private limited companies there are reduced requirements for small and medium-sized companies, as identified in the Companies Act, and this would include most landscape architectural practices.

Public and private companies

Companies whether limited or unlimited may be either public or private. A public company is the only type of company that is permitted to offer its shares to the public. Only companies with a nominal share capital of at least £50,000.00 may be a Public Limited Company (PLC). A number of large multidisciplinary environmental practices are now PLCs.

Not all public limited companies trade shares on the Stock Exchange, although unquoted companies may be set up with that ultimate aim. The Stock Exchange operates a three-tier market:

- Full Stock Exchange listing, for very large companies with at least five years' track record. The RPS Group is an example of an environmental consultancy fully listed on the Stock Exchange and on the FTSE 250 index.
- The Unlisted Securities Market (USM), started in 1980 for larger companies with at least three years' track record.
- The Third Market, introduced in 1987 for companies too small or new for USM or full listing.

Reasons for flotation on the Stock Exchange, apart from the raising of finance, include the provision of evidence of the standing of the practice, improved efficiency from the necessary disciplined management and the ability to acquire other businesses to widen capabilities. However, flotation is costly, there are onerous Stock Exchange requirements for accounts and reports, and the practice will be committed to time-consuming management and a constant striving for growth. The practice will also be vulnerable to take-over bids.

In general a small landscape architectural practice will incorporate as a private company and the individuals who would otherwise be partners will be the directors and also the shareholders.

Accounts/finance

- Profits are distributed among shareholders in accordance with the rights attached to their shares, which relate to the class of shares owned. Preferential shareholders will receive profits (in the form of dividends) before ordinary shareholders; if there are insufficient funds ordinary shareholders may receive no dividends.
- Directors and employees are paid salaries out of the profits of companies which are tax-deducted.
- Accounts must be audited and filed at Companies House.

Size

A company may have an unlimited number of shareholders.

Shareholders

Liabilities and rights of members/shareholders:

- Cannot make contracts binding on a company.
- Are not liable personally for the debts or obligations incurred by other shareholders.

- Are liable, if the company is limited, for the torts and obligations of the company to the amount unpaid on their shares.
- If a company is dissolved by winding up, both members and past members (within the past 12 months) will be liable to contribute towards the assets of a company so that it can meet its liabilities.

Liabilites and rights of directors: The 2006 Act replaced and codified the principal common law and the equitable duties of directors. The emphasis is now on corporate social responsibility. There are seven codified duties:

- *To act within their powers* – to abide by the terms of the company's Memorandum and Articles of Association, and decisions made by the shareholders.
- *To promote the success of the company* – to benefit the shareholders as a whole, but in addition to have regard to:
  - the long-term consequences of decisions;
  - the interests of employees;
  - the need to foster the company's business relationships with suppliers, customers and others;
  - the impact on the community and the environment;
  - the desire to maintain a reputation for high standards of business conduct;
  - the need to act fairly between members.
- *To exercise independent judgment.*
- *To exercise reasonable care, skill and diligence.*
- *To avoid conflicts of interest.*
- *Not to accept benefits from third parties.*
- *To declare an interest in a proposed transaction with the company.*

Generally, company directors

- Are given the power to manage the company under the ultimate supervision of shareholders, but they can delegate this to a managing director.
- Are not a servant/agent and cannot bind the company. (A managing director can normally be expected to have authority to bind the company.)
- Are not liable for torts/debts of the company unless they are also a shareholder of the company, however they are liable for their own torts.
- Must prepare and disclose company accounts and keep the books of the company at the registered office.
- Must prepare an annual report on the company's finances/dividends.
- Must hold an annual general meeting.
- Must ensure that the company is audited yearly if the turnover exceeds a stated amount and that the audits, reports and accounts are filed with the Register of Companies for inspection by the public.
- Are only allowed remuneration specified in the articles.

- Owe the company a duty of loyalty and faith and must exercise reasonable care in the conduct of business.

Dissolution of a company

A company can be dissolved:

- Through winding up/liquidation (under the Insolvency Act).
- By being struck off the Companies Register (under the Companies Act) normally when the company is no longer carrying on business or fails to present its annual accounts.

Advantages of operating as a limited liability company

- Liability as shareholders and directors are limited as the company is a separate legal entity.
- It is easier to raise outside finance than for a partnership as security can more readily be created over the assets of a company.
- Easy to transfer shares, and generally there is greater continuity.
- The taxation position is relatively simple.
- All employees, including directors, are subject to PAYE, avoiding sudden large tax demands later.
- Overall taxation is likely to be lower than for a partnership.
- All salaries, including directors', are deductible before calculation of profit for corporation tax purposes.
- An interest in a company may be given more readily than in a partnership by making directors or shareholders of both architects and non-architects with useful expertise.
- It is easier to remove an unsatisfactory director than a partner.

Disadvantages of operating as a limited liability company

- May need to disclose company information to the public.
- Involves considerable documentation and expenses in forming and maintaining the company.

OTHER FORMS OF ASSOCIATION/COLLABORATION

Regardless of whether they are practising as partnerships, companies or co-operatives, practices may join forces in various forms of collaboration. This increases the availability of skills and resources while retaining identity and a measure of independence. Such arrangements contrast with the more usual situation where consultants are appointed by the client on the architect's advice and are answerable individually to the client.

Group practices

Individual private firms of one profession, under various forms of agreement, may be grouped for their mutual benefit and to give better service while each retains some independence:

Association of individual firms

Beyond agreeing to a division of overheads and expenses, individual firms retain their profits and their normal responsibility to their respective clients.

Coordinated groups

For large jobs work can be undertaken by two or more firms with one appointed to coordinate the activities of the others. The coordinating firm is solely liable to the client, but the individual firms are still liable to the coordinating firm for acts committed in their area of activity.

Consortia

In law consortia are little different from group practices. The term normally implies the association of firms with different professional skills acting as one for carrying out projects jointly, yet retaining their separate identity and their own responsibility to the client.

Co-operatives

A co-operative is a method of working rather than a form of practice. It is based on a commitment to the principles of cooperative working and collective decision-making. Liability, capital and valuations of the business and members' capital should be clearly defined.

There are two ways of setting up a co-operative and three possible forms of organisation:

- Registration as a company under the Companies Act (for unlimited liability societies, or for limited liability societies with fewer than seven members).
- Registration as a society with the Register of Friendly Societies (RFS) under the Industrial and Provident Societies Act 1965–75 (for limited liability societies with seven or more members). It can be carried out through a promoting body such as the Co-operative Union Industrial Common Ownership Movement (ICOM).

Trusts

Examples include the Groundwork UK Trust (England, Wales and Northern Ireland), the Landscape Trust and the National Trust. The key principles of a trust are:

- A non-profit-making organisation.
- Has a board of trustees (who normally have other business interests).
- Depends on sponsorship (i.e. charity), central government or local funding.
- Is not taxed.
- Has employees.
- Must disclose accounts as per a limited company to the Register of Companies for inspection by the public.

Non-governmental organisations (NGOs)

Community/charity/environmental/non-profit/voluntary organisations

Non-governmental organisations are legally constituted corporations that operate independently from any form of government and generally are not conventional for-profit businesses. In the cases in which NGOs are funded totally or partially by governments, the NGO maintains its non-governmental status by excluding government representatives from membership in the organisation. NGOs can be at community, city, national or international level (e.g. Friends of the Earth).

Apart from 'NGO', there are many alternative or overlapping terms in use, including: non-profit organisation (NPO), voluntary organisation (VO), civil society organisation (CSO), grassroots organisation (GO), social movement organisation (SMO), private voluntary organisation (PVO), self-help organisation (SHO) and non-state actors (NSAs).

There is a growing interest in doing charitable work for community, heritage or environmental organisations. This can be divided broadly into two types: 'not-for-profit' and 'pro bono' ('for the good of', i.e. free of charge). However a limited fee or no fee involved does not mean a reduction in the scope of liabilities and responsibilities, and the cost of these need to be covered in some way. In non-profit or charitable work it is important that the scope of services is very clearly defined to avoid misunderstandings arising. Not-for-profit groups can set up either as a limited company or as a society.

PRACTICE MANAGEMENT

A practice needs to manage the essential elements of its organisation to stay in business.

Marketing management

Learning to manage your market and services to enable the business to achieve a good reputation and succeed.

Money management

How the business money is managed, from ensuring short-term cash flow on a monthly basis to long-term cash flow and financial management.

Time and cost management

How time spent during the business is controlled and managed to ensure that the right time is spent on the right activities by the right people.

Staff appointment and people management

Ensuring the right people are employed, in the right conditions, and motivating staff to enable the practice to deliver professional work and to move forward to achieve its long-term ambitions.

Office and quality management systems

Keeping the service of the business at the highest possible standard to avoid claims and improve business and financial efficiency – getting things right first time.

Risk management

Helping the practice to manage out or minimise the risk to its successful establishment.

Marketing management

Marketing

'The management process through which services move from concept to the customer.'

Marketing includes the coordination of four elements known as the 4 Ps:

- Identification, selection and development of a Product (your services).
- Determination of its Price.
- Placing your product with the right clients.
- Development and implementation of a Promotional strategy.

It is assumed that the landscape practice understands its own product. Pricing strategy is covered under the section on 'Time and cost management' (see p. 139).

A practice should carry out marketing when it is at its busiest. If left to quiet times it will take too long for a concentrated effort of marketing to generate any work and hence any income. The golden rule in marketing is that it should be carried out at all times and at all levels, whether by the receptionist who answers the phone, the project landscape architect administering a contract or running a meeting, or a partner/director discussing a potential project with a client. The practice should see all these activities as a marketing opportunity.

Develop a marketing strategy as part of the practice business plan

Every new practice should formulate a business strategy that states clearly its business aims and how it is going to achieve them. It is important to set goals and work to them, both as a means of bench-marking achievement and as an expression of leadership that unites all those who work for the practice and focuses them on worthwhile objectives.

A new or an existing practice will need to:

- Evaluate the current position of the business to decide where the principals would like the business to be in five years.
- Devise a marketing plan for moving the business from its current position towards achieving its defined objectives. This should be set out as goals and targets, usually over a 12–24-month period.

The marketing strategy forms a vital part of the business plan which is a longer term strategy.

Evaluate the current position of the business

Business skills analysis:

- What are your skills?
- What sets you apart from other landscape consultants?
- Why do clients buy your services?

Market sector research: Understand your market including:

- Client sectors – who will buy your services? (Public, private.)
- Market sectors – commercial, retail, health, education, business, residential, etc.

Competitor research: Understand your competitors including:

- Competitor research – who is out there, where are they located, what do they do, who are their clients?

SWOT analysis: Review the business in relation to its Strengths, Weaknesses, Opportunities and Threats (SWOT analysis).

Review where you want to position the practice

Once you have established the current position of your business, you need then to consider where it is you want to get to. This stage is all about setting clear, concise goals or objectives. Objectives need to be market-led and achievable. Follow the SMART technique (Specific, Measurable, Achievable, Realistic and Timed), more simply expressed as what/how/who/when?

The goals and objectives should be explained to the staff as they can help you deliver and achieve these goals. It will also engage, empower and motivate your staff.

Prepare the strategy and set the time frame and budget

Decide what activities will get you to where you want to be in 12–24 months. A few key targets will generate greater success. Examples include:

- Gain two new clients.
- Move into the education sector.
- Reclaim two lost clients.
- Increase the turnover by 20 per cent.

Strategic activities to achieve these goals can be divided into various categories:

- Client relationships – existing/previous/new.
- Existing markets – how to sell more of your services to them.
- New markets and business development.
- Promotional material.
- Advertising/PR.

Based on the strategy a marketing budget should be set to enable the targets to be achieved.

Developing client relationships

Your existing clients are the mainstay of your business – you must keep them happy. All the hard effort you put into getting those clients should not be wasted by bad client relationships including poor service and quality of work. They should always be at the top of your list when responding as they are most likely to give you repeat business.

A client list and database should be prepared. Each director/partner of the practice should be responsible for their own list of clients. A list may be sector-led (e.g. healthcare/education) or organisation-led (public or private). It will be the responsibility of the relevant director or partner to keep these lists up to date, keep these clients happy, and investigate the possibility of new project work.

Previous clients who have stopped coming back for your services should be identified and the relevant partner/director should find out why this has happened. Sometimes there are reasons beyond the consultant's control, such as the client has moved on to a new position or retired. In this case efforts should be made to keep in contact with the client in their new position, or the replacement for the retired client should be marketed.

Obtaining new clients you have identified in your strategy will be harder, as it likely they already have preferred consultants. It will require a lot of effort to persuade these clients to drop their existing consultants and use you.

What marketing methods exist?

- Introduction at networking events.
- Sending out promotional material.
- Following up the above with a phone call to assess the opportunity to meet.
- Delivering a presentation.
- Following it up with a thank you letter or phone call.
- Keeping in contact through news updates or occasional calls.

There are many people that commission consultants; for the same project it may be possible to market to all members of the procurement team: the client, the architect, the project manager and the surveyor.

Enhancing existing markets and entering new markets

Opportunities may exist for you to expand sales of your services to your existing markets. This may require you to see more people in an organisation – perhaps it has various departments, all of whom put work out to consultants, and you are currently only dealing with one of them. Your existing contacts are best placed to introduce you to their colleagues in other departments.

It may be harder to expand into new markets and require a longer time frame. The consultant may have to learn new skills, train staff or appoint staff who are already qualified in that area. For example if your marketing strategy suggests you could work in the growing renewables sector you will most likely need staff qualified in Landscape and Visual Impact Assessment.

Preparing promotional material and branding

New work can be obtained by marketing and business development. Promotional material is vital to this and will require time to develop if you are a new practice. One of the first areas to consider is the business brand which should clearly identify the personality and ethos of the business.

The brand is the first part of the practice that a potential client will notice; it is therefore very important and may require an external consultant to design. Once established it should form part of all the promotional material of the practice. Changing a brand has significant cost implications, so it is worth choosing a lasting brand which can incorporate changes signifying advancements of the practice, such as a new partner or a change in the practice name.

Marketing material can include the following (from top level down):

- The practice website including core values and services, introducing the directors, projects, specialisms, news and Twitter feeds. This must be kept up to date.
- A practice brochure (digital and hard copy) covering the practice profile, core values, services and work sectors.
- Practice capability statements in key sectors (e.g. health, education, urban design).
- Individual project sheets – specific project examples.
- Presentations in digital format for client pitches.
- Examples of publications the practice has written.
- Staff CVs.
- Practice stationery – business cards and letter-headed paper.
- Compliments slips in the form of postcards advertising particular projects.
- E-newsletters.
- Press releases.

Advertising and PR

There are a number of methods of advertising:

- Professional institutes – becoming a member of your institute means that your information is available for potential clients to review when considering the best practice for their project based on the information available to them.
- Professional and client journals.
- Focused press release – to cover the opening of a new project or office.
- Competition entries – even if you don't win your name or entry may be available for the public and potential clients to review.
- Practice events – to celebrate a practice anniversary, a new publication, a new practice name or a new director joining.
- Practice networking events – inviting clients onto tables at construction or PR events (Landscape Institute Awards, etc.).

Remember – all practice promotional material and advertising must follow your code of professional conduct.

> ***Standard 10:*** **Members of the Landscape Institute should only promote their professional services in a truthful and responsible manner and such promotion shall not be an attempt to subvert professional work from another member.**
> When advertising your services you should not make untruthful or misleading statements, nor claim to be better than other professional members. Special expertise, however, may properly be claimed and referred to.
>
> If you are aware that a client already has a contract for services provided by another member, you should not attempt to gain that contract.

Strategy review

The success of the strategy should be reviewed at the end of the marketing plan's life span or at specific target dates. Did you achieve the measurable targets that were set? Did you:

- Gain two new clients?
- Move into the education sector?
- Reclaim two lost clients?
- Increase the turnover by 20 per cent?

If not, why not? The results of this review will help inform a new marketing strategy and new budgets.

Money management

Initial raising of money

A practice should appoint its own financial advisors to assist with its establishment and the creation of the financial management processes. It is also useful to have on a regular basis an external, expert overview of the financial health of the practice.

One of the partners/directors should take responsibility for finance at management level. Sole practitioners will inevitably have to assume these responsibilities personally.

A new practice is almost certain to need cash for its establishment costs (including premises, equipment, etc.) and ongoing costs (including salaries, lease and other running costs), as income is unlikely to flow for some months. This cash can come from a variety of sources:

- the partners'/directors' own money;
- borrowings, usually from a bank but potentially from other sources;
- a bank loan.

It is common for the initial costs of establishing the practice to be secured from a combination of sources. Once a loan/overdraft facility has been agreed the new practice will need to open bank account(s), usually with the lending bank.

An established practice may have short-term cash-flow difficulties. If it has been trading for some time, and can demonstrate long-term income from ongoing projects, the first port of call will be an extended overdraft from the bank. This is an expensive way of obtaining additional cash but may be suitable for a short-term solution.

Financial management strategy

After a practice has secured its initial start-up costs it needs to consider its long-term financial strategy. This will include a series of financial management components including:

- The long-term business-plan budget which includes finance, marketing, staff and IT.
- An annual cash flow, updated monthly.
- A monthly bank book system/management accounts recording receipts and payments.
- The annual accounts prepared by the practice accountant.

A bank book system

This system is set up using specific accounting software (e.g. Sage) and it records:

Receipts from invoices raised
- fees claimed,
- expenses claimed.

Outgoing payments:
- monthly salaries,
- overheads (insurances, rates, rent, stationery, telephone, postage and other general running costs),
- tax,
- direct expenses (materials, consultants, suppliers, travel).

The bank book system should balance at the end of the month account with the bank statement. It is used by the accountant to prepare the annual accounts. It can be linked to other financial and time management software systems that record time spent on projects by various grades of staff, invoices issued and fees received, and supplier or sub-consultant invoices received and paid.

Invoicing and payments

Invoices

To help cash flow, practice invoices should be raised promptly in accordance with a schedule agreed with the client or at specific stages of the project. Clients should be advised in advance and invoices to large companies should be timed with their specific payment dates. The practice should use standard pro-forma invoices which include key information:

- Project name and information.
- Client name and address.
- Payment claimed (stage and value).
- Purchase order number.
- Payment details (bank branch, sort code, and account name).
- Payment date due.

Chasing payments

- Remember *Cash is King* and is the life blood of your business. If you don't receive payment for work completed then you don't exist as a business. You are not in business to lose money.
- Good practice management allows for a list of invoices and payment dates to be prepared on a monthly basis. An administrative member of staff should be tasked with chasing late payments. Where payments are further delayed the director or partner who is responsible for the project should carry out follow-up calls at a higher level. The last recourse is through the courts – there are always some clients who do not want to pay.

Cash flow forecast for monthly and long-term financial planning

This is produced to ensure the financial stability of a practice. It is essential for negotiating overdraft facilities, borrowing money and long-term financial planning.

The cash flow forecast should cover:

- Monthly forecast of fee income.
- Monthly summary of expenditure.
- Annual budget forecast of fee income and expenditure.
- Profit and loss ratio.

Pipeline projects

A practice cannot rely on finance coming in from projects not yet confirmed. However it is useful to use the list of financial proposals submitted as a predicted pipeline 'cash flow'. These pipeline projects can be used as marketing 'aide-memoires' to chase up clients on the results of fee submissions and get useful feedback on the practices performance in relation to quality and fee proposals against other firms.

Annual statement of accounts and balance sheet

This is produced (normally by the practice accountant) for audit and tax purposes and practice forecasting.

Financial monitoring

Practices should keep records of financial performance and use these to measure improvement/variation over time. This information can be gathered from a variety of sources, principally from the software used to record finance/project management.

It is useful to monitor on an annual basis:

- Income by partner/director as main fee earners.
- Turnover by sector – client, location, project type, procurement type, etc.
- Profit as percentage of turnover.
- Profit by fee earner as director/partner.
- Profit by group – client, location, sector, project/procurement type, etc.
- Average creditor and debtor days.

Profits sharing and reinvesting

Profits will be shared in a company in accordance with the rights attached to a shareholder's shares, and in a partnership in accordance with the partnership agreement. In the early days of a practice it may be best for profits to be left in the practice to ensure a good cash flow.

If the practice thrives and accrues profits the business and financial management plans should cover reinvestment (IT, furniture, additional staff), or expansion opportunities (including mergers and acquisitions of other businesses) if these form part of the long-term business plan.

Time and cost management

Establishing a staff hierarchy and costs

Practices should ensure that they employ staff of a suitable level and with suitable skills to be able to undertake the range of work the practice carries out. Depending on the nature of the office these may include:

- Directors/partners/heads of departments – those with a practice-wide responsibility for objectives, organisation and management.
- Managers – those with responsibility for organising and managing the work, architectural and other, as it progresses through the practice.
- Professional staff, from senior to junior grades – who undertake the work.
- Technicians – who support those undertaking the work.
- Administration – who support those undertaking the work.

For each of these a time-charge hourly cost should be prepared. Administration staff time is not charged against projects and has to be absorbed as part of the office overheads.

The client cannot be charged for every hour people are at work because staff do not work on the client's business all the time. Time is also taken up by:

- training and CPD;
- administration;
- statutory and public holidays;
- sickness;
- bidding for projects;
- competitions.

Potential earnable hours for a 35-hour working week may be reduced from 1,820 hrs/year to 1,540 once hours are deducted for the above. Each practice must understand its own costs and use this to ascertain the hourly rate for each chargeable member of staff. A graduate may earn £20,000.00 but this may equate to £32,000.00 a year once the cost of practice overheads has been added on (heating, lighting, administration staff, pensions, etc.).

$$\frac{£32{,}000.00}{1{,}540 \text{ hrs}} = £21/\text{hr without any profit.}$$

A practice is in business to make money therefore a percentage profit margin should be applied to staff hourly rates. The profit margin will depend on a variety of factors, for example, whether the practice is bidding directly to a client with no competition, or in a competitive fee bid. Profit margins can vary and may be between 15 and 30 per cent.

If a 25 per cent profit margin is applied the charge-out rate above becomes £26.25 per hour.

A range of hourly rates with differing profit margins should be set for each chargeable member of staff.

Time management and who does what in the office

Which member of staff undertakes what aspect of work should be carried out in the most efficient way. There is no point in the most expensive member of staff undertaking photocopying or colouring.

Directors or partners are there to manage the business, market the practice and bring in work. Generally speaking they will not be undertaking design work unless they are a design director, in which case their role will be overseeing design work or undertaking high-level concept design.

When a project has been won, the practice will allocate a design team to it. This is based on the practice programme and on who is best placed to undertake the work in terms of skills and availability. It is up to the assigned manager or senior landscape architect to complete the work within the programme and budget, to the client's satisfaction and preferably with the agreed profit margin.

Staff time is recorded on a time-sheet basis which forms part of the overall finance and time-management system. This assists the practice in seeing how time has been spent on a project and its profit and loss ratio.

Staff appointment and people management

Legal requirements

Legislation governing the employment of staff originates from the UK Government and from European Directives and Regulations. This is an ever-growing and changing area of law and businesses may require specialist legal advice. Guidance can initially be sought from a number of government advisory services:

- GOV.UK (www.gov.uk/browse/working) – working, jobs and pensions.
- ACAS (www.acas.org.uk) – Advisory, Conciliation and Arbitration Service.

Generally there is very little difference in employment law between England and Wales, some differences in Scotland, but there are important differences for employees and employers in Northern Ireland. The main difference is that the law is devolved to the Northern Ireland Assembly. Some rules will be found in a different piece of legislation (to the rest of the UK), sometimes only a portion of the rules will apply in Northern Ireland, and often the rules apply from a different date. ACAS does not exist in Northern Ireland.

Information can be obtained from: NI Direct Department for Employment and Learning (www.delni.gov.uk).

What are an employer's duties?

Generally employers have a duty to provide safe and suitable working environments for their employees and to protect them from accidents and harm in the course of their work. Employer's liabilities in tort have largely been covered by statute, both to emphasise their importance and to make actions easier to pursue. However, the raft of employment legislation governs other duties of employers towards employees.

In employment law a person's employment status helps determine their rights and their employer's responsibilities.

The main types of employment status

- Worker/agency worker.
- Employee.
- Self-employed and contractor.
- Director.
- Office holder.

Under law each of these has different rights and responsibilities associated with it (refer to www.gov.uk/agency-workers-your-rights/overview).

Written statement of terms and conditions of employment: An employer is under a legal obligation to provide an employee with written particulars of terms and conditions of their employment no later than two months after they start their employment.

What a written statement must include: A written statement can be made up of more than one document if the employer gives employees different sections of their statement at different times. If this does happen, one of the documents (called the 'principal statement') must include at least:

Contents of a written statement

- The name of the business.
- The employee's name, job title or a description of work and start date.
- If a previous job counts towards a period of continuous employment, the date the period started.
- How much and how often an employee will get paid.
- Hours of work (and if employees will have to work).
- Holiday entitlement (and if that includes public holidays).
- Where an employee will be working and whether they might have to relocate.
- If an employee works in different places, where these will be and what the employer's address is.

As well as the principal statement, a written statement must also contain information about:

- How long a temporary job is expected to last.
- The end date of a fixed-term contract.
- Notice periods.
- Collective agreements.
- Pensions.
- Who to go to with a grievance.
- How to complain about how a grievance is handled.
- How to complain about a disciplinary or dismissal decision.

What a written statement does not need to include: The written statement doesn't need to cover the following, but it must say where the information can be found:

- Sick pay and procedures.
- Disciplinary and dismissal procedures.
- Grievance procedures.

In Northern Ireland, a written statement must explain what the disciplinary rules and procedures are.

Contract terms

The legal parts of a contract are known as 'terms'. An employer should make clear which parts of a contract are legally binding. Contract terms may be:

- In a written contract, or similar document like a written statement of employment.
- Verbally agreed.
- In an employee handbook or on a company notice board.
- In an offer letter from the employer.
- Required by law (e.g. an employer must pay employees at least the national minimum wage).
- Implied terms – automatically part of a contract even if they're not written down.

Implied terms

If there's nothing clearly agreed between you and your employer about a particular issue, it may be covered by an implied term, for example:

- Employees not stealing from their employer.

- Your employer providing a safe and secure working environment.
- A legal requirement such as the right to a minimum of 5.6 weeks' paid holidays.
- Something necessary to do the job, such as a driver having a valid licence.
- Something that's been done regularly in a company over a long time such as paying a Christmas bonus.

Working abroad

If an employee has to work abroad for more than a month, their employer must state:

- How long they'll be abroad.
- What currency they'll be paid in.
- What additional pay or benefits they'll get.
- Terms relating to their return to the UK.

Unfair dismissal

All employees with two years' service have the right to raise a claim for unfair dismissal which must be raised within three months of their employment terminating. It is also possible for an employee to raise a claim for constructive unfair dismissal where the employer has materially breached the employee's contract of employment in such a way that the employee is entitled to resign and treat themselves as having been dismissed.

In order to terminate employment fairly the dismissal must be for one of the following grounds:

- Conduct.
- Capability (including competence to do the job, and ill-health).
- Redundancy.
- Contravention of a statutory enactment.
- Some other substantial reason.

In order to dismiss an employee fairly it is essential to follow a fair procedure. A series of warnings should be issued over a period of time (with a process at each stage which is compliant with the ACAS code being followed) advising the employee of the particular shortfalls in their performance and any improvements required.

Discrimination

- Employers should have an Equal Opportunities Policy in place. Managers and employees should also be provided with relevant training in respect of the policy.

- It is unlawful to discriminate against an employee on the basis of age, sex, race, disability, marriage and civil partnership, sexual orientation, gender reassignment, pregnancy and maternity, and religion or belief. In addition, under the Equality Act 2010 it is unlawful to offer different and less favourable pay and conditions to women and men who are doing equal work (i.e. like work or work rated as equivalent or work of equal value).
- It is also unlawful to discriminate against someone on the basis that they work part time or on the basis that they have a fixed-term contract.

Working Time Regulations

The Working Time Regulations 1998 apply to all 'workers', which includes employees. The employer must take all reasonable steps to ensure that the worker does not exceed the limit of an average of more than 48 hours per week over a reference period of normally 17 weeks.

National minimum wage

All workers are covered by the national minimum wage legislation.

Sick Pay

Employers are required only to pay statutory sick pay (SSP) if the employee is absent because of sickness for a continuous period of four days or more. If the employee is absent for less than four consecutive days then they are not entitled to SSP. Employers must keep records of payments and absences in excess of four consecutive days. Employees may not claim SSP for more than 28 weeks in each period of sickness absence.

Pensions

The law relating to pensions changed with the implementation of 'auto-enrolment' as of 1 October 2012. Employers are obliged to automatically enrol their eligible jobholders into a pension scheme from their relevant staging date.

Family-friendly leave

There are certain family-friendly rights which employees enjoy. Very generally these are as follows:

- *Maternity leave* – Employees are entitled to six months' ordinary maternity leave (OML) and six months' additional maternity leave (AML).
- *Adoption leave* – Adoption leave operates in much the same way as maternity leave.

- *Paternity leave* – An employee who has a child born or expected to be born or placed for adoption, and satisfies certain conditions, is entitled to two weeks' paternity leave.
- *Parental leave* – Any employee who has completed one year's continuous employment has a legally enforceable right to take unpaid parental leave while the child is under age 5. If disability living allowance is payable in respect of the child the age restriction is increased to age 18.
- *Other rights: flexible working* – As of 30 June 2014, all employees with 26 weeks of service are entitled to request a flexible working arrangement. In addition, employees have the right to time off (unpaid) to deal with certain domestic emergencies.

The Health and Safety at Work Act 1974 (HASAW)

Obligations are placed on employers with regard to health and safety, such as the general duty on employers 'so far as is reasonably practicable' to protect the health, safety and welfare at work of all employees.

Employers must provide safe plant and systems of work, safe methods for the use, handling, storage and transport of articles and substances, necessary information, instruction, training and supervision, a safe and well-maintained workplace, including safe access and egress and a safe working environment with adequate welfare facilities.

In addition to its own employees, an employer owes statutory duties to:

- other people's employees working on the employer's premises,
- members of the public who are affected by the activities of the employer.

Health and Safety at Work Regulations 1999

The employer should appoint one or more persons he believes are competent to assist him in carrying out his health and safety obligations. It is for the employer to decide on the person suitable for the post and therefore whether they are competent. Factors to be considered in judging competency are whether they have sufficient training and experience or knowledge and other qualities to enable them properly to assist in undertaking the necessary measures. The employer will still be ultimately responsible for health and safety – the fact that they have appointed people to assist will not absolve them from responsibility.

There are more detailed regulations setting out specific health and safety requirements for employers relating to:

- Assessing risks to health and safety at work.
- Devising a written health and safety policy where there are five or more employees. Where there are fewer than five employees appropriate measures still require to be taken but there is no need to commit this to writing.

- Providing employees with adequate first aid facilities.
- Notifying employees of general matters under health and safety law.

Any breach of these obligations will result in the employer being held liable. Liability can be both civil and criminal. Responsible managers and officers of the company may be personally liable in addition to the company. Employers are obliged to maintain insurance against liability for bodily injury or disease sustained by employees arising out of or sustained in the course of their employment in the UK. The insurance must be taken out under one or more approved policies with authorised insurers.

Over and above the legislation already referred to there is a vast number of more detailed regulations that target specific work-related hazards including safety of the workplace and work equipment, fire hazards, and lifting or other strenuous activities, to name but a few.

The Health and Safety Executive enforces compliance with the regulations but it also produces a lot of helpful information for employers that can be accessed on its website (www.hse.gov.uk).

Payroll and taxation

It is necessary to register with HM Revenue & Customs (HMRC) for employee income tax and national insurance purposes. Before an employer registers with HMRC it is necessary to gather certain preliminary information which the employer will need during the registration process (which in most cases can be done over the telephone or by email). The pieces of information required relate to general facts about the company (e.g. business name, address, nature of business), details about how many employees will be involved, and information on where the payroll will be run from, with the names, addresses and phone numbers of those looking after the payroll. With these items, employers can register with the HMRC who will then send all the information required to set up the payroll. More details can be found on HMRC's website (www.hmrc.gov.uk).

Data protection

The Data Protection Act 1998 (DPA) brings UK law into line with the EU Data Protection Directive of 1995. It is the main piece of legislation that governs the protection of personal data in the UK. The Data Protection Act controls how your personal information is used by organisations, businesses or the Government. Everyone who is responsible for using data has to follow strict rules called 'data protection principles'. They must make sure the information is:

- used fairly and lawfully;
- used for limited, specifically stated purposes;
- used in a way that is adequate, relevant and not excessive;
- accurate;

- kept for no longer than is absolutely necessary;
- handled according to people's data protection rights;
- kept safe and secure;
- not transferred outside the UK without adequate protection.

The Data Protection Act gives you the right to find out what information the Government and other organisations store about you.

Personal data an employer can keep about an employee

Employees' personal data should be kept safe, secure and up-to-date by an employer. Data an employer can keep about an employee includes:

- name;
- address;
- date of birth;
- sex;
- education and qualifications;
- work experience;
- national insurance number;
- tax code;
- details of any known disability;
- emergency contact details.

They will also keep details about an employee such as:

- employment history with the organisation;
- employment terms and conditions (e.g. pay, hours of work, holidays, benefits, absence);
- any accidents connected with work;
- any training taken;
- any disciplinary action.

What an employer should tell an employee

An employee has a right to be told:

- what records are kept and how they're used;
- the confidentiality of the records;
- how these records can help with their training and development at work.

An employer should not keep data any longer than is necessary and they must follow the rules on data protection.

The Freedom of Information Act

The Freedom of Information Act (FOIA) gives you the right to ask any public sector (publicly funded) organisation for the recorded information they have on any subject. Anyone can make a request for information – there are no restrictions on age, nationality or where you live. Your request will be handled under different regulations depending on the kind of information you're requesting, for example:

- *The Data Protection Act if you ask for the information an organisation holds about yourself.*
- *The Environmental Information Regulations (EIRs) if you ask for environmental information from an organisation.*

Workplace bullying and harassment

Harassment is unlawful under the Equality Act 2010. Examples of bullying or harassing behaviour include:

- spreading malicious rumours;
- unfair treatment;
- picking on someone;
- regularly undermining a competent worker;
- denying someone opportunities for training or promotion.

Bullying and harassment can happen:

- face-to-face;
- by letter;
- by email;
- by phone.

Bullying itself is not against the law, but harassment is. This is when the unwanted behaviour is related to one of the following:

- age;
- sex;
- disability;
- gender (including gender reassignment);
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief;
- sexual orientation.

Workplace temperatures

During working hours the temperature in all indoor workplaces must be reasonable. There is no law for minimum or maximum working temperatures, i.e. when it's too cold or too hot to work. However, guidance suggests a minimum of 16ºC, or 13ºC if employees are doing physical work. There is no guidance for a maximum temperature limit.

Employers must comply with the law relating to health and safety at work, including:

- keeping the temperature at a comfortable level;
- providing clean and fresh air.

Employee's duties

What obligations/duties does the employee owe to their employer?

These may be explained in the contract of employment, but the law also says that there are certain obligations and duties owed by an employee to their employer even if the contract does not mention them. These include:

- To do what a reasonable employee would do in any situation.
- To be honest.
- Not to disrupt business, e.g. take part in industrial action.
- To disclose wrongdoing (does not include 'spent' convictions). The employee must disclose wrongdoing by other employees, even if this will incriminate them.
- To carry out and follow orders of the employer (as long as they are legal).
- Not to disclose the employer's confidential information.
- To work with reasonable care and skill.
- To look after the employer's property if using it.
- Not to compete in business against the employer while still working for them as an employee.
- Not to take bribes.
- To be prepared to change when the job changes, for example, if computers or other machinery are introduced to help the employee do their job.
- To give any inventions to the employer if these are developed by the employee during their employment.

The Health and Safety at Work etc. Act 1974

The Act places a duty on employees to take reasonable care of their own health and safety, and that of anyone who could be adversely affected by their 'acts or omissions at work', and to cooperate with their employer in taking steps to meet legal requirements. Therefore where reasonable care has not been taken by the employee and the employer has done everything in his power 'so far as reasonably practicable' to comply with the various obligations placed on him, the employer may not be liable for the breach.

Staff recruitment

Public sector or large private organisations will have human resources departments that will deal with recruitment. As well as complying with all relevant employment legislation they will have their own in-house procedures to deal with advertising, interviewing and appointment.

Regardless of whether they are public or private sector, practices or departments should ensure that they employ staff of a suitable level and with suitable skills to be able to undertake the range of work they carry out. A schedule of staff skills and experience should be drawn up in the office and used when a vacancy occurs or when as part of the practice business strategy new staff are required for an expansion office.

Should the appropriate level of skills not be available it will be necessary to recruit. A person and job description, including a list of key skills and experience required, should be prepared to make sure that the recruitment process is as focused as possible and that the candidate appointed has the best chance of succeeding in the role. The description can not infringe any discrimination regulations.

Factors to consider include:

- Skills required (e.g. CAD skills, team-leading skills, project-management skills).
- Experience required.
- Qualifications required.
- Basis of employment (permanent/temporary), likely salary and other benefits, etc.
- Method of recruitment.

Recruitment optons: There are various methods of recruiting staff, including:

- Personal recommendation (private sector only) – usually considered the most reliable, and cheapest, way to recruit new staff.
- Advertisements – either in the professional or main line press/websites. Prices vary according to the publication and size of advert placed.
- Professional institutes' on-line sections.
- Agencies.
- Previous applicants retained on file.

Recruitment/interview process

- Decide on the most appropriate method of recruitment.
- Set out a clear person and job description.
- Screen the CVs of candidates for appropriate skills/experience and produce a limited shortlist, ideally around three candidates for each post to be filled.
- Establish an interview process including who will be interviewing the candidates.
- Set a list of questions and criteria that all candidates can be judged against fairly and equally (including specific skills tests, such as AutoCAD, as required).

Appointment and probationary period

- Unsuccessful candidates should be informed as soon as possible, and given details of their performance at the interview in terms of scores against the questions/tests with an explanation of why they were not considered suitable.
- Successful candidates must have an induction process which includes the review and signature of all practice policies such as the office health and safety manual.
- A contract should be set up within two months of appointment.
- The probationary period is usually three months, after which it is normal for a review process to confirm the suitability of the new staff member.

Staff training and motivation

Keeping staff motivated and loyal to the practice enables the practice to deliver professional work, which contributes to moving the practice forward to achieve its long-term ambitions.

What motivates staff?

Factors that have a positive motivational effect on landscape architects and landscape architectural staff include:

- Working on quality/interesting work.
- Taking an active part in office development including the business plan and long-term goals.
- Recognition, both internally and among their peers, for involvement with well-designed and well-delivered projects.
- Role and responsibility given and opportunities for advancement.
- Social aspects.
- Training/personal development.
- Financial reward and benefits offered.

All staff should have reviews with a member of the senior management team, which should cover not only their performance but also their aims and ambitions and the training/reallocation of work needed to realise these. Outcomes of the review must be recorded to assess progress against actions. Reviews should be held a minimum of twice a year. Continuing professional development (CPD) is required of professional members of the Institute and this should be recorded as part of the training plan.

Office and quality management systems

Office procedures manual

The procedures manual allows the management to communicate to all members of staff the principles behind the running of the practice. The manual is used to introduce new staff to the practice.

Sample office procedures manual

Company

- Organisation and structure including organogram.
- Core values.
- Responsibilities.
- Office policies (QA, health and safety, etc.).

Staff

- Induction.
- Development, training and performance reviews.
- HR policies such as those for disciplinary procedures and holidays.
- Health and safety.
- Email and internet usage.

Office handbook

- Office security and emergency action plans.
- Administration procedures.
- Guidelines on the use of office equipment such as printers and telephones.
- Contacts for all office departments.
- Standard administration forms.

Guidelines

- QA procedures and reference to the QA manual.
- Company guidelines on the production of external communications such as drawings and brochures.
- Company manuals for hardware, software and online internal library.

Quality management systems/ISO 9000

What is ISO 900: ISO 9000 is an international quality standard developed to provide a framework around which a quality management system can effectively be implemented; it consists of three parts, 9001–9003. ISO 9001:2008 provides a set of standardised requirements for a quality management system regardless of what the user organisation does, its size or whether it is in the private or public sector. It is the only standard in the family against which organisations can be certified, although certification is not a compulsory requirement of the standard. It includes the following main sections:

- Quality Management System (ISO: 9001).
- Management Responsibility.
- Resource Management.
- Product Realisation.
- Measurement Analysis and Improvement.

Accreditation is determined by an external assessor/certification body, who will be a member of the National Accreditation Council for Certification Bodies. A firm whose management system has been successfully assessed against the requirements of ISO 9000 is entered on a register, and becomes a Registered Firm of Assessed Capability. Accreditation is a sign of management quality assurance.

Quality assurance is about consistent everyday management involving evaluation, monitoring, feedback, development and correction to assist directors, partners and sole principals in the control of their own business and achievement of their long-term business/management plan objectives. Quality management refers to systems not products. Good-quality management allows the landscape architect to provide expert advice and creative expression, safe in the knowledge that defined systems for all operational areas of business are in place to facilitate the project.

In simple terms, implementation means producing a quality manual with procedures put in place to audit its effectiveness. Central to the manual is the production of a quality policy that outlines the ethics, aspirations and conduct of how the business will operate. The manual should cover all aspects of the running of an office to meet the standard including design, contract administration, finance, marketing, HR and administration. A good-quality manual with associated processes should fit into the work carried out, and be concise and clear, so that it is not seen as a paper-filling exercise and an extra burden on the working day.

Qualtiy manual: The quality manual is the firm's own record of the way it works. It should explain the methods and the checking/auditing procedure it uses. It should include a quality policy and a quality procedures manual.

Qualtiy policy: The quality policy is a statement as to the organisation's commitment to and long-term intentions regarding quality of service.

Qualtiy procedures manaual: The quality procedures manual sets down, with regard to ISO 9000:2000, the organisation's profile and both overall policies

and detailed requirements relating to the firm's management systems and responsibilities, documentation, resource management, service realisation and measurement, analysis and improvement. It must clearly document how the organisation works.

- Document Control and Records.
- Client Requirements and Satisfaction.
- Measurement and Improvement.
- Management Review.
- Resource Management.
- Design Control.
- Project Control.
- Purchasing.
- Process Control.
- Measurement and Improvements.
- Internal Audit.
- Control of Non-Conformities.
- Corrective and Preventive Action.

Auditing: Internal audits as well as third-party assessments using the criteria of BS EN ISO 9000 against the office quality manual, enable a firm to assess whether its business-plan objectives are being achieved.

Why become quality assured – possible benefits to a practice

Standard 9 of the Landscape Institute's Code of Professional Conduct and Practice states: 'Landscape Architects shall have appropriate and effective internal procedures, including monitoring and review procedures, and ensure qualified and supervised staff to enable it to function efficiently'.

Enhanced credibility

An internationally recognised benchmark reassures clients and places landscape architects on the same level as other disciplines.

Improved efficiency and consistency

Getting things right first time – good management practices reduce unproductive time which means greater gains in revenue.

Wider marketing opportunities

Many client bodies are making certification a prerequisite when drawing up tender lists. The number and types of clients may increase.

Reduction in claims

A well-managed office is less likely to experience claims, and in the event of a claim will have a clear record of the event.

Feedback

Auditing ensures that lessons are learnt for the benefit of future work.

PRACTICE MANAGEMENT: TOP 10 QUESTIONS

1 What are the mains ways of setting up in private practice?
2 What are the advantages and disadvantages of each?
3 What alternative methods of practice exist both in the private and public sector?
4 What are the essential areas of management in a private practice? What would you need to consider when setting up a private practice?
5 What obligations does the employer owe their employees?
6 What obligations does an employee owe their employer?
7 Explain what quality management systems exist?
8 What are the benefits to a practice of becoming quality assured to an international standard?
9 What options are available to a practice for promotion and marketing?
10 How are finances monitored in a practice?

7 The planning system

CHAPTER CONTENTS

PLANNING SYSTEM STRUCTURE

Planning is a mechanism for controlling and guiding the use of all land and buildings and the process of change in the environment. The emphasis is now on sustainable development that balances economic development and environmental quality.

The current system of planning originated in the Town and Country Planning Act 1947. This Act introduced the basic system of Development Plans, Development Control and Enforcement. It brought all development under control by making it subject to planning permission, and required development plans for the whole of the country to be prepared which outlined the way in which areas were to be developed or preserved. In addition the Government had to provide policy guidance to local planning authorities on how to administer and operate the planning system.

The following elements are still central to the system that is current in the UK, and which operate at three distinct levels

National

Primary legislation

In the UK primary and secondary legislation sets out the basic framework within which the planning system operates. It is prepared by central government.

National planning policy

The Government produces national planning policy which sets out the basic objectives of the planning system and forms the framework for its day-to-day administration. This includes the preparation of development plans and the way in which planning applications should be assessed by local planning authorities.

Strategic

Regional Development Strategies/Strategic Development Plans: Regional Development Strategies/Strategic Development Plans set out the long-term planning strategy for an area on a regional/strategic scale, and apply in Wales, Scotland and Northern Ireland. (The Localism Act 2011 abolished Regional Strategies in England.)

Local

Local Development Plans: Local development plans are the main documents which guide development control decisions and which set out decisions about future development in a local authority area.
Development Control/Management and Enforcement: Development Control/Management (Scotland) is the term which defines the system used for issuing permits for land use development (planning application approval) and for taking actions against unauthorised development. Planning applications are considered in relation to national, regional and local guidance.

PLANNING POLICY AND DEVELOPMENT PLANS

Primary legislation and European/national planning advice

In the UK primary legislation sets out the basic framework for the operation of the planning system. The Government Minister for each country supplies subordinate legislation (in the form of Orders and Regulations) which guides a planning

authority on how it should operate within the limits set by the law. In order to achieve uniformity in decision-making, planning control is heavily influenced by policy guidance. The format of this varies for each country in the UK.

England

Primary legislation

- The Planning Act 2008.
- Growth and Infrastructure Act 2013.
- Localism Act 2011 (amends sections of the following Acts which are still in force).
- The Town and Country (Environmental Impact Assessment) Regulations 2011.
- Planning and Compulsory Purchase Act 2004.
- Planning and Compensation Act 1991.
- Town and Country Planning Act 1990.
- Planning (Listed Buildings and Conservation Areas) Act 1990.

Subordinate legislation

This is contained in Government Orders and Regulations. For example:

- Town and Country Planning (General Permitted Development) Order.
- Town and Country Planning (General Development Procedure) Order.
- Town and Country Planning (Use Classes) Order.

Government department that deals with local government and planning

- Department of Communities and Local Government (DCLG) (refer to www.communities.gov.uk).

Planning Guidace

Planning policy is issued by the DCLG through a variety of formats. These are intended to provide concise and practical guidance on planning policies in a clear and accessible form (refer to www.communities.gov.uk).

National Planning Policy Framework (NPPF)

The National Planning Policy Framework is a key part of government reforms to make the planning system less complex and more accessible, to protect the environment, and to promote sustainable growth. It sets out the Government's planning policies for England and how these are expected to be applied. It covers 13 categories.

NPPF planning policy categories – some examples

- Delivering a wide choice of high-quality homes.
- Requiring good design.
- Promoting healthy communities.
- Protecting Green Belt land.
- Meeting the challenge of climate change, flooding and coastal change.
- Conserving and enhancing the natural environment.
- Conserving and enhancing the historic environment.

The NPPF was adopted in March 2012 and supersedes all previous planning policy guidance issued including the following (except, at the time of going to press, Mineral Policy Guidance (MPG) 4, 8 and 9 as well as Planning Policy Statement 10: Waste Management):

- National Policy Statements (NPSs).
- Planning Policy Statements (PPSs).
- Mineral Policy Statements (MPSs).
- Marine Mineral Guidance (MMGs).
- Regional Spatial Strategies.

Planning practice guidance

The Government has reviewed all previous planning guidance and reduced it to a single up-to-date web-based live resource on the Planning Portal (http://planningguidance.planningportal.gov.uk). There are currently 42 areas of guidance including the Community Infrastructure Levy, Flood Risk and Coastal Change, Environmental Impact Assessment, and Design. A new section on Health and Wellbeing has been introduced to encourage the consideration of physical activity as part of the plan-making process.

Circulars

Circulars provide non-statutory advice and guidance on particular issues to expand on subjects referred to in legislation. Circulars are used to explain policy and regulation more fully. Many circulars are quasi-legislative and include a direction or requirement to take specific action. Letters are used to provide key communication between central and local government.

Good practice guidance

This guidance is issued by the DCLG to augment policy and advise on the best way of achieving certain technical outcomes.

Wales

The National Assembly of Wales (NAW) was inaugurated following devolution in July 1999 under the Government of Wales Act 1998. Following the Yes vote in the 2011 referendum on law-making powers for the National Assembly, the Government of Wales Act 2006 enabled the Welsh Government to bring forward its own programme of legislation. This is made up of Assembly Bills as primary legislation with additional legislative vehicles enabling it to take policies forward. Powers over most areas of planning have now been devolved to the Welsh Government, excluding nationally significant infrastructure projects which are to be decided by the Planning Inspectorate.

Primary legislation

The Draft Planning (Wales) Bill

At the time of going to press the the Planning (Wales) Bill is moving through the National Assembly for Wales' legislative process before it can become an Act in 2015. The Bill proposes to modernise the planning system through changes to primary legislation, secondary legislation, policy and guidance. The Bill aims to move away from regulating development towards encouraging and supporting development.

- The Planning Act 2008 (NB, in planning terms, the Localism Act 2011 has limited application in Wales except for the abolition of Nationally Significant Infrastructure Projects which also applies to Wales).
- The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 and amendment 2008 (Wales only – the National Assembly for Wales has still to review and update).
- Planning and Compulsory Purchase Act 2004.
- Planning and Compensation Act 1991.
- Town and Country Planning Act 1990.
- Planning (Listed Buildings and Conservation Areas) Act 1990 (N.B. The Government of Wales is currently progressing the Welsh Heritage Bill 2013).

Subordinate legislation

Subordinate legislation is contained in Government Orders and Regulations (refer to www.wales.gov.uk for updates). For example: Town and Country Planning Development Management (Wales) Order 2012.

Government department that deals with local government and planning

- Local government and planning is Local Government and Communities (refer to www.wales.gov.uk).

Plainning guidance

The Government provides the following national planning guidance.

Wales Spatial Plan (Updated 2008)

The Wales Spatial Plan sets out the direction by which the country intends to enable sustainable spatial development.

The National Development Framework (NDF)

The NDF is a national land-use plan that will replace the Wales Spatial Plan under the Draft Planning (Wales) Bill.

Strategic Development Plans (Cardiff, Swansea and the A55 Corridor)

These are proposed under the Draft Planning (Wales) Bill for cross-boundary issues.

Planning Policy Wales (PPW) Edition 6, 2014

PPW provides a land-use planning policy framework for the effective preparation of development plans.

Minerals Planning Policy Wales (MPPW)

This sets out the land-use planning policy guidance in relation to mineral extraction and related development in Wales, and cancels parts of the Minerals Planning Guidance Notes. It is updated by Ministerial Interim Planning Policy Statements (MIPPSs). Both documents are supported by TANs and MTANs.

Ministerial Interim Planning Policy Statements (MIPPSs)

MIPPSs provide interim guidance on planning policy currently being reviewed in relation to the Planning Bill.

Technical Advice Notes (TANs)

TANs provide detailed planning advice on 24 subject areas. They are taken into account by local planning authorities when they are preparing development plans.

They should be read along with the Planning Policy Wales document, Ministerial Interim Planning Policy Statements (MIPPSs) and any circulars.

Mineral TANs (MTANs)

These cover minerals and are due to be reviewed and updated with the Planning Bill.

Minerals Planning Guidance Notes Wales (MPGW)

MPGW provide advice on minerals planning and were published between 1988 and 1995 by the then Welsh Office (WO) and the Department of the Environment (DoE). Ten of these remain partly in force.

NAW Circulars

Additional national guidance is provided through the medium of circulars. Circular letters are used to provide clarification of policy or procedure.

Scotland

The Scottish Parliament was formed following devolution in July 1999 under the Scotland Act 1998. The Scottish Parliament has primary and secondary legislative powers subject to compliance with EC law and section 29 of the 1998 Act relating to 'Reserved Matters', i.e. not acting outwith the competence of the Scottish Parliament.

Primary legislation

- The Planning etc. (Scotland) Act 2006.
- The Environmental Impact Assessment (Scotland) Regulations 2011.
- The Town and Country Planning (Scotland) Act 1997.
- Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, *amended by*
- Historic Environment (Amendment) (Scotland) Act 2011.

Subordinate legislation

Subordinate legislation is contained in Government Orders and Regulations (refer to www.scotland.gov.uk for updates). For example:

- Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009.
- Town and Country Planning (Use Classes) (Scotland) Order 1997.

Scottish Government Directorates that deal with local government and planning

- Governance and Communities (Local Government, Built Environment/ Planning) (refer to www.scotland.gov.uk).

Planning guidance

Planning guidance is issued by the Scottish Government. Its key priorities are promoting a plan-led system, driving improved performance, simplifying and streamlining, and delivering development. These are to be achieved not through changes to the legislation, but specifically through guidance, the NPF3 and SPP.

National Planning Framework (NPF3): June 2014

The NPF3 sets the context for development planning in Scotland and provides a framework for the spatial development of Scotland as a whole. It sets out the Government's development priorities over the next 20–30 years.

Scottish Planning Policy (SPP): June 2014

The SPP is a statement of policy on how nationally important land-use planning matters are addressed across the country. It sets out national planning policies which reflect priorities for operation of the planning system and for the development and use of land. It does not require approval by Parliament, unlike NPF3. It relates directly to

- the preparation of development plans;
- the design of development, from initial concept through to delivery;
- the determination of planning applications and appeals.

There is now a presumption in favour of sustainable development as a significant material consideration where plans are out of date or silent. It also for the first time includes mapping of 'wild land areas' and 'sensitive areas' which benefit from stronger protection. The SPP should be read alongside the NPF3, Government Policy Statements 'Creating Places', 'Designing Streets' and various circulars.

Planning Advice Notes (PANs)

PANs identify and disseminate good practice and provide more specific design advice of a practical nature. Subjects covered in PANs range from master-planning, community engagement, inclusive design, to housing in the countryside.

Circulars

These contain guidance on policy implementation through legislative or procedural change. In addition the Scottish Government provides a range of advice on different subjects and in different forms, including: Guides, Letters from the Chief Planner, Design Guidance and Specific Advice Documents/Sheets.

Northern Ireland

Devolution was restored to the Northern Ireland Assembly on Tuesday 8 May 2007. While the Assembly was in suspension, its legislative powers were exercised by the UK Government, which effectively had power to legislate by decree. Laws that would normally have been within the competence of the Assembly were passed by the UK Parliament in the form of Orders-in-Council, providing governing legislation, a form of secondary legislation under the Northern Ireland Act 2000, rather than legislative Acts.

Now the Assembly has both legislative powers and responsibility for electing the Northern Ireland Executive, which is the administrative branch of the Northern Ireland Assembly.

Primary legislation

- Planning Act (Northern Ireland) 2011.
- Planning Reform (Northern Ireland) Order 2006.
- Planning (Amendment) (Northern Ireland) Order 2003.
- Planning (Compensation, etc.) Act (Northern Ireland) 2001.
- Planning (Northern Ireland) Order 1991.
- The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2012.

Planning legislation is still based on Parliamentary Orders. The Planning (Northern Ireland) Order 1991 gave the Department of the Environment power to grant planning permission, prepare development plans and enforce development control. This was extended by the Planning (Amendment) (Northern Ireland) Order 2003, and the Planning Reform (Northern Ireland) Order 2006.

The Planning Act (Northern Ireland) 2011 provides the legislative basis to radically reform the planning system and for the transfer of planning powers from central Government to 11 new District Councils in April 2015. This includes development plan functions, development control and enforcement.

The Planning Bill was introduced to the Northern Ireland Assembly on 14 January 2013. It aimed to speed up reforms and modernise the planning system before the intended transfer of the majority of planning powers to local government in 2015. However the Bill was withdrawn in October 2013 following legal advice that restrictions proposed on judicial reviews would breach obligations under the European Convention on Human Rights.

Subordinate legislation

Subordinate legislation takes the form of Regulations and Orders made as statutory rules. These range from prescribing the fees for planning applications to the requirement, in certain circumstances, for specific environmental information to accompany planning applications (refer to www.northernireland.gov.uk for updates). For example:

- The Planning (Fees) (Amendment) Regulations (Northern Ireland) 2014.
- The Planning (Control of Advertisements) (Amendment) Regulations (Northern Ireland) 2014.
- The Planning (General Development) (Amendment) Order (Northern Ireland) 2014.

The Government departments that deal with local government and planning

(Refer to www.northernireland.gov.uk)

- Office of the First Minister and Deputy First Minister, for Department of Environment (includes planning of the built and natural environment)
- Department of Agricultural and Rural Development, Department for Regional Development.

Planning guidance

The Northern Ireland Executive, Regional Development Department and Department of Environment (DOENI) Planning Service provide both regional and local planning guidance and development control, although this will change with the implementation of the Planning Act (Northern Ireland) 2011. Planning Policy Guidance currently comprises the following documents.

The Regional Development Strategy (RDS) 2035, published 2012

This updates the previous strategy, 'Shaping our Future 2025', for the development of Northern Ireland up to 2035. It contains a Spatial Development Strategy and related Strategic Planning Guidelines prepared by the Department for Regional Development.

A Planning Strategy for Rural Northern Ireland, published 1993

This strategy establishes the objectives and policies for land use and development appropriate to the particular circumstances of Northern Ireland, and which need to be considered on a scale wider than an individual District Council Area. Planning Policy Statements (PPSs) are gradually replacing the policy provisions of the Planning Strategy for Rural Northern Ireland, and each PPS indicates those policies

of the strategy that it is superseding. Until it is completely superseded, the Planning Strategy remains in force for those topics not covered by a PPS or other policy publication and which, where still applicable, remain a material consideration.

Planning Policy Statements (PPSs)

Planning Policy Statements apply to the whole of Northern Ireland. They set out the main planning considerations that the Department of Environment NI takes into account when assessing proposals. They are relevant to the preparation of development plans and are material to decisions on individual planning appeals. The guiding principle in making decisions on planning applications is set out in PPS 1: General Principles. This states that development should be permitted, having regard to the development plan and all other material considerations, unless it would cause demonstrable harm to interests of acknowledged importance.

Draft Strategic Planning Policy Statement for Northern Ireland (SPPS)

The draft SPPS was published for consultation on 4 February 2014. This single policy document aims to consolidate more than 20 separate planning policy statements and is due for publication at the end of 2014.

Development Control Advice Notes and Design Guides

These contain detailed guidance for development control.

The European Spatial Development Perspective (ESDP)

> *'Towards Balanced and Sustainable Development of the Territory of the European Union.'*

Spatial development policies are intended to ensure the balanced and sustainable development of the territory of the European Union (EU) in accordance with the basic objectives of Community policy: economic and social cohesion, knowledge-based economic competitiveness complying with the principles of sustainable development, and the conservation of diverse natural and cultural resources.

Although it does not create further Community responsibilities as regards spatial planning, the European Spatial Development Perspective (ESDP) is a framework for policy guidance to improve cooperation among Community sectorial policies which have a significant impact in spatial terms. It was drawn up because it was found that the work of the Member States complemented each other best if directed towards common objectives for spatial development. It is an intergovernmental document which is for guidance and is not binding. In

accordance with the principle of subsidiarity, it is applied at the most appropriate level and as desired by the various parties engaged in spatial development.

The ESDP is designed to facilitate cooperation in EU sectorial policies which have a significant impact on territorial development. It is thus very much in line with the integrated approach that is the hallmark of European cohesion policy. Its aims remain core EU priorities as they are very closely linked to the targets of the EU 2020 strategy.

DEVELOPMENT PLANS

The role of development plans

A development plan is intended to provide the policy framework within which planning authorities exercise their planning powers. The plan also serves as a guide to landowners, developers and members of the public as to the local planning authority's main policies and proposals for the future use and development of land in their area.

In the devolved nations and England legislation places the emphasis on the role of the development plan in development decisions made by the Secretary of State and local authorities. Planning applications are required to accord with the development plan unless material considerations indicate otherwise. In addition, legislation requires development plans to include spatial planning, a sustainability appraisal, sustainable community strategy development and community involvement.

Development Plans in England

The current system in England: The Localism Act 2011

Development plans are now to accord with the National Planning Policy Framework 2012 which creates a single tier of development plans: the Local Plan including Neighbourhood Plans where appropriate.

The Localism Act 2011: Key Principles

The Act includes a wide range of reforms to planning and related legislation to create a more efficient and more local planning system.

The main elements of the Localism Act 2011 that affect planning

- The abolition of Regional Spatial Strategies.
- The abolition of the Infrastructure Planning Commission (its duties now are covered by the Planning Inspectorate).
- A new Neighbourhood Plan level of Local Development Plans.
- Local Enterprise Partnerships (LEPs) replace Regional Development Agencies (RDAs).

National Planning Policy Framework 2012: key principles

- Integrates the previous suite of policy statements and guidance (National Planning Statements, Planning Policy Statements, Planning Policy Guidance) into a single document and sets out the objectives of the new development plan system.
- Planning decisions must be taken in accordance with the development plan (Local Development Plans) unless material considerations indicate otherwise.

Local Development Plans (LDPs)

- Each local planning authority must produce a local plan for its area. Any additional development plan documents should only be used where clearly justified, i.e. to help applicants make successful applications or aid infrastructure delivery. They should not be used to add unnecessarily to the financial burdens on development.
- Local plans should address the spatial implications of economic, social and environmental change and set out the opportunities for development with clear policies on what will or will not be permitted and where.
- Local plans must be prepared with the objective of contributing to the achievement of sustainable development and be consistent with the principles and policies set out in NPPF. This includes the presumption in favour of sustainable development in relation to its economic, social and environmental dimensions, and net gains across all three.
- Early and meaningful engagement and collaboration with neighbourhoods, local organisations and businesses is required.
- Local councils have a statutory duty when preparing local plans to work with their neighbouring Ccuncils on strategic issues such as housing numbers, waste strategies and employment land allocations, to cover the gap left by the abolition of Regional Strategies.
- Local plans should demonstrate a five-year supply of sites for housing that must be deliverable and viable, and should be updated annually. It should also include a 5 per cent buffer of additional land (20 per cent if the local authority has a record of 'persistent under-delivery'). (Note that the new online Practice Planning Guidance (PPG) allows councils to include student accommodation and housing for the elderly as part of their housing supply.) Local planning authorities should set out the strategic priorities and policies for their area and plan positively for the development and infrastructure required to meet the objectives, principles and policies of the NPPF.

Local plans should:

- Be drawn up over an appropriate timescale (preferably a 15-year time horizon), take account of longer term requirements, and be kept up to date.
- Be based on cooperation with neighbouring authorities, public, voluntary and private sector organisations.

- Indicate broad locations for strategic development on a key diagram, and land-use designations on a proposals map.
- Allocate sites to promote development and flexible use of land, bringing forward new land where necessary, and provide detail on form, scale, access and quantum of development where appropriate.
- Identify areas where it may be necessary to limit freedom to change the use of buildings, and support such restrictions with a clear explanation.
- Identify land where development would be inappropriate, for instance because of its environmental or historic significance.
- Contain a clear strategy for enhancing the natural, built and historic environment, and supporting Nature Improvement Areas where they have been identified.

Neighbourhood Development Plans (NDPs)

Neighbourhood planning can be taken forward by two types of body – town and parish councils or 'neighbourhood forums'. Neighbourhood forums are community groups that are designated to take forward neighbourhood planning in areas without parishes. It is the role of the local planning authority to agree who should be represented on the neighbourhood forum for the neighbourhood area.

Neighbourhood forums and parish councils can use new neighbourhood planning powers to establish general planning policies for the development and use of land in a neighbourhood – legally termed Neighbourhood Development Plans (NDPs). These plans can focus in greater detail on the environment, housing, community, economy, traffic management and design issues that are pertinent to that community.

Neighbourhood Development Orders (NDOs) allow communities to use neighbourhood planning to permit the development they want to see (in full or in outline) without the need for planning applications. Cockermouth is the first town to propose NDOs which include the conversion of commercial properties in the historic core into cafés, bars and restaurants without the need for planning approval (June 2014).

Local councils will continue to produce development plans that set out the strategic context within which Neighbourhood Development Plans will sit. However NDOs can be produced before a local plan if there is sufficient evidence and information to support them.

To come into force, proposed Neighbourhood Development Plans or Orders need to gain the approval of a majority of voters of the neighbourhood in a referendum. If a proposal passes the referendum, the local planning authority is under a legal duty to bring it into force.

NDPs have to meet a number of conditions before they can be put to a community referendum. These ensure that plans are legally compliant and take account of wider policy considerations (e.g. national policy):

- They must have regard to national planning policy.

- They must be in general conformity with strategic policies in the development plan for the local area (i.e. such as in a core strategy).
- They must be compatible with EU obligations and human rights requirements.

Note on neighbourhood plans

By June 2014 14 Neighbourhood Plans had been adopted in England, with 1,000 more going through the neighbourhood planning process. The first business NDO was also being prepared for Milton Keynes at that time.

The outgoing system in England

The Planning and Compulsory Purchase Act 2004 set up a two-tier system of Development Plans.

Regional Spatial Strategies (RSSs): these dealt with the long-term strategic, spatial and integrated framework for a region. Following environmental assessment all Regional Strategies were revoked and abolished by Order (March 2013) using powers from the Localism Act.

Note on Regional Spatial Strategies

Regional housing targets have continued to have weight with inspectors considering local plans, on the grounds that they provide the only figures that have been scrutinized through the independent examination process.

The Local Development Framework (LDF): This is a non-statutory term for the portfolio of Local Development Documents (LDDs) that comprise the spatial planning strategy for a local planning authority area. An LDF must include Development Plan Documents (DPDs) such as:

- *A Core Strategy* – Sets out the spatial vision, strategic spatial objectives and core policies of the local planning authority's area. A core strategy is the only development plan document that is mandatory.
- *Site-Specific Land Allocations* – Set out the allocation of land for specific uses which are separate from the core strategy.
- *Adopted Proposals Map* – Illustrates all site-specific policies and identifies areas of protection.
- *Area Action Plans (AAPs)* – Focus on a specific location or an area subject to conservation or significant change.
- *Other DPDs* – Prepared for particular topics such as affordable housing or retail development.
- *Generic Development Control Policies* – Policies which set out criteria against which planning applications will be considered.

In addition to the DPDs listed the LDF portfolio also contains:

- A Local Development Scheme (LDS) – a programme for local development documents.
- A Statement of Community Involvement (SCI).
- An Annual Monitoring Report (AMR).
- Supplementary Planning Documents (SPDs).
- Simplified Planning Zones (SPZs).
- Local Development Orders (LDOs).

Transition period and progress

By March 2013 (12 months after the publication of NPPF) Councils without an up-to-date local plan, i.e.

> *'absent, silent or indeterminate or where relevant policies are out of date'*

would see their planning applications judged by their degree of conformity to the NPPF. All current plans require a new certificate to confirm that they are consistent with NPPF, or must be amended to accord with the Framework. New plans have to be examined by planning inspectors to ensure conformity with the NPPF.

The key areas that will be assessed are:

- *Presumption in favour of sustainable development* – Does the plan positively seek opportunities to meet the development needs of the area and is it flexible enough to adapt to rapid change?
- *Housing delivery* – Does the plan address five or more years of specific deliverable sites with a 5 per cent buffer? If the council has a record of persistent under-delivery they will require a buffer of 20 per cent.

Note on transition period and progress

- By May 2014 only 57 per cent of Councils in England had an adopted plan; 17.6 per cent were still without an adopted plan, and the remaining percentage were going through the examination process.
- There have been calls for a Parliamentary Inquiry on the effectiveness of the NPPF in terms of the requirement for a five-year land supply for housing, the duty to cooperate and the loss of a sub-regional planning structure.
- LEPs have now agreed to take on a role in monitoring councils' progress in bringing forward local plans in their areas.

The Welsh Development Plan System

NAW prepared 'The Wales Spatial Plan', updated in 2008. It was the first spatial strategy in the UK. It provides a blueprint for local authorities developing their own strategies for the next 20 years. It covers the traditional definition of planning through directing land use and planning, but extends into other areas with spatial implications including health, social, economic, environmental, transport and education issues. The plan identifies six distinctive areas within Wales, each of which has an area group to develop projects and oversee implementation.

Local Development Plans (LDPs)

Part 6 of the Planning and Compulsory Purchase Act 2004 reformed the Welsh development plan system. The plans themselves are simpler, more concise than the previous Unitary Development Plans (UDPs), and are called Local Development Plans (LDPs). Every local planning authority in Wales has a statutory duty to prepare a local development plan within the framework set by national planning policy in Planning Policy Wales. This also must take account of the Wales Spatial Plan which provides the strategic context for local authority development plans.

LDPs provide the proposals and policies to control development of the local area for the next 15 years. They focus on objectives for the use and development of land and include general policies (with scope for more detailed policies in key localities). They include specific land allocations and detailed proposals which are illustrated on a proposals map.

Once the Local Planning Authority (LPA) has prepared the LDP, it is examined by an independent planning inspector to consider the 'soundness' of the plan, with hearings held in public.

Once the LDP has been adopted, the LPA must prepare an Annual Monitoring Report (AMR) demonstrating how the plan is delivering against its objectives. They must complete a full review every four years to ensure the plans stay up to date. LPAs must publish a Delivery Agreement at the start of the community engagement process which sets out the key stages and when people can get involved.

Planning applications must be decided in accordance with the adopted Local Development Plan unless material considerations indicate otherwise.

Note on the Draft Planning (Wales) Bill

At the time of going to press the the Planning (Wales) Bill is moving through the National Assembly for Wales' legislative process before it can become an Act. The Bill proposes to modernise the planning system through changes to primary legislation, secondary legislation, policy and guidance. New proposals include:

- *National Development Framework (NDF)* – to replace the Wales Spatial Plan.
- *Strategic Development Plans (SDPs)* – for cross-boundary issues.

Development plans in Scotland

Scotland's National Planning Framework (NPF3), June 2014

The NPF sets the context for development planning in Scotland and provides a framework for the spatial development of Scotland as a whole. It sets out the Government's development priorities over the next 20–30 years and identifies 14 national developments which support the development strategy. It provides guidance on the country's four city-region strategic development plans as well the preparation of local development plans and development decisions. The NPF3 focuses on sustainability, community benefit and a low-carbon economy. It also for the first time includes mapping of wild land.

The first National Planning Framework was brought in by The Planning etc. (Scotland) Act 2006. This introduced radical changes to the planning system which included the replacement of Structure Plans by Strategic Development Plans (SDPs) and the introduction of Local Development Plans (LDPs) across the whole of Scotland.

Strategic Development Plans (SDPs)

SDPs are prepared for strategic development plan areas (Aberdeen City and Shire; Tay – Dundee, Perth, Angus and North Fife; Edinburgh and South East Scotland; Glasgow and the Clyde Valley). Areas that lie outwith these boundaries are subject to single-tier Local Development Plans.

Planning authorities that are located within the SDP Areas are required together to form a Strategic Planning Development Authority (SPDA) to establish a common approach to matters that extend beyond an individual authority's boundary.

SPDAs prepare the SDPs which include:

- *A vision statement* – a broad statement of strategic development.
- *A spatial strategy* – a broad statement of proposals as to the development and use of land within the Strategic Development Plan area. These proposals focus on key land-use and strategic development matters such as the provision of housing market areas and travel-to-work areas.
- *Key maps and diagrams* and descriptive text for the area.

The SDPs consider the population, physical, economic, social, environmental and infrastructure (waste, water and transport) features of an area and any changes proposed. They are prepared in accordance with the National Planning Framework and contribute to sustainable development. Key agencies and each planning authority within the SDP area must be consulted in their preparation. The plan may be subject to a separate examination prior to final approval by the Scottish Government. Once approved it is published and advertised and must be reviewed on a five-yearly basis.

Local Development Plans (LDPs)

LDPs are prepared for a local authority area and contain:

- *A vision statement* (only if the area is not within a Strategic Development Plan area) – a broad statement of the planning authority's views as to how development should occur.
- *A spatial strategy* – a detailed statement of the policy and proposals as to the development and use of the land in the district.
- *Key maps and diagrams* for the area.

The LDPs are to consider the population, physical, economic, social, environmental and infrastructure (waste, water and transport) features of an area and any changes proposed.

The plans are to be prepared in accordance with the National Planning Framework or the Strategic Development Plan where relevant. Different LDPs may be prepared for different purposes for the same part of any district.

Key agencies and each planning authority department within the LDP area must be consulted in the preparation of LDPs. The plans may be subject to a separate examination prior to final approval by the Scottish Ministers. Once approved they are published and advertised. They must be prepared and reviewed on a five-yearly basis.

Development Plan Schemes (DPSs)

Local planning authorities must prepare a Development Plan Scheme which provides a timetable for preparing and reviewing the Strategic or Local Development Plans, and an Action Programme which sets out how the authority proposes to implement the Development Plan Scheme. They should include a consultation statement prior to final adoption of the plan.

Preparation process of SDPs and LDPs

Strategic Development Plans and Local Development Plans go through similar processes of preparation. The key stages are:

- Main Issues Report.
- Proposed plan.
- Modifications.
- Submission to Scottish Ministers.
- Examination.
- Approval/refusal (Strategic Development Plans) or adoption (Local Development Plans).

Development plans in Northern Ireland

The Planning Act (Northern Ireland) 2011 is enacted with a programme for implementation by 2015. It includes a reform of development plans and policy as well as development control, before the intended transfer of the majority of planning powers to local government in 2015. The current hierarchy of current planning documents includes the following.

The Regional Development Strategy (RDS) 2035

The RDS is a strategy for Northern Ireland up to 2035. It contains a Spatial Development Strategy and related Strategic Planning Guidelines which provide the planning context for:

- Social and economic growth.
- Protecting and enhancing the environment.
- Housing, transport, air and water quality, energy, waste strategies and infrastructure.

All planning policy and plans must now be 'in general conformity' with the strategy.

Development plans

The Department of the Environment (DOENI) has a statutory power, laid down in the Planning (Northern Ireland) Order 1991, to make a development plan for any area. Development plans apply the regional policies of the Department at the appropriate local level, and inform the general public, statutory authorities, developers and other interested bodies of the policy framework and land-use proposals that will be used to guide development decisions within their local area.

Development plans may be in the form of:

- *Area plans* – cover a large area such as a whole District Council, or group of Councils;
- *Local plans* – cover an area within a District Council, such as a town centre; *or*
- *Subject plans* – cover a particular issue rather than geographical area, such as houses of multiple occupancy.

The Department is required to ensure that development plans are in general conformity with the Regional Development Strategy and are prepared in accordance with Planning Policy Statement 1: General Principles. Development plans are one of a number of planning documents taken into account in making decisions on planning applications.

DEVELOPMENT CONTROL

The meaning of development

Current planning law is set out in primary legislation as noted above. Detailed explanation and interpretation of development is given in the General Permitted Development Order (GDPO) 1995, revised in 2003. In Scotland, the current GPDO dates from 1992.

In the Acts, permission is required for any development of land. The following definitions are given, originally set out in the Town & Country Planning Act 1947 and still valid.

Development

The carrying out of building operations, engineering operations, mining operations or other operations in, on, over or under land or the making of any material change in the use of any buildings or other land.

Building operations

Building operations include rebuilding, structural alterations or additions of buildings and other operations normally undertaken by a person carrying on business as a builder. Demolition, reconstruction and certain other similar operations are also included under building operations.

Under the Planning etc. (Scotland) Act 2006 the meaning of development was extended to include works inside a building in order to control gross floor space. As a result, insertion of mezzanine floors in retail units (supermarkets) may now require consent.

Building

'Building' is defined as any structure or erection and any part of a building, structure or erection, but does not include plant or machinery comprised in a building, structure or erection. Under the Town and Country Planning Act (General Permitted Development) Order 1995 and amendments to 1999, gates, fences, walls or other means of enclosure are also expressly excluded from the definition of building.

Engineering operations

These are the formation or laying out of means of access to highways and 'means of access'. This includes any means of access, public or private for vehicles or foot passengers and includes a street. Also included are bridge building, installation of fuel storage tanks, etc. and anything that results in some physical alteration of land, an alteration that has some degree of permanence in relation to the land itself.

Mining

Mining was not defined in legislation until 1992, but minerals were partially defined in the 1971/1972 Acts and include all minerals and substances in or under land of a kind ordinarily worked for removal by underground or surface working. Mineral includes: sand, gravel, top soil, clay, peat, stone and mineral ores.

Under the Town and Country Planning (Minerals) Act 1981 and confirmed by the Town and Country Planning Act 1990, the scope of mining was extended to include:

- Removal of material of any description:
  - from a mineral deposit;
  - from a deposit of PFA or furnace ash or clinker;
  - from a deposit of iron, steel or other metallic slag.
- Extraction of mineral deposits from a disused railway embankment. 'Mineral deposit' includes any deposit of material remaining after minerals have been extracted from land.

Under the Town and Country Planning (General Permitted Development) (Scotland) Order 1992, with subsequent amendment, the actual process of mining operations was defined as: 'The winning and working of minerals in, on, or under land whether by surface or underground working'.

Other operations

These are operations in the context of or in association with building, engineering or mining.

Material change of use

'Use' refers to activities which are done in, alongside or on the land, but which do not interfere with the actual physical characteristics of the land. A change of use constitutes development only if it is material from a planning point of view. 'Materialness' is a matter of fact and degree, i.e.

- Will the change of use materially alter the character of land or buildings?
- Where an existing use is intensified, does this alter the character of land or buildings?
- If character is only partly affected, is the change material for some other reason, e.g.
  - the burden on services is substantial,
  - it has a major effect on the neighbourhood.
- Is the purpose of the change of use incidental to the existing use?
- Will the change of use affect only a proportion of the whole site?
- Whether or not 'established use' rights have been lost or abandoned;
  - extinguishment: if a building is destroyed 'use rights' attached to it are also extinguished;

  - abandonment: can it be demonstrated that use has been properly discontinued?
- Change from one use class to another.

'Use classes' refers to a classification of uses of all land into 16 different types. This was most comprehensively set out in the Town and Country Planning (Use Classes) Order 1987, SI 1987 No. 764 as amended, and in Scotland under the Town and Country Planning (General Development) (Scotland) Order 1997 (SI 1997:3061).

The Use Classes Order is a detailed list of definitions, e.g. a basic definition of the expression 'business use' followed by more refined definitions of 'light industrial building', 'general industrial building' and 'special industrial building'. Words like 'office' and 'shop' are also defined. The underlying idea is to distinguish between activities according to their impact on amenity, infrastructure, society and the economy.

Examples of use classes

A1	Shops
A2	Financial and Professional Services
A3	Food and Drink
B1	Business
B2	General Industrial Use (including special uses)
B8	Distribution or Storage Centre
C1	Hotel or Hostels
C2	Residential Institutions
C3	Dwelling House
D1	Non-Residential Uses, such as medical or health services
D2	Assembly and Leisure

Example applications of the change of use idea

Change of use from a bookshop to a travel agency would not be considered to be 'development' unless the planning authority said it does by Order, but change of use from a bookshop to a shop selling hot food may well be 'development' because hot food is excluded from Class A1.

Not all uses are in a class and these are referred to as *sui generis*. Examples include theatres, sculptors' studios, a students' hostel. Applications for these activities would be dealt with on merit and context.

In England, with effect from 2005 the A3 class order was split into three separate categories: restaurants and cafés (A3), drinking establishments (A4) and hot food takeaway outlets (A5). Planning permission is required to convert any

building into a night club. The intention is to give local planning authorities more influence over the evening economy.

The classification in the Town and Country Planning (General Development) (Scotland) Order 1992 differs slightly from England: as in Northern Ireland, there are 11 categories. The English classification generally applies in Wales but there are differences: for instance, the division of class A3 described above has not taken place.

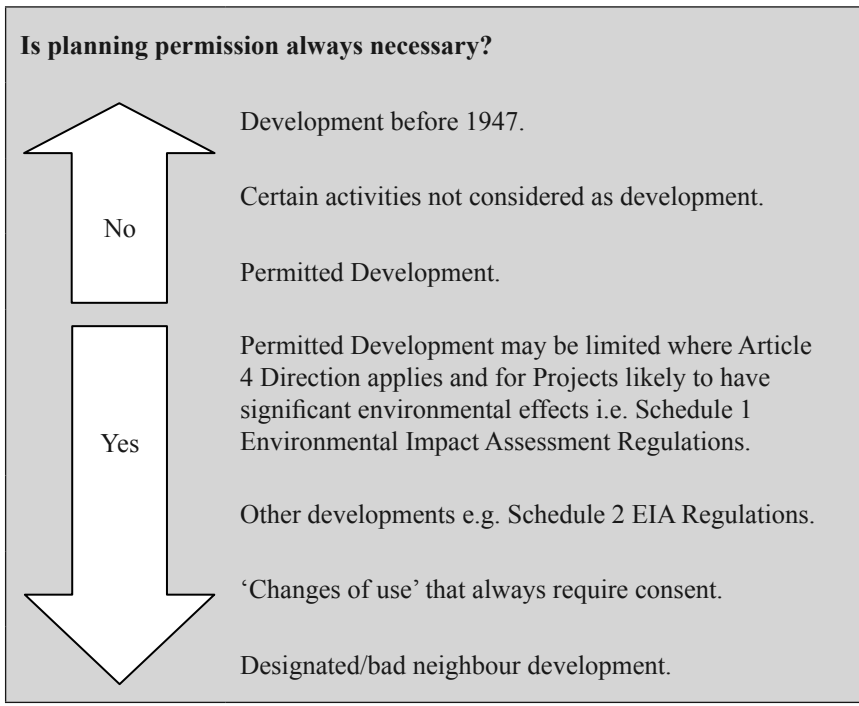
Note that there are two classification lists, the Use Classes list above and Classes of Permitted Development (later). They are not the same.

IS PLANNING PERMISSION ALWAYS NECESSARY?

Introduction

Planning permission is not always necessary. Exempt from permission are developments which took place before 1947 and certain activities 'not considered to be development'. Other activities are deemed to be 'permitted development' and no formal application is usually necessary.

However, some developments always require planning permission: these are certain changes of use, 'Designated' and 'Bad Neighbour' developments and developments covered by Annex 1 of the Environmental Impact Assessment Regulations.



Between permitted development and those proposals always requiring consent is a mass of developments which a planning authority will assess individually on merit. These include proposals covered by Annex 2 of the Environmental Impact Assessment Regulations. These distinctions are described further below.

The definition of development includes the surface of land, the ground beneath and the air above. The Planning etc. (Scotland) Act 2006 allowed Scottish Ministers to extend planning control over marine development out to a distance of 12 nautical miles. This was intended to enable control over fish farms outside inland waters. Fish farms in UK inland waters (3 miles) are already controlled under the 1997 Planning Act.

Certain activities are not considered to be development

- Works to the interior of a building or works that do not materially affect its external appearance. Note that putting in windows or doors and works below ground internally may constitute development.
- Maintenance or improvement to highways by the local authority.
- Breaking open of streets for inspection, repair, etc., of sewers, cables etc., by local authority or statutory undertaker.
- Use of land, building etc., within the curtilage of a dwelling house for purposes incidental to the enjoyment of a house. This does not include putting up buildings in the first place, i.e. a new building does require planning permission.
- Use of land and buildings for forestry or agriculture. New buildings are not included here though they may be 'permitted development'. Agriculture includes horticulture, fruit growing, the use of land for market gardens and nursery grounds. Glass houses count as agricultural buildings for the purposes of planning control. Use of land for importing or wholesale distribution of containerised trees and shrubs, including growing on trees for landscape work, is considered to be an agricultural activity. Planning permission is always required for farm dwellings. In the open countryside planning permission is normally granted only in exceptional circumstances, for example, if it is essential for a farm worker to live in the immediate vicinity of the workplace in order to attend to livestock. If permission is granted in such circumstances, it is usually conditional on the dwelling being kept available to meet that agricultural need.
- Change of use within a use class.
- The formation of hard-standings, except in conservation areas.
- The formation of a means of access to a road which is not a trunk or classified road, except in conservation areas.
- The installation of solar panels and Velux windows on up to 10 per cent of a roof area, except in conservation areas.
- Developments in Enterprise Zones, Simplified Planning Zones and Special Development Orders (New Towns).

Permitted development (PD)

To reduce the burden on planning authorities, the government introduced the concept of developments which are permitted without the necessity of formal application for planning consent. These are usually small-scale and relatively uncontroversial. Such development is known as 'permitted development' and is described in the General Permitted Development Order (GPDO) 1995. This GDPO has been amended by England, Scotland and Wales and the detail of PD in all UK nations is gradually diverging. However, permitted development still includes the following examples:

- Limited enlargement or improvement of a dwelling house.
- Forming, laying out and construction of a means of access to a minor road except where this caused a hazard or obstruction. Note that from 1 October 2008, Government changed the GPDO, making the hard surfacing of more than $5m^2$ of domestic front gardens permitted development only where the surface in question is rendered permeable. Use of traditional materials, such as impermeable concrete, where there was no facility in place to ensure permeability, requires an application for planning permission.
- Painting the exterior of a building or work other than for purposes of advertisement, announcement or direction.
- 31 classes of permitted development were listed, some of which are shown in Table 7.1.

As noted, details of permitted development change from time to time. For instance, installation of garden decking or patios now may require permission if they are judged as substantial enlargement of a dwelling or have significant visual impact or compromise the amenity of neighbours. Note also that section 215 of the Town and Country Planning Act 1990 authorises required tidying up of a back garden or building if it adversely affects a neighbour's amenity.

For the purposes of planning, contact with the local planning authority is generally only necessary before carrying out permitted development where:

- *Prior approval* from the local planning authority is required in advance of development e.g. for demolition.
- The neighbour consultation scheme applies.
- The local planning authority has a Community Infrastructure Levy in place which requires developers to contact the local planning authority before carrying out permitted development. Failure to do this may result in the local planning authority imposing a surcharge on a developer.
- Permitted development rights require the developer to notify the local planning authority of a change of use.

The relevant parts in Schedule 2 to the General Permitted Development Order set out the procedures which must be followed when advance notification is required.

Table 7.1 Some classes of permitted development

Class	*Description (a selection)*
Class I	Development within the curtilage of a dwelling house. This includes summer houses, tool sheds, etc., provided that they meet height, distance and location requirements. National parks; areas of natural beauty and conservation areas are excluded.
Class II	Gates, fences below 1m high adjoining a vehicular highway; less than 2m high elsewhere.
Class III	Change of use within the same use class.
Class IV	Temporary buildings and uses.
Class VI	Agricultural buildings and works. *(see note on prior notification below)*
Class VII	Forestry buildings and works.
Class VIII	Development for industrial buildings.

Permitted development in England

In 2014 the Coalition government published Statutory Instrument 2014 Nos. 564 and 565 describing changes to permitted development rules which would allow conversion of retail or agricultural premises into residences and agricultural to educational premises. Despite being publicised as liberating, SI 564 and SI 565 show these changes are strictly controlled. For example, the local planning authority may consider the impact of such change of use on transport and highways impacts, contamination risks, flooding risks, the design and external appearance of the building, and undesirable impacts on shopping facilities before making a decision. Conversion is limited to premises of less than 150m^2 and the new PD rights do not extend to National Parks, the Broads, Areas of Outstanding Natural Beauty, Conservation Areas, World Heritage Sites and certain areas specified under the Wildlife and Countryside Act 1981.

See http://www.legislation.gov.uk/uksi/2014/564/pdfs/uksiem_20140564_en.pdf.

Permitted development in Northern Ireland

The Planning (General Development) Order 1993 as amended, gives permission for certain types of development. The Order gives the Planning DOE the power to remove or limit permitted development rights in protected or sensitive environments such as conservation areas or AONBs and for development where an Environmental Impact assessment is required. PD rights may also be removed through conditions attached to planning permission.

Permitted development in Scotland

In 2011–2012 the Town and Country Planning (General Permitted Development) (Scotland) Amendment Order 2011 changed the TCP (GPD) (Scotland) Order 1992 classes for telecommunications and demolition with effect from 21 November 2011. Householder permitted development rights changed with effect from 6 February 2012.

Planning permission is required where demolition of non-residential buildings or associated development is likely to have significant environmental impact and merits an EIA (i.e. the impact has wider than local importance or is in an environmentally sensitive area). Permission is still required to demolish listed buildings, residential properties and associated non-residential buildings.

The Town and Country Planning (General Permitted Development) (Scotland) Amendment Order 2014 made changes to existing classes and added new classes. For instance existing telecommunications aerials may be heightened (within limits) without consent. A new class allows PD rights for construction or alteration of access ramps intended to improve disabled access to non-domestic buildings.

Article 2(8) substitutes a new class 25 in Part 8 (industrial and warehouse development). The new class introduces new restrictions and conditions to permitted development. The provision of a hard surface within the curtilage of an industrial building or warehouse is not permitted where the development would take place on land within the following – a site of archaeological interest, a national scenic area, historic garden or designed landscape, a historic battlefield, a conservation area, a National Park or a World Heritage Site. In addition the hard surface must be made of porous materials and provision must be made for water run-off to a porous surface.

Permitted development in Wales

The Town & Country Planning General Permitted Development Order (GPDO) 1995 applies, but there are some differences to England. For instance the recent change to allow retail unit (class A1) or financial/professional services unit (class A2) to be converted into residential use without planning permission has not been made in Wales to date.

Prior notification (UK)

Prior notification is a term and process which applies to agricultural and forestry developments permitted under Parts 6 and 7 of the Town and Country Planning General Development Order 1995 to agricultural units of 5 hectares or more for:

- building, significant extension or significant alteration of a building;
- formation or alteration of a private way;
- carrying out of certain excavations and waste disposal;
- placing or assembly of a tank or cage for use in fish farming in any waters.

This applies also to *forestry* land:

- building, significant extension or significant alteration of a building;
- formation or alteration of a private way;
- proposed road;
- proposed excavation/deposit of waste;
- building a fish tank.

Anyone proposing to carry out such development must apply to the planning authority in advance for a determination as to whether the authority's prior approval of certain details is required.

In England from 1 June 2013, prior approval was extended to other land uses and now permits several controversial changes of use:

- Premises in B1(A) office use may change to C3 residential use subject to 'prior approval' covering flooding, highways and transport issues and contamination.
- Premises in B1, C1, C2, C2A, D1 and D2 will be able to change permanently to a state-funded school.
- Small agricultural buildings will be able to change to shops, businesses, hostels or hotels.
- Temporary change of use will be permitted for some offices, business uses and non-residential uses to encourage start-ups.

This change to prior approval could have major effects locally. If, say, an industrial estate with office premises accumulates many homes, then there may be pressure on other services to be amended including bus routes, refuse collection, the provision of schools and leisure facilities – all of which would normally be addressed through the normal planning process including the formation of local plans.

Article 4 direction (UK)

This refers to Article 4 of the Town and Country Planning (General Permitted Development) Orders by which, in the UK as a whole, permitted development rights can be removed by the Secretary of State or the local planning authority. These are usually applied in designated areas of architectural or historic interest, i.e. Conservation Areas, National Parks, Areas of Outstanding Natural Beauty (AONB), Areas of Great Landscape Value (AGLV) and Sites of Special Scientific Interest (SSSI) where stricter powers of control are desirable. Article 4 directions are confirmed by the local planning authority, but in England and Wales (not in Scotland) they must be notified to the Secretary of State in England or Welsh Ministers who have powers to modify or cancel most Article 4 directions at any point.

Table 7.2 Use of Article 4 direction

Designated sites	*England*	*N Ireland*	*Scotland*	*Wales*
National parks	*	✓	✓	✓
SSSI, NNR, SAC, SPA, Ramsar	✓	✓	✓	✓
AONB, National Scenic Areas	*	✓	✓	✓
Conservation Areas	✓	✓	✓	✓
Local green space	✓			
Heritage Coast	✓			✓
Locations at risk from flooding or coastal erosion	✓			✓
Designated heritage assets:				
World Heritage Sites	✓	✓	✓	✓
Scheduled monuments	✓	✓	✓	✓
Protected wreck sites	✓	✓	✓	✓
Battlefields	✓	✓	✓	✓
Grade I or Grade II* listed buildings, parks and gardens	✓	✓	✓	✓

*Note that in England since 2010, National Parks and AONBs have been excluded from the planning definition of designated sites.

Changes of use that always require consent

The first two items of the list below refer to the earliest function of local authorities in the UK to protect public health. The first is intended to prevent overcrowding and sub-division of houses into inadequate dwellings and the second is to control the deposit of waste.

- Separation of a building into two or more separate dwelling houses.
- Deposit of refuse or waste material on land already used for this purpose which enlarges the surface area or increases the height above the land adjoining the site.
- Display of advertisements on any external part of a building not normally used for that purpose. In this case you need to refer to the Advertising Regulations, Town and Country Planning (Control of Advertisement) Regulations 1992.
- Fish farms.

Designated development (England and Wales)/bad neighbours (Scotland)

What are designated developments/bad neighbours? Land uses with a significant impact on the character of an area, the nature and intensity of traffic, noise and disturbance at unsocial hours, or with risks for public health and safety:

- Public conveniences.
- Disposal of refuse or waste, scrap yards, coal yards, winning or working of minerals.
- Construction of buildings or other operations or use of land for retention, treatment or disposal of sewage, trade waste or sludge.
- Construction of buildings to a height exceeding 20m.
- Slaughter house, knacker's yard, building for killing or plucking poultry.
- Casino, fun fair, bingo hall, theatre, cinema, music hall, dance hall, skating rink, swimming bath, gymnasium (not part of a school, college or university), Turkish or other vapour or foam bath.
- Zoo, breeding or boarding dogs or cats.
- Motor car, motor cycle racing.
- Cemetery.
- Construction of buildings, operations, use of land which will affect residential property with fumes, noise, vibrations, etc; alter the character of an established amenity; bring crowds to a generally quiet area, cause noise and activity between 8pm and 8am and introduce significant change into a homogeneous area. (A catch-all category.)
- Licensed premises, hot food shops, specific leisure-related premises, tall buildings and operations during 'unsocial hours' (in Scotland from 2008).

Full planning permission and advertisement, consultation and consent are required beyond the usual case. Press advertisements are mandatory and since 1984, have been placed by the local planning authority.

In Scotland 'bad neighbour' developments are defined in Schedule 3 of The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 (Originally in Schedule 2 of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992). The requirements for advertisement are listed in Schedule 2 of the Town and Country Planning (General Permitted Development) (Scotland) (Order) 1992.

How would you decide if your project required planning permission?

- Study the local planning authority's plans and policies.
- Consider the definition of 'development'.
- Is it 'permitted development' or 'not considered to be development'?
- Is the project nationally significant, 'major' or of local interest only?
- Is the site sensitive for its location, species or habitat?

Nationally Significant Infrastructure Projects (NSIP) – England

Successive governments have tried different methods of dealing with big projects of national strategic importance. The Labour Government of 1997–2010 passed the Planning Act 2008 which created the Infrastructure Planning Commission (IPC)

to deal with consents for development for energy, transport, water, waste water and waste of national significance in England and Wales. It applied in Scotland only for pipelines where one end is in Scotland. Most of these developments were formerly outside the normal planning consent procedure and were assessed by specially commissioned public inquiries. Some projects, such as new railways and ports required consent in the form of special Acts of Parliament. The Coalition Government abolished the IPC on 1 April 2012 through the Localism Act 2011 and transferred its functions to the Planning Inspectorate.

NSIPs require a type of consent known as 'Development Consent' under procedures governed by the Planning Act 2008 (as amended by the Localism Act 2011). The 2008 Act set out thresholds above which certain types of infrastructure development are considered to be nationally significant and require development consent.

The Planning Inspectorate examines applications for Development Consent from the energy, transport, waste, waste water and water sectors. The Growth and Infrastructure Act 2013 extended this regime to some business and commercial projects. In Wales, it examines applications for energy and harbour development, subject to detailed provisions in the Act; other matters are for Welsh Ministers.

Any developer wishing to construct an NSIP must first apply for consent to do so. For such projects, the Planning Inspectorate examines the application and will make a recommendation to the relevant Secretary of State, who will make the decision on whether to grant or to refuse development consent (Development Consent Order, DCO). A DCO automatically removes the need to obtain several consents that would otherwise be required for development including planning permission and compulsory purchase orders. The idea is to have a quicker process (about 15 months) for large-scale projects to obtain the necessary consents, rather than obtain each separately. However when the Growth and Infrastructure Act 2013 repealed provisions of the Planning Act that applied a Special Parliamentary Procedures mechanism to major infrastructure projects regarding compulsory acquisition of land that was holding up decision-making on major infrastructure project, it may also have reduced parliamentary oversight of the process.

The Coalition Government has published the National Infrastructure Plan 2013 which announced a 'top 40' priority investment for the NSIP regime, which may also allow projects that would not normally be caught by the 2008 Act threshold to use the DCO process. This is targeted at science and innovation.

Applications for a DCO may include a number of options, but 'options should only be included in exceptional cases where, following full public consultation and environmental assessment, the alternative options are finely balanced or public opinion is polarised'.

Refinement of the NSIP process continues: a discussion document proposed clearer guidance on engagement between developers, statutory consultees, local authorities and communities.

Nationally Significant Infrastructure Projects – Northern Ireland

There are three categories of development:

- Major development: multiple housing, commercial and government and civic types of development. These are NSIP under Article 31 of the Planning (NI) Order 1991.
- Intermediate development: single dwellings.
- Minor development: mainly residential alterations and extensions.

NSIPs/major developments have regional significance and are processed by the Strategic Planning Division in the Planning DoE. Intermediate and minor development is dealt with by the Local Planning Division.

Hierarchy of development – Scotland

A hierarchical approach to development control based on scale was formally introduced into UK law by Scottish legislation and came into effect in Scotland only from 3 August 2009. Under the Planning etc. (Scotland) Act 2006 development is in three categories – national, major or local – which are subject to different procedures for submission, processing and determination depending on the category in which they fall.

National developments

A small number of developments designated under the National Planning Framework are regarded by Scottish Ministers as of national strategic importance.

Major developments

A small range of the largest planning applications are not of national importance, but are identified in development plans. The period for decisions will be four months instead of two. All national and major developments will need pre-application consultation with communities, including consultation with community councils for applications submitted on and after Monday 3 August 2009. A 'Proposal of Application Notice' will need to be submitted at least 12 weeks before the submission of a national or major planning application.

Local developments

Everything else falls in this third category: in addition, local developments are decided by local planning officers under a 'scheme of delegation' while larger or more complicated proposals will be decided by elected members in committee. The decision period remains as two months.

Nationally Significant Infrastructure Projects – Wales

In Wales the development consent process for NSIPs established in the Localism Act 2011 applies only to developments where responsibility had previously been the remit of the UK Government. These are energy projects over 50 Megawatts onshore or over 100 Megawatts offshore, major electricity lines, cross-country pipelines, underground gas storage and some types of harbour development. Consent for 'associated development' (such as an electricity sub-station associated with a new power station) is processed by the local planning authority rather than the Planning Inspectorate because of the devolution settlement.

NSIPs in all the home nations are government approved and therefore discussion with local planning departments should be only about details.

Major developments

The four home nations have different definitions of the term 'major development' (see Table 7.3).

SPECIAL DEVELOPMENT AREAS AND AGENCIES

These concern areas not classified as development, subject to less stringent control, covered by special rights/consents, or with a special agency set up to promote regeneration. They vary in their coverage in the UK.

Special development areas and agencies

- Local Enterprise Partnerships.
- Urban Development Areas and Corporations.
- Enterprise Zones.
- Simplified Planning Zone Schemes.
- Local Development Orders.
- Business Improvement Districts.
- Development Consent Orders.

Local Enterprise Partnerships (LEPs) (England only)

Local Enterprise Partnerships are partnerships formed between local authorities and businesses to help determine local economic priorities and lead economic growth and job creation within a local area. Established in 2011, they carry out some of the functions previously carried out by the nine Regional Development Agencies which were abolished in March 2012 by the Government's Localism Act.

Local Enterprise Partnerships are not defined by legislation but are intended as locally owned partnerships between local authorities and businesses. They are

Table 7.3 'Major development' defined by nation

Development of:	*England*	*Scotland*	*Wales*	*N Ireland*
Minerals	✓	✓	✓	✓
Waste	✓	✓	✓	✓
Dwellings (number)	≥10	≥50	≥10	✓
Dwellings (hectares)	≥0.5	≥2.0	≥0.5	
Buildings (m^2)	≥1,000	≥10,000	≥1,000	
Development (hectares)	≥1	≥2	≥1	
Commercial, government and civic development				✓
Substantial departure from development plan				✓
Significant to all or a substantial part of N. Ireland				✓
Affect the whole of a neighbourhood				✓
Involve access to trunk road or motorway				✓
EIA Schedule 1 development	✓	✓	✓	✓
Electricity generation onshore (capacity in MW)		≥20	≤50	
Electricity generation offshore (capacity in MW)		≥1-50	≤100	
Fish farming (hectares)		≥2		

Sources: The Town and Country Planning (Development Management Procedure) (England) Order 2010 (Pt. 1 (2)); Scottish Government Circular 5/2009 Hierarchy of Developments; The Town and Country Planning (Development Management Procedure) (Wales) Order 2012 (Pt. 1 (2)); Planning (Northern Ireland) Order 1991 Article 31.

to play a central role in determining local economic priorities and undertaking activities to drive economic growth and the creation of local jobs. They are also a key vehicle in delivering government objectives for economic growth and decentralisation, whilst also providing a means for local authorities to work with business in order to quicken economic recovery.

LEPs have the power to set up new-style Enterprise Zones in their areas and will administer the Infrastructure Funds issued by the Government, intended to restart work on stalled developments. The Coalition Government has, of July 2014, given LEPs access to a devolved portion of government funds – the Local Growth Fund – to finance housing, transport and skills schemes in their areas.

The Government is encouraging LEPs to ensure Councils fulfil their duty to cooperate and a number of LEPs have now taken on the role of monitoring the progress of local planning authorities in completing local plans in their area.

Urban Development Areas and Corporations (wound up in April 2014)

The Local Government Planning and Land Act 1980 empowered the Secretary of State to designate an area of land as an 'Urban Development Area' and to establish an Urban Development Corporation to regenerate that area. An Urban Development Corporation was not an elected body and was appointed by the Secretary of State. They had the duty of regenerating their respective areas by:

- Bringing land and buildings into effective use.
- Encouraging development of industry and commerce.
- Ensuring that housing and social facilities were available, and creating an attractive environment.

Urban Development Corporations had great powers to deal with matters of land assembly and disposal, planning, housing and industrial promotion. Three new UDCs were established in 2004 (London Thames Gateway/Thurrock Thames Gateway/West Northamptonshire) to secure regeneration in their areas and the delivery of housing growth proposed in the Sustainable Communities Plan. Following the establishment of the Conservative/Liberal Democrat Coalition Government in May 2010, all three remaining UDCs were wound up and their powers handed back to local authorities.

Enterprise Zones (UK-wide)

The Local Government, Planning and Land Act 1980 set up the principle of Enterprise Zones, intended to encourage industrial and commercial activity in areas of physical and economic decline through the removal of certain constraints and obligations, e.g. 100 per cent capital allowance, exemption from general rates and relaxed planning controls. They were established for a set period of 10 years and the last expired in August 2006.

In 2011 the Government reintroduced 11 new Enterprise Zones which will be overseen by the new Local Enterprise Partnerships which will have 'radically simplified planning approaches'. These new Enterprise Zones differ from their 1980s forerunners in that many are focused on economic growth and job creation, rather than regeneration. They feature:

- A 100 per cent business rate discount, worth up to £275,000 over a five-year period, for businesses that moved into an Enterprise Zone during the course of the Parliament.
- For a period of at least 25 years all business rates growth within the zone will be retained and shared by the local authorities in the LEP area to support their economic priorities.
- Access to government and local authority help to develop radically simplified planning approaches in the zone.

- Government support to ensure superfast broadband is rolled out in the zone. This will be achieved through guaranteeing the most supportive environment and, if necessary, public funding.

In Scotland the Government's Economic Strategy 2011 outlined a commitment to establish four Enterprise Areas, comprising 15 strategic sites, with a life span of five years from 2012. The change in terminology, from Enterprise Zones to Enterprise Areas, reflected a change in emphasis from designating specific sites for such status to instead designating particular growth sectors for such status.

The Welsh Government has designated seven Enterprise Zones each based on a key target sector aimed at creating jobs and sustainable growth.

Northern Ireland's first Enterprise Zone was announced in 2014 as part of the UK Government's Budget. Enterprise Zones formed part of the 'Building a Prosperous and United Community' document, agreed with the UK Prime Minister in June 2013.

Simplified Planning Zone schemes (UK-wide)

Simplified Planning Zones (SPZs) extended the concept of Enterprise Zones. The Housing and Planning Act 1986 empowers local authorities to make Simplified Planning Zone Schemes, an extension of the Enterprise Zone concept without the financial benefit. SPZs were extended by the 2004 Act (2006 in Scotland and 2011 in Northern Ireland) to include all areas of regeneration where jobs, growth and productivity are needed.

Legislation bringing SPZs into force

- Town and Country Planning Act 1990.
- Planning and Compensation Act 1991 (streamlines procedure).
- Planning and Compulsory Purchase Act 2004.
- The Planning etc. (Scotland) Act 2006.
- Planning Act (Northern Ireland) 2011.

Power is given to local authorities to grant advance planning permission for defined types of development in specified areas. A developer will be able to carry out such development in a scheme without making an application for planning permission and paying the requisite fee. Schemes will most often be promoted to assist with the industrial regeneration of older urban areas by stimulating investment and development activity and by helping generate confidence in the area. SPZs are shown in the local authority's Local Development Framework.

Exemptions exist as to the type of land that may be included in a SPZ. Examples of exemptions include land in a National Park, SSSI, Conservation Area, Area of Outstanding Natural Beauty, Green Belt or the area of The Broads Authority.

Local Development Orders (LDOs) (England and Wales only)

LDOs were introduced under the Planning and Compulsory Purchase Act 2004 to implement policy in a local development plan or policy. An LDO allows a council to grant permitted development rights in a defined area beyond those available nationally and exempts some changes to land use from requiring planning permission. It is a type of permitted development but set locally in response to local circumstances. LDOs are intended to allow local authorities to implement policy proactively. They should mean that developers do not have to apply for planning permission for certain aspects, leading to lower cost and faster development. LDOs could be general to an area, perhaps for minor works, or for a specific area, perhaps for regeneration or flagship development.

LDOs are the most likely mechanism by which local authorities will reduce planning control in an Enterprise Zone.

Business Improvement Districts (BIDs) (UK-wide)

The Local Government Act 2003 paved the way for towns and cities in England and Wales to regenerate urban areas. The Act enables businesses to work with local authorities and other stakeholders on urban realm projects that benefit them and local communities both economically and socially. BIDs are financed through establishing a local tax and have to be approved by a majority of local businesses.

A BID is established for a minimum of one year to a maximum of five years. At the time of expiration a new ballot will be undertaken as to whether the BID should continue and a new business plan be implemented. Any change to the business plan must be passed through a ballot and the results must respect the same conditions as at the initial ballot. By early 2012, there were over 110 BIDs in operation in the United Kingdom.

The legislation in Scotland (The Planning etc. (Scotland) Act 2006) is different from the legislation in England and Wales in that it allows property owners as well as occupiers to be included in a BID. The intention of the legislation is that BIDs should not be restricted to towns and city centres, and to allow different kinds of BIDs to be developed across the country. The consultation of 2003 proposed that the BIDs model could be used in business parks, tourism and visitor areas, rural areas, agriculture and single business sectors.

In Northern Ireland the Business Improvement Districts Act (Northern Ireland) 2013 was passed to introduce BIDs. The first one was announced in the Budget of April 2014.

Development Consent Orders (DCOs) (England)

The Planning Act 2008 introduced a new development consent process for Nationally Significant Infrastructure Projects (NSIPs). NSIPs are usually large-scale developments (relating to energy, transport, water, waste water or waste) which require a type of consent known as Development Consent.

The Growth and Infrastructure Act 2013 introduced an extension of the regime to certain business and commercial projects. A Development Consent Order automatically removes the need to obtain several consents that would otherwise be required for development, including planning permission and compulsory purchase orders. It should therefore be quicker for large-scale development projects to get the necessary planning permission and other related consents (taking approximately 15 months) than having to separately apply for everything.

The final decision on granting a DCO rests with the Secretary of State for that field, based on advice from planning inspectors from the National Infrastructure Directorate of the Planning Inspectorate – known in legislation as the 'examining authority'.

HERITAGE AND CONSERVATION PLANNING

Legislation and policy

Local authorities are empowered by legislation to preserve and/or enhance the 'pleasant' features of the town and country by formulating policies relating to conservation, townscape and landscape.

- *In England and Wales* – protection of heritage is through the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning and Compulsory Purchase Act 2004 and associated Regulations in England and Wales, and the Planning (Listed Buildings and Conservation Areas) (Wales) Regulations 2012.
- *In Scotland* – protection of heritage is through the Planning etc. (Scotland) Act 2006, the Historic Environment (Amendment) (Scotland) Act 2011 and the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997.
- *In Northern Ireland* – protection of heritage is covered by the Planning (Northern Ireland) Order 1991, amendment 2006 and associated Regulations which are implemented by the Department of the Environment and its Environment and Heritage Service or Planning Service.

Other legislation exists to preserve UK heritage in terms of ancient monuments, archaeological areas, battlefields and gardens/landscapes. Legislation is also reinforced by planning policy which sets out measures for the protection of heritage within the UK. (Refer also to Table 7.4 Heritage Protection in the UK.)

TREES

Tree Preservation Orders (TPOs)

Under the UK planning system, LPAs have a statutory duty to consider the protection and planting of trees when granting planning permission for proposed development. The potential effect of development on trees, whether statutorily protected or not, is a material consideration that is taken into account when dealing with planning applications. In addition, planning policy guidance states that planning authorities should seek to protect trees, groups of trees and areas of woodland where they have natural heritage value, biodiversity value, cultural or historical significance, or contribute to the character or amenity of a particular locality.

If a planning authority considers that

> *'it is expedient in the interests of amenity'*

to make provision for the preservation of any trees or woodland, then they can make a Tree Preservation Order under:

- Town and Country Amenities Act 1974.
- Town and Country Planning Act 1990.
- Planning and Compensation Act 1991.
- The Planning etc. (Scotland) Act 2006.
- Planning (Northern Ireland) Order 1991.

Secondary legislation exists in the form of TPO Regulations for each of the devolved Governments:

- The Town and Country Planning (Tree Preservation) Regulations (England) 2012.
- Town and Country Planning (Tree Preservation Orders and Trees in Conservation Areas) (Scotland) Regulations 2010.
- Planning (Trees) Regulations (Northern Ireland) 2003.
- The Town and Country Planning (Trees) Regulations 1999 and The Town and Country Planning (Trees) (Amendment) (Wales) Regulations 2012.

Trees in Conservation Areas are automatically protected. The procedure for gaining consent for works to trees in Conservation Areas is different from those protected by Tree Preservation Orders.

Definition of a tree

The term 'tree' is not defined in the Act. Each of the UK Governments may have varying definitions that will be contained within advisory information.

Northern Ireland – Department of the Environment DOE, Information Leaflet 4: TPOs

For the purposes of TPOs the Department uses the following definition: 'A tree may be defined as a woody, perennial plant which can attain a stature of 6m or more on a single stem. The stem may divide low down, but it must do so above ground level' (Alan Mitchell, Trees of Britain and Europe*, Collins Field Guide, 1982).*

Judgement gives new slant on tree definition

A High Court ruling has provided a new legal definition of what constitutes a tree and what this means for tree preservation orders (TPOs).

The definition has been highlighted in a nearly 12,000-word long judgement from Mr Justice Cranston. This follows a legal challenge by a company which wanted to build a wharf on land formerly used for a lime and cement works in Kent. Medway Council refused the application and decided to safeguard the land by making a TPO.

Subsequently the company, Palm Developments, applied to undertake some surveying work at the site. This involved the removal of scrub, shrubs and saplings which it contended were not trees and therefore not covered by the order. The Council disagreed and the developer was unsuccessful after a recovered appeal. Palm Developments went to the High Court but failed again. The Judge said the Secretary of State was entitled to take the same approach as the planning inspector who argued that the TPO covered saplings and trees at all stages of their development. The Judge said: 'There is no definition of a tree. I conclude that with TPOs there are no limitations in terms of size for what is to be treated as a tree. In other words, saplings are trees. Moreover, a TPO for woodland extends to all trees in the woodland, even if not in existence at the time the order is made.'

Although Section 198 of the Town and Country Planning Act 1990 provided for TPOs to preserve trees, groups of trees and woodlands, Mr. Justice Cranston complained there was 'no statutory definition of a tree' and concluded that 'with tree preservation orders there are no limitations in terms of size for what is to be treated as a tree'.

(Roger Milne, Planning Portal, February 2009)

Purpose of a Tree Preservation Order

- To prevent the felling, mutilation and harming to the health of a tree or woodland covered by an Order unless consent is obtained from the local authority.

- Protect selected trees and woodlands if their removal would have significant impact on the environment and its enjoyment by the public.

Extent of a Tree Preservation Order

- Prohibits the cutting down, uprooting, topping, lopping, wilful damage or wilful destruction of a tree/trees, unless consent is obtained from the local authority.
- Secures the replanting of trees the felling of which has been permitted by the local authority.

Types of Tree Preservation Orders

- Individual.
- Areas.
- Groups.
- Woodland.

Exemptions to Orders

Orders cannot be placed on:

- Hedges (protected through other legislation), bushes, shrubs.
- Trees on Crown land (without consent of the appropriate government department).
- Forestry Authority interest in land (unless no dedication covenant is in force and consent is obtained).

Exemptions to the need to obtain consent for carrying out work on protected trees

- Planning permission granted.
- Dead or dangerous trees.
- Preventing/abating a nuisance.
- Trees on airfields/defence installations.
- Commercial ornamental fruit trees and orchards.
- Forestry Authority plans of operation.
- Trees on/adjacent to Ancient Monuments or churchyards.
- Work by statutory authorities as defined, e.g. gas, water, sewerage, a relevant airport or rail operator, electricity, post office and telecommunications. (Not utility companies except in certain situations, e.g. safety.)

Who makes the Tree Preservation Order?

- Local planning authorities make TPOs.
- Special arrangements exist for National Parks, The Broads, Enterprise Zones and UDAs.

Procedure for making a Tree Preservation Order

- A TPO must be in the form of the model Order contained in the Regulations.
- The Order must define the position of the trees, groups of trees or woodlands to which it relates and also the number, species and location, using an OS map at a scale of 1:1250 or 1:2500 for woodlands.
- A copy of the Order, map and grounds for it being made is served to the occupiers of the land and also deposited at a place in the locality where it can be inspected.
- Objections may be made to the appropriate authority within 28 days.
- A copy of the Order is served to the Conservator of Forests (it is no longer required to send one to the District Valuer or Keeper of the Register).
- The LPA is advised to inform affected neighbours and to provide a site notice if the TPO will affect the interests of the neighbourhood.

Objections

- Must be made within 28 days to the Planning Department of the local authority, after which it makes a decision and stops, modifies or confirms the Order.
- If no objections are made an Order can be confirmed by the authority within 42 days, following the specified procedure set out in the Regulations.
- A LPA must confirm the Order within six months or the trees covered will cease to be protected.
- Appeals can be made to the Secretary of State/relevant Government Minister in the devolved nations only on the grounds of carrying out work to a TPO, not for creating a one; otherwise an application can be made to the High Court within six weeks of confirmation of an Order to challenge a TPO by any person who is 'aggrieved' by the TPO.

Applications to carry out work on protected trees

An application to carry out works on protected trees must:

- Be made to the LPA on the standard application form, otherwise it will be regarded as an invalid application.
- Include the information required on the form.
- Be accompanied by a sketch plan which identifies the tree(s) on which work is proposed and the main features of the property.

- Clearly specify the work for which consent is sought.
- State the reasons for making the application. (In certain circumstances specific technical information and evidence is required to support the proposal to ensure that the LPA is able to make an informed decision.)
- Provide appropriate evidence describing the damage or defect where the work is proposed to address any structural damage to property or in relation to tree health or safety.

LPAs have no power to require information additional to that specified in the standard TPO application form. If the LPA considers that they need information or evidence over and above that set out in the TPO application form in order to make a decision, they will be able to request it, but will not have the power to require it.

Alleged subsidence damage to property

Applicants frequently allege that a tree is causing subsidence damage to a property, but with little or no supporting evidence. Reports will usually be required from a structural engineer and/or a chartered surveyor and have to be supported by technical analysis from other experts, e.g. for root and soil analysis. These reports must include the following information:

- A description of the property, the damage/crack pattern, the date that the damage first occurred/was noted, details of any previous underpinning or building work and the geological strata for the site identified from the geological map.
- Details of vegetation in the vicinity and its management since discovery of the damage, together with a plan showing the vegetation and affected building.
- Measurement of the extent and distribution of vertical movement using level monitoring.
- The profile of a trial hole dug to identify soil characteristics and foundation type and depth.
- The subsoil characteristics including soil type.
- The location and identification of roots found, including DNA testing where identification is inconclusive.
- Proposals and estimated costs of options to repair the damage.

In addition the application should include a report from an arboriculturist to support the tree work proposals, including arboricultural options for avoidance or remediation of indirect tree-related damage.

Local authority decisions on applications to carry out work on protected trees

When the LPA decide to refuse consent (or grant consent subject to conditions) they should:

- Clearly state their reasons for the decision. These should relate to each of the applicant's reasons for making the application.
- Explain that the applicant has a right of appeal against the decision to the Secretary of State or relevant Government Minister in the devolved nations.
- Explain that the applicant has a right to compensation for loss or damage suffered as a result of the LPA's decision.

Appeals

The appeal process varies between England and the devolved nations. There is a fast-track appeal procedure or written representation process. In practice most cases are dealt with on the basis of the original application and its supporting information, the decision of the LPA and the reasons they gave when making that decision. The inspector may, however, ask for further information. Either party may if they wish have the appeal dealt with at a hearing or public local inquiry.

Compensation

If consent is refused – or granted with conditions – compensation can be claimed from the local planning authority for any loss or damage which results, unless the local planning authority has issued a certificate saying either:

- that the refusal or condition is in the interests of good forestry, *or*
- that the trees or woodland have an outstanding or special amenity value.

Where a felling licence application has been refused by the Forestry Commission compensation may be claimed.

Compensation can be claimed from the local planning authority where, on giving permission to cut down protected woodland, it has required replacement planting. But such compensation is only available if the Forestry Commission will not give a grant for the replanting on the grounds that it would not be in accordance with good forestry practice.

Replanting of trees and woodlands covered by an order

- Replanting may be required:
  - through a condition of a consent to fell;
  - where the tree is dead/dangerous (not applicable if by force majeure).
- Where a tree is destroyed in contravention of an Order, a notice is served to the owner of the land specifying a minimum period within which to plant an appropriate replacement tree.
- Replacement trees are to be of an appropriate size and species and planted in the same place.
- Where an offender fails to carry out the prescribed replanting, the Council can serve an Enforcement Notice requiring them to do so.
- There is a right of appeal against a replacement notice.

Is a Forestry Commission felling licence required to cut down trees covered by a TPO?

Whether or not a TPO is in force you must first apply to the Forestry Commission for a felling licence if you want to cut down trees containing more than $5m^3$ of wood in any calendar quarter. There are exceptions to this rule which are set out in the Forestry Act 1967 and Regulations made under that Act. For example, you do not need a licence for felling trees in gardens.

If a licence is required and the trees are covered by a TPO, the Forestry Commission will deal with an application in consultation with the local planning authority. Where the Commission proposes to grant a licence it will first give notice to the local planning authority.

In such cases the local planning authority has the right to object to the proposal and if it does so the application will be referred to the Secretary of State for Communities and Local Government or relevant Minister in the devolved nations who will make a final decision. The Commission will require felled trees to be restocked.

Penalties for non-compliance with an Order

The maximum penalties associated with an offence have been substantially increased by the Planning and Compensation Act 1991, so that any person found guilty will be liable:

- On summary conviction to a fine not exceeding £20,000. Summary conviction is classified as a minor offence in the Criminal Code and tried without jury in a Magistrates' Court.
- On conviction on indictment, to an unlimited fine. An indictable offence is more serious than a summary conviction offence and is raised by the Crown. Trial is by jury and conviction of an indictable offence exposes you to greater penalties.

This major change takes account of the substantial profits which may accrue to an offender as a result of the illegal felling or destruction of protected trees. For other offences you could be fined an additional £2,500.

Record fine – 23 November 2012

A man in Dorset has been given what is thought to be a record fine of £75,000 for hiring a tree surgeon to cut down a protected pine in his neighbour's garden. Neil Davey paid Thomas McGuire to carry out the act, leaving him with 'uninterrupted views of the Purbeck Hills and harbour from his hot tub'. The tree-felling increased the value of Davey's property by £50,000.

Provisional Tree Preservation Orders

Provisional Tree Preservation Orders have a duration of six months and are made when an urgent Order needs to be placed. A normal Tree Preservation Order takes effect when confirmed. In order to prevent tree felling before an Order can come into effect the local authority can make a provisional Tree Preservation Order that includes a provision for the Order coming into effect on the date specified.

Effects of planning permission on TPOs

No application is required to be made to the LPA for work to trees covered by TPO under the Act,

> *'for work immediately required for the purpose of carrying out development authorised by … planning permission granted on an application'.*

This does not apply to outline planning consent (unless reserved matters have been resolved and full planning permission has been granted) or permitted development. However, through planning policy and attached conditions to the consent, the LPA may control what work occurs. The Act places a duty on LPAs to ensure that they make adequate provision for the preservation and planting of trees when granting planning permission by imposing conditions and making TPOs.

The LPA will take into account the effect of any loss of amenity when assessing any development likely to have an adverse effect on trees, groups of trees and woodlands specified in a TPO. In assessing proposals affecting a TPO all the following criteria must be met before a development is looked on favourably:

- Development proposals must aim for a high-quality landscape design that respects the existing trees and the local environment.
- Where proposals would result in the loss of any individual trees, groups of trees or woodlands, the applicant must provide for compensatory planting as part of the overall scheme or elsewhere within the vicinity. (This may involve the use of section 106/75 agreements.)
- Proposals must include details of methods to be adopted, including legal agreements, to guarantee future maintenance arrangements.
- The size and position of the trees after development including their future growth must be considered. If a tree in the future interferes unreasonably with an occupier's enjoyment of a property or poses a danger, the LPA will find it difficult to object to a consent to lop or fell.

BS: 5837-2012 'Trees in Relation to Design, Demolition and Construction – Recommendations'

(Refer to BS for full details.) Local planning authorities will require supporting information for any planning application submission that impacts on trees. This

is likely to include the following information in accordance with BS: 5837-2012 'Trees in Relation to Design, Demolition and Construction – Recommendations'. The extent of the information required will be dependent on the condition or status of the trees and the likely impact of the development on the trees.

BS: 5837-2012: Supporting information required

Tree survey

A survey carried out by an arboriculturalist and recorded in a tree survey schedule and on a tree survey plan. The tree survey should be based on an accurate topographical survey that identifies all site features, spot levels around the site and at the base of trees, and the position of trees including those overhanging the site or on the site boundary. The tree survey schedules should list:

- Sequential reference number (recorded on the tree survey plan).
- Species listed by common name, with a key provided to scientific names.
- Height.
- Stem diameter.
- Branch spread, taken as a minimum at the four cardinal points.
- Existing height above ground level of the first significant branch, direction of growth and the canopy.
- Life stage (e.g. young, semi-mature, early mature, mature, overmature).
- Structural and/or physiological condition.
- Preliminary management recommendations.
- Estimated remaining contribution, in years (<10, 10+, 20+, 40+).
- Category U (unsuitable for retention) or A to C (high, moderate or low quality) grading, to be colour recorded on the tree survey plan.

The Root Protection Area (RPA)

The calculation of the Root Protection Area of each tree enables assessment of the construction exclusion zone. The BS has a detailed formula for calculating the RPA for individual and multi-stem trees.

Arboricultural Impact Assessment

The Arboricultural Impact Assessment evaluates the effects of the proposed design, recommends mitigation and informs the preparation of a Tree Protection Plan. The assessment should include:

- The tree survey.
- Trees selected for retention, removal or pruning.
- Construction operations in order to prevent damage to soil structure.

- Evaluation of impact of proposed tree losses.
- Evaluation of tree constraints.
- Issues to be addressed by an Arboricultural Method Statement.

Tree Protection Plan and Construction Exclusion Zone

The Tree Protection Plan should be superimposed on the proposed layout plan and indicate all hard surfacing, including temporary works and other existing structures within the RPA. The plan should clearly indicate the precise location of protective barriers to be erected to form a construction exclusion zone around the retained trees. Examples are included in the BS.

Arboricultural Method Statement

The Arboricultural Method Statement should be appropriate to the proposals and may include:

- Removal of existing structures and hard surfacing.
- Installation of temporary ground protection.
- Installation of new hard surfacing.
- Specialist foundations or retaining structures to facilitate changes in ground levels.
- Site monitoring.

Statutory undertakers and utility companies' powers in relation to trees

Most utility companies are statutory undertakers. Statutory undertakers have a statutory right or duty to install, inspect, maintain, repair or replace apparatus in or under the street in primary legislation. They do not need to obtain the LPA's consent before cutting down or carrying out work on a tree situated on the undertaker's operational land:

- in the interest of safety;
- when inspecting, repairing or renewing their apparatus;
- when carrying out their permitted development rights.

Street trees are protected by statutory authorities under the New Roads, Public Utilities and Street Works Act 1991, which states that undertakers may be required to compensate street authorities for damage or loss suffered by them in their capacity, which could apply to street trees.

All utility operators are committed to implementing the guidelines prepared by the National Joint Utilities Group in 1995 to take care to avoid damaging any trees.

British Waterways have powers to clear trees to keep waterways open and navigable.

Dangerous trees and the legal framework

Blame in relation to collapsing trees can be apportioned through either criminal or civil law under the following legislation:

- Occupiers' Liability Acts 1957 and 1984 (OLA).
- The Health and Safety at Work Act 1974 (HASAW) and associated Regulations.
- The Highways Act 1980.

Occupiers' Liability Act (1957 and 1984)

- The overriding principle is that of a 'duty of care'.
- Everyone with control over land or property should take reasonable measures to prevent foreseeable harm befalling others (visitors, passers-by or trespassers), i.e. your trees must not fall on people while they are on your land.
- You should also take reasonable precautions to prevent the 'escape' of your property onto the public highway. This principle applies equally to escaped animals, noxious chemicals, poisonous plants and trees falling onto the public highway/footway.
- This allows for an injured party, e.g. neighbour or visitor to your property, to take a civil action against you, and the Crown to bring a criminal action against you.
- For tree owners to discharge their duty of care they must take 'reasonable' measures to establish the condition of their trees.

The courts differentiate between 'lay' members of the public and large corporations or local authorities responsible for managing land who are expected to know what condition their trees are in through effective and frequent tree inspections and to take necessary action. The British Standard 5837-2012 'Trees in Relation to Design, Demolition and Construction – Recommendations' requires surveys to be carried out by arboriculturalists. Additionally, the law differentiates between trees that collapse as a result of an identifiable defect and those that collapse unpredictably, e.g. after an extraordinary event such as a lightning strike.

The Health and Safety at Work Act 1974 (HASAW)

- HASAW confers a duty of care on those at work towards bystanders.
- The Health and Safety Executive prosecuted Birmingham City Council for a breach of HASAW when an ash tree fell and killed three people. The tree had fallen due to an identifiable defect that was a foreseeable danger, and the Council was prosecuted for negligence in its tree management.

The Highways Act (1980)

- Section 130 of the Highways Act places a duty on highway authorities to prevent either the 'stopping up' or the 'obstruction' of the highways under their jurisdiction. This relates to trees or branches that might fall across the highway but also is inferred to include trees on land adjacent to the highway, even though they may not be under the highway authority's ownership.
- Section 154 gives highway authorities powers to compel remediation by the owners of trees that are deemed to be a danger to the highway. The power also provides for entry onto private land by highway authority contractors, should the owner fail to put in hand the necessary measures. The authority can recover costs from the owners.
- Trunk Routes Maintenance Manual (TRMM 1999) states that all 'highway trees' (defined as trees within falling distance of the highway) require an arboricultural inspection every five years, but this period may be reduced on the advice of the arboriculturalist.

HERITAGE AND CONSERVATION DESIGNATIONS

Conservation Areas

Designation of Conservation Areas

- Town and Country Amenities Act 1974.
- Town and Country Planning Act 1990, Planning (Listed Buildings and Conservation Areas) Act 1990 and associated Regulations.
- The Planning (Listed Buildings and Conservation Areas) (Wales) Regulations 2012.
- The Planning etc. (Scotland) Act 2006, Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, and the Historic Environment (Amendment) (Scotland) Act 2011.
- Planning (Northern Ireland) Order 1991, the Planning (Conservation Areas) Regulations 2006, and the Planning Act (Northern Ireland) 2011.

It is the duty of the local planning authority to determine which parts of their area should be treated as Conservation Areas, i.e. areas of special architectural or

historic interest, the character or appearance of which it is desirable to preserve or enhance. Other features (such as trees or other buildings) may contribute to the appearance of a Conservation Area. Once an area has been designated as a Conservation Area, notice of the fact must be published in the press. Notice must also be entered in the local land charges register.

Conservation Area plan

The local planning authority is required to prepare proposals for the preservation and enhancement of the character and appearance of the Conservation Area. Such proposals must be published and submitted to a public meeting in the area concerned, and, before finalising the proposals, the local planning authority must have regard to any views expressed.

Effect of Conservation Area

Demolition: Demolition of any building in a Conservation Area is prohibited without Conservation Area consent. The section does not apply to ecclesiastical or ancient monuments.

Trees: In Conservation Areas trees that are already protected by a TPO are subject to normal controls. Trees not protected have a special provision that anyone who wishes to cut down, top, lop, uproot, wilfully damage or wilfully destroy any such tree must give six weeks' notice of their intention to the local planning authority. This does not have to be in the model form set out under the TPO Regulations.

An LPA can respond to a six week notice in the following ways:

- Make a TPO if justified in the interests of amenity and/or for cultural or historical significance. (The proposal would then have to be the subject of a formal application under the TPO.)
- Decide not to make a TPO and allow the six-week period to expire, at which point the proposed work may go ahead as long as it is carried out within two years from the date of the notice, *or*
- Decide not to make a TPO and inform the applicant that the work can go ahead.

The LPA cannot refuse consent or grant consent subject to conditions. This is because the prior notification is not an application for consent under a TPO. If a notice is not submitted then penalties are similar for those contravening a Tree Preservation Order. This covers all trees regardless of species as they may contribute to the landscape character or setting of the area.

The LPA has powers to enforce the replacement of a tree with a tree replacement notice which must be served within four years of unauthorised work.

Exemptions exist including trees on land owned by the LPA and work carried out with the LPA's consent; trees less than 75mm diameter; and work in accordance with a Forestry Authority licence or covenant.

There are special Regulations prescribing the classes of advertisements which may be permitted in Conservation Areas.

Listed buildings: buildings of special architectural or historic interest

Designation of listed buildings

- Town and Country Planning Act 1990, Planning (Listed Buildings and Conservation Areas) Act 1990 and associated Regulations.
- The Planning (Listed Buildings and Conservation Areas) (Wales) Regulations 2012.
- The Planning etc. (Scotland) Act 2006, Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 and associated Regulations, and the Historic Environment (Amendment) (Scotland) Act 2011.
- Planning (Northern Ireland) Order 1991 and the Planning Act (Northern Ireland) 2011.

A building is listed with regard to:

- The contribution which its exterior makes to the architectural or historic interest of a group of buildings.
- The desirability of preserving any feature fixed to the building or contained within its curtilage.

Listed buildings consent

It is an offence for a person to execute or cause to be executed any works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest, unless listed building consent has been obtained. There are fines for unauthorised works and also enforcement powers that will allow for the reversal or amelioration of unauthorised works.

Application for listed building consent is made to the local planning authority. Special regard has to be paid not only to the building but also to its setting. The local authority must therefore be consulted before making any alteration to landscape within the curtilage of a listed building.

Building preservation notice

A local authority may serve a building preservation notice in order to protect a building which has not yet been listed from demolition or where alteration is threatened. Compensation is payable if within six months the Secretary of State decides not to list the building, or no decision is made. The local authority will be liable for compensation, which may include payments for breach of contract.

Enterprise and Regulatory Reform Act 2013 (England Only)

This provides secondary legislation to accompany existing heritage provisions. Several provisions of the Act affect the historic environment, mainly related to listed buildings. The Department for Culture, Media and Sport has consulted on draft Regulations to implement the Act's heritage provisions which came into effect in April 2014.
The key aims of the Act are to streamline and reduce costs associated with the heritage protection system. Changes include:

- *Heritage Partnership Agreements (HPAs)* – established between Councils and owners of large estates that contain heritage features to help manage long-term change. HPAs could grant listed building consent for specified alterations or extensions.
- *Local Listed Building Consent Orders* – allow LPAs to grant listed building consent in advance for certain types of alteration/extension to specified buildings in their areas, with a public notification period of 28 days. *Consultation with English Heritage on HPAs* – could be restricted to Grade I and Grade II listed buildings.
- *National Listed Building Consent Orders* – give owners or managers of nationally distributed listed buildings a general consent for prescribed works.
- *Certificates of Lawfulness of Proposed Works* – allow owners and developers to apply to an LPA for formal confirmation that planned alteration or extension works do not require listed building consent.

Ancient monuments and archaeological areas

Designation

- Ancient Monuments and Archaeological Areas Act 1979 (England and Wales).
- Historic Environment (Amendment) (Scotland) Act 2011.
- Historic Monuments and Archaeological Objects (Northern Ireland) Order 1995.

The law is administered in England by English Heritage and the Department of Culture, Media and Sport; in Scotland by Historic Scotland with the Royal Commission for Ancient and Historic Monuments Scotland (RCAHMS); in Wales by Cadw; and in Northern Ireland by the Department of the Environment (DOENI).

The RCAHMS and Historic Scotland Merger Bill 2013–14 proposes to merge the two organisations and create a new non-departmental public body (NDPB), Historic Environment Scotland, which would operate from 2015.

Ancient monuments

Schedule of monuments

Under the above Acts the Secretary of State/relevant Government Minister of the Devolved Nations is required to maintain a schedule of monuments of national importance. There are two types:

- Scheduled monuments (in private ownership).
- Monuments in care (ownership is vested in the Secretary of State/Government Minister).

Once a monument is scheduled, i.e. of national importance, it immediately becomes an offence to carry out, without authorisation:

- Any works resulting in the demolition or destruction of, or any damage to, the monument.
- Any works of removal, repair, alterations or addition.
- Any flooding or tipping operations on the land.

There are fines for unauthorised works and also enforcement powers that will allow for the reversal or amelioration of such works.

An Ancient Monuments (Class Consents) Order

An Ancient Monuments (Class Consents) Order covers a range of work for which there is deemed to be consent.

Scheduled Monument Consent

Scheduled Monument Consent covers other works which require specific consent. An application is subject to a public inquiry, and may be granted with or without conditions or refused. A consent will lapse after five years.

The Secretary of State/Government Minister may compulsorily acquire a monument for the purpose of securing its preservation.

Archaeological areas

The provisions of the Acts are not intended to prevent development on archaeological sites but simply to enable rescue archaeological investigations/ records to be made.

Once an area has been designated by the Secretary of State/relevant Government Minister of the devolved nations as being of archaeological importance, a developer is required to serve an 'operations notice' on the local authority six weeks prior to the carrying out of any:

- operations which disturb the ground;
- flooding or tipping operations.

Once the notice has been served, the 'designated investigating authority' has the right to enter the land to investigate archaeological excavation or to record material of archaeological or historical interest. A notice of intention to excavate must be served on the developer prior to the six-week period ending. The developer must bear the cost of this.

Historic Gardens and Designed Landscapes

No primary legislation exists to protect Historic Gardens and Designed Landscapes. They are protected through inclusion on a register prepared by each governing body and through planning policy guidance. English Heritage, Historic Scotland, Cadw (Welsh Historic Monuments) and the DOENI Built Heritage: Environment and Heritage Services maintain the inventory of historic gardens and designed landscapes. LPAs are required to consult them as statutory consultees on development proposals considered to affect an inventory Garden or Designed Landscape.

The effects of a listing

- There will be a presumption against any development that is likely to have an adverse effect on the integrity, landscape setting or distinctive character of gardens and designed landscapes listed in the Inventory.
- Proposals for the restoration of the original landscapes and removal of unsympathetic planting or structures will be viewed favourably.
- New structures and/or landscape works will generally only be acceptable where they will enhance the design and setting of the garden or designed landscape. All works must be well designed, carefully sited and constructed. Future maintenance arrangements must be put in place.
- Development proposals must be shown in the context of the garden or the designed landscape and demonstrate that they recognise their integrity and offer enhancement of the existing situation.
- The LPA will seek to encourage the sensitive management of gardens and designed landscapes.
- Registration of landscape is a material consideration in planning terms.

Few public parks were included in the 'Register of Parks & Gardens of Special Historic Interest' when it was first compiled in 1983–8. Public parks started to be added in the 1990s. In 1999–2002 a thematic study was undertaken and at least 56 parks have been added to the Register as a result.

Under the Historic Environment (Amendment) (Scotland) Act 2011 there is now a statutory duty on Scottish Ministers to compile or maintain an inventory of designed landscapes and an inventory of battlefields.

Battlefields and wrecks

Refer to Table 7.4 Heritage Protection in the UK.

Table 7.4 Heritage production in the UK

	Legislation & Guidance	*Relevant parties*
Listed Buildings		
England	• Enterprise and Regulatory Reform Act 2013 • Planning (Listed Buildings and Conservation Areas) Act 1990 • National Heritage List for England – Principles of Selection for Listed Buildings • English Heritage Listing Selection Guidelines • NPPF	DCMS EH LPA
Wales	• Planning (Listed Buildings and Conservation Areas) Act 1990 • The Planning (Listed Buildings and Conservation Areas) (Wales) Regulations 2012 • Circular 61/96 Planning and the Historic Environment • Circular 1/98 Planning and the Historic Environment • Technical Advice Note 12: Design	NAW Cadw LPA
Scotland	• Historic Environment (Amendment) (Scotland) Act 2011 • Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 • The Scottish Historic Environment Policy 2011	HEPU LPA HS
Northern Ireland	• Planning (NI) Order 1991 • Planning Act (Northern Ireland) 2011	DOENI BHPS
Conservation Areas		
England	• Planning (Listed Buildings and Conservation Areas) Act 1990 • Enterprise and Regulatory Reform Act 2013 • Town and Country Planning (General Permitted Development) Order 1995 • NPPF	DCMS EH LPA
Wales	• Planning (Listed Buildings and Conservation Areas) Act 1990 • The Planning (Listed Buildings and Conservation Areas) (Wales) Regulations 2012 • Circular 61/96 Planning and the Historic Environment • Planning Policy Wales –Conserving the Historic Environment • Technical Advice Note 12: Design	NAW Cadw LPA
Scotland	• Historic Environment (Amendment) (Scotland) Act 2011 • Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 • The Scottish Historic Environment Policy 2011	HEPU LPA HS

continued …

Table 7.4 continued

	Legislation & Guidance	*Relevant parties*
Northern Ireland	• Planning (NI) Order 1991 • The Planning (Conservation Areas) Regulations 2006 • Planning Act (Northern Ireland) 2011	DOENI BHPS
Ancient Monuments and Archaeological Areas		
England	• Ancient Monuments and Archaeological Areas Act 1979 • Scheduled Monuments Policy Statement	DCMS EH
Wales	• Ancient Monuments and Archaeological Areas Act 1979 • Circular 60/96 Planning and the Historic Environment – Archaeology • Wales-specific Policy on Heritage being prepared	NAW Cadw RCAHMW
Scotland	• Historic Environment (Amendment) (Scotland) Act 2011 • Historic Buildings and Ancient Monuments Act 1953 • Ancient Monuments and Archaeological Areas Act 1979 • The Scottish Historic Environment Policy 2011	HEPU HS RCAHMS
Northern Ireland	• Historic Monuments and Archaeological Objects (NI) Order 1995	DOENI Built Heritage HMC
Historic Battlefields, Defence Heritage		
England	• Historic Buildings and Ancient Monuments Act 1953 • Heritage Counts, English Heritage, 2011 • NPPF • Circular 9/95	DCMS EH
Wales	• Currently preparing a Register of Historic Battlefields • Wales-specific Policy on Heritage being prepared	NAW CADW RCAHMW
Scotland	• Inventory of Scottish Battlefields • Historic Environment (Amendment) (Scotland) Act 2011 • The Scottish Historic Environment Policy 2011	HEPU HS RCAHMS
Northern Ireland	• Historic Monuments and Archaeological Objects (NI) Order 1995 • Planning (NI) Order 1991	DOENI Built Heritage
Historic Gardens and Designed Landscapes		
England	• Historic Buildings and Ancient Monuments Act 1953 • Natural Heritage Lists: EH • Park and Gardens Designation Criteria: EH • NPPF • Circular 9/95	DCMS EH
Wales	• Non-statutory Register of Landscapes, Parks and Gardens of Special Historic Interest in Wales	NAW Cadw
Scotland	• Inventory of Gardens and Designed Landscapes • Historic Environment (Amendment) (Scotland) Act 2011 • The Scottish Historic Environment Policy 2011	HEPU HS
Northern Ireland	• Planning (NI) Order 1991 • ICOMO Florence Charter 1981 • Planning Policy Statement 6 • Heritage Gardens Inventory • The Register of Historic Parks, Gardens and Demesnes	DOENI NI Heritage Garden Committee

	Legislation & Guidance	*Relevant parties*
Historic Marine Protected Areas/Wrecks		
England	• Protection of Wrecks Act 1973 • Ancient Monuments and Archaeological Areas Act 1979 • Protection of Military Remains Act 1986 • NPPF	DCMS EH
Wales	• Protection of Wrecks Act 1973 • Wales-specific Policy on Heritage being prepared	NAW Cadw
Scotland	• Historic Environment (Amendment) (Scotland) Act 2011 • The Scottish Historic Environment Policy 2011	HEPU HS RCAHMS
Northern Ireland	• The Historic Wrecks Act 1973 • Historic Monuments and Archaeological Objects (NI) Order 1995	DOENI Built Heritage
World Heritage Sites		
Engand	• UNESCO World Heritage Convention, 1972 • NPPF • Guidance Note to Circular for England on the Protection of World Heritage Sites, 2009	UNESCO DCMS EH
Wales	• UNESCO World Heritage Convention, 1972 • NPPF	UNESCO DCMS
Sscotland	• UNESCO World Heritage Convention, 1972 • Historic Environment (Amendment) (Scotland) Act 2011 • The Scottish Historic Environment Policy 2011	UNESCO DCMS HEPU HS
Northern Ireland	• UNESCO World Heritage Convention, 1972	UNESCO DCMS DOENI

KEY: Cadw – Welsh Historic Environment Service; BHPS – Built Heritage Planning Service; DCMS – Dept. for Culture, Media and Sport; DOENI – Dept. of the Environment NI; EH – English Heritage; HEPU – Scottish Government Historic Environment Protection Unit; HMC – Historic Monuments Council NI; HS – Historic Scotland; ICOMO – International Council of Monuments and Sites; LPA – local planning authority; NAW – National Assembly of Wales; NIEA (ES) – Northern Ireland Environment Agency; NPPF – National Planning Policy Framework; RCAHMS – Royal Commission for Ancient and Historic Monuments Scotland; RCAHMW – Royal Commission for Ancient and Historic Monuments Wales.

PLANNING CONSENT PROCEDURE

Application for planning permission

There are several kinds of planning application:

Full

In an application for full permission, the applicant provides complete details. All reserved type matters are decided at this time. Conditions may be imposed.

Outline (in Scotland planning permission in principle)

Either before purchasing land or incurring the cost of preparing plans, a developer may wish to know whether or not his proposed development is likely to get development consent if he applies for it. Therefore he applies for outline planning permission, which requires information about the proposed type of use, amount and access points. Outline consent provides a decision on the general principles of how a site can be developed. Then the local planning authority has three options:

- *Grant* outline planning consent subject to a condition that there shall be subsequent approval by that authority of any 'reserved matters'.
- *Hold* the application for consideration of further particulars, i.e. the reserved matters may be relevant at the initial stage.
- *Decline* the application.

Application for approval of reserved matters

Once this application is approved, the application has full planning permission. 'Reserved matters' are aspects of a proposal which an applicant may choose not to submit with an outline application and they can be 'reserved' for later determination.

- *Access* to and within the site for vehicles, cycles and pedestrians and how these relate to the surrounding access network.
- *Appearance*: aspects which determine the visual impression of the development including architecture, materials, decoration, lighting, colour and texture.
- *Landscape* including screening by walls, fences etc; planting of trees, shrubs, hedges or grass; formation of banks, terraces or other earthworks; laying out of gardens, courts, squares, water features, sculpture or public art; other amenities.
- *Layout:* situation and orientation of buildings, routes and open spaces in relation to each other and to buildings and spaces outside the development.
- *Scale*: height, width and length of buildings in relation to their surroundings.

Variation to planning consent

This is an application to make insignificant changes to a consent already given. (In Scotland, LPAs have discretion to allow variation in an existing consent where it considers that the change sought is not material.)

Notice of intention to develop (NID)

Local planning authorities cannot automatically give themselves planning permission, but have to complete the application process in the normal way and

publish a NID in a local newspaper, describing the scheme concerned and where and when details may be viewed, before the development takes place.

Other application types are for listed buildings, conservation areas, TPOs and advertisements.

Requirements of an application for planning permission

Local planning authorities all used to design their own application forms, but there is a trend for each home nation to standardise their forms as the detail required in local forms varied between planning authorities.

The standard form for England, the National Standard Planning Application Form 1APP, is on the Planning Portal for online applications at: www.planningportal.gov.uk. The Planning Portal website also includes a fee calculator. The Welsh Government requires all applications except mining and some prior approval matters to be on their standard form APP1. Under the Planning etc. (Scotland) Act 2006, Scottish Ministers have the power to introduce standard application forms and prescribe their contents by regulation or development order.

Compulsory requirements

All applications for full planning permission should include the correct fee (where one is necessary) and three copies of the following:

- The completed application form.
- Ownership certificates.
- Agricultural holdings certificates.
- The location plan (and site plan if required) (a red line is drawn around the application boundary and a blue line around any other land owned by the applicant in the vicinity).
- Drawings (including floor plans).
- Elevations (required in Scotland).
- Environmental statement (for EIA applications).

Application form

A basic form for development consists of:

- Name, address and telephone number of applicant.
- Purpose for which permission is sought.
- Location of development proposed.
- Name, address, telephone number and profession of the client's agent.
- Name, address, telephone number and profession of any person preparing the plans if different from the applicant or agent.
- When it is intended to start and finish the development.

- Estimated cost of works.
- Storage of hazardous materials.

Design and Access Statement (DAS) (England, Wales and Scotland)

DAS is a requirement for some types of development under town and country planning law in England, Scotland and Wales. A DAS is not required in Northern Ireland, although the DOENI planning office may request additional information in line with normal planning rules.

Generally, the DAS should explain defined aspects of a development including amount, layout, scale, access, landscape and appearance. DAS should be a short report accompanying and supporting a planning application to illustrate the process that has led to the development proposal, and to explain and justify the proposal in a structured way (DCLG Circular 01/06). A DAS is not a substitute for drawings, but is a communication tool to facilitate negotiation with the planning authority and to explain the scheme to the local community.

The English guidance (which is similar in principle to Scotland and Wales) says that a Design and Access Statement must demonstrate the steps taken to appraise the context of the proposed development, and how the development's design takes that context into account. 'Context' refers to the particular characteristics of the application site and its wider setting.

Table 7.5 Types of development that require DAS

England	*Scotland*	*Wales*
Major developments, full and outline	National and major developments	All applications, full and outline
Development in a 'designated area', i.e. World Heritage Site or Conservation Area comprising: a) one or more dwellings, b) building(s) with floor space of 100m^2 or more. NB National Parks and AONBs were excluded from 'designated areas' in 2010	Local development in a 'designated area', i.e. World Heritage Site (WHS), Conservation Area; historic garden or designed landscape; National Scenic Area (NSA); Scheduled Monument (SM)	
Listed building (DAS must include the building's setting)	Category A listed building (unless development comprises alteration or extension of an existing building)	Listed building (DAS required for exterior works)
	New fish farms but only in WHS, NSA and SM.	

Design and Access Statements must also explain the applicant's approach to access, including:

- Relevant Local Plan policies.
- How consultation undertaken about access has informed the design.
- How specific issues which might affect access have been addressed.

All three nations use DAS but there are differences between them; for example, in Scotland, DAS is not required for 'planning permission in principle' (the English and Welsh 'outline' consent) unless the local planning authority requires it. The differences are summarised in Tables 7.5 and 7.6.

Table 7.6 Developments *not* requiring DAS

England	*Scotland*	*Wales*
Material change of use	Material change of use	Material change of use (an access statement may be required for public or employee access)
Engineering operations	Engineering operations	Engineering operations
Mining operations	Mining operations	Mining operations
Amendment of conditions attached to a planning consent	Section 42 (TCP Scotland Act 1997) applications (i.e. an application where previous planning consent conditions have not been met)	
Waste development		
Tree Preservation Orders		Tree Preservation Orders
Storage of hazardous substances		Storage of hazardous substances
Advertisement control		Advertisement control
Outline consent	Planning permission in principle	
	Householder development (i.e. development of an existing dwelling house, or development within the curtilage for any purpose incidental to its enjoyment as a dwelling house)	Householder development (i.e. development of an existing dwelling house, or development within the curtilage for any purpose incidental to its enjoyment as a dwelling house). (NB all new dwellings will require DAS unless resulting solely from a change of use)

Current law on DAS is in the following regulations:

- Town & Country Planning (Development Management Procedure) (England) (Amendment) Order 2013.
- Scotland: Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013 (SSI 2013/ 155).
- Scotland: Planning Series Circular 3/2013: Development Management Procedures.
- Wales: Technical Advice Note (TAN) 12: Design (2014). NB this document has a good but lengthy appendix on DAS.
- Wales: The Town and Country Planning (Development Management Procedure) (Wales) Order 2012 and the Planning (Listed Buildings and Conservation Areas) (Wales) Regulations 2012.

Certificates about ownership, agricultural holdings and neighbour notification (UK)

The applicant for planning permission *certifies* that:

- The land is not an agricultural holding or that notice has been given to the tenant of agricultural land to which the application relates.
- A certificate providing certain details about the ownership of the application site and confirming that an appropriate notice has been served on any other owners (and agricultural tenants). An application is not valid, and therefore cannot be determined by the local planning authority, unless the relevant certificate has been completed.
- Neighbours have been notified with applicant's name, location and nature of development and that the plans are available for view. Applicants should supply a list of those notified, i.e. coterminous proprietors and those across the road. If interested parties have not been informed, explain why not. In this case (and if the local planning authority is itself seeking development consent) a notice of the proposal should be posted on the land concerned for 21 days, 28 days before the application is made.

Planning applications fees

Section 303 of the Town and Country Planning 1990 enables the Secretary of State to regulate the payment of fees to the local planning authority for planning applications and other matters. These fees may vary according to acreage; changes of use fees have a standard rate whilst other developments fees relate to the floor-space. The Planning Portal has a comprehensive downloadable list for England at http://www.planningportal.gov.uk/uploads/english_application_fees.pdf.

If development consists of more than one item, fees may be cumulative. The arithmetic of this is complicated and a landscape architect would be advised to enquire of the relevant planning office for each application.

The Labour Government attempted to make the planning process pay for itself by increasing the fees and there were substantial increases in fees throughout the UK in 2005–8. Then it was mooted that for the first time that these fees would be associated with performance requirements – decisions should be made in a timely manner. The Coalition Government is trying to reduce the cost of the planning service by reducing the number of applications through taking minor developments out of planning control.

Fees in Scotland are comparatively low: the maximum fee in Scotland is £19,100 (2013 Regulations) compared to over £250,000 in England and Wales. The Scottish Government consulted authorities about effective resourcing of the planning process by, for example, linking fees to the value of development or linking fees to planning officers' time spent on applications, with a maximum fee of £100,000.

Publicity

Rules on publicity are set out in the GDPO 1995, the Planning (Listed Buildings and Conservation Areas) Act 1990, and Planning (Listed Buildings and Conservation Areas) Regulations 1990. Circular 15/92 Publicity for Planning Applications also provides guidance.

Under the 1991 Planning and Compensation Act, neighbour notification in *England and Wales* takes the form of notices to each property, one addressed to the occupier, one to the owner and one to the lessee. A plan identifying the site must be included with each notification. Plans are available for view for 21 days. Local planning authorities are responsible for publicising planning applications. However, permitted development requiring prior notification to the local authority (e.g. some agricultural or forestry works) requires a site notice posted by the developer.

In *Scotland* there has been a formal system of neighbour notification of *all* planning applications since 1984. Planning authorities organise neighbour notification to people whose property is within 20m of a planning application. They also place advertisements in the local press for some developments and where neighbour notification is not possible. Planning authorities are also required to publish a weekly list of applications on their websites and to have an online and paper register of live planning applications and determined applications for public inspection. National and major development proposals require applicants to undertake pre-consultation events which are open to the public. Owner notification is still the responsibility of the applicant. (See Scottish Planning Series Planning Circular 3/2013 Development Management Procedures (0044/00441568).)

Publicity in *Northern Ireland*: the Planning Department of DOENI advertises all applications for outline or full planning permission (including householder applications), reserved matters, Listed Building Consent and Conservation Area Consent. Planning applications are advertised in the local press and on the DOENI Planning Department website. Applications are not determined before 14 days from when the notice was first published.

Statutory requirements for publicity in England and Wales are given in Table 7.7.

Table 7.7 Statutory requirements for publicity for applications in England (E) and Wales (W)

Nature of development	*Newspaper*	*Website unspecified timescale*	*Site notice*	*Site notice or neighbour notification*	*Neighbour notification*
Application subject to EIA accompanied by environmental statement	14 days	EW	21 days		
Proposal departs from development plan	14 days	EW	21 days		
Development affecting public right of way to which Part 3 of the Wildlife and Countryside Act 1981 applies	14 days	EW	21 days		
Applications not covered in the above, i.e. non-major development		EW	W	E	W
Major development (see definition on pp. 190–191)	EW	EW	W	E 21 days	W
Minor development		EW		E 21 days	
Development affecting the setting or exterior of a listed building	21 days	EW	7 days		
Development affecting the character or appearance of a conservation area	21 days	EW	7 days		
Application to vary or discharge conditions attached to a listed building consent or conservation area consent or involving exterior works to a listed building.	14 days	EW	21 days		

Calling in further information (UK)

The Town and Country Planning (Development Management Procedure) (England) Order 2010 states the following:

Paragraph 4 (2) 'Where the authority who are to determine an application for outline planning permission are of the opinion that, in the circumstances of the case, the application ought not to be considered separately from all or any of the reserved matters, they shall within the period of 1 month beginning with the receipt of the application notify the applicant that they are unable to determine it unless further details are submitted, specifying the further details they require.'

Paragraph 35 (9) 'The local planning authority may by notice in writing require the applicant to provide such further information as may be specified to enable them to deal with the application.'

Each home nation's planning rules have similar provisions and a tree survey is a typical requirement.

Many supplementary studies are possible, but governments request planning authorities to be reasonable, relevant and proportionate in their requests for additional information. Studies may include:

- Supporting planning statement.
- Design statement (for all applications where design is an issue).
- Access statement.
- Transport assessment.
- Draft travel plan.
- Planning obligations.
- Flood-risk assessment/drainage strategy.
- Listed-building appraisal and conservation-area appraisal.
- Regeneration statements.
- Retail assessments.
- Affordable housing statement.
- Open space.
- Sustainability appraisal.
- Landscaping.
- Tree survey/arboricultural statement.
- Historical, archaeological features and scheduled ancient monuments.
- Nature conservation/ecological assessment/natural beauty.
- Noise impact assessment.
- Air quality assessment.
- Assessment for the treatment of foul sewage.
- Utilities statement.
- Energy statement.
- Sound insulation requirements.
- Mineral working and restoration.
- Sunlight/day-lighting assessment.
- Ventilation/extraction and refuse disposal details.
- Structural survey.
- Details of any lighting scheme, including a light pollution assessment.
- Photographs and photomontages.

Building regulations (UK)

In addition to the application for planning permission Building Standards Regulations may have to be complied with.

E-planning and planning advice services (UK)

In 2005, the Government published targets for more efficient public services, increasing public access and involvement in planning and raising the public's

knowledge of the system. The use of the internet was a key part of these aims and is intended to speed handling of applications, reduce planning officers' administration time, enable applicants and consultees to track the progress of applications and receive automatic notification once a decision has been reached. The aim is to make e-planning the norm and support modernisation of building control.

Local councils received government funding to assist putting pre-application planning information on-line and enabling submission of planning applications, appeals, enforcement cases, consultation and associated services to be conducted electronically. By 2009, all UK planning authorities had on-line planning services.

E-planning projects include the Planning Portal which provides free on-line planning information and services for all users. E-planning also includes the Planning Casework Service which allows tracking of the Planning Inspectorate's cases (www.planningportal.gov.uk).

Planning Aid England, run by the Royal Town Planning Institute supports individuals and communities about planning issues.

In Northern Ireland, Community Places provides independent advice, training and project support from full-time staff for groups meeting eligibility criteria. It also facilitates public and community consultation on planning and public service issues. Otherwise Planning DOE provides advice.

Planning Aid for Scotland (an independent charity) provides professional planning advice, training and support to individuals and groups.

Planning Aid Wales (core-funded by the Welsh Government) provides a similar service. It has been recommended that a Planning Advisory and Improvement Body for Wales should be established.

Local planning authority actions

Considerations of local planning authority

A local planning authority decision on a planning application:

- Must comply with any Secretary of State directive.
- Have regard to views of other government department and other authorities.
- Consider the representations of interested parties (neighbours and other consultees).
- Must comply with provisions of the Local Development Plan or equivalent and local area-specific land allocations plans.
- Does not consider cost or need.
- Considers national planning policy guidance.
- Must keep a register of applications, permissions granted and permissions refused.

Pre-application consultation (PAC) (England)

Under the Planning Act 2008, developers are required to undertake pre-application consultation with the community for NSIPs. In discussion with the LPA, the

developer prepares a Statement of Community Consultation which sets out how the public consultation will be handled.

PAC is intended to add value at the start of the development process and ensure that the public is better informed about the proposals. It should allow an applicant to obtain key information about the economic, social and environmental impacts of a scheme from consultees, and therefore help to identify as early as possible those project options which are unsuitable and not worth developing further. PAC should also allow potential mitigating measures to be considered and perhaps be built into the project before an application is submitted; and finally, PAC may identify ways in which a project could, without significant additional costs, support wider strategic or local objectives.

Pre-application consultation – Northern Ireland

The Planning Act (Northern Ireland) 2011 placed a duty on applicants for planning permission to consult the community in advance of submitting an application for a 'major' project (see definition earlier).

However, this legislation will not take effect until later in 2015 or early 2016. It will be included in the new 'Strategic Planning Policy Statement for Northern Ireland'.". In the interim, Department of the Environment Northern Ireland (DOENI) wished to ensure that communities would be actively involved in the current planning system at an early stage and throughout the process. Therefore in June 2014 the Department of the Environment published its 'Information Leaflet 16 – Pre-Application Community Consultation Guidance' which provides guidance on how pre-application consultation could be undertaken by prospective applicants for major applications on a voluntary basis prior to implementation of the Planning Act (NI) 2011.

It was hoped that pre-application consultation would improve the quality of planning applications received; mitigate negative impacts where possible; address community issues or misunderstandings; and provide smoother and faster decision-making, all to the benefit of the community, the applicant and the environment.

The leaflet includes suggestions for advertising consultation events, who should be encouraged to attend, what sort of information should be provided, how events could be conducted and how they could be reported on. Applicants are requested to allow at least 12 weeks for the consultation before submitting an application and advertise events in the local press at least one week before they take place.

Pre-application consultation – Scotland

The Planning (Scotland) Act 2006 introduced the possibility that national and major developments would be subject to a formal pre-application consultation process. The aims are to improve the quality of applications, address misunderstandings, and air and deal with community issues. The key stages are:

- *Proposal of application notice:* This notice, describing the proposed development and giving a site address, a plan sufficient to identify the site and contact details of the applicant, must be submitted to the local planning authority at least 12 weeks before the planning application is submitted.
- *Consultation:* The period between the Proposal of Application Notice and formal application would be used for public consultation. The developer is not required to accept or adapt to the community's views and the community retains the right to comment formally on an application in the normal way.
- *Planning application:* A planning application submitted as normal, but accompanied by a 'pre-application consultation report'.
- *Pre-determination hearings* Scottish Ministers may also require a planning authority to hold a pre-determination hearing for major and local developments contrary to the development plan, developments requiring Environmental Impact Assessment and large-scale Bad Neighbour developments. The local authority decides who should be able to attend and the procedures to be followed.

Pre-application consultation – Wales

At the time of writing, the Welsh Government is consulting interested parties about their proposals on proposals for the new pre-application procedures included in the Planning (Wales) Bill. The new procedures are intended to make the planning application process more effective and efficient by 'frontloading', i.e. ensuring applicants are aware of any significant issues before submitting a planning application.

The Welsh Government is also asking how powers provided in the Planning (Wales) Bill and the Planning and Compulsory Purchase Act 2004 could help to improve service delivery from statutory consultees.

The Planning (Wales) Bill introduces new pre-application provisions that:

- Place a duty on applicants to carry out pre-application consultation with the community and statutory consultees for major developments.
- Require local planning authorities to provide pre-application services to applicants.
- Reinforce the duty in the Planning and Compulsory Purchase Act 2004 which requires statutory consultees to provide 'substantive' consultation responses within specified timescales.

These provisions should allow significant issues to be raised before planning applications are submitted and provide communities with an opportunity to provide their views early in the planning process.

Site visit (UK)

Planning officers and elected members have no statutory obligation to visit a site before deciding a planning application. However, they may be vulnerable to challenges on appeal and award of costs on grounds of unreasonable behaviour if

they fail to take into account a material planning consideration that would have been evident if a site visit had been made.

Consultations for major and local planning applications (UK)

Before granting consent the local planning authority will consult statutory consultees if appropriate to the development, although from 2003 this was no longer required in England if the planning authorities think proposed developments accord with advice issued by the relevant agency. The Planning and Compulsory Purchase Act 2004 requires statutory consultees to respond within 21 days or other period agreed in writing by both parties.

Typically, consultation would be with the Environment Agency/SEPA/NRW/DOENI or local water and sewerage company (about water, sewerage and flooding), the Highways Authority (about access and traffic impact) and the Health and Safety Executive (if dangerous chemicals are part of the development).

Consultees may respond in four ways: say they have no comment; they are content with the development; refer to standing advice; or provide advice (ODPM 08/05). LPAs may ask applicants to adjust their proposals to meet consultees' advice. If the LPA's decision is contrary to the advice of statutory consultees, the statutory consultees have the right to be told why.

It was reported early in 2014 that, following budget cuts, the Environment Agency would no longer comment on the biodiversity aspects of planning applications.

Lists of statutory and non-statutory consultees can be difficult to find, but possible sources for Scotland and Wales are at:

- Schedule 5 of 'The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008' & Circular 3/2013 'Development Management Procedures'.
- Welsh Government, *Information Report: List of Statutory and Non-Statutory Consultees in the Planning Application Process* (2011).

Consultation example: Off-shore wind farm

Consultation took place with the following organisations:

- SNH, SEPA, Planning Authorities, Crown Estate
- several Scottish Executive departments: planning development, climate change division, marine team, Water Framework Directive team, salmon and freshwater fisheries, countryside and natural heritage, wildlife and habitats unit
- Defence Estates Safeguarding unit
- Civil Aviation Authority
- Health and Safety Executive
- Radio Communication Agency
- Scottish Fishermen's Federation
- Association of District Salmon Fishery Boards

Environmental Impact Assessment/Statement (UK)

EIA is a technique and process by which information about the anticipated environmental effects of a project are collected, both by a developer and from other sources, and taken into account by a planning authority in forming their judgement on whether or not a development should proceed. EIA regulations apply to two separate lists of projects:

- Annex 1 projects for which EIA is required in every case.
- Annex 2 projects for which EIA is required only if a particular project is judged likely to give rise to significant environmental effects.

See later for much more detail on EIA.

Town and Country Planning (Mineral) Act 1981 (UK)

This is an important Act because it made open-cast mining subject to control by the local planning authority. Before this ruling, mining was a county planning matter. See Chapter 9 for more details about this Act.

Agreements associated with applications for development consent

Planning obligations (section 106 agreements) (England and Wales)

The Government recognises that local planning authorities will seek improvements to development proposals where those improvements would be to the *general public benefit*, rather than for the benefit of some specific piece of neighbouring land. Under the Town and Country Planning Act 1971, section 52, these improvements could be achieved by the use of agreements (also called covenants).

This measure was retained in the Town and Country Planning Act 1990, section 106, but renamed 'Planning Obligation', now referred to as a section 106 agreement. The current rules are set out in the Community Infrastructure Levy (CIL) Regulations 2010 and a useful guide is in Annexe N of the Planning Inspectorate's 'Procedural Guide: Planning Appeals. England. 2014'. Planning Obligations and CIL are alternatives: a development may have one associated with it but not both.

The Act stated that an agreement is made: '*For the purpose of restricting or regulating the development or use of land either permanently or during such period as may be prescribed by the Agreement.'* Agreements may be positive or negative. Circular 05/2005 (which replaced 1/97) stated that obligations are intended to make acceptable development that would otherwise be unacceptable in planning terms. Obligations may restrict development or use of the land; require operations or activities to be carried out in, on, over or under land; require land to be used in a specific way; require sums to be paid to the local authority as a single sum or periodically.

Planning obligations can either require the person giving the undertaking, or their successor, to do a specified thing or prevent the use or development of the land in a specified way. Planning obligations can be entered into between the local planning authority and the landowner or unilaterally by the landowner. The latter may be used where negotiations with the local planning authority are unnecessarily protracted or unreasonable.

Section 106 may be used, for example, to secure the planting of new boundaries, or the resurfacing of public rights of way. The ODPM issued a Circular in 2003 to encourage use of section 106 to facilitate inclusion of 'affordable homes' as part of a development and to make it apply to all developments (not just those over 25 residential units as at present).

A local planning authority should include details in its local plan of its policy in regularly seeking planning obligations in connection with certain types of development. Circular 05/2005, endorsed by National Planning Policy Framework (NPPF) clause 204 and in Scotland (Circular 3/2013), sets out the following tests, all of which must be satisfied for an obligation to be acceptable to the government:

1 necessary to make the development acceptable in planning terms;
2 directly related to the proposed development;
3 fairly and reasonably related in scale and kind to the proposed development.

Negotiation is a vital component in this process and the existence of policies does not preclude the negotiation of obligations on an *ad hoc* basis. Unlike section 52 agreements, planning obligations can be modified or discharged by formal application to the local authority with right of appeal to the Secretary of State.

The NPPF replaced Circular 05/2005 which stipulated that Councils should not permit unacceptable developments as a result of inducements offered by developers. Use of planning obligations must be governed by the principle that planning permission may not be bought or sold. It is unclear if the principle that inducements are unacceptable still stands.

Planning obligations run with the land and are therefore enforceable against successors in title. They are legally binding, but need not be agreed in detail before planning permission is granted. However, the formal planning consent (a formal letter) is unlikely to be issued until all details of the obligation have been agreed.

If there is a choice between imposing conditions and entering into a planning obligation, conditions are preferable because developers have more rights of appeal in relation to conditions than to obligations (see Circular 05/05, para. B51). Moreover, conditions are simpler to impose as they do not require the creation of special contractual arrangements between planning authority and developer.

From 2014 there will be limits on the local use of planning obligations for pooled contributions towards items that could be funded by CIL (see below). This means that councils that do not yet have a CIL scheme in place could miss out on some planning obligation income.

Section 75 planning obligations (Scotland)

Under the Planning (Scotland) Act 2006, agreements are now called planning obligations, though are still under section 75. The principles of section 106 agreement apply. A section 75 agreement is a contract between a local authority and a landowner (and possible future owners) which requires the landowner to restrict or regulate the use of their development or mitigate potential negative impacts. In addition, developers may provide unilateral obligations, used to allow the applicant to deliver certain benefits. Section 75 agreements are used where conditions (attached to a planning permission) cannot be used.

People bound by obligations may appeal to the planning authority for the modification or discharge of obligations. The authority may determine that the obligation should continue unmodified, be modified or discharged. Further appeal is possible to Scottish Ministers where the authority has determined that the obligation should continue without modification. Under the Planning etc. (Scotland) Act 2006 (Saving and Transitional Provisions) Amendment Order 2011, these provisions became retrospective, i.e. they apply to planning obligations agreed before the Planning etc. (Scotland) Act 2006 came into force.

Planning agreements (Northern Ireland)

The Planning (Northern Ireland) Order 1991 as amended allows the DOE to enter planning agreements (Article 40 agreements) to facilitate, restrict or regulate development or use of land. The DOE can negotiate legal agreements in conjunction with planning permission which include contributions paid to the DOE to offset the impact of development ('developer's contributions').

Planning Policy Statement 13 'Transportation and Land Use' places responsibilities on developers to pay for additional transport infrastructure if development requires it, including improved access by public transport, walking and cycling. This provision is underused. Unlike in the rest of the UK, contributions in NI cannot be used for affordable housing, but there are draft proposals to enable this to take place.

Community Infrastructure Levy (CIL) (England and Wales only)

This was formerly referred to as Planning Gain Supplement. The overall aim of CIL is to ensure that costs incurred in providing infrastructure to support development of an area can be funded wholly or mainly by owners or developers of land. Its operation is described in 'Community Infrastructure Levy: An Overview' (2010) and the formal policy is in the Community Infrastructure Levy Regulations 2010 (www.communities.gov.uk).

CIL is an *optional alternative* to section 106. However if planning authorities wish to use CIL, they have to identify what infrastructure is needed and its cost, and calculate the contribution each development should make to that cost. CIL proposals need to be independently tested to secure fairness; consequently

infrastructure planning associated with CIL has to be embedded in the development plan system (therefore tested through the local plan inquiry process). The levy is paid to the local authority.

Local authorities have to set out in their local plans what contributions they are likely to seek and when; what factors they will take into account; the scale and form of contributions (which may be capped by the Government); when commuted sums will be required for maintenance; and instances where developers will not be required to make contributions. The local authority must appoint an independent and appropriately qualified person (an 'examiner') to examine a draft schedule of charges and recommend its approval to the local authority.

To date, drawing up CIL schemes has taken local authorities between six weeks and 18 months from draft to formal council approval. It is a complex change involving not only planning policy and development control but also finance, IT, legal and building control departments. Appeal may be made to HM Revenue and Customs about the method of calculating the schedule of CIL charges. Evasion of CIL may be a criminal offence, where conviction may involve imprisonment and fines.

The tariff may be applied to most *new* residential and commercial schemes over $100m^2$ or where a new dwelling is created. Structures such as wind turbines and pylons are not included. Relief is available for social housing and development by charities for charitable purposes.

CIL income may be used towards:

- Provision of roads and other transport facilities.
- Flood defences.
- Schools and other educational facilities.
- Medical facilities.
- Sporting and recreational facilities.
- Open spaces.
- Affordable housing.

There has been criticism that the system is inflexible and unresponsive to changes in economic climate, but government guidance clearly states that authorities may use differential rate scales. For example, the practical guide *Community Infrastructure Levy: Guidance Charge Setting and Charging Schedule Procedures* (Communities and Local Government, 2010) states that 'An authority could set differential rates by reference to both zones, *and* the categories of development within its area' (para. 37). However authorities are advised to keep charging scales simple and they must comply with rules on fairness and transparency.

The Coalition Government conducted an impact assessment of CIL, published in January 2011 but has retained it and recognised it in the NPPF clause 175. CIL has been amended several times. In CIL Statutory Guidance 2014 councils became required to strike an appropriate balance between using CIL and harming the viability of development. However councils have until 2015 to use section 106 agreements to fund infrastructure. In addition, CIL payment may be phased in

stages through the course of development and CIL need not be financial but may be payments in kind, e.g. land or infrastructure (see http://http://planningguidance.planningportal.gov.uk/blog/guidance/community-infrastructure-levy/).

Good Neighbour Agreements (Scotland)

The Planning (Scotland) Act 2006 allows for Good Neighbour Agreements between the community council or other community body and the developer. These operate in a similar way to section 75 obligations, i.e. they may be recorded in the Register of Sasines; there are rules about modification, discharge and appeal.

The Highways Agency and section 278 agreements

The Highways Agency is an executive agency of the Department for Transport in England. Agreements for the private sector funding of works on the strategic road network are made under section 278 of the Highways Act 1980, as amended by section 23 of the New Roads and Street Works Act 1991. These agreements are a form of contract which provides a financial mechanism for ensuring completion of mitigation works identified and determined as a condition of granting planning permission.

The agreement may include details of how the developer will fund the work and a commuted sum for maintenance. It may also include details of any land conveyed (acquired) for the purpose of building a new road or altering an existing one. The agreement will include drawings showing how the work will be completed to the Highways Agency's approved specification. A section 278 agreement does not mean that the Highways Agency will support a developer in any planning application or subsequent proceedings.

Legislation and policy guidelines relevant to landscape design

Under the Town and Country Planning Acts the local planning authority has a duty to reserve trees and enhance the environment by planting them. The value of trees was restated in ODPM Circular 06/2005, but with a shift in emphasis towards biodiversity: it stated that veteran and other substantial trees or many types of wood, especially ancient and semi-natural woods, can be important for biodiversity conservation. Along with their contribution to general amenity, nature conservation value is a relevant consideration in considering whether trees or woods merit a TPO.

PPG1 (General Policy and Principles) First edition 1992 Appendix A: Design Considerations (superseded but historically interesting for introducing landscape considerations as a factor in planning permission) included several paragraphs important to the landscape architects. '*Applicants for planning permission should demonstrate wherever appropriate that they have considered the wider setting of buildings. New developments should respect but not necessarily mimic the character of their surroundings. Particular weight should be given to the impact of development on existing buildings and the landscape in environmentally*

sensitive areas such as National Parks, Areas of Outstanding Natural Beauty and Conservation Areas, where the scale of new development and the use of appropriate building materials will often be particularly important …'

The appearance and treatment of the spaces between and around buildings is also of great importance. Where these from part of an application site, the landscape design – whether hard or soft – will often be of comparable importance to the design of the buildings and should likewise be the subject of consideration, attention and expert advice. The aim should be for any development to result in a "benefit" in environmental and landscape terms.'

For the first time, the process and application of landscape design was recognised and incorporated in government planning guidance. PPG1 drew landscape into the development process, influencing planning decisions and appeals. A landscape architect would have apprised a client of the value placed on landscape in planning policy and advised that a planning authority would require attention to this issue (e.g. by tree planting).

In addition, Circular 11/95 (superseded by NPPF) raised the required standard of landscape information associated with new development, including design details, earth-moving guidelines, and enforcement of landscape requirements by planning authorities. Completion of a housing development could be prohibited until the previously agreed planting scheme was complete. Long-term maintenance and management, together with more effective tree protection during construction, were also discussed.

In 2005 PPG1 was replaced by Planning Policy Statement 1 (PPS1) in 2005. The PPS was less specific than PPG1, but set out key principles of sustainable development, spatial planning and community involvement. PPS1 stated that sustainable development should be linked to the promotion of high-quality and inclusive design for all developments. Design that is inappropriate in its context or fails to take opportunities to improve the character and quality of an area should not be accepted. Authorities *'should take account of the range of effects on the environment as well as the effects of development in terms of economic benefits and social well-being'*.

This has been superseded by the NPPF which includes the following bland comment as one of 12 principles of good planning: '*always seek to secure high quality design and a good standard of amenity for all existing and future occupants of land and buildings*'. However, clause 57 states more strongly '*It is important to plan positively for the achievement of high quality and inclusive design for all development, including individual buildings, public and private spaces and wider area development schemes.*'

NPPF (58) gives government guidance on good design which is a synthesis of modern planning ideas giving some emphasis to a sense of place, but rather feeble on landscape design compared to PPG1: 'Local and neighbourhood plans should develop robust and comprehensive policies that set out the quality of development that will be expected for the area. Such policies should be based on stated objectives for the future of the area and an understanding and evaluation of its defining characteristics.'

Planning policies and decisions should aim to ensure that developments:

- 'will function well and add to the overall quality of the area, not just for the short term but over the lifetime of the development;
- establish a strong sense of place, using streetscapes and buildings to create attractive and comfortable places to live, work and visit;
- optimise the potential of the site to accommodate development, create and sustain an appropriate mix of uses (including incorporation of green and other public space as part of developments) and support local facilities and transport networks;
- respond to local character and history, and reflect the identity of local surroundings and materials, while not preventing or discouraging appropriate innovation;
- create safe and accessible environments where crime and disorder, and the fear of crime, do not undermine quality of life or community cohesion; and
- are visually attractive as a result of good architecture and appropriate landscaping'.

NPPF (109) says that the planning system should protect and enhance valued landscapes and remediate brown-field land. NPPF (114) says that local planning authorities should adopt a strategic approach in planning positively for the creation, protection, enhancement and management of networks of biodiversity and green infrastructure. They should similarly plan to maintain the character of the undeveloped coast, protecting and enhancing its distinctive landscapes, particularly in areas defined as Heritage Coast, and improve public access to and enjoyment of the coast.

The NPPF reaffirms the importance of maintaining biodiversity originally set out in PPS9 (though in less detail) and indicates that Circular 06/2005 still applies. It also recognises that previously developed sites may have environmental value that should be retained. Circular 06/2005 details the legal duties on biodiversity and geological conservation applied through the planning process. The Circular also specifies how the Countryside and Rights of Way Act 2000 amends the general duty of local authorities under the Wildlife and Countryside Act 1981.

NPPF (117) refers to Nature Improvement Areas, suggesting that planning authorities consider what would be appropriate development in them.

Planning authority decision options (UK)

On application for planning permission a local authority may:

- Grant unconditional permission. In England, with effect from 2003, reasons have to be given for all decisions and a list of relevant development plan policies and proposals. This may have far-reaching implications because it will make it easier for third-party objectors to request a judicial review.
- Grant permission with conditions.

- Refuse permission. Reasons must be given. These must be precise, specific and relevant. Reference must be made to all polices and proposals in the development plan relevant to the decision.

It is a statutory requirement that planning committee decisions pay attention to current national and regional policies, therefore clear and convincing reasons have to be given for any departure from such policy.

In Scotland reasons for a decision are compulsory only if the consent is contrary to the local plan, but Best Value reviews have now spread the good practice to most authorities that reasons are given for all decisions of any type. Under the Planning (Scotland) Act 2006, planning authorities are required to *keep registers* of and publish decision notices including conditions and reasons for the decision and conditions. In fact, many planning authorities throughout the UK already publish this information on their planning pages on the web.

In England, Scotland and Wales, planning application decisions are normally made by the planning committee of the local authority, but increasingly decisions are taken by the chairman of the committee or chief planning officer (under a 'scheme of delegation') in order to speed up the process.

The 1990 Planning Act gave planning authorities the power to revoke or modify a consent, full or outline, provided that this order is confirmed by the Secretary of State. The Planning and Compulsory Purchase Act 2004 gave authorities the power to decline to determine repeat and subsequent applications for proposals that are similar to ones they have rejected in the past two years, or if an application has been dismissed at appeal within the same period. However, government guidance is that if a genuine attempt has been made to address previous objections, the authority should determine the application.

Planning authority 'conditions' must (DoE Circular 11/95, NPPF 2012 clause 204, Scottish Circular 3/2013):

- Be necessary.
- Be imposed freely, without preconceptions due to previous applications.
- Be relevant to the application and serve some useful planning purpose, e.g. amenity, social need, comfort and convenience of occupants, relate to existing rights.
- Be certain and unambiguous.
- Be reasonable.
- Not effect an alteration to general law.
- Be enforceable.
- A reason for conditions must be given.

May an applicant appeal against conditions?

Yes, but there is usually a time condition about commencement and completion which cannot usually be appealed against.

Time for decision

Local planning authorities should make decisions on planning applications within 13 weeks for major applications (changed from eight weeks with effect from January 2005) and eight weeks for all other applications, unless the applicant agrees in writing to an extension of time. For EIAs the decision period is 16 weeks.

Lack of decision can be treated as a refusal. Grant of planning permission does not come into effect until written notice is given to the applicant.

However, the Coalition Government has said that lack of a decision can be treated as consent. If a local authority determined fewer than the 30 per cent benchmark of major applications within 13 weeks between July 2011 and June 2013 they could lose their planning powers and developers could bypass them through 'special measures' imposed by the Government and submit applications to the Planning Inspectorate.

Duration of permissions

Since the 1971/1972 Acts all permissions have been of limited duration. The Planning and Compulsory Purchase Act 2004 shortened duration of full planning permission from five to three years. The Planning Scotland Act 2006 is similar, although planning authorities may stipulate a shorter period than three years if appropriate and unapproved matters should be agreed within three years of outline consent being granted.

Full planning permission normally lasts for three years. Outline planning permission is normally valid for three years, with two years for details and reserved matters, and development must begin within two years of approval of reserved matters, but planning authorities may stipulate a longer or shorter time if appropriate. In Scotland under the 2006 Act, outline consent is called 'planning permission in principle' and the term 'reserved matters' has been repealed.

The government has confirmed that local authorities may extend planning permissions up to five years during recessions. From 1 October 2009, powers under sections 91 and 92 of the Town and Country Planning Act 1990 may be used to grant consents longer than the default periods above.

Commencement

Development is deemed to have begun when any of the following has taken place:

- Any work of construction.
- A trench for foundations has been dug or begun.
- Laying mains or pipes.
- Laying out/construction of a road.
- Any material change in land use.

The Government is considering introducing a legal definition of what constitutes a 'substantial start' to avoid major sites being held up by long delays after only a ditch or other minor work has been done.

Failure to complete development

If a trench is dug but no further work occurs, the LPA may serve a 'Completion Notice' to take effect within a specified period of not less than 12 months. The notice must be confirmed by the Secretary of State.

Land banking

The Planning and Compulsory Purchase Act 2004 dispensed with section 73 applications which had been used to extend the lifetime of permissions already granted. The reason for this change was to prevent developers banking sites which then become derelict.

Commencement and completion letters

Developers may be required (by condition) to inform local planning authorities of the date when they intend to commence the work for which they have received planning permission and confirm completion. Failure to inform the planning authority will be a breach of planning control.

Refusal of application and advice to client

If planning permission is refused, the three options open to the landscape architect are:

- With the client's approval accept the refusal.
- Recommend amendments to the proposals to suit the local planning authority's conditions then resubmit within one year free of charge. However, note that under the Planning and Compensation Act 1991 authorities are able to decline to determine an application for planning permission if the Secretary of State (on appeal or call-in) has turned down a similar application in the last two years and there has been no significant change in the development plan or any other material consideration.
- Authorities are allowed to refuse to determine applications similar to proposals they have rejected within the previous two years or if an application has been dismissed at appeal within the same period. Governments advise that this should only be used if authorities believe applications are being used to wear down opposition.
- Appeal.

Appeal processes in the home nations

England

In England, appeals are addressed to the Planning Inspectorate (PINS) (in the name of the Secretary of State) who will determine whether an appeal should be dealt with by written submission, a hearing, by local inquiry or by the Minister. For all types, the inspector will visit the appeal site. (See the detailed guide: *The Planning Inspectorate: Procedural Guide. Planning Appeals. England*. 2014.) The Secretary of State has the right to hear the appeal himself/herself.

Northern Ireland

In Northern Ireland, the Planning Appeals Commission (PAC) is an independent appeals body operating under the Planning (Northern Ireland) Order 1991. PAC makes decisions on all appeals against DOENI decisions on most planning and environmental matters. It also conducts organises and provides Reporters (the senior planning officer who adjudicates at Inquiries and Hearings) for Public Inquiries and Hearings. Decisions are taken out of political decision unlike the rest of the UK, where appeals bodies make decisions in the name of Ministers. PAC makes its decisions on the basis of reports by Commissioners whose decisions are final, but may be challenged by judicial review in the High Court.

Scotland

In Scotland, there are two systems in operation:

1. Appeal to a committee (introduced into Scotland by the Planning etc. (Scotland) Act 2006). A Planning Local Review Body of three to seven councillors (who were not involved in the original decision) may be established to deal with applications that had been delegated and decided by Council officers.
2. Appeals against applications decided by an Area Committee or the Planning Committee will be reviewed by a reporter appointed by the Directorate for Planning and Environmental Appeals on behalf of Scottish Ministers.

Wales

In Wales, the Planning Inspectorate is an Executive Agency of both the UK Government and the Welsh Government. In Wales the Planning Inspectorate's duties include planning and enforcement appeals, public examination of Local Development Plans, reporting on planning applications called in by Welsh Ministers and certain NSIPs.

Third-party right of appeal

In the UK there is no third-party right of appeal that would enable objectors from the community to challenge the merits of planning decisions. The UK Government in 2000 and the Scottish Executive in 2004 considered and consulted on this issue in the context of human rights law, but both rejected the idea following opposition from many businesses, developers, national and regional agencies and most local authorities. The Government concluded that third-party rights of appeal '*would not be consistent with our democratically accountable system of planning and could add to the costs and uncertainties of planning*'.

However, other law may ameliorate this situation for third parties. The Freedom of Information Act 2000 and the UN Aarhus Convention (in force from May 2005) gives the '*right of every person present and future generations to live in an environment adequate to his or her wellbeing*'. The Convention gives the public rights of access to environmental information, participation in environmental decision-making and justice in environmental matters.

The appeal procedure

England and Wales

Relevant legislation includes section 78 of the TCP Act 1990, the Highways Act 1980, the Highways (Assessment of Environmental Effects) Regulations 1988, the Transport and Works Act 1992 and the Transport and Works (Assessment of Environmental Effects) Regulations 1995. The process differs according to the covering legislation, but the process for non-road and energy inquiries is described below.

Appeals can be made against refusal of planning permission, conditions imposed or the non-determination of a planning application. A householder or minor commercial applicant can appeal to the Secretary of State within 12 weeks of the date of the notice or the determination giving rise to the appeal, eight weeks for advertising consent (or six months for listed building and other cases). Appeals against Enforcement Notices usually should be made within 28 days of the date of the Enforcement Notice.

An appeal includes:

- A notice of appeal with a full 'Statement of Case' giving the grounds of appeal.
- The appellant's suggestions for planning conditions that would be acceptable.
- A Statement of Common Ground.
- A copy of the planning application form and plans/drawings, etc..
- A copy of the decision notice.
- All other relevant correspondence.

There are three procedures that an appeal can follow, written representations, a hearing or an inquiry. For all the procedures the inspector will visit the appeal site.

The normal method of hearing an appeal is by public local inquiry but *if parties agree* it can be either by hearing or written representation.

Both the local planning authority and the appellant prepare a statement and send it to the Planning Inspectorate (or equivalent) before the hearing. The deadlines for submissions are strict but vary between appeal types. Statements should be less than 3,000 words. Statutory consultees may attend. Interested persons may attend at the discretion of the inspector. Decisions are communicated to all participants and registered interested parties. The only further challenge is by appeal to the High Court on a point of law, although judicial review and appeals to the House of Lords are permissible.

The decision will be published on the Planning Portal website at: http://www.planningportal.gov.uk/planning/appeals/online/search.

The timing of appeal stages was reviewed in 1999 and rigid timetabling was introduced in order to reduce the duration of planning inquiries. In addition, ODPM Circular 07/05 *Planning Inquiries into Major Infrastructure Projects: Procedures* allows for concurrent inquiries held by a number of inspectors coordinated by a lead inspector; appointment of a 'technical advisor'; identification of 'major participants' and additional publicity. This applies in England only.

Northern Ireland

The appeals processes are similar to the rest of the UK with submission of questionnaires and statements of case to Planning Appeals Commission (PAC) Commissioners according to strict timetables. However, the parties also issue 'Rebuttal Statements' in response to the other parties' Statements of Case. The PAC Commissioners conduct the inquiry or hearing and report to the DOE who issues its decision on the application and publishes the PAC's report. See, for example: http://www.pacni.gov.uk/procedures_for_public_local_inquiries_and_hearings_into_major_planning_applications_-_24-07-2014.pdf.

Scotland

Current guidance is in the Town and Country Planning (Appeals) (Scotland) Regulations 2013. See also http://www.scotland.gov.uk/Publications/2010/10/19104538/11. The processes are similar to England. Inquiries are the normal process led by a 'reporter' appointed by the Scottish Government's Directorate for Planning and Environmental Appeals (DPEA) but minor appeals may involve just written submissions, or hearings addressed to a reporter. Appeals must be made within three months of the planning authority decision (six months for advertising consent). There are strict timetables for the submission of evidence. The reporter's decision is sent to all parties and published on-line at http://www.dpea.scotland.gov.uk.

EU law

Note that EU law may be cited in appeals. For example, the European Court of Justice ruled that France had not fulfilled its obligations under the Birds Directive to define an adequate SPA area at Basses Corbières. This ruling was cited by SNH in opposition to an application to build a wind farm in Argyll in an area that could be designated as a SPA in the future. See http://vlex.com/vid/commission-france-basses-res-457793 for the Basses Corbières case.

Judicial review

Judicial review used to be rare, but is becoming more common. The judicial review process is intended to assess whether procedures have been followed correctly, rather than looking at the merits of a decision. The usual argument for a judicial review is that a decision is unreasonable and that either irrelevant considerations were taken into account or relevant considerations were not. Increasing awareness of the EIA regulations has led to an increase in the number of judicial reviews. Commercial rivals are also increasing their use of reviews.

Public inquiries

The public inquiry procedure provides for the investigation into, and formal testing of, complex and/or technical evidence, usually through expert witnesses. *Inquiries are used as part of the process of drawing up local plans and for major development projects*. The site may be inspected before, during or after the inquiry. Public inquiries are not courts of law. Under the inquiries procedure an inspector holds an inquiry at which parties may be formally represented by advocates. Inspectors are usually respected members of the planning profession.

The local planning authority has two months to prepare a Statement of Case. The appellant and the local planning authority should prepare an agreed Statement of Common Ground (SCG) and send it to the Secretary of State and any statutory party four weeks before the inquiry. The SCG is required in order that the inquiry concentrates on areas of difference. Twenty-eight days before inquiry the LPA sends copy of evidence to Appellant and S27 parties. ('S27 parties' refers to section 27 of the Town and Country Planning Act 1971, and any persons making representations to Secretary of State through the inquiry process.)

The local planning authority's statement deals with four matters:

- Statements of submissions they propose to put forward.
- Lists all plans and documents, and where they can be inspected and copied.
- Mentions relevant directions of Secretary of State.
- Includes views of other government departments if they are to be used.

The Statement of Case cannot be departed from without leave of the inspector.

What happens at an inquiry?

(This is at the inspector's discretion!)

- The inspector opens the inquiry formally. The appellant's and local planning authority's advocates name the witnesses they will call. The inspector asks if any other parties wish to be heard.
- Appellant's advocate summarises his or her client's case. Like the local planning authority, the appellant's evidence should be submitted in advance of the inquiry.
- Summary of proof now usually required and read out. The local planning authority's advocate cross-examines, s27 and third parties can cross-examine.
- Appellant's advocate re-examines (often to correct or clarify any confusion that has arisen during cross-examination).
- The local planning authority's advocate follows the second, third and fourth steps above.
- S27 and third parties state their case.
- Appellant's advocate makes closing speech.
- The local planning authority's advocate makes closing speech.
- Inspector closes inquiry and makes accompanied site visit.

The decision

Having heard the case for and against, the Secretary of State or inspector may:

- Sustain or dismiss the appeal.
- Reverse or vary any part of the original decision – whether the appeal relates to that part of the decision or not.
- Deal with the application as if it had been made to him in the first instance.

Eighty per cent of decisions are made by inspectors, but where the Minister is to make the decision the inspector reports findings of fact and his conclusions, then the Minister makes a decision and notifies the parties. If the Minister disagrees with inspector he must inform all parties, allowing 21 days for representations, and ask for the inquiry to be reopened. A 1999 government target states 80 per cent of appeals decided by inquiry should be determined in 36 weeks.

Public inquiries for local plans

Public inquiries may be held to review appeals against local planning authority decisions, but they are also a normal part of the process of adopting new local plans as a formal type of public consultation. Under the Planning and Compulsory Purchase Act 2004 local plan inquiries assess the overall soundness of submitted development plan documents, rather than merely consider objections.

Examinations tend to be informal (around-table discussions) and shorter, though inspectors have the right to cross-examine if necessary. Representations should be in writing and grouped by nine tests described in PPS12. The inspector's report is to be binding on the local authority. Objectors will also have to relate comments to the nine tests.

Planning Inquiry Commissions (PIC): a historic note!

This method of assessing very substantial applications was superseded in England and Wales by creation of the Infrastructure Planning Commission under the Planning Act 2008. PICs were held where the usual appeal-type public inquiry was not best suited to development, e.g. third London airport, Sizewell Nuclear Power Station.

The Minister set up a commission which worked in two stages:

- Taking written and oral evidence and carrying out the necessary research at the Secretary of State's expense.
- Holding the normal public inquiry with cross-examination.

A report was prepared for the Minister who made the decision.

Some of these enquiries were notorious for their duration. Sometimes years passed before their decisions were finalised.

Technical and expert evidence

If you are involved in an enquiry or an appeal, do not leave preparation until the last moment as the outcome may depend on the quality of *your* evidence. Evidence should include:

- Any fact that may be disputed by the other side – supported with reason and evidence.
- Any technical questions and answers that may assist the inspector.
- Any intentions the landowner/developer may have for the land in the future.

Landscape architect

A landscape architect may have to prepare written precognitions stating the landscape case on behalf of their clients, or illustrative material about visual or landscape matters and Environmental Impact Assessment. After the appeal decision, landscape architects may advise on reasons for refusal or implementation of landscape conditions. Allow plenty of time and take care over this – your evidence may be very influential!

Ethics of being a witness

As a landscape architect you may be appearing on behalf of either the local authority or the appellant. As a local authority employee you will be expected to defend the decision of your authority. If you are in private practice your client will have appointed you to represent his or her interests. Either may pose professional and ethical problems.

A professional witness is not meant to be an Advocate or Queen's Counsel, but to put forward his or her 'bona fide professional opinions'. A professional expert is expected to give evidence in 'good faith', i.e. be able to present, declare and distinguish between generally accepted ideas on the one hand and individual theories on the other. If testimony is not given in good faith, then there may be a 'failure of candour' – true reasons may be withheld because it is thought they may not gain wider agreement or further the client's case.

Thus a chartered landscape architect giving evidence would be expected to be familiar with and able to respond *in good faith* to questions on the Landscape Institute's publications such as *Green Infrastructure*, *Public Health and Landscape*, LVIA and the LI Advice Note on photography and photo montage.

Finally, note that any witness (scientist, expert or professional) who gives evidence in a large number of cases will be under psychological pressure to sustain and continue the original argument, even if he or she is correct all the time.

Enforcement

Enforcement is based on Part V of the Town and Country Planning Act 1972 and as amended by Part II of the Planning and Compensation Act 1991. For England only: Environment Circular 10/97: Enforcing Planning Control; legislative provisions and procedural requirements is relevant.

Planning authorities are responsible for taking enforcement action in the public interest. Decisions and resulting action should be taken without undue delay. Failure to act promptly could constitute maladministration. Under the Planning and Compensation Act 1991 most unauthorised developments acquire lawful status after four years for building, engineering, mining or other operations in, on, over or under land, without planning permission. This applies also for change of use of a building, or part of a building, to use as a single dwelling house. There is a 10-year period for enforcement for all other development. The 10-year period runs from the date the breach of planning control was committed. Once these time limits pass, development becomes lawful, in terms of planning.

Enforcement action should be commensurate with the breach: it is usually inappropriate to take formal action against a trivial or technical breach that causes no harm to amenity.

A breach of planning consent can be:

- An unauthorised operation.
- An unauthorised material change of use.

- A breach of condition.
- Failure to notify the planning authority of commencement or completion of approved development.

A breach is a civic offence, with a maximum penalty of £20,000. The court may consider any financial benefit accruing in consequence of the offence.

A planning authority may serve:

- A planning contravention notice where it appears there may have been a breach of planning control.
- An enforcement notice requiring the breach to be remedied. Failure to comply may lead to prosecution.
- A breach of condition notice where there has been a failure to comply with conditions or limitations attached to a permission.
- A stop notice. This makes it an offence to continue with the alleged breach until the issue has been determined.
- More commonly, the LPA will seek an injunction.
- The Planning and Compulsory Purchase Act 2004 created a temporary stop notice giving local authorities power to take early action at the beginning of an unauthorised development. The Planning etc. (Scotland) Act 2006 includes temporary stop notices with an immediate power to stop for 28 days.

An enforcement notice is served on the owner, lessee and occupier of the land to which it relates or on any other person with a material interest in the land. The notice must specify:

- The matters alleged to constitute the breach of control.
- The steps required to restore the position or to bring the land to a condition satisfactory to the planning authority.
- The date on which the notice is to take effect.
- The period(s) within which any steps are to be carried out.
- The exact boundaries of the land to which the notice relates.
- The reason for serving the notice.
- An explanation of the rights of appeal.

Immunity from enforcement action

Immunity applies for all breaches occurring before 1965. Notices must be served within specified periods of the breach (building, engineering, mining or other operations, or change of use of a building to a single dwelling – four years; any other breach – 10 years).

In 2005 the UK courts ruled that Article 8 of the European Convention on Human Rights (the right to respect for the home) is not an 'absolute' right and does not exist in a vacuum. It operates in the context of the legal and democratic structures that protect the rights of all of us. Therefore, Enforcement Notices cannot be ignored.

Grounds for appeal to the Secretary of State

- Permission should be granted or the condition discharged.
- The matters alleged do not constitute a breach.
- The alleged breach has not taken place.
- Immunity due to timing.
- Notice served incorrectly.
- Steps required are unreasonable or time allowed is inadequate.

The Scottish Government has considered introducing fixed penalty fines of up to £5,000 for breaking planning rules, for example, breach of an enforcement or condition notice.

How would you advise a client about a planning application for a large housing scheme?

- Consult the local planning authority's plans.
- Inform them about the planning application process (if necessary).
- Consider the scheme's scale – a major project may require additional application steps.
- Advise on the requirements for EIA.

If your client's proposal is a borderline case, what actions should be taken?

- Ask for a meeting with a senior planning officer to discuss the proposal.
- Ask for a written response to the discussion.
- Consider applying for outline planning permission (or planning permission in principle in Scotland).
- Advise that pre-application discussion with the local community will be required for a major or national scheme.

ENVIRONMENTAL IMPACT ASSESSMENT (EIA)

Key legislation

The EC Directive on 'The Assessment of the Effects of Certain Public and Private Projects on the Environment' adopted on 27 June 1985 (85/337/EEC).

The European Commission brought the 1985 Directive and its three subsequent revisions (EC Directives 97/11/EC, 2003/35/EC and 2009/31/EC) into one single

codified EIA Directive 2011/92/EU. UK legislation brought the EC Directive into force. However, since the last main changes in 1999 these Regulations have been repeatedly amended (to take into account case law from domestic and European courts, and changes to the Directive and/or domestic legislation) which made them increasingly complex and difficult to follow. The Regulations have now been consolidated in the following format in order to make them more accessible:

- The Town and Country (Environmental Impact Assessment) Regulations 2011 (England only – apart from provisions relating to projects serving national defence purposes in Scotland, Wales and Northern Ireland).
- The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 and amendment 2008 (the National Assembly for Wales is still to review and update).
- The Environmental Impact Assessment (Scotland) Regulations 2011.
- The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2012.

In March 2014, the European Parliament approved a range of amendments to the Environmental Impact Assessment (EIA) Directive (2011/92/EU). Member States, including the devolved nations, have three years to implement the new directive. The intended purpose of the new proposal, as stated by the Commission, is:

- To correct perceived shortcomings in the existing process by amending the procedure for determining whether projects should be subject to a full assessment (screening); improving the quality of the assessments; and ensuring that the Directive is applied consistently between Member States and in relation to other European Union legislation.
- To reflect ongoing environmental and socio-economic priorities by streamlining the process and reducing burdens on business.
- To amend the text to incorporate relevant European case law.

Key changes to Environmental Impact Assessment (EIA) Directive (2011/92/EU) 2014

- **The EIA screening process** – will be required to be more comprehensive. This will include the provision of information on design measures, proposed mitigation and the need to consider the impacts of the development process.
- **Mitigation measures** – can be taken into account in screening, which may help avoid EIA, but will need to be specified, and retained in the final development proposals.
- **EIA scoping** – where requested, will result in the scoping opinion being the basis for the subsequent EIA.
- **EIA Reports** – the new name for Environmental Statements.

- **New topics introduced** – including climate change, biodiversity, human health and resource use.
- **A range of 'alternatives'** – including a 'do nothing' scenario, alternative designs, technologies, locations, sizes and scales of development, will need to be assessed if they have been considered by the applicant.
- **Monitoring arrangements** – will need to be defined in EIA Reports in relation to any significant environmental effects, where appropriate.
- **'Competent experts'** – are required to undertake the EIA; this term will be defined more clearly by individual member states.

Environmental Impact Assessment: the process in outline

Environmental Impact Assessment is a process:

'by which information about the environmental effects of a project is collected, both by the developer and from other sources, and taken into account by the planning authority in forming its judgement on whether the project can be given development consent.'

The procedure is a means of drawing together, in a systematic way, an assessment of a project's likely significant environmental effects. This helps to ensure that the importance of the predicted effects, and the scope for reducing them, are properly understood by the public and the relevant competent authority before it makes its decision.

The process should start at the stage of site selection and process selection, so that the environmental merits of practicable alternatives can be considered. Where EIA is required there are three broad stages to the procedure.

The scope and preparation of the Environmental Statement (ES)/ Report

The developer must compile detailed information about the likely main environmental effects. To help the developer, public authorities must make available any relevant environmental information in their possession. The developer can also ask the 'competent authority' for their opinion on what information needs to be included. The information finally compiled by the developer will now be known as an 'Environmental Report'.

The consultation process

The ES/Report (and the application to which it relates) must be publicised. Public authorities with relevant environmental responsibilities and the public must be given an opportunity to give their views about the project and ES.

The decision-making process

The ES/Report, together with any other information, comments and representations made on it, must be taken into account by the competent authority in deciding whether or not to give consent for the development. The public must be informed of the decision and the main reasons for it.

Environmental Impact Assessment: key requirements

When is an Environmental Impact Assessment needed?

The Regulations require that certain types of projects which are likely to have significant environmental effects should not proceed until these effects have been systematically assessed. The Regulations apply to two separate lists of projects:

- Schedule 1 projects – for which EIA is required in every case.
- Schedule 2 projects – for which EIA is required only if the particular project in question is judged likely to give rise to *significant* environmental effects.

Examples of Schedule 1 projects

- Crude oil refinery.
- Thermal/nuclear power station.
- Radioactive waste disposal.
- Melting of cast iron/steel.
- Asbestos extraction and processing.
- Chemical installations.
- Special road, railway or aerodrome.
- Trading port.
- Hazardous waste disposal.

Examples of Schedule 2 projects

EIA required only if they give rise to significant environemntal effects:

- Extractive industry
- Energy industry
- Infrastructure projects
- Industrial estate development projects
- Urban development projects including shopping centres and car parks
- Tourism and leisure projects including marinas, ski runs and tow lifts/cable cars, holiday villages, theme parks, camp sites or caravan parks, golf courses.

How is 'significance' assessed?

'Significance' is a key issue in Environmental Impact Assessment. Schedule 1 projects require Environmental Impact Assessment in every case. However, those falling within Schedule 2 require Environmental Impact Assessment only where the project is likely to have a significant effect on the environment.

To help developers and planning authorities judge when a development is likely to have a significant effect on the environment, the Government has issued thresholds and criteria for Schedule 2 projects.

Three main criteria used to assess significance

- Whether the project is a major one (of more than local importance) in terms of scale.
- Whether the project is in a sensitive or vulnerable location, e.g. a National Park or SSSI, and hence may have significant effects on the area's environment.
- Whether it is a project with unusually complex and potentially adverse environmental effects.

Simplified Planning Zones, Enterprise Zones, Local Development Orders

All Schedule 1 projects are excluded from the scope of SPZs and EZs and therefore require an EIA. Schedule 2 projects will require an EIA if considered necessary by the local planning authority and the Secretary of State. If not, the project will enjoy the benefit of general permission granted and no separate application will be required.

Screening: obtaining a ruling on the need for EIA

The Regulations allow a procedure which enables a developer to apply to the local planning authority for an opinion on whether an EIA is needed prior to applying for planning permission, known as 'screening'.

For all Schedule 2 development (including that which would otherwise benefit from permitted development rights), the local planning authority (LPA) must adopt its own formal determination of whether or not EIA is required (screening opinion) before or after a planning application has been submitted and place it on the planning register. The LPA must provide a written statement as to their reasons for an EIA being required.

Duty to give reasons for negative screening decisions

Regulation 4 places a duty on LPAs and the Secretary of State to give, on request, reasons for negative as well as positive screening decisions.

Appeal on a decision can be made to the Secretary of State who must provide a written statement on his decision within three weeks.

Schedule 3 of the Regulations covers information that the LPA will consider when determining whether or not an EIA is required.

Outline planning/planning in principle applications

When any planning application is made in outline, the local planning authority will need to satisfy themselves that they have sufficient information available on the environmental effects of the proposal to enable them to determine whether or not planning permission should be granted in principle. In cases where the Regulations require more information for the Environmental Statement than has been provided in an outline application (for instance, on the visual effects of a development in a National Park), authorities should request further information.

Subsequent applications

Regulation 7 requires the screening of subsequent planning applications for development which have not already been subject to a screening opinion or direction, and which are not accompanied by an Environmental Statement under the EIA Regulations. For example:

- Where an EIA has not been prepared at outline or full planning application stage, but where significant effects on the environment are likely to arise.
- Where a scheme has been amended in a way which is likely have significant effects.
- Where there has been a change in circumstance – e.g. baseline conditions may have changed.

Where the original planning application was subject to EIA, then Regulation 8 requires the original Environmental Statement to be considered when determining subsequent applications unless a new Environmental Statement is submitted. If the LPA considers the environmental information already before it to be inadequate to assess the environmental effects of the development, it shall serve a notice seeking further information in accordance with Regulation 22.

Whilst it has been a best practice point for several years, EIA can now formally be required at all stages of the planning process irrespective of whether an EIA has already been undertaken. The EIA Regulations now apply to applications for approval of any matters reserved from consideration with the original planning application, including reserved matters, conditions and review of minerals permissions.

Changes to the screening of modifications or extensions to projects

Extensions and alterations are no longer considered in isolation but as the cumulative whole of the development. Schedule 2(13) ‘Changes and Extensions’

requires extensive cross-referencing to Schedule 1. For Schedule 2 development, screening is required if the 'development has changed or extended or may have significant adverse effects on the environment', or the change or extension exceed the thresholds in Schedule 2, or the site is in a sensitive area.

Preparing an environmental statement (report)

For projects requiring an EIA, an environmental statement/report must be submitted alongside the planning application. An environmental statement comprises a document (or series of documents) providing 'specified information' to assess the likely impact upon the environment of the proposed development.

Specified information for an environmental statement (report)

The Regulations (Schedule 4) specify the information which an environmental statement has to provide:

- A description of the development proposed, comprising information about the site and the design and size or scale of the development.
- An outline of the main alternatives studied by the applicant, appellant or authority and an indication of the main reasons for choosing the development proposed, taking into account the environmental effects. This may now be considered at a strategic level with the Strategic Environmental Impact Assessment Directive.
- The data necessary to identify and assess the main effects which that development is likely to have on the environment.
- A description of the aspects of the environment likely to be significantly affected by the effects – direct and indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative – of the development on the environment, explained by reference to its possible impact on: *population; flora; fauna; soil; water; air; climate; the landscape; material assets; the cultural heritage; and the interrelationship between the above factors*.
- Where significant adverse effects are identified with respect to any of the foregoing, a description of the measures envisaged in order to avoid, reduce or remedy those effects.
- A summary in non-technical language of the information specified in sub-paragraphs (a) to (d). An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the applicant or appellant in compiling the required information.

An environmental statement/reort should include, by way of explanation or amplification of any specified information, further information on any of the following matters:

- The physical characteristics of the proposed development, and the land-use requirements during the construction and operational phases.
- The main characteristics of the production processes proposed, including the nature and quality of the materials to be used.
- The estimated type and quantity of expected residues and emissions (including pollutants of water, air or soil; noise; vibration; light; heat; and radiation) resulting from the proposed development when in operation.
- The likely significant direct and indirect effects on the environment of the development proposed which may result from:
  - the use of natural resources;
  - the emission of pollutants, the creation of nuisances, and the elimination of waste.
- The forecasting methods used to assess any effects on the environment about which information is given including secondary, cumulative, short-, medium- and long-term, permanent, temporary, positive and negative effects.
- Any difficulties, such as technical deficiencies or lack of know-how, encountered in compiling any specified information.

Scoping: the scope of an environmental statement/report

The Regulations allow developers to obtain a formal (scoping) opinion from the local planning authority on what should be included in the Environmental Statement. This ensures that the LPA (or the Secretary of State in the case of scoping directions) and the relevant consultees can consider the project and the likely impacts at an early stage and can focus the EIA process on those which are relevant.

The 'specified information' covers all potential situations. It is unlikely that all the items will be relevant to any one project and this is why scoping is of particular importance.

Environmental statement/report submission procedure

(Extensive and complex procedures for alternative situations are set out in detail in Part 5 of the Regulations.)

- The LPA or 'competent authority' receives a request from the developer for an opinion on the need for an EIA. The LPA carries out a screening exercise to determine whether or not an EIA is required.
- If sufficient information is provided, the LPA notifies the developer of its decision within three weeks of the date of the receipt of the request, and gives its reason. The LPA puts the details on public record.
- For all Schedule 2 developments the LPA must determine whether or not an EIA is required and record the decision on the planning register (screening).
- If an EIA is required, the developer notifies the LPA in writing that they will produce an EIA and requests a formal scoping opinion from the LPA.

- The LPA informs the statutory consultees listed in the Regulations, who are then required to provide relevant information to the developer if requested. The LPA has discretionary powers to consult beyond the statutory bodies, e.g. specialist interest groups.

Example list of consultees

- Principal Council (if not the planning authority).
- Conservancy Councils (Natural England; Countryside Council for Wales; Scottish Natural Heritage; Environment and Heritage Service – Northern Ireland).
- Environment Agency/SEPA/Northern Ireland Environmental Service for Pollution (special waste or pollution).
- Highways Authority.
- Secretary of State.
- HSE for hazardous operations, or reference to HSE Guidance *Planning Advice for Developments near Hazardous Installations*.
- Coal Authority for mining.
- English Heritage/Historic Scotland/Northern Ireland Environment Agency/CADW (Welsh Historic Monuments) for listed buildings.
- DEFRA/SDEFRA for loss of agricultural land.
- Marine Management Organisation in certain circumstances.

- A developer can request the assistance of the LPA (or Secretary of State) in obtaining environmental information which they and the consultees hold.
- A specialist team is assembled and consults statutory and relevant consultees. The ES/report is prepared and submitted alongside the planning application.
- The applicant publishes a notice in the press, and posts a site notice giving information on where the ES/report can be inspected for 21 days.
- The ES/report is placed on the planning register and copies are sent to the Secretary of State within 14 days.
- The LPA consults the statutory consultees who have 14 days to comment.
- The LPA considers representations from third parties and statutory consultees and gives its decision. This must not be made in less than 21 days but must be within 16 weeks. When determining an EIA application the LPA or Secretary of State must inform the public of their decision to grant or refuse the application and their main reasons for it.
- If the LPA is also the applicant then certain procedures do not apply, e.g. requesting an opinion on the need for EIA, or the type of application.
- Public notice is required to be given of any further information which the applicant or appellant is required to provide unless it is to be provided for the purpose of a local inquiry.

Recourse can only be made to the Secretary of State on the LPA's decision for the need of an EIA.

Mitigation, implementation and monitoring

Mitigation measures proposed in an ES/report are designed to limit the environmental effects of the development. Planning authorities will need to consider carefully how such measures are secured, particularly in relation to the main mitigation measures specified in the decision.

Conditions attached to a planning permission may include mitigation measures. However, a condition requiring the development to be 'in accordance with the Environmental Statement' is unlikely to be valid unless the ES/report was exceptional in the precision with which it specified the mitigation measures to be undertaken. Even then, the condition would need to refer to the specific part of the ES/report rather than the whole document.

A planning condition may require a scheme of mitigation for more minor measures to be submitted to the LPA and approved in writing before any development is undertaken. However, planning conditions should not duplicate other legislative controls. In particular, planning authorities should not seek to substitute their own judgement on pollution control issues for that of the bodies with the relevant expertise and the statutory responsibility for that control.

Another possible method of securing mitigation measures is through planning obligations, which are enforceable by the LPA. Planning obligations may be entered into unilaterally by a developer or by agreement between a developer and the LPA.

In addition, developers may adopt environmental management systems such as the Eco-Management and Audit Scheme (EMAS) to demonstrate implementation of mitigation measures and to monitor their effectiveness.

Monitoring is the responsibility of the developer and determining authority. Enforcement action can be carried out to ensure that mitigation measures implemented are effective.

EIA and other types of environmental assessment

There are a number of other European Community Directives which require the assessment of effects on the environment:

- Developments which will affect a Special Protection Area designated under the Wild Birds Directive, or Special Area of Conservation designated under the Habitats Directive, must be subject to an assessment of those effects in accordance with the Conservation (Natural Habitats etc.) Regulations 1994.
- Certain industrial developments will require a permit under the Integrated Pollution Prevention Control (IPPC) Directive.
- Certain establishments which have the potential to cause a major accident hazard will require a consent under the Control of Major Accident Hazards Directive.

Other projects will require EIAs under separate Regulations; these are submitted to the appropriate governing agency or authority, for example, Forestry Authority, Highways Agency, Scottish Natural Heritage or Natural England. The following list is not exhaustive but contains legislation of particular relevance to Landscape Professionals. (The UK and its devolved nations have their own versions of the Regulations.) Most recent updates to the Regulations have addressed the need to take on further public consultation.

Other legislation covering works that may require EIA

- Transport and Works Act 1992.
- Transport and Works Act (Assessment of Environmental Effects) Regulations.
- Highways (Environmental Impact Assessment) Regulations.
- Environmental Impact Assessment (Land Drainage Improvement Works).
- Environmental Impact Assessment (Agriculture) Regulations.
- The Harbour Works (Environmental Impact Assessment) Regulations.
- The Marine Works (Environmental Impact Assessment) Regulations.
- The Environmental Impact Assessment (Forestry) Regulations.
- The Environmental Impact Assessment (Fish Farming in Marine Waters) Regulations.
- The Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations.
- The Public Gas Transporter Pipe-line Works (Environmental Impact Assessment) Regulations.
- Electricity Works (Environmental Impact Assessment) Regulations.
- The Pipe-line Works (Environmental Impact Assessment) Regulations.
- Environmental Impact Assessment and Habitats (Extraction of Minerals by Marine Dredging) Regulations.
- The Water Resources (Environmental Impact Assessment) Regulations.

Projects approved by private Act of Parliament

The EC Directive does not apply to projects which have been approved by a specific Act of national legislation. This provision covers projects authorised by a private or hybrid Bill and exempts them from the Regulations. However, under the 'Environment Assessment and Private Legislation Procedures' Directive an EIA still is required for projects which are likely to have significant environmental effects.

Enforcement of environmental law

In April 2002 the European Parliament approved two proposals for a decision and a directive on the enforcement of environmental legislation through criminal law.

LANDSCAPE AND VISUAL IMPACT ASSESSMENT (LVIA)

Introduction

The Landscape Institute and the Institute of Environmental Management and Assessment have produced *Guidelines for Landscape and Visual Impact Assessment* (3rd edition, 2012). This replaces the previous edition of 2002 and takes account of planning and legal changes that have taken place since the last revision.

The Guidelines emphasise that Landscape and Visual Impact Assessment forms part of the environmental impact assessment regulation requirements. The methodology to carry out assessments should be agreed with the regulatory authority at the scoping stage and should be appropriate for the nature, location and scale of the project. The Guidelines provide an outline methodology that should be flexible to suit modifications required during early stages of the project.

The Landscape Institute has produced *Photography and Photomontage in Landscape and Visual Impact Assessment*, Landscape Institute (2011) Advice Note 01/11. This advice note supersedes no. 01/09.

Methodology and process

Scoping

To be carried out with the competent local authority and statutory consultees at the outset of the project to consider:

- The extent of the study area to be used for assessment of landscape and visual effects.
- Sources of information.
- The nature of the possible landscape and visual effects that might occur.
- The main receptors of the potential landscape and visual effects that need to be addressed in the full assessment, including viewpoints that should be assessed.
- The extent and level of detail for the baseline studies that will be carried out for the LVIA.
- Methods to be used in assessing the significance of the effects that may be identified.
- The requirements with respect to the assessment of cumulative landscape and visual effects.

Description of the proposed development

A general description of the siting, layout and characteristics of the proposed development.

Consideration of alternatives

A description of the main alternatives considered, including environmental effects, and reasons for the final development choice.

Stages in the project life cycle

A description of the development at each stage in the life cycle:

- Construction stage.
- Operational stage.
- Decommissioning and restoration stage.

Baseline studies

These provide a factual record and analysis of the current nature and value of the landscape and visual amenity of an area through:

- Research and survey work.
- Classification of landscape into character types.
- Viewpoints and zones of visual influence.
- Analysis of information.

Identification and assessment of landscape and visual effects

- Identify the sources of effects throughout the project life cycle (construction, operation, decommissioning and restoration).
- Identify the nature of the effects: direct (as a result of the development), indirect or secondary (as a result of an associated development secondary to the main development), or cumulative; whether they are classified as short-, medium- or long-term, and permanent or temporary.
- The effects have to be identified as positive or beneficial; or negative, adverse or detrimental.
- Identify the landscape effects in relation to the sensitivity of the landscape; the scale and magnitude.
- Identify the visual effects in relation to sensitivity of visual receptors; the scale or magnitude.
- Identify the significance of landscape and visual effects (e.g. minor, moderate, major or substantial).

Evaluation and effects

Whether the effects are deemed to be significant is dependent on:

THE NATURE OF THE RECEPTORS:

- the level at which the receptor affected is important in policy terms (whether international, national, regional or local);
- the sensitivity of the receptor to the type of change or development proposed.

THE NATURE OF THE CHANGE OR EFFECT:

- the magnitude or size of the change predicted;
- the geographical extent of the area which the change will influence;
- the duration of the effect and its reversibility.

Mitigation

Proposals should address likely negative effects on the environment arising from the development:

- Measures, developed through the iterative design process, which have become integrated mainstream components of the project design.
- Standard construction practices for avoiding and minimising environmental effects.
- Measures designed to address any adverse effects remaining after primary measures and standard construction practices have been incorporated into the scheme – compensation and enhancement.

These should be considered for all stages in the project life cycle.

Engaging with stakeholders and the public

Greater emphasis has been placed on widespread, timely and effective participation in environmental decision-making since the UK ratified the Aarhus Convention in 2005. This has been reinforced by changes to legislation on planning and related matters that place greater emphasis on local communities.

Engaging with stakeholders: There are statutory consultees (stakeholders) as part of an EIA that also apply to LVIA. Engagement with statutory consultees is required from the initial scoping stage or earlier in the development site selection. Other interested parties and non-statutory consultees will vary depending on the project but may also have important contributions. This target audience should be researched to ensure proper engagement is achieved.

Engaging with the public: The EIA procedures only require consultation with the public at the stage of submission and review of the environmental statement. However, earlier engagement may allow greater understanding of the key issues that may arise, resulting in positive benefits to the proposals and reduced objections.

STRATEGIC ENVIRONMENTAL ASSESSMENT (SEA)

'Environmental Assessment of Plans and Programmes Regulations 2004' came into force in July 2004 from the EC Directive 'The Assessment of the Effects of Certain Plans and Programmes on the Environment' (Directive 2001/42). It covers England, Scotland, Wales and Northern Ireland. Detail was provided in 'The Environmental Assessment of Plans and Programmes Regulations 2005'.

The objective of the Regulations is 'to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development'.

The Regulations require environmental assessments to be carried out for a range of plans and programmes likely to have significant effects on the environment. They apply to plans and programmes whose formal preparation began after July 2004 and also to those already in preparation by that date. They were adopted in July 2006.

The plans and programmes that fall within the scope of the Regulations are those which:

- are subject to preparation or adoption by an authority at national, regional or local levels; *or*
- are prepared by an authority for adoption through a legislative procedure by Parliament or Government; *and, in either case,*
- are required by legislative, regulatory or administrative provisions.

This could include:

- plans prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, and which set the framework for future development consent for projects listed in Annex I and II of the EIA Directive, *or*
- plans that have been determined to require an assessment under the Habitats Directive.

A screening process is required to determine whether plans are likely to have significant environmental effects and whether SEA is required. The Regulations list criteria for determining the likely significance of effects. The SEA must be carried out during the preparation of the plan and before its adoption.

An Environmental Report is prepared by the authority producing the SEA and should cover:

- The environmental protection objectives of the plan.
- The existing state of the environment.

- The significant effects on the environment including: *Biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage, landscape, and the interrelationship between these factors.*
- The mitigation measures.
- An outline of the reasons for selecting the alternatives dealt with.
- Monitoring measures and a non-technical summary.

The Regulations require that the public, environmental bodies and authorities concerned by the environmental effects of implementing the plan are consulted as part of the process. Responses are taken into account and used to develop ways to mitigate the negative effects in the final preparation and adoption of the plan. Monitoring is required after adoption.

THE PLANNING SYSTEM: TOP 10 QUESTIONS

1 What is the hierarchy/structure of the planning system in the UK?
2 What is the role of development plans and what types of development plans exist in the UK?
3 Do you always need to apply for consent for works to a tree with a TPO?
4 What are provisional TPOs and how are they converted to a full TPO?
5 What is the effect of a Conservation Area?
6 How is the need for an Environmental Impact Assessment determined?
7 Is an EIA required for outline planning and reserved matters?
8 How are proposals of national or major significance treated differently from local projects in the planning permission process?
9 How does a developer know if CIL (the Community Infrastructure Levy) applies and how much it will be?
10 If a planning authority received critical representations from statutory consultees, would your client's application for planning permission automatically fail? What may happen next?

8 Environmental legislation

CHAPTER CONTENTS

LANDSCAPE CHARACTER ASSESSMENT

Landscape character assessment is used as a tool for identifying features that give a locality its sense of place and distinctiveness. Landscape character has been defined as a '*distinct and recognisable pattern of elements that occur consistently in a particular type of landscape. Particular combinations of geology, landform, soils, vegetation, land use, field patterns and human settlement create character*'. The initial guidance for landscape architects was *Landscape Character Assessment: Guidance for England and Scotland* (2002), prepared for the Countryside Agency and Scottish Natural Heritage by C. Swanwick, Department of Landscape University of Sheffield and Land Use Consultants.

The Character of England (1995) was produced by the Countryside Commission and English Nature in association with English Heritage. The map charted the character and wildlife character of the whole country. 159 separate 'character areas' summarise a region's historic character, landscape and natural history. 22 maritime areas were also identified.

This classification was revised and republished in 2014 as 159 National Character Areas (NCA). The NCAs combine a range of information to create a 'profile' for each of England's 159 major landscape areas, describing the characteristic landscape, wildlife, cultural and geological features, outlining how the landscape is changing, how it supports economic activity and what are the local environmental opportunities for the future. The information is available free and is regarded as definitive. Individual

NCA pages on the Natural England website (http://publications.naturalengland.org.uk/category/587130) link to archived versions of earlier landscape character assessments and to the fascinating national archive on-line.

The landscape character of Scotland and Wales has also been analysed and mapped, but the Welsh approach, called LANDMAP, uses a different methodology from that in England and Scotland. The LANDMAP methodology separates landscape into five aspects: geology (geology, geomorphology and hydrology); landscape habitats (vegetation); visual and sensory; historic landscape; and cultural landscape.

Landscape character assessment may be used as a part of and to guide local plan development policies; studies of development potential and landscape capacity; environmental impact assessment and landscape management proposals. It is different from visual assessment, but may be closely linked to it, for instance when assessing landscape capacity.

There are six main stages in landscape character assessment:

- Define the scope, geographical scale and required outputs of the study (this is critical to successful completion by the researcher and the study's practical value to the client).
- Desk study.
- Field survey.
- Classification and description.
- Make judgements – deciding on the approach.
- Make judgements – drawing conclusions.

There is not space here to give a detailed account and readers are advised to read the specialist literature.

ENVIRONMENTAL AGENCIES

The Joint Nature Conservation Committee (JNCC)

The JNCC acts as a coordinating body between the UK environmental agencies and provides a national, European and global dimension to nature conservation in the United Kingdom. Initially founded by the Environmental Protection Act 1990, it was reconstituted most recently by the Natural Environment and Rural Communities Act 2006. It is a UK-wide organisation (including Northern Ireland) with its own budget and staff.

Its duties include establishing common standards between the UK conservation bodies. It is authorised to give advice to the authorities (Secretary of State or other Minister, Scottish Ministers, the Welsh Assembly and relevant Northern Ireland Departments) on conservation matters common to the UK, matters affecting the interests of the UK and matters arising outside the UK. In discharging its functions the JNCC may acquire or dispose of property, accept gifts and commission research.

The JNCC website has downloadable data sheets describing SACs, SPAs, Ramsar and some SSSIs in the UK. Full SSSI schedules are available from each national conservancy.

Table 8.1 Conservation agencies in the UK

	Main remit		
Location	*Natural habitats and ecology*	*Historic built environment*	*Social and economic*
UK	Joint Nature Conservation Committee (JNCC)		
England	Natural England	English Heritage Trust Historic England	Dept. for Farming, Environment and Rural Affairs DEFRA
Wales	Natural Resources Wales (NRW)	(Combined EA, CCW and FC Wales)	
	Cadw	Welsh Assembly Government's Ministry for Rural Affairs	
Scotland	Scottish Natural Heritage	Historic Scotland	
(also deals with listed landscapes)	Scottish Government Enterprise and Forestry Directorate SGEFD		
Northern Ireland	The Council for Nature Conservation and the Countryside and NIEA	NI Environment Agency (NIEA)	Department of Agriculture and Rural Development DARD

Natural England (NE)

This is an independent agency, combining English Nature, the Landscape, Access and Recreation Division of the Countryside Agency, and the environmental activities of DEFRA's Rural Development Service. It is a 'non-departmental public body' working on biodiversity, resource protection and landscape improvement. Its core aims do not emphasise social and economic development, but the Coalition Government's Natural Environment White Paper 2011 indicated that a healthy natural environment is the bedrock of future prosperity and that Natural England's activity should support growth of the UK economy.

Natural England came into being in 2007 through the Natural Environment and Rural Communities Act 2006. Its remit is wider than the former English Nature as it includes both town and country. Its general purpose is to ensure that the natural environment is conserved, enhanced and managed for the benefit of future generations, thereby contributing to sustainable development. Its general purpose includes:

- Promoting nature conservation, reducing the decline of biodiversity and *controlling licensing of protected species*.
- Conserving and enhancing the landscape: designating National Parks and AONBs.
- Securing the provision and improvement of facilities for the study, understanding and enjoyment of the natural environment.
- Promoting access to the countryside and open spaces and encouraging open-air recreation, particularly on open access land, coasts and public rights of way.
- *Contributing to social and economic well-being through management of the natural environment.* This purpose in particular may be achieved by working with local communities.

Natural England also must:

- Manage England's green farming schemes, SSSIs, National Parks and AONBs, NNRs and enforce relevant regulations.
- Advise the Secretary of State in his or her duty to publish a list of the living organisms and types of habitats which are of principal importance for the conserving of biodiversity.
- Have regard to common standards established by the JNCC.
- Give advice on request to public authorities relating to NE's general purpose. However, public authorities must inform NE if and why they reject the advice from NE. This refers particularly to NE's role as statutory consultee for the planning system.
- Have regard to Secretary of State's directions on regional planning matters, after the Secretary of State has consulted Natural England, the Environment Agency and any other appropriate person.

In aid of Natural England's general purpose, it has several powers indicating a good deal of autonomy, but it is constrained by financial limits. Natural England may: give financial assistance to any person; enter management agreements; conduct experimental schemes; provide and publish information; provide consultancy and special professional or technical skill for special problems; may charge for services (advice, information and consultancy) or licences; institute criminal proceedings; acquire or dispose of property; accept gifts; borrow or invest money; subject to the approval of the Secretary of State, form bodies corporate or enter or dispose of an interest in a body corporate.

Natural England's current grant scheme lists aid for the following subjects:

- Catchment Sensitive Farming
- Conservation and Enhancement scheme
- Environmental Stewardship

Natural England's budget has been cut by 30 per cent between 2011 and 2015 and not surprisingly its Corporate Plan 2014–2019 refers to partnership and finding alternative ways of working. Its 'direct programme delivery' and grant funding are likely to be severely curtailed, apart from the EU Rural Development Programme which it administers on behalf of DEFRA.

Natural Resources Wales (NRW)

NRW came into being on 1 April 2013. It is a combination of the former Countryside Council for Wales (CCW), Forestry Commission Wales and the Environment Agency Wales. It describes itself as a Welsh Government-Sponsored Body. 'Our purpose is to ensure that the natural resources of Wales are sustainably maintained, enhanced and used, now and in the future'.

CCW was responsible for landscape and nature conservation and countryside recreation in Wales and advised the Assembly of Wales in the exercise of its duty to publish a list of the living organisms and types of habitats which are of principle importance for the conserving of biodiversity (Natural Environment and Rural Communities Act 2006).

CCW gave grants towards: wildlife, geology and landscape, provision and promotion of access and recreation; promote understanding and awareness; general cross-cutting themes within any of the above: capacity building, regeneration, and health and wellbeing. These duties have been transferred in an updated form to NRW.

NRW also gives grants to improve aquatic environments in the context of the water Framework Directive, and 'Splash' grants to help people enjoy new or improved public access to inland and coastal water for recreational and educational purposes. There is also the Resilient Ecosystems Fund – applications assessed by the Wales Biodiversity Partnership – and grants that benefit both people and wildlife.

Scottish Natural Heritage

The Natural Heritage (Scotland) Act 1991 merged the Countryside Commission for Scotland and Nature Conservation Council for Scotland, creating Scottish Natural Heritage. Its purpose is to promote, care for and improve Scotland's natural heritage, help people enjoy it responsibly, promote awareness and understanding and promote sustainable use of natural resources now and for the future.

SNH aims as described in its *Corporate Strategy 2012–2015* are:

- High-quality nature and landscapes that are resilient to change and deliver public value.
- Nature and landscapes that make Scotland a better place in which to live, work and visit.

- More people experiencing, enjoying and valuing our nature and landscapes.
- Nature and landscapes as assets contributing more to the Scottish economy.

At the time of writing, SNH was giving grants only for its Peatland Action Fund but in the recent past it match-funded some HLF, Big Lottery, EU funding including LIFE+ and LEADER and landfill tax related schemes, funding from trusts and charities.

Northern Ireland Environment Agency (NIEA)

The NIEA is responsible for environmental protection including water management, industrial pollution and drinking water. It is also responsible for the built heritage including recording and protecting historic buildings and monuments; natural heritage including conservation science, designations and protection, countryside and coast and biodiversity. The NIEA also gives advice and implements government policy on environmental strategy and policy in NI including climate change, promoting appreciation of the environment and sustainable development.

NIEA gives grants for:

- Natural heritage: protection and management of biodiversity and geodiversity, countryside access, landscape protection, management and promotion.
- Listed buildings.
- Research: biodiversity and landscape; water, waste and pollution, built heritage.
- EU funding.
- Water quality improvement.

The Council for Nature Conservation advises the NI Department of the Environment (DOE) on matters affecting the countryside and on nature conservation issues. Its specific functions are to advise on the establishment and management of national parks, areas of outstanding natural beauty, areas of special scientific interest and nature reserves; to advise on the protection of wildlife species; to advise on the management of land acquired for conservation or amenity purposes, and to advise on payment of grants to voluntary conservation bodies and on promotional and educational activities. In practice this includes advising on current policy issues, responding to consultations, for example, on Planning Policy Statements or the implementation of European Directives, and discussing with the Northern Ireland Environment Agency (formerly the Environment and Heritage Service) the designation and management of protected sites and areas, and wildlife protection.

English Heritage and Historic England

On 1 April 2015 English Heritage (EH) split in two and a new organisation Historic England was established. English Heritage or English Heritage Trust (its official title) is a charity independent of government. Its main tasks are to:

- Enhance the visitor experience;
- Care for over 400 properties and address conservation defects using a one-off government grant.

Officially, the new organisation is the Historic Buildings and Monuments Commission for England, but its common name is Historic England (HE). HE's tasks are:

- Statutory designation of historic 'assets';
- 'Buildings at risk' register;
- National Monuments Record Centre (NMRC);
- Advice to the government and other national organisations on the value of the historic environment;
- Advisor to government on relevant international conventions, regulations and directives;
- Lead organisation on the government's Heritage Protection Reform;
- Planning advice: HE is a statutory consultee for Grade I and II* listed buildings and landscapes, Conservation Areas, scheduled ancient monuments and some local plans. HE is involved in strategic planning with the Environment Agency, Natural England, World Heritage Sites, Marine Plans and Local Enterprise Partnerships. HE may give pre-application advice for historic environments including landscape and registered battlefields, scoping and screening for EIA and advice on Marine Conservation Zones;
- Statutory consultee for Nationally Significant Infrastructure projects;
- Research;
- Statutory rôle of expert advice to owners, local authorities and the public.

English Heritage may give grants for:

- Expert advice to reduce risk to heritage assets and advice on lottery applications.
- Building competence in management and conservation in the voluntary sector.
- Repair grants.
- Acquisition and repair.
- Mitigating unavoidable loss through pre-loss recording and research.
- EH was the administrator for the Aggregates Levy Sustainability Fund from its creation in April 2002 to its closure on 31 March 2011. All grants given are listed on the SHAPE website at: http://shape.english-heritage.org.uk.

Grant process

- Initial application supported by adequate information.
- Relevant regional office of English Heritage assigned to the project.
- Initial assessment and approval or refusal by English Heritage at relevant regional office.
- Site visit by English Heritage architect or other professional.
- Full submission of grant application.
- Decision given in six months (or longer for complex projects).
- Grant contract signed. This includes conditions that will apply for 10–15 years, depending on whether the grant is under or over £200,000; progress reports; at least three tenders; compliance with copyright, intellectual property rights and EU procurement rules; and guaranteed maintenance once works are complete.

Cadw

Cadw's remit is to:

- Protect and sustain.
- Encourage community engagement.
- Improve access to the historic environment of Wales. This includes historic buildings, ancient monuments, historic parks, gardens and landscapes, and underwater archaeology.

Grants for historic parks and gardens in Wales are available from several bodies including the Historic Buildings Council, the Countryside Council for Wales (through its Tir Gofal scheme), the Forestry Commission (through its Woodland Grant scheme) and the Heritage Lottery Fund.

Cadw is able to give grants, but first it must – by law – consult the Historic Buildings Advisory Council for Wales. The Historic Buildings Advisory Council is an independent advisory body whose members are appointed by the National Assembly to provide advice on grants and other means of protecting the historic buildings and townscapes. The Secretariat of the Council is provided by Cadw. The Council makes its recommendations to the National Assembly.

Grant priority is given to repair to structures judged to be of outstanding architectural or historic interest. External works to structures in Conservation Areas may be grant-aided provided that the works make a significant contribution towards the preservation or enhancement of that area. Many local planning authorities work with Cadw in jointly funding Town Schemes which provide assistance for repairs to the external features of a property.

Grants are also given to the voluntary sector as it is recognised that civic societies and other voluntary groups situated throughout Wales play an important part in promoting interest in the built heritage, including the Architectural Heritage Fund, the Civic Trust for Wales, and national amenity societies such as the Victorian

Society, the Georgian Group and the Council for British Archaeology. Cadw also runs the Civic Initiatives (Heritage) Grant Scheme to help local groups promote better understanding of the built heritage.

Historic Scotland (HS)

The role and responsibilities of Historic Scotland include:

- Advising and delivering policy on all aspects of the historic environment on behalf of Scottish Ministers.
- Execution of statutory functions relating to two Acts of Parliament – the Ancient Monuments and Archaeological Areas Act 1979, which allows HS to schedule sites of national importance and take them into state care, and the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 that grants HS the authority to list structures for their architectural or historical significance.
- Giving planning advice and assessment of proposals for alterations to scheduled monuments and listed buildings.
- Providing financial assistance towards conservation and enhancement.
- Providing guidance on the management of the historic environment.

In contributing to the Government's purpose of increasing sustainable growth, Historic Scotland also pursues the following aims:

- Care for, protect and enhance the historic environment.
- Secure greater economic benefits from the historic environment.
- Help people value, understand and enjoy the historic environment.

HS's Framework Document 2008 describes its remit, structure and lists its grant budget.

Historic Scotland may give grants towards:
- Repairs
- Places of worship
- Archaeology
- Voluntary sector support
- Ancient monuments
- One-off heritage related events

Decisions on grants are made following extensive public consultation, and assessment of the extent to which projects deliver benefits for communities, promote quality, develop knowledge and skills and build capacity for local heritage management.

Historic Scotland Historic Environment Regeneration Fund

This provides funding for Conservation Area regeneration or townscape heritage.

Department for Environment, Food and Rural Affairs (DEFRA)

Established in 2001 from a combination of the Ministry of Agriculture, Fisheries and Food and some functions from the Department of Environment, Transport and the Regions, its main aim is sustainable development, defined as '*development which enables all people throughout the world to satisfy their basic needs and enjoy a better quality of life without compromising the quality of life of future generations*'.

Sustainable development is to be achieved through five strategic priorities:

- climate change and energy;
- sustainable consumption and production;
- protecting the countryside and natural resource protection;
- sustainable rural communities;
- a sustainable farming and food sector including animal health and welfare.

DEFRA's tasks include integration of the environment with other government policies; promote less wasteful use of natural resources; prevent animal disease outbreaks; reform of the EU Common Fisheries Policy to preserve a healthy marine environment and sustainable fishing for the future. These kinds of functions are performed in Scotland by the Scottish Government's Enterprise and Forestry Directorate SGEFD (functions formerly executed by the Scottish Executive Environment and Rural Affairs Department: SEERAD).

The Environment Agency

The Environment Agency (EA) was established by the Environment Act 1995. Its principal aim is to protect or enhance the environment (land, air and water) taken as a whole and to make a contribution towards achieving sustainable development. Its functions include water resource management and conservation.

With regard to pollution, the EA works to prevent or mitigate pollution on land or water, form waste regulation authorities (Control of Pollution (Amendment) Act 1989 and Environmental Protection Act 1990), control water pollution, perform regulatory functions detailed in the Alkali Works Regulation Act 1906, Radioactive Substances Act 1993, Agriculture Sludge (Regulations 1989) and deal with special category effluent in water (Water Industry Act 1991).

Its water resources management role includes flood defence, land drainage, fisheries, responsibility as a navigation and harbour authority and a conservation authority (under the Water Act 1989).

The EA's conservation duties include conservation and enhancement of natural beauty and amenity of inland and coastal waters and of land associated with such

water; promoting the cleanliness of inland, ground and coastal waters of England and Wales and water resources; conservation of flora and fauna dependent on the aquatic environment; and use of such water and land for recreational purposes.

As far as possible the agency is required to further conservation and enhancement of natural beauty and conservation of flora, fauna, geological and physiographical features of special interest, buildings and sites and objects of archaeological, architectural, engineering or historical interest; beauty or amenity of any urban or rural area, flora, fauna, features buildings sites or objects; economic and social well-being of communities in rural areas. It also has to consider preserving for the public any freedom of access within its arena.

The EA inherited the HASAW Inspectorate from the Secretary of State.

The Scottish Environment Protection Agency

When founded by the Environment Act 1995, SEPA had no principal aim like the Environment Agency. It was regarded as a pollution control body charged to prevent or mitigate pollutions of water, land and air, flood warning systems, waste regulations authorities, waste disposal authorities, functions under the Alkali Works Regulation Act 1906, Radioactive Substances Act 1993, smoke control (Clean Air Act 1993) and air pollution: part b processes (Environmental Protection Act 1990).

SEPA was given responsibility for water management, specifically land drainage, assessment of flood risk and issuing flood warnings. SEPA does not have the same wide-ranging powers as the EA in relation to water resources management and flood defence, although the new agency has a greater authority than the old River Purification Authorities. For instance, flood prevention remained a 'planning' duty of local authorities.

SEPA inherited the Health and Safety Work Act's inspectorate function from the Secretary of State.

SEPA's functions have been modified by the Regulatory Reform (Scotland) Act 2014 which requires it to improve the health and wellbeing of people in Scotland and achieve sustainable economic growth.

The environmental agencies and access to information

An increasingly important function of environmental regulatory bodies throughout the UK is the provision of information to the public by means of statutory registers as required by the Public Access to Environmental Information Directive 2003/4/EC and consequent Environmental Information Regulations 2004 (which replaced the 1992 Regulations) and Environmental Information (Scotland) Regulations 2004.

The Regulations apply to all such Ministers of the Crown, government departments, local authorities and other persons carrying out functions of public administration at a national, regional or local level with responsibilities related to the environment; and anybody with public responsibilities for the environment

which is under the control of a person in the government and its agencies and local authorities.

'Environmental information' means any information in written, visual, aural, electronic or any other material form about:

a. the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
b. factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
c. measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
d. reports on the implementation of environmental legislation;
e. cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
f. the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).

In addition, note the EU INSPIRE project (Infrastructure for Spatial Information in the European Community) followed EU Directive 2007/2/EC which aimed to facilitate better environmental policy across Europe by improving access to spatial data (see http://data.gov.uk/location/inspire). The datasets cover 34 themes. Natural England has statutory duties to publish metadata and datasets for INSPIRE.

FUNDING

Some of the main funding sources are outlined below, but readers should check information provided by each funding organisation for details of relevance and application procedures. Please note also that the current economic climate affects the availability of grants.

Grants for conservation

The Conservancies (the Council for Nature Conservation and the Countryside and NIEA, Natural England NE, Natural Resources Wales NRW and Scottish Natural Heritage SNH) may give grants, prioritising SSSI, NR, AONB and green belts.

Grants may be given for amenity tree planting; woodland planting and management; pollarding of willows and alders; tree surgery; hedgerows or hedge banks; walls and dikes and other field boundaries; fencing; pond works, ditches and drainage; heather management; bracken control; footpath repair; urban fringe wildlife areas; valuable landscapes (e.g. chalk and limestone grasslands, coast, upland, waterside, heath, historic landscapes, old meadows and pasture).

DEFRA/SGEFD/NRW/NIEA grants to agriculture and forestry

These organisations may give grants under the Rural Development Programme for agri-environment schemes.

Forestry Authority/Commission

National Woodland Grant Schemes – see forestry section.

Woods In and Around Towns

A Forestry Commission Scotland scheme 2011–2014 which aims to create new woodland; bring neglected woodland into active management; work with people to help them use their local woodland and, more recently, a stronger emphasis on the role of urban woods in delivering environmental and economic benefits.

Architectural Heritage Fund

AHF is a registered charity founded in 1976 to promote the conservation of historic buildings in the UK. It does this by providing advice, information and financial assistance in the form of grants and low-interest working capital loans for projects undertaken by building preservation trusts (BPTs) and other charities throughout the UK. AHF does not help private owners or buildings in long-term ownership or use. A free and regularly updated on-line guide to relevant sources of funding for historic buildings is published by the Architectural Heritage Fund at http://www.ahfund.org.uk/ and www.ffhb.org.uk.

Heritage Lottery Fund

The Heritage Lottery Fund is administered by the National Heritage Memorial Fund (NHMF) which in 1994 was given the responsibility of distributing a share of money raised through the National Lottery for Good Causes to heritage across the UK. The HLF is a non-departmental public body accountable to Parliament via the Department of Culture, Media and Sport. Heritage will be a lottery theme at least until 2019. Grant applications are normally required to follow the HLF's schedule of actions: this tends to be time-consuming and very demanding.

- **Heritage Grants** (grants above £100,000) This is the NHMF's main programme for grants over £100,000 for all kinds of heritage that relate to the national, regional and local heritage of the UK. It is open to all not-for-profit organisations.
- **Sharing Heritage** (£3,000 to £10,000) For any type of project related to national, regional or local heritage in the UK.
- **Our Heritage** (£10,000 to £100,000) The Our Heritage programme is for any type of project related to national, regional or local heritage in the UK.
- **Young Roots** (£3,000 to £25,000) This programme is for projects led by young people. It aims to involve 13–25 year olds in finding out about their heritage, developing skills, building confidence and promoting community involvement.
- **First World War then and now** (£3,000 to £10,000) For communities to mark the centenary.
- **Townscape Heritage Initiative** (£500,000 to £2,000,000) THI grants to help communities to regenerate Conservation Areas displaying particular social and economic need.
- **Parks for People** (£250,000 to £5,000,000) For whole-park projects that support the regeneration of existing designed urban or rural green spaces, the main purpose of which is for informal recreation and enjoyment.
- **Landscape Partnerships** (£250,000 to £2,000,000) This programme supports schemes that are led by partnerships of local, regional and national interests, which aim to conserve areas of distinctive landscape character throughout the UK.
- **Skills for the Future** (£100,000 to £1,000,000) Fund projects which provide paid training placements to meet a skills gap in the heritage sector, and fully support trainees to learn practical skills.
- **Repair grants for places of worship** (£10,000 to £250,000) Funding for urgent, high-level repair work to listed places of worship. The scheme is managed separately in each of the four countries of the UK.
- **Heritage Enterprise** (£500,000 to £5,000,000) supports enterprising community organisations across the UK to rescue neglected historic buildings and sites and unlock their economic potential.
- **Start-up grants** are for anyone thinking about creating a new organisation to look after or engage people with heritage, or existing groups taking on new responsibilities for heritage.
- **Transition funding** is available to organisations in the UK who want to achieve significant strategic change in order to become more resilient and sustain improved management of heritage for the long term.
- **Catalyst grants** initiatives form part of a broader partnership initiative between HLF, DCMS and Arts Council England (ACE).

Grants for environmental improvement

Derelict land grants: English Partnerships (now in the Homes and Communities Agency)

English Partnerships (also called the Urban Regeneration Agency) has a remit to develop vacant or contaminated land in England, including coalfields. EP took over funding from the Derelict Land Grant, English Estates and City Grant funding for land that has been deemed so damaged by industrial or other development that it is incapable of beneficial use without treatment. English Partnerships became part of the Homes and Communities Agency in December 2008.

The Land Trust

The Land Trust was launched as the Land Restoration Trust (LRT) in 2004 for a three-year pilot, which has continued. LT was made an independent charitable trust in 2008 by the Homes and Communities Agency (HCA). It is backed by the HCA, Groundwork and the Conservation Volunteers. LRT takes derelict, neglected or underused brownfield land and change it into community assets such as woodland, wetland, skateboard park or nature trail. Most sites are in the English Partnerships National Coalfield Programme, but the portfolio also includes the Liverpool Garden Festival site. Sites are maintained by endowments.

Urban Development Grants – Northern Ireland

Urban Development Grants are discretionary grants used for promoting job creation, inward investment and environmental improvement, by developing vacant, derelict or underused land or buildings in priority inner urban areas. Priority is given to schemes in the Belfast Regeneration Office Team areas in Belfast and the City Centre and Waterside Business Districts in Londonderry. UDG may also be allocated to urgent needs outside priority areas. Increasingly, grants are directed towards Neighbourhood Renewal areas (www.dsdni.gov.uk).

European Regional Development Funds

The ERDF aims to strengthen economic and social cohesion in the European Union by correcting imbalances between its regions including environmental work which addresses three regional policy objectives: convergence (to create modern sustainable employment); regional competitiveness and employment; European territorial cooperation.

Local authorities (varies between each authority)

Local authorities may give grants towards tree planting in conservation areas and town scheme grants to enhance or preserve buildings in outstanding conservation areas.

Mineral Industry Research Organisation (MIRO)

MIRO was founded by a group of mineral extraction companies in 1972 to:

- Organise and manage collaborative research projects.
- Provide a forum for the mineral industry to discuss technological and related topics.

By 2007 MIRO was managing projects worth £20m including funds from the Aggregates Levy Sustainability Fund. MIRO distributed these through the Mineral Industry Sustainable Technology programme (MIST) and the Office of the Deputy Prime Minister's Sustainable Land Won and Marine Dredged Aggregate Minerals Programme (SAMP). These programmes operate on a call for bids basis. The aim is to mitigate impacts on the environment from the necessary extraction of aggregates – sand, stone and gravel – and waste issues.

Grants for habitat creation

- Natural England: section 38 project grants and others;
- European Union ACE Fund and others;
- Forestry Authority Woodland Grant Scheme;
- Forest Company/FC Funds for owners to create woodland in the National Forest;
- Grant-making trusts: see Charities Aid Foundation's *The Directory of Grant Making Trusts*;
- Local authorities: enquire locally;
- DEFRA agri-environment schemes;
- National Lottery (gives grants towards social policy targets such as inactive young people and participation projects);
- Scottish Natural Heritage: section 38 project grants;
- UK Government departments/agencies reclamation grants;
- Landfill Tax Environment Fund.

Grants for sustainability

European Commission LIFE Environment Programme supports innovative environmental demonstration projects for sustainable development. See also www.governmentfunding.org.uk.

Other funding sources

- Natural England at: http://www.naturalengland.org.uk/grantsfunding/findagrant/default.aspx.
- Scottish Government: http://www.scotland.gov.uk/Topics/Environment/funding-and-grants.

- Welsh Government: http://wales.gov.uk/funding/fundgrantareas/envirocountrysidefund.
- Northern Ireland: http://www.communityfoundationni.org.
- Greenspace Scotland has a useful list of funding sources (not confined to Scotland) at: http://www.greenspacescotland.org.uk/funding-sources.aspx.

Defunct schemes

Aggregates Levy

See Chapter 9 on Environmental Control.

Doorstep Greens and Millennium Greens (DG and MG)

MG was launched in 1996 by the Countryside Agency scheme to create at least 250 greens close to towns and villages in England and Wales. Greens were to be within walking distance of home and designed to meet specific needs of the community. By December 2001, 245 Millennium Greens had been created and it was regarded as such a success that it was followed by the Doorstep Green grant scheme in 2001. These schemes were also supported by the Big Lottery Fund Sustainable Communities programme and other funders between 2001 and 2006.

Community Environment Renewal Grants Scheme (CERGS)

CERGS operated 2002 to 2008. It used half of the Aggregates Levy funding to assist Scottish communities close to sites of past or present aggregate extraction (rock, gravel or sand).

TREES AND WOODLANDS

European Union forestry strategy

The EU regards forestry policy as a national matter and EU forestry strategy seeks to coordinate national policies rather than dictate them. EU members recognise the multi-functional importance of forests and their vulnerability to reduction by clearing and pollution. EU forestry policy includes the Rural Development Policy, protection against fires and air pollution, conservation of biodiversity, climate change, competitiveness of forest-based and related industries and research.

The EU also recognises a wider global connection, for example, by forthcoming legislation to prevent importation into Europe of illegally harvested timber.

From 2013, EU forestry has been coordinated through 'Horizon 2020 – the Framework Programme for Research and Innovation' which emphasises the need to turn innovative ideas into products and services that create growth and jobs. This approach is reflected in the new UK forest strategy.

Forestry Grants and the EU Rural Development Programme: a fresh approach 2014–2020

Following the 2013 reform of the Common Agricultural Policy, all the UK nations are reconfiguring their Rural Development Programmes (Pillar 2) in accordance with the new EU funding round and its priorities. This includes grants for forestry as well as for agriculture. The nations' rural and forestry agencies plan to have full details available in 2015.

It is likely that the new UK woodland grant schemes will echo the requirements for agricultural support: in order to receive income support payments (Pillar 1), farmers must adopt environmentally sustainable farming methods called 'greening'. They must maintain permanent grassland areas (grass is good at absorbing carbon dioxide, which helps in the fight against climate change); diversify crops and promote biodiversity (reserving at least 5 per cent of the land as an ecological focus area). In addition, the CAP promotes safeguarding the scenic value of the landscape (as expressed by public opinion), protecting biodiversity and wildlife habitats (this may include Natura 2000 sites), managing water resources and dealing with climate change.

The Forestry Commission and its duties

The Forestry Commission was founded under the Forestry Act 1919 as the Government's authority on forestry with the principal task to increase the long-term production of timber in Great Britain (i.e. not Northern Ireland). Forestry Acts 1919 to 1963 were consolidated in the 1967 Act, which has been amended in 1979, 1981, 1986 and 1991. The Plant Health Act 1967 gave the FC duties regarding pests and diseases in forestry crops.

Since the 1991 Forestry Act it has carried out most of its activity through the Forestry Authority and Forestry Enterprise. The Commission owns large tracts of forest itself, but also operates extensively through agreements with private landowners.

The Forestry Commission is required to:

- Promote the interests of forestry.
- Develop afforestation, prevent loss of tree cover and ensure that forestry operations do not harm the environment.
- Oversee production and supply of timber and other forest products in Great Britain. This includes administering the Forest Reproductive Material Regulations to provide assurance of the source of seeds, cuttings, cones and other plant stock.
- Promote, establish and maintain adequate reserves of growing trees.
- Control timber pests and diseases (by managing plant health legislation for trees and check on imported timber).

Table 8.2 Tree cover in Britain in 2011

Great Britain	13.0%
England	9.9%
Scotland	17.8%
Wales	14.3%

The Wildlife and Countryside (Amendment) Act 1985 requires the Forestry Commission to find a reasonable balance between:

- development of afforestation, management of forests and production and supply of timber, and
- the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological and geophysiographical features of special interest.

The *mission* of the Forestry Commission is to protect and expand Britain's forests and woodlands and increase their value to society and the environment (2009). The wooded area is continuously surveyed by the FC on a five-year cycle. It is difficult to measure forest cover accurately, but it is estimated that tree cover in Britain has increased from 5 per cent in 1919 to the satellite-based estimate of May 2011, shown in Table 8.2, which includes urban areas.

With effect from 1 April 2013, the Forestry Commission in Wales has been combined with the Environment Agency in Wales and the Countryside Commission for Wales into a new organisation called Natural Resources Wales.

UK Forest Strategy

Forest Strategy for Great Britain is described in *Science and Innovation Strategy for Forestry in Great Britain* (2014), jointly published by the Forestry Commissions in England, Scotland and Wales, for application across all the UK. Its aim is *'to ensure that forests and woodlands in Britain are able to maximise their contribution to three key areas of sustainability through research into:*

- *The maintenance of a diverse, healthy and resilient environment;*
- *People's enjoyment of the countryside, both rural and around towns;*
- *The efficient use of timber and other ecosystem services to maintain and improve economic competitiveness.'*

The emphasis includes sustainable land-use change, sustainable economic development and informed change to policy and practice. The strategy will harness research by the Forestry Commissions in England, Scotland and Wales (NRW) and the Northern Ireland Forestry Service.

The UK Forestry Standard and the Woodland Assurance Scheme

Published in 1998, revised in 2004 and again in 2011, this sets out the Government's framework for the practice of sustainable forestry management. Compliance with the standard is necessary for receipt of grant aid, Environmental Impact Assessment and felling licences. The standard takes into account the main factors in sustainable forest management and describes the requirements for each under headings of general forestry practice, biodiversity, climate change, historic environment, landscape, people, soil and water.

The standard builds on the Helsinki Guidelines (1993) and Pan-European Criteria (1994) on environment, sustainability, biodiversity, productivity and socio-economic functions and conditions.

The Forestry Standard is implemented by the Forestry Commission in England and Scotland, by Natural Resources Wales and by the Forestry Service of the Department of Agriculture and Rural Development for Northern Ireland. The FC and DARD use several mechanisms including:

- Woodland Grant Scheme
- Forest Design Plans (for Forest Enterprise)
- Energy Crops (England)
- Felling licences and Forest Plans (for the private sector)
- Environmental Impact Assessment

The UK Woodland Assurance Scheme (2nd edition 2006, amended 2008) was first published in 2000 and is supported by the Forestry Commission, Forest Stewardship Council, Timber Growers Association and World Wildlife Fund for Nature. It is designed to demonstrate high-quality and managed impact of forestry management. Certification means that woods are well-managed and provide benefits for the present generation while protecting the environment and maintaining benefits for future generations. A management plan with detailed maps is essential for certification. Woodland managers have to be able to demonstrate sound management of chemicals, health and safety, access and active monitoring in order to be able to report on status in relation to objectives.

Forest design

Forest Design Plans (FDP)

A mechanism used by Forest Enterprise, an FDP is long-term outline design plan covering at least 20 years. The first few years of planting, felling, regeneration and environmental management plans are set out in detail.

Forest and Woodland Design

In 1996, the Forestry Commission (Scotland) published Guidance Note 6 on 'Landscape Design and Presentation' written by Nicholas Shepherd, CMLI, which

was intended to give practical advice to those preparing applications for WGS funding. It covers site survey and presentation of visual and other information in support of grant applications. It may be downloaded from: http://www.forestry.gov.uk/pdf/LandDes&Present.pdf/$FILE/LandDes&Present.pdf.

In addition, in 2010 the Forestry Commission published its own Action Plan (2010–2015) for implementation of the European Landscape Convention. The plan shows how the 10 Articles of the ELC may be translated into action on the ground and measurable targets. The action plan is available at: http://www.forestry.gov.uk/pdf/eng-elc-actionplan.pdf/$file/eng-elc-actionplan.pdf.

Forest plans

Created from 2000 to enable owners to obtain FC approval for felling and replanting grants for a 10-year period on private estates in England, Scotland (scheme closed in 2005) and Wales.

Dedication schemes

Dedication schemes were closed to new application in 1981. Owners of existing dedicated estates may continue to put forward plans of operations for Forestry Commission approval.

Environmental Impact Assessment

Control of forestry is also exerted by the Environmental Impact Assessment (Afforestation) Regulations 1988. Any new planting proposals which are likely to have significant effects on the environment and may lead to adverse ecological change due to their size, nature and location will require an Environmental Assessment by the Forestry Commission.

Proposals definitely requiring an Environmental Assessment include:

- New planting in a National Nature Reserve or SSSI where this operation is listed as damaging.
- Other nationally important areas, i.e. National Parks, National Scenic Areas, AONB, some uncultivated land and semi-natural areas, and Environmentally Sensitive Areas.
- Areas over 100 hectares.
- Other locations where, due to the proposal's size, location or nature, there are likely to be significant effects on the environment.

Proposals for woodland restoration and creation of heaths under the Higher Level Stewardship scheme may be liable to the EIA (Forestry) (England and Wales) Regulations 1999.

Ancient and veteran trees

The conservation agencies maintain Registers of Ancient and semi-natural woodlands. Ancient woodland is woodland that has been in continuous existence since 1600 in England, Wales and Northern Ireland and since 1750 in Scotland. There is no automatic statutory protection for ancient woodland, but:

- Development affecting semi-natural woodlands should be notified to the FC.
- Planning guidance about nature conservation supports retention of ancient woodland.
- Trees have some protection through the need for a FC licence to fell more than two trees.
- Ancient woodlands are recognised as special habitats in the Higher Level Stewardship agri-environment scheme.

Trees on land listed in the registers of designed and historic landscapes may have greater protection as listing on the registers is a 'material consideration' in planning applications. Trees may also be protected indirectly if they are the habitat for protected species.

Veteran trees – individual trees of great age and value – have no statutory protection unless they are the subject of a TPO, but they are now mentioned in national planning guidance.

The Ancient Tree Inventory is an actively maintained database of ancient, veteran and notable trees (Trees of Special Interest) compiled by the Woodland Trust, Tree Register of the British Isles and the Ancient Tree Forum. More detailed information about this is in the Woodland Trust newsletter at http://www.woodlandtrust.org.uk/mediafile/100151758/Spring-2014.pdf.

Woodland Grant Schemes (WGS)

The WGS was introduced in April 1988 as a successor to the Forestry Grant Scheme and the Broad-leaved Woodland Grant Scheme. Since 1998 WGS has been replaced by individual grant schemes in England, Wales, Scotland and Northern Ireland. These schemes reflect the forest strategies of each country but all work carried out with modern grants must meet UK Forestry Standard criteria. See national sections below for more information about each scheme.

Generally, Woodland Grant Schemes aim to:

- Encourage creation of new forests and woodlands, increase production of wood, enhance the landscape, provide new wildlife habitats and offer opportunities for sport and recreation.
- Encourage appropriate management.
- Provide jobs and increase the economic potential of rural areas.
- Provide a use for land as an alternative agriculture.

Since 1998, owners have been urged to produce 20-year plans for management, harvesting, replanting and public access, in return for greater flexibility and faster approval of applications.

After grants have been approved,

- A contract is made between the FC and the applicant.
- Once work has been done, applicant submits a claim, and FC staff inspect the work.
- Payments – or penalties and recovery of grants follow.

The WGS are now regarded by UK Governments as being part of the Common Agricultural Policy and all are part of the EU Rural Development Regulation. Stand-alone forestry grants may no longer be available. See www.forestry.gov.uk.

Felling licences

From the 1967 Forestry Act, a licence has been required to fell growing trees, but there are many exemptions, including:

- Topping and lopping.
- Felling less than $5m^3$ in a calendar quarter (provided not more than $2m^3$ are sold).
- Felling in accordance with an approved plan of operations under a FC grant scheme.
- The trees are in a garden, orchard, church yard or public open space.
- The trees are below a certain diameter (8/10cm (thinnings) or 15cm (coppicing).
- The trees are interfering with permitted development or statutory works by public bodies.
- Trees are dead, dangerous, causing a nuisance or are badly affected by Dutch Elm disease.
- Felling is in compliance with an Act of Parliament.

When the Forestry Commission officers assess an application for a felling licence, they inspect the trees and also consult with the local authority and any other relevant statutory authority such as Natural England, Scottish Natural Heritage, Red Deer Commission, Civil Aviation Authority and Historic Scotland. Special permission from local planning authorities is required for felling in Conservation Areas and TPO trees. Permission is required from the nature conservancies (SNH, NE, NRW and NIEA) in SSSIs. The FC may impose replanting conditions on the issue of a licence in the interests of good forestry or the amenities of the district.

Penalties for unauthorised felling:

- Felling without a licence (unless exempted case) is an offence and carries a fine not exceeding £2,500 or twice the value of the trees (whichever is higher).

- A replacement notice may be issued to instruct restocking of the land and maintenance for up to 10 years. This does not apply in relation to trees with Tree Preservation Orders or trees felled prior 1986.

Felling licences are not required in Northern Ireland, but the Environmental Impact Assessment Regulations are applicable.

Landscape ecology

Landscape ecology is an evolving discipline that the Forestry Commission regards as highly relevant to the ecology and management of British forests for the following reasons:

- The FC recognises the need to consider biodiversity in modern multi-use forestry.
- Biodiversity is threatened by the fragmentation of woodland and other semi-natural habitats. Fragmentation affects both the physical structure of the landscape and its ecological function for the species within it.
- Biodiversity protection is most effective when actions at the landscape scale are combined with site-based measures.
- Landscape ecology research can be applied to modern forestry and landscape management through the effective targeting and evaluation of landscape change.

Landscape architects need to be aware of this developing discipline and its prestige within government agencies including the Forestry Commission, DEFRA, NRW and the EU.

National schemes

England

Current strategy to 2020 is outlined in the *Strategic Plan for the Forest Estate in England* (2013). Its goals focus on sustainable land management for the economy, nature and people.

English Woodland Grant Scheme (EWGS)

At the time of writing, grant schemes favour projects for plant health, but future schemes are likely to continue similar themes to EWGS 2005–2014. The aims of the EWGS (2005–2014) were to:

- sustain and increase public benefits from existing woodlands;
- help create new woodlands to deliver additional public benefit.

Public benefits include public access, improving the condition of SSSIs, biodiversity action and restoration of industrial land. Grants are also given for commercial woodland planting. A scheme of transition is in place until the new RDPE grant schedule comes into force from 2015/2016. It is likely that the new scheme will have similar grant types and application processes as before.

The 2005–2014 scheme had six grant types, which were prioritised according to regional targets.

- Wood Fuel Woodland Improvement Grant: a new grant (2012) for infrastructure (e.g. forest roads) and to help with managing harvesting contracts.
- Woodland Planning Grant: to prepare plans for managing woodland and meet the UK Woodland Assurance Scheme standards.
- Woodland Regeneration Grant: changing the composition of woodland through natural regeneration and restocking after felling.
- Woodland Improvement Grant: to create, enhance and sustain public benefits (three themes): Woodland Biodiversity Action Plan; Woodland SSSI condition improvement; Access. Also grants in East of England and West Midlands to use woods for human health.
- Woodland Management Grant: assisting with costs of providing higher quality public benefits, but closed until further notice.
- Woodland Creation Grant: to encourage creation of new woodlands where they deliver greatest public benefit, but closed until further notice.
- Farm Woodland payments from DEFRA are also available to compensate for agricultural income foregone.

To apply for EWGS support, applicants needed to:

- Register themselves and their land with the Rural Payments Agency.
- Submit an application for the grant required – the forms and associated guidance are available from the FC website.
- Submit a map of the woodland – the FC may help with this.
- Check what designations could affect the woodland – the FC has a land information search which may be used to identify these.
- Submit an application to their regional office.

National Forest (England)

The National Forest is located between Burton-upon-Trent, Tamworth and Leicester and is about 40km east to west and 10km north to south. Conceived as part of a government strategy to develop a ‘multi-purpose countryside’ and initiated in 1990 by the Countryside Agency, the National Forest has been run by a private company (the Forestry Company) since 1995. All bids for funding have to comply with the Forestry Authority’s Woodland Grant Scheme. By 1995, 230

hectares had been planted but by 2013, over 10,000 hectares – at 19.5 per cent of the area, this is over half the target cover. Participation by landowners is voluntary. A new strategy for the forest covers 2014–24 and aims to expand the forest and its economy and become known for excellence in woodland management practice and visitor experience (http://www.nationalforest.org).

Community Forests (England)

This programme was established in 1990 by the then Countryside Commission as a pilot project to demonstrate the potential contribution of environmental improvement to economic and social regeneration. Three initial pilots were expanded to a national programme, which made use of multi-agency partnerships to test project formats and create permanent change to the outskirts of major cities in England. The aim is to include woodland, farmland, heath land, meadows and lakes with facilities for nature study and outdoor leisure and recreation. Each site is developed to a 30-year government-approved Forest Plan. Although the FC and Natural England are major partners, recently Community Forests have moved towards greater financial independence from national funding bodies and further strengthening of local focus. See http://www.communityforest.org.uk/yourlocalforest.htm and individual websites.

The Community Forests and their adjacent towns are:

- Red Rose Forest (West Manchester)
- South Yorkshire Forest (Sheffield)
- The Greenwood (Nottingham)
- The Mersey Forest (Liverpool and Dee Estuary)
- Forest of Mercia (Birmingham)
- Thames Chase (North and North-east London)
- Great Western (Swindon and Bristol)
- Bedford and Milton Keynes

Scotland

Scottish Forestry Strategy

The initial strategy published in 2000 aimed to:

- Maximise the value to the economy of the wood resource through the next 20 years.
- Create a diverse resource of high quality for the twenty-first century and beyond.
- Ensure that trees and woodland make a positive contribution to the environment.
- Create opportunities for enjoyment.
- Help communities to benefit from woods.

Revised in 2006, and now supplemented by an Implementation Plan for 2014–2017, the initial aims were refocused into seven themes:

- Climate change
- Timber
- Business development
- Community development
- Environmental quality
- Biodiversity
- Access and health

Indicative Forestry Strategies (IFS) and the forest planning hierarchy

The UK Forestry Strategy and the Scottish Forestry Strategy have general applicability and do not reflect regional issues. Planting new large-scale commercial forest caused controversy in Scotland, therefore Indicative Forestry Strategies were introduced by Circular 13/1990 requiring Scottish Regional Councils to identify preferred, potential or sensitive areas for new forest planting and incorporate these into structure plans. The initial aim was to encourage the expansion of forestry (33,000 hectares of new planting a year required by the Government) in an environmentally acceptable way. This approach is continued by the five Regional Forestry Forums which advise on forestry policy and practice in their areas (2014).

Indicative Forestry Strategies should identify:

- Preferred areas for new planting.
- Potential area where planting may be acceptable subject to resolution of particular issues.
- Sensitive areas where there is a concentration of sensitive issues. A successful strategy will ease the pressure on sensitive areas.

Circular 9/1999 replaced Circular 13/1990 and required the IFS to recognise the multiple environmental, social and economic roles that forestry may play.

Forestry frameworks

These are also known as Woodland Strategies and are an intermediate stage between strategic SFS and IFS and local action, expressed in strategic plans/forest design Plans (for the national forest estate) and forest plans/SFGS (for private, voluntary and other estates). By 2005 only Angus, City of Edinburgh, East Lothian and Midlothian lacked any forest planning.

Scottish Forestry Grant Scheme (SFGS)

The SFGS was revised for the period 2007–2013 under the EU Rural Development Regulation and the associated Scottish Rural Development Plan (SRDP). Grants

were part of a new programme called 'Rural Development Contracts – Rural Priorities'. Funding was available for woodland creation, short rotation coppice crops, sustainable management of forests, woodland improvement grants, managing ancient woodland pasture and improving the economic value of forests. Small woodlands were supported through 'land management options' as part of the SRDP and stand-alone forestry grants were no longer available. The SFGS was notorious among foresters for its complexity and the difficulty of obtaining funding from it.

The scheme closed on 31 December 2013, but there are transitional grant arrangements available until the new Scottish Rural Development Programme (SRDP) starts in 2015. (See also Indicative Forestry Strategy and www.forestry.gov.uk/scotland.)

Central Scotland Forest (CSF) and Central Scotland Green Network

This is a discontinuous forest spread through 620 square miles between Edinburgh, Glasgow, Falkirk, Stirling and Lanark in the Central Belt of Scotland. The CSF Trust partners are the Scottish Executive, Scottish Enterprise, Forestry Commission, five local authorities, SNH and informal partners including landowners, voluntary organisations and communities. CSFT promotes the forest and implements planting. The aim is to double woodland cover in Central Scotland to 34,000 hectares by 2015 (www.centralscotlandgreennetwork.org).

Woodlands In and Around Towns and Forests for People

Woodland In and Around Towns (WIAT) is a Forestry Commission scheme launched in 2005 and now in its fourth phase (2015–2020). It is the main on-site mechanism of the Central Scotland Green Network. It offers grants for urban fringe woodland and other community-supporting activity around towns of 2,000 people or more throughout Scotland. The aims are:

- improve the quality of life for people in urban areas;
- bringing neglected woodland into management;
- creating new woodlands; and
- supporting people to use and enjoy their local woods.

A second scheme, Forests for People (F4P) provides grants to help community learning, health and social development.

Wales

Welsh Forestry

Natural Resources Wales has taken over the functions previously carried out by the Forestry Commission in Wales.

Welsh Forestry Strategy

Woodlands for Wales, written in 2001 and revised in 2009, is designed to be a 50-year strategy. It is the reference document for the Welsh Government forest policy and underlies action plans for economic, social and environmental and forestry targets. It has four strategic themes:

- Coping with climate change and helping reduce carbon footprint. (Theme added since 2001.)
- Woodlands for people: serving local needs for health, education and jobs.
- Competitive and integrated forestry: innovative, skilled industries supplying renewable products.
- Environmental quality: making a positive contribution to biodiversity, landscapes and heritage, and reducing other environmental pressures.

Welsh woodland grant schemes

A WGS for Wales closed in 2006 and was replaced by 'Better Woodland for Wales' (BWW). It aimed to emphasise good woodland management because timber industry customers increasingly wish to buy timber from woods certified as being sustainably managed. Owners and their plans had to comply with the minimum standards of the UK Woodland Assurance Scheme.

The BWW scheme closed in 2011 because it was not designed to deal with climate change, carbon capture and water management and most BWW grants were being used to manage existing woodland rather than create new ones or bring unmanaged farm woods into care. From 2013 woodland grants became part of Glastir, the new Sustainable Land Management Scheme for Wales managed by the Department for Rural Affairs of the Welsh Assembly Government (i.e. Glastir is not managed by the FC).

Northern Ireland

The Forestry Commission does not operate in Northern Ireland but there is a Forestry Service in the Department of Agriculture and Rural Development (DARD). Current legislation is the new Forestry (Northern Ireland) Act 2010 which updates the Forestry Act (NI) 1953. The new Act modernised management of forests by FS DARD. The Act restated duties of afforestation and forestry business, but added a wider context and new powers. These included protection of biodiversity and the environment (soil, water, air) through sustainable forestry; mitigating or adapting to climate change; promotion of recreational use and social benefit from forests; and reintroduction of felling licences. The Department will also be able to use or develop forestry land for a purpose other than forestry, in order to obtain better value from the public estate – for example, to allow for the creation of wind farms or the development of tourist facilities.

Grants are available for sustainable forestry operations; farm woodlands, restocking, short rotation coppice, woodland environment and community woodlands.

Some other woodland and tree bodies

Tree Council

The Tree Council is a registered charity formed in 1974 to help counteract the problem of diminishing tree cover in the UK. It promotes the improvement of the environment by the planting and conservation of trees and woods in town and country and provides grants for tree planting.

Its aims are:

- To make trees matter to everyone.
- More trees of the right type in the right place.
- Better care for all trees of all ages.
- Inspiring effective action for trees.

The Tree Council's main campaign is National Tree Week held annually in late November and early December, but it also organises 'A walk in the woods' in spring; seed gathering in late September–early October; and TLC for young trees, i.e. tending, loosening tree ties and clearing grass and weeds. The Tree Council runs the Tree Warden scheme and gives grants to schools and communities. It also produces a magazine called *Tree News* (www.treecouncil.org.uk).

International Tree Foundation (ITF) (Formerly Men of the Trees)

A charity founded in 1924 by Dr Richard St Barbe Baker, the organisation campaigns to maintain tree cover around the world and prevent the formation of dust bowls and desertification. The ITF plants trees, educates children, campaigns to protect ancient, significant and vulnerable trees and forests throughout the world (www.internationaltreefoundation.org).

The Arboricultural Association

Its main aim is to advance the science of arboriculture for the public benefit. It organises conferences and seminars, produces publications and organises an annual directory of approved contractors and registered consultants (www.trees.org.uk).

The Woodland Trust

A conservation charity dedicated to preserving and expanding *native* woodlands. It campaigns to protect ancient woodlands, improve woodland biodiversity,

increase native woodland cover and increase understanding and enjoyment of woodlands (www.woodlandtrust.org.uk).

Royal Forestry Society (RFS)

The RFS was founded in 1882 by and for people interested in trees including forest owners, forester, arborists and landscape architects.

LANDSCAPE DESIGNATIONS

Green belt

Legislation: Green Belt (London and Home Counties) Act 1938.
Town and Country Planning Acts (for places throughout the UK outside London). NPPF cl. 79.

The first green belt was established to protect the amenity of London, to check the unrestricted sprawl of built-up areas and to safeguard the surrounding countryside against further encroachment. The 1938 Act was used as the prototype to encourage establishment of other green belts as described in Circular 42/55. All other green belts are designated under the Town and Country Planning legislation, with guidance in national planning policy documents.

Green belts should be several miles wide and sacrosanct from new buildings and alterations of buildings, unless for sport, agriculture, cemeteries or institutions standing in extensive grounds. Their essential characteristics are open landscapes and permanence.

In England, green belts have five purposes (NPPF 2012, clause 80, unchanged from PPG2 2001):

- Check the unrestricted sprawl of large built-up areas.
- Prevent neighbouring towns merging into one another.
- Assist in safeguarding the countryside from encroachment.
- Preserve the setting and special character of historic towns.
- Assist in urban regeneration, by encouraging the recycling of derelict and other urban land.

Table 8.3 Green belts in the UK

	No. of green belts	*Greenbelt area in hectares*	*Greenbelt as % of total area*
England	14	1,639,540	13%
Scotland	6	156,000	2%
Wales	1	Unknown	Unknown
Northern Ireland	30	226,000	16%

There is a strong presumption against development in green belts, but any development should:

- Safeguard the countryside.
- Assist urban generation.
- Maintain the essential characteristics of green belts.
- Constitute a special circumstance.
- Lend itself to a rural environment.
- Maintain the visual amenity of the area.

Once designated, English green belts should be planned positively to fulfil several objectives:

- Provide opportunities for access to the open countryside for the urban population.
- Provide opportunities for outdoor sport and outdoor recreation near urban areas.
- Retain attractive landscapes, and enhance landscapes, near to where people live.
- Improve damaged and derelict land around towns.
- Secure nature conservation interest.
- Retain land in agricultural, forestry and related uses.

In Scotland, greenbelt policy is in the consolidated SPP 2014, clause 49. The purposes are largely unchanged from SPP21 published in 2006, which should support spatial strategy and:

- Direct planned growth to the most appropriate locations and support regeneration.
- Protect and enhance the character, landscape setting and identity of towns and cities.
- Protect and give access to open space in and around towns and cities.

In Northern Ireland, the strategic objectives of green belts are very similar to those in England:

- Prevent the unrestricted sprawl of large built-up areas.
- Prevent neighbouring settlements from merging.
- Safeguard the surrounding countryside.
- Protect the setting of settlements.
- Assist in urban regeneration.

Greenbelt designation used to be a passive designation to protect the distinct characters of town and countryside, but current policy treats it as tool of positive planning and controlled change. Green belts are under threat from development

pressure from population growth, employment mobility afforded by high car ownership and the internet, although many residents in rural areas struggle to travel for work or leisure.

Areas of Landscape Value (ALVs)

Legislation: Town and Country Planning Act 1947 and subsequent consolidating Town and Country Planning Acts for England, Wales and Scotland. Originally called Areas of Great Landscape Value (AGLV), this designation receives greater recognition in Scotland than in other UK nations. In Scotland the requirement to designate ALVs was set out in SDD Circular 2/1962 and current guidance on 'areas of local landscape value' is retained in SPP 2014.

ALVs are designated by local planning authorities in development plans in order to protect areas of regional or local landscape importance from inappropriate development. ALV status may afford slightly more protection to countryside areas than green belt designation because local planning officers have a good deal of discretion about how that protection may be defined in the local plan. In a green belt it may be permissible to build a farmhouse on agricultural land. In ALVs permitted development and reserved matters may be more strictly controlled. The ALV 'rules' should comply with planning policy guidance on housing in the countryside.

The Scottish SPP 2014 (clause 197) states that the purpose of an 'area of local landscape value' is:

- To safeguard and enhance the character and quality of a landscape which is important or particularly valued locally or regionally.
- To promote understanding and awareness of the distinctive character and special qualities of local landscapes.
- To safeguard and promote important local settings for outdoor recreation and tourism.

Current English guidance does not refer to this designation but NPPF 2012 (109) says that the planning system should protect and enhance 'valued landscapes, geological conservation areas and soils'. This designation does not appear in current Welsh or Northern Irish planning policy.

National parks

Legislation: National Parks and Access to the Countryside Act 1949, the Environment Act 1995 and the National Parks (Scotland) Act 2000. Natural Environment and Rural Communities Act 2006 Nature Conservation and Amenity Lands Order (NI) 1985 (www.nationalparks.gov.uk).

In 1931, the Council for the Protection of Rural England identified 12 sites for national parks in England and Wales. Ten were established between 1951 and 1957; the New Forest in 2005. Creation of the fifteenth park in the UK, the South Downs, was confirmed in 2009, 60 years after the National Parks Act was passed.

- England: Dartmoor, Exmoor, Lake District, New Forest, Northumberland, North York Moors, Peak District, the Yorkshire Dales, the South Downs and the Broads which has equivalent status to a National Park.
- Wales: Brecon Beacons, Pembrokeshire Coast and Snowdonia.
- Scotland: Cairngorms and Loch Lomond and the Trossachs.
- Northern Ireland: None at present but the Mourne Mountains are a possible future park. Although the concept is recognised in existing legislation, new primary legislation would be required to enable full UK-style management.

From 1949 to 2000 national parks legislation applied only to England and Wales. National parks were defined as extensive tracts of country designated for their natural beauty and the opportunities they afforded for open air recreation having regard both to their character and their position in relation to centres of population. Ten parks were designated. All remain largely in many private hands.

In 1949 the aims of management were to:

- preserve and enhance the natural beauty of the parks;
- encourage the provision and improvement of facilities within the parks.

In 1995 these aims were replaced by:

- conservation and enhancement of the natural beauty, wildlife and cultural heritage of the parks;
- promotion of opportunities for the understanding and enjoyment of the special qualities of those areas by the public.

In 2006, the National Parks website stated that conservation has priority if these aims conflict, i.e. the Sandford Principle applies. (See National Parks in Scotland below.)

Norfolk Broads

The Broads Authority has a third purpose, protecting the interests of navigation. Under the Broads Act 1988 all three purposes have equal priority. This was reinforced by the Natural Environment and Rural Communities Act 2006.

Definition of natural beauty

The Natural Environment and Rural Communities Act stated that '*an area in England or Wales used for agriculture, woodland or parks, or other area*

whose flora, fauna or physiographical features are partly the product of human intervention in the landscape, does not prevent it from being treated, for the purposes of any enactment (whenever passed) as an area of natural beauty (or outstanding natural beauty)'.

This clarification followed the case *Meyrick Estate Management Ltd v Secretary of State for Environment, Food and Rural Affairs* (2005) regarding designation of land for the New Forest National Park designated in 2005. Meyrick Estate claimed that the New Forest could not become a national park because it was not 'natural' under the terms of the 1949 Act, but the court case established that human intervention in the landscape could be part of 'natural beauty'. This interpretation is compatible with the European Landscape Convention (see later).

National Parks in Scotland

In Scotland, the National Parks have four aims, listed below, the first two of which are similar to the aims in the 1949/1995 legislation. The third and fourth aims however, were new. It is accepted that the four aims may conflict from time to time, but in that case the 'Sandford Principle' would apply, i.e. the aim of *conservation* would prevail.

- To conserve and enhance the natural and cultural heritage of the area.
- To promote understanding and enjoyment (including enjoyment in the form of recreation) of the special qualities of the area by the public.
- To promote sustainable use of the natural resources of the area.
- To promote sustainable economic and social development of the area's communities.

Loch Lomond and the Trossachs National Park is an independent planning authority but Cairngorms National Park is not. For the Cairngorms, this means there is an inbuilt possibility of a conflict of interest between the component local authorities and the national park management.

Scottish Natural Heritage prepared a short list of sites for a Coastal and Marine National Park. Public consultation took place during 2006, with designation scheduled for 2008. This process was superseded by the Marine (Scotland) Act 2010.

Governing bodies – many names, similar functions

Originally called the National Parks Commission, the governing body in England and Wales was renamed the Countryside Commission under the Countryside Act 1968 and then reconstituted by the Environmental Protection Act 1990 as the Countryside Commission (England) and the Countryside Council for Wales, English Nature and the Joint Nature Conservation Committee. In 1999, the Countryside Commission (England)

was renamed the Countryside Agency (CA). The Natural England and Rural Communities Act 2006 disbanded the CA and English Nature and created Natural England as the governing body from 2007. For Wales, Natural Resources Wales has assumed the CCW's role, but its first business plan makes only one mention of national parks – a criterion that they undertake at least one project targeted at disadvantaged communities and one project to maintain or enhance biodiversity.

Natural England has power to take action on proposals for enhancement, preservation or promotion. It may encourage provision and improvement of facilities for accommodation, refreshments, camping sites and parking places and erect buildings and carry out 'necessary and expedient' work (only where existing facilities are inadequate or unsatisfactory).

National Park Authority controls and powers

- Public interest is served by strict planning controls on development and by access arrangements. In addition each park committee must draw up a development plan for the park (Development Plan as in TCP regulations). The Environment Act 1995 established National Park Authorities that have local planning authority functions, except tree preservation and replacement, and wasteland notices.
- Each National Park Authority is required to produce a National Park Management Plan for the park within three years of the park's establishment. It must be reviewed every five years. This plan and the Development Plan must be drawn up in consultation with NE/CCW.
- National Park Authorities have the power to make by-laws, e.g. to preserve order, to control interference to enjoyment caused by other people's behaviour and to protect the land, or anything therein, from damage. This is an important power.
- Areas of moor and heath in parks have special protection, e.g. from ploughing.
- Grants and loans may be given by the authorities to other bodies and individuals to further the aims of the national parks.
- The Scottish National Parks (Loch Lomond and the Trossachs (LLT) designated in 2002, and Cairngorms, designated in 2003) are also governed by National Parks Authorities. The LLT Authority has full planning powers, but in Cairngorm these powers are split between the National Park Authority and four local councils.

Areas of Outstanding Natural Beauty (AONB)

The concept of Areas of Outstanding Natural Beauty was established in National Parks and Access to the Countryside Act 1949 and the Nature Conservation and Amenity Lands Order (NI) 1985. It applies to England, Wales and Northern Ireland. The Countryside and Rights of Way Act 2000 significantly affected AONBs.

There are 33 AONBs in England, four in Wales, one straddles the England–Wales border and there are eight in Northern Ireland. They cover 18 per cent of the UK's land area.

Background

In 1945, the report to the Government by architect-planner John Dower which recommended creation of national parks also noted that there were many beautiful areas that were perhaps not large enough or wild enough to be national parks, but which still required protection. This suggestion led, in the 1949 Act, to the creation of Areas of Outstanding Natural Beauty.

Purpose

Natural England may designate any area in England and Wales which is not a national park, but which appears to them of such *outstanding natural beauty* that it is desirable that the provisions of the Act should also apply. Designation is underlain by a scientific conservation concept: AONBs have valuable and distinct landscapes, but unlike national parks, it was thought extensive outdoor recreation may not be appropriate and its provision (including public access) is still not a requirement.

The secondary purposes of AONBs are to:

- meet the need for quiet enjoyment of the countryside;
- have regard for the interests of those who live and work there.

These aims are achieved through planning controls, practical countryside management and raising awareness among local people and visitors in order to form supporting partnerships.

- There are restrictions on development elsewhere permitted under the General Development Order.
- The County Council (or equivalent) must be consulted in the formation of development plans.
- Management agreements are encouraged to control farming methods.
- The local authority may make by-laws for its own land in an AONB and appoint wardens.

In 'Areas of Outstanding Natural Beauty: A Policy Statement' (1991) (CCP356) the Government restated three subsidiary purposes: the socio-economic needs of local communities, recreation and sustainable development. These aims are integrated through management plans.

Organisation

AONBs are funded by their local authorities and by grants from Natural England and the Countryside Council for Wales, now Natural Resources Wales. They may have a small permanent staff. AONBs are not completely independent organisations like National Parks Authorities, but have a Joint Action Committee (JAC) or similar. The composition of a JAC depends on the organisations relevant to the area, but includes local authorities with land in the AONB who provide the core administration. JACs tend also to include the following organisations depending on circumstances: Natural England, Cadw, the Rural Development Service of DEFRA, the Forestry Commission, parish councils, the Country Land and Business Association, English Heritage, the National Farmers Union, local water companies and the Ramblers Association.

Unlike in a national park, a JAC is not a planning authority, but may advise the local planning authorities with jurisdiction in the AONB. In turn the local planning authorities are heavily involved in achieving the purposes of AONB designation, dealing with planning issues and all local authority functions including public rights of way, countryside services, tourism and public services. This responsibility was reinforced in section 8.4 of the CROW Act 2000 by which they are empowered to '*take all such action as appears to them expedient for the accomplishment of the purpose of conserving and enhancing the natural beauty of the AONB*'.

The National Association of AONBs is a well-organised group with informative websites, on-line reference library and an annual conference.

Management plans

The CROW Act 2000 made it a statutory requirement that AONBs had management plans by 2004, reviewed every five years. These documents vary a good deal in their approach, partly because they reflect the different and complex relationships of organisations within the JACs.

For example, the Wye Valley AONB Management Plan was drawn up using the Welsh planning method for AONBs. It involved four local authorities, the Countryside Agency, the Countryside Council for Wales and Natural England. The first plan was for 2004–2009 and received national recognition for its comprehensive public consultation process which led to a clear articulation of what makes the AONB special and a 'vision state' as a future goal. This led to the 'State of the AONB' report; a listing of the special qualities of the area; and robust policies and targets. A 'State of the AONB' report records the condition of

the AONB at a given date and is intended to be a baseline against which changes in condition may be measured in the future.

In contrast, the Howardian Hills AONB plan and the Mendip Hills plan involved 11 and 14 organisations respectively. Their plans seem to reflect, in different ways, the complexity of the discussions, values and priorities that must lie behind the finished plans.

The Welsh method

An AONB Staff Induction CD stated: 'The inter-relationships that exist between communities and their landscapes, and the environment and the economy are brought together and discussed within this planning process [which integrates views of all stakeholders]. An assessment of the resource and the forces that act upon them is the only way to truly inform decision making within the context of sustainable development. The AONB management planning process in Wales seeks to develop this thinking.'

For further information about AONBs see www.landscapesforlife.org.uk. AONBs have websites, which vary in content, style and quality, but some are very interesting and informative.

Heritage Coasts

A Heritage Coast is a section of coast in England or Wales exceeding one mile in length that is of exceptional scenic quality, substantially undeveloped and containing features of special significance and interest. Designation is agreed between local authorities and Natural England/Natural Resources Wales to help local authorities plan and manage their coastlines. These coasts are managed to conserve natural beauty and enhance public recreational access.

Heritage Coast is a non-statutory designation, unlike national parks and AONBs, but these three designations are known as the 'designated areas'. Their boundaries may overlap with AONBs.

In 2012 Natural England stated that the aims for Heritage Coasts are:

- To conserve, protect and enhance the natural beauty of the coasts, their marine flora and fauna and their landscape features.
- To facilitate and enhance their enjoyment, understanding and appreciation by the public.
- To maintain and improve the health of inshore waters affecting Heritage Coasts and their beaches through environmental management.
- To take account of the needs of agriculture, forestry and fishing and the economic and social needs of small communities of the Heritage Coast.

National Scenic Areas (NSA)

The 40 original NSAs were identified in 'Scotland's Scenic Heritage' (1978). NSAs (and AGLVs) were formally recognised in a Scottish Development Department Circular in 1980, in the National Heritage (Scotland) Act 1991 and in S. 50 of the Planning (Scotland) Act 2006.

The 40 sites have international recognition, being listed as Category V (Protected Landscapes) in the International Union for the Conservation of Nature (IUCN) World List of Protected Sites.

The Planning (Scotland) Act 2006 gave a statutory basis to NSAs by adding a section to the Town and Country Planning (Scotland) Act 1997. The NSA boundaries are unchanged from those defined in 1978. However, the statute allows Ministers to designate an NSA by direction and to vary or revoke the designation. The Act enables Ministers to issue guidance to local planning authorities about how NSAs should be treated. This is expressed in Scottish Planning Policy (para. 212) which says that '*Development is permitted only when it will not adversely affect the integrity of the area or the qualities for which it has been designated, or such adverse effects are clearly outweighed by social, environmental of economic benefits of national importance'*. This reinforces imposition of the strict development control regime introduced by SDD Circulars 20/1980 and 9/1987.

SNH is a statutory consultee for development in NSAs. For instance applications for structures over 12m in height (e.g. wind farms) must be notified to SNH; also sites for five or more caravans or houses outside settlements and non-residential development greater than 5 hectares.

An NSA is an area recommended by Scottish Natural Heritage (SNH) as being of '*outstanding natural heritage of Scotland and that special protection measures are appropriate for it*'. The natural heritage of Scotland includes flora, fauna, geological and physiographical features and the natural beauty and amenity of Scotland, '*whether or not to any extent the product of human intervention in the landscape*'.

SNH assists relevant public authorities and private interests to produce a management strategy setting out a basis for sustainable land use in the area, which would be implemented through development plans, grants and management agreements. Policy development lags a long way behind AONBs, but Dumfries and Galloway's three NSAs have led the way in coherent analysis and planning and are the only NSAs with completed management strategies.

SNH conducted a formal review of NSAs: 'National Scenic Areas: SNH's Advice to Government' (1999). SNH recommended new primary legislation to strengthen and clarify the status and conservation of NSAs.

In 2007 and 2008 Scottish Natural Heritage surveyed all the NSAs and produced an up-to-date list of the landscape qualities that make each one special.

This review, carried out in partnership with Historic Scotland and the Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS), was published in August 2010 as *The Special Qualities of the National Scenic Areas* (SNH Commissioned Report No. 374). The idea is that identification of the 'special qualities' will help to protect them from unsuitable development.

Country parks

Legislation: The concept was established in the Countryside Act 1968 (England and Wales) and extended to Scotland in the Countryside (Scotland) Act 1981.

Country parks were created by local authorities on their own or private land as pleasure grounds especially near conurbations. Councils may acquire land compulsory for this purpose and provide public amenities on these and common lands. The authorities have special powers to encourage water recreation. There are about 400 sites called country parks in the UK. This is not a designation of landscape beauty, but country parks often include water for wildlife and leisure.

Natural England launched an accreditation scheme for country parks in 2009. Country parks have few resources for maintenance or development, which means that landscape improvement tends to be funded by one-off capital investment, but in England and Wales, the Country Parks Network provides guidance on good practice. See the Natural England website.

Local green space

Under clauses 76–8 of the National Planning Policy Framework for England, local communities are able to designate land of special importance to them as local green space. The designation is supposed to protect these sites from development. The designation is to be used only in exceptional cases and where the land is small in extent, close to the community concerned and particularly significant for its cultural, aesthetic, historic, wildlife, recreational or tranquil character. These sites should be managed similarly to green belts.

Hedgerows

Legislation: The Environment Act 1995 (Part V) Hedgerow Regulations 1997 (SI 1997 No. 1160). This law applies in England and Wales only. Scotland has only 7 per cent of Britain's hedgerows and this legislation was deemed to be unnecessary in Scotland.

The Secretary of State may protect by regulation 'important' hedgerows, i.e. those of significant archaeological, historic, wildlife or landscape value. Generally hedgerows should be at least 30 years old, in the countryside, over 20m in length and contain certain species. Garden hedges are not covered by these regulations.

Designations are recommended by local planning authorities and confirmed by the Secretary of State for the Environment and DEFRA in England and by the Secretary of State for Wales.

Land managers must notify the local planning authority if they wish to remove a protected hedge. The planning authority has 42 days in which to consider the issues and give or refuse consent.

Note that this legislation did not consider landscape visual character as a criterion, nor did the rules include conservation measures or prevent loss through neglect. Research indicates that the Regulations successfully stemmed the loss of hedgerows, but has failed to protect locally distinctive, ancient or species-rich hedgerows. However, if hedgerows are covered by historic land characterisation, they are protected for their historic importance and wildlife value.

DEFRA issued proposed amendments for consultation in 2003 (and in 2004 and 2006), which included measures for holly, elm and willow and hedges that form habitat for protected species. Local authorities would also have longer to consider removal notices (eight weeks instead of six). All these proposals are on hold.

Conservation of hedges appears to have been strengthened by ODPM Circular 06/2005. The Circular referred to Article 8 of the Habitats Directive which requires Member States to encourage management of linear landscape features with a continuous structure or function of major importance for wild flora or fauna as stepping stones essential for migration, dispersal or genetic exchange, e.g. rivers and their banks, traditional field boundary systems, ponds and small woods.

The EU CAP also supports hedges through the cross-compliance rules, i.e. land managers meet certain standards of care for landscape and habitat including hedges in order to receive EU funding. DEFRA has a *Good Agricultural and Environmental Condition Guide* (No. 14) explaining what is required. Planning conditions and obligations also may be used to promote their management.

'*Between 1984 and 1990 it was estimated that the length of hedgerows in Great Britain declined by about 23 per cent. When the 1997 Regulations were introduced, Ministers were advised that only 20 per cent of hedgerows were likely to be protected under these criteria and undertook to review the Regulations within a few years. However, subsequent ADAS research indicated that over 70 per cent of hedgerows might be protected, and the results of the Countryside Survey 2000 indicated that by 1998 the decline in length of hedgerows as reported in the 1980s had been halted.'* (Source: www.hedgelink.org.uk)

Under the Anti-social Behaviour Act 2003 part 8, landscape architects and tree preservation officers may be required to adjudicate on high-hedge difficulties between feuding neighbours. See www.nature.net for much more detail and useful guidance.

World Heritage Sites

A designation based on the Convention for the Protection of the World Cultural and Natural Heritage 1972. The aim is to provide recognition and assistance for protection of monuments, buildings and sites that are the natural and man-made treasures of the world. Sites have '*outstanding universal value*' for science, aesthetics or nature conservation.

The World Heritage Committee of UNESCO identifies sites according to strict criteria. States are expected to take active and utmost steps to conserve these sites and educate the public to appreciate them. International assistance may be available. (See http://whc.unesco.org/en.) British examples include St Kilda, Stonehenge, Ironbridge and Edinburgh New Town. Examples abroad are the Grand Canyon and the Taj Mahal.

The NPPF 2014 (section 12) includes world heritage sites with scheduled monuments, protected wreck sites, battlefields, grade I and grade II* listed buildings, grade I and grade II* registered parks and gardens as 'designated heritage assets'. NPPF 2014 advises that development should sustain and enhance these sites, contribute to sustainable communities and their economy, and contribute to local character and distinctiveness.

The local planning authority may publish special guidance for development of property within a world heritage site or its buffer zone, essential setting or significant view. An access and design statement including potential impact on the world heritage site or setting may well be necessary. In addition, a scheduled monument consent application to the national conservancy or listed building consent application to the local authority may be required. Larger scale developments will require environmental statements in support of their planning applications.

European Landscape Convention (ELC)

The European Landscape Convention (the Florence Convention) came into force on 1 March 2004 and was ratified by the UK on 1 March 2007. The aims of the Convention are stated in Article 3: '*To promote landscape protection, management and planning and to organise European cooperation on landscape issues.*' The EU definition of landscape includes all urban and peri-urban landscapes, towns, villages and rural areas, marine and inland water. It applies to ordinary or even degraded landscape as well as those areas that are outstanding or protected.

The aims of the ELC are:

- Protection to conserve and maintain the significant or characteristic landscape features.
- Management to ensure regular upkeep of landscape in order to '*guide and harmonise changes*'.
- Landscape planning to enhance, restore or create landscapes.
- Organising European cooperation on landscape issues.

The underlying idea of the ELC is that all landscapes are valuable, being the result of interaction between people, places and nature over time. The convention recognises that all landscapes affect quality of life.

The ELC is intended to address the loss of landscape detail and skill in maintaining landscape that is occurring as a result of modern land-use pressures. Key is the major role assigned to the public about perception and value attached to landscape. Therefore raising awareness is essential in order to involve the public in decisions about landscape.

The ELC concept is related to world heritage status: both recognise the 'outstanding universal value' of the world's cultural and natural heritage. Cultural landscape is designed, evolved or associative. 'Cultural landscape' was recognised as a concept by UNESCO in 1992. The International Council on Monuments and Sites (ICMOS) studies World Heritage cultural landscapes in order to plan conservation of valuable aspects of landscapes.

Natural England published guidance on how to integrate ELC into policies and plans. SNH indicates that the ELC underlies implementation of the EU Rural Development Programme. One tangible expression of the ELC is the UK Landscape Award; another is the revision of the LI and IEMA's *Guidelines for Landscape and Visual Impact assessment* (3rd edition, 2013).

Summary of landscape and amenity designations

The UK's landscape and amenity designations are summarised in Table 8.4.

ECOLOGICAL DESIGNATIONS

The UK's SSSI, ASSI, Nature Reserves, National Nature Reserves, Marine Nature Reserves, limestone pavements and fundamentals of species protection were all founded under British Acts in force before the UK joined the European Union in 1973. SAC, SPA, Ramsar, MCZ, Biosphere and Biogenetic Reserves are founded through European or international laws confirmed by UK Acts or Regulations. Planning law (local plans and development control) is very important for these sites, but conservancies and other agencies have significant responsibilities as well.

Sites of Special Scientific Interest (SSSI)/ASSI in Northern Ireland

Legislation: National Parks and Access to the Countryside Act 1949; Wildlife and Countryside Act 1981 Wildlife and Countryside (Amendment) Act 1985; Nature Conservation SOED Circular 13/1991 Countryside (Scotland) Act 1981; Countryside and Rights of Way Act 2000; ODPM Circular 06/2005; Nature Conservation and Amenity Lands (NI) Order 1985, succeeded by the Environment (NI) Order 2002; Nature Conservation (Scotland) Act 2004; Natural Environment and Rural Communities Act 2006; Wildlife & Natural Environment (Northern Ireland) Act 20122. SSSIs/ASSSIs exist throughout the UK.

Table 8.4 Summary of landscape and amenity designations

	Green Belt	*Area of Landscape Value*	*Country Park*	*Local Green Space*	*National Park*		*Area of Outstanding Natural Beauty*	*National Scenic Area*
Where	UK	(E, W) S	UK	E	E, W	S	E, W	S
Legislation	Act	Act	Act	NPF	Act	Act	Act	Act
Run by	Local Planning Authority		Local Authority	Community Group	National Park Authority		Joint Action Committee	No dedicated administration
Independent planning authority	Yes	Yes	Yes	No	Yes	Yes and no	No	No
Beautiful	Unnecessary	Yes	Maybe	Maybe	Yes	Yes	Yes	Yes
Special funding	No	No	No	No	Yes	Yes	Yes	No
Grants and loans	No	No	No	No	Yes	Yes	Occasionally	No
Management plan	No	No	Maybe	Maybe	Yes	Yes	Yes	No
By-laws	No	No	No	No	Yes	Yes	No	No
Access encouraged	Yes (was no)	No	Yes	Maybe	Yes	Yes	No	No

Key to Table 8.4

Where	E	England
	S	Scotland
	W	Wales
Legislation	Act	Designation created by Act of Parliament
	NPF	National Planning Framework
Independent planning authority	Yes	Site is managed by or under the jurisdiction of a single independent planning authority
Beautiful	Yes	Beauty is a requirement of its designation
Special funding	Yes	Governments and their agencies allocate funding to the site administrators towards achieving site aims
Grants and loans	Yes	The site's administrators can give grants and loans towards achieving the site's aims
Management plan	Yes	Management Plans are required by law
	Maybe	Voluntary management plan
By-laws	Yes	Site administrators have the power to create by-laws
Access encouraged	Yes	Access encouraged as site objective

An SSSI is '*An area of special interest by reason of its flora, fauna, geological or physiographical interes*t'. Countryside and Rights of Way Act 2000 (CROW) guidance states that the purpose of the SSSI *series* is '*to safeguard, for present and future generations, the diversity and geographic range of habitats, species, geological and geomorphological features, including the full range of natural and semi-natural ecosystems and important geological and physiographical phenomena ...*' (DEFRA, 1 September 2000).

SSSIs are regarded as collectively comprising the full range of natural and semi-natural ecosystems and the most important geological and physiographical sites, selected using well-established and publicly available scientific criteria. The CROW Act formally connected SSSIs to the UKBAP: notification, effective management and conservation of SSSIs are core elements of achieving UKBAP targets.

The CROW 2000 Act and its supporting guidance and Nature Conservation (Scotland) Act 2004 demonstrate that the Government has significantly strengthened the status and care of SSSIs in the UK beyond their former passive state. Notification of SSSI status is no longer the end of the protection process. It is now expected that sites will be *actively managed* by owners and occupiers in partnership with the conservancies. The conservancies have a duty to further the conservation and enhancement of the features that make an SSSI of interest.

The government stated that SSSI management should reflect the general principles of sustainable development set out in its strategy 'A Better Quality of Life' published in 1999. Accordingly, for example, Natural England is expected to assess how delivery of nature conservation objectives may be integrated with its duty under the Countryside Act 1968 to have due regard to the needs of agriculture, forestry and the socio-economic interests of rural areas.

A conservancy such as Natural England selects SSSIs following published criteria: 'Guidelines for the Selection of SSSIs' published by the Joint Nature Conservation Committee.

The conservancy issues a preliminary notice of intent to the local planning authority, owners, occupiers, anyone with a special interest, the Environment Agency and the Secretary of State. The conservancies should also inform DEFRA or SGEFD, the Forestry Authority or Water Authority where relevant. This notification takes effect immediately.

The notice must:

- Describe the location of the site.
- Make reference to a map.
- State the features that make the site of interest.
- Specify 'potentially damaging operations' likely to harm the special features.
- Specify a period (at least three months) and arrangements for making representations.
- Natural England (etc.) is also now required to advertise the notification in a local newspaper, so that people have an opportunity to inspect the proposals and comment on them. The advertisement must make it clear that notification

is purely on scientific grounds and carries no additional public rights such as access.
- NE, SNH, CCW is also now required to include a statement about how the land needs to be managed in order to retain its interest.
- For SSSIs notified under the 1981 Act, Natural England and Scottish Natural Heritage are formally required to issue a statement of views about the management of every SSSI.

The conservancy must consider any views expressed by the consultees including the Secretary of State for the Environment, Transport and the Regions (in England).

Owners and occupiers have three months in which to comment and then the conservancies may revise or issue the statement and confirm notification within nine months (1985 Amendment) or the notification will lapse (six months in Scotland). Formal notification may include a modified list of potentially damaging operations, i.e. lists may be reduced by agreement with owner/occupiers.

In England and Wales, the SSSI is registered as a land charge. This constitutes notice to any purchaser of the land. In Scotland the land is registered with the Land Register of Scotland or in the General Register of Sasines. The conservancies and local authorities must also keep a register of SSSIs. Owners and occupiers who dispose of their interest in an SSSI must give details of new ownership or occupancy to the conservancies, so that a new relationship may be set up with the owner.

Consequences of SSSI notification

It is an offence for an owner or occupier to carry out any potentially damaging operation (PDO) unless:

- Written notice has been given to the conservancies and the nature conservancy gives written consent. In Scotland, PDOs are now called Operations Requiring Consent (ORC) under the Nature Conservation (Scotland) Act 2004.
- The operation is by agreement under other Acts (1985 Amendment).
- The owner or occupier gives notice and if, after four months, the conservancy has not given consent, this is deemed to be a refusal of consent. Conservancies may agree to extend this period, to allow further consideration.
- Four months have elapsed (1985 Amendment).
- NE and SNH may now renegotiate any agreement or withdraw or modify consent, whether it was given in writing or was tacit. Reasons must be given. There is scope for appeal (in Scotland to the Scottish Land Court) and for payments if withdrawal or modification of consent causes additional costs.
- The operation is in accordance with a management agreement.
- It is an emergency operation and conservancies are told as soon as possible by the owner or occupier after the need becomes apparent.
- Planning permission has been granted.

- The operation has been authorised by another approved agency (CROW 2000 and NC(S) 2004). Other agencies are also expected to have full regard to their duty to further conservation and enhancement of the SSSI and to consult the conservancies before issuing any permission, authorisation or consent which may affect the SSSI. Other agencies include: Secretary of State or Scottish Ministers; local authorities; Crofters Commission; Deer Commission for Scotland; District Salmon Fisheries Boards; Forestry Commissioners; Environment Agency and Scottish Environment Protection Agency.

Under the CROW Act 2000 and NC(S) Act 2004, *conservancies have the right to refuse consent* for PDOs/ORCs and encourage positive management. Previously, they could only postpone them. Reasons must be given if proposed operations are refused by the conservancies. Applicants may appeal (in England to the Secretary of State for the Environment, Food and Rural Affairs). The Secretary of State has the power to award costs if any party has acted unreasonably. In Scotland appeal may be made to the Scottish Land Court.

Planning permission and SSSIs

Local planning authority have to consult the conservancies before giving planning permission for any development affecting SSSIs and tell the conservancies if they decide to grant consent against their advice. This allows the conservancies to ask the Secretary of State or Scottish Executive to call in the application.

Under SOED Circular 13/1991 and the Countryside and Rights of Way Act 2000, local planning authorities are asked to be aware that any development close to a protected site may have an effect within it. They are to consult NE/NRW/SNH where this may occur or where there is doubt about the precise boundaries of site. CROW also set new duties for public bodies to further and enhance the conservation of SSSIs. Under CROW 2000, an explanation has to be provided to Natural England if its advice is not taken into account in the planning process.

Where exercise of permitted development rights on an SSSI would constitute a PDO, the owner or occupier must apply to a conservancy for consent as usual. If the conservancy refuses consent, the applicant may appeal to the local planning authority or the Secretary of State. If planning permission is granted, local planning authorities are expected to ensure any attached conditions are met in full and maximise the use of legally binding agreements.

Local planning authorities are expected to include policies for protecting SSSIs in local plans and take account of them in Mineral Plans. SSSIs cannot be included in Simplified Planning Zones.

Emergency operations

It is a reasonable excuse to carry out a potentially damaging operation which is an emergency, e.g. felling a dangerous tree. The conservancies must be notified as soon as possible.

No public right of access

The public is confined to public footpaths unless an access agreement is in force.

Managing SSSIs

The government now requires SSSIs to be appropriately and positively managed in order to achieve 'favourable condition', recognising that lack of management is the commonest cause of deterioration of the special interest. Positive management is most likely to be secured through the active cooperation of land managers using voluntary agreements.

If necessary a management scheme will be appropriate, drawn up by NE/NRW/SNH in consultation with the owners or occupiers, which sets out measures for conserving or restoring a site. Owners or occupiers have three months to make representations, and then the conservancy must either confirm or withdraw the existing or modified requirements of the scheme.

A court judgment in 2004 ruled that Natural England's practice of seeking positive management of SSSIs under the Countryside and Wildlife Act 1981 was acceptable and compatible with the European Convention on Human Rights. The case indicates that a successful balance has been found between nature conservation and landowners' interests.

Note that there is no provision for by-laws. If by-laws are needed, designating the site as a nature reserve may be more appropriate.

Management agreement

The nature conservancies or the owner may seek a management agreement. This provision originally applied only in England and Wales but the 1981 Countryside (Scotland) Act extended it to Scotland. Management agreements may be used where conservation work requires payment to the owner or occupier. Now management agreements may also be entered into on land not included in an SSSI, but where this would help sustain the special interest of the SSSI. This is in the spirit of the 'whole farm' approach being adopted in government support to farming and forestry and conservancy officers are now expected to be able to advise on agri-environment schemes relevant to the management of SSSIs.

Management notice (MN) or land management order (LMO)

If a management scheme is not being implemented, leading to the deterioration of the special features *and* where a management agreement (including relevant payment) cannot be reached on reasonable grounds, under CROW 2000 and NC(S) Act 2004, NE, NRW or SNH may issue a management notice (LMO in Scotland) requiring certain operations to be carried out by the owner or occupier. These operations must be those identified in the management scheme. Appeal against the MN or LMO is to the Secretary of State or Scottish Land Court.

Failing to keep a MN or LMO is an offence and may lead to enforcement action. NE, SNH or CCW may enter the land and carry out the work, charging the costs to the owner or occupier.

Compulsory purchase

CROW gave Natural England enhanced powers to acquire land compulsorily if it cannot reach an agreement about managing an SSSI within a reasonable period, or where the terms of an agreement have been broken and the special features are unlikely to be in favourable condition.

Notices and signs

Nature conservancies are empowered to erect or take down signs relating to an SSSI and it is an offence to damage, destroy or remove these signs.

Statutory duty of public bodies

Under the CROW Act 2000 it is now a statutory duty for public bodies to adopt the highest standards to further the conservation and enhancement of SSSIs in all stages of their activities. This includes Ministries, government departments, local authorities and statutory undertakers (public sector and private utilities) and other Crown officers.

If these agencies propose PDOs, they must consult NE or NRW who must respond within 28 days with advice about impact and mitigating actions. If agencies proceed with PDOs they must be able to demonstrate how they have weighed the balance between differing interests. Judicial review is available in exceptional cases.

Land owned by the government, its departments, agencies and non-departmental public bodies have agreed a biodiversity checklist. This encourages them to make statements of commitment and develop positive management regimes. A good example is the MOD, which has adopted a positive and systematic approach to maximising biodiversity on the Defence Estate commensurate with its military remit.

Funding

Funding may be available from the EU Rural Development Programme which will start a new group of grant funding schemes for 2015–2020 throughout the UK.

Penalties

Penalties for damage to SSSIs by owners, occupiers and other parties were increased under CROW 2000 and NC(S) Act 2004. Fines may not exceed £20,000 in the Magistrate's Court or unlimited fines in the Crown Court.

Under CROW 2000 and NC(S) Act 2004, new offences have been created which may lead to enforcement action if carried out without reasonable excuse.

SSSI owners and occupiers:

- carrying out, causing or allowing operations likely to damage an SSSI without consent;
- failing to keep to a management notice;
- failing to let the conservancies know about a change in occupation or ownership of land in a SSSI.

Public bodies:

- intentionally or recklessly carrying out operations likely to damage an SSSI without reasonable excuse or without meeting the requirements to notify the conservancies;
- failing to minimise any damage to an SSSI and if there is any damage, failing to restore it to its former state as far as is reasonably practical and possible;
- under the Natural Environment and Rural Communities Act 2006 in England only: intentionally or recklessly destroying or damaging a SSSI's special features without reasonable excuse; and,
- without reasonable excuse, permitting the carrying out of an operation which damages an SSSI (England).

Any person:

- intentionally or recklessly damaging, destroying or disturbing any of the habitats or features of an SSSI (the maximum fine for intentional or reckless damage is £40,000, e.g. for theft of wild bluebells or damage by quad-biking);
- preventing a conservancy officer from lawfully having access to an SSSI;
- damaging or destroying etc. conservancy signs or notices at SSSIs.

Amendment to SSSI notification

The National Heritage (Scotland) Act 1991 provided for the scientific justification for designations of SSSIs to be reconsidered. This power is now UK-wide and nature conservancies have the power to amend the list of special features, the area of land covered, the list of damaging operations or its management statement, but they must follow the same consultation procedure including advertisement now required for initial notification of SSSIs. SSSI notification may also be cancelled, following consultation with owners and occupiers, but this is expected to occur only in exceptional circumstances.

Change of owner or occupier

Under CROW 2000 and NC(S) Act 2004, EN, NRW or SNH must be informed within 28 days if someone disposes of their interest in an SSSI or there is a new or additional owner or occupier of land within an SSSI.

The condition of SSSI/ASSIs

Through the umbrella organisation, the Joint Nature Conservation Committee, statutory bodies use the following categories to describe the condition of SSSI/ASSIs:

- Favourable: A feature of interest is recorded as favourable when its condition objectives have been met.
- Unfavourable recovering: A feature of interest can be recorded as recovering after damage or neglect if it has begun to show, or is continuing to show a trend towards favourable condition and all measures are in place to bring about favourable condition.
- Unfavourable no change: An interest may be retained in a more or less steady state by repeated or continuing damage or neglect.
- Unfavourable declining: Decline is another possible consequence of a damaging activity. In this case recovery is possible and may occur if suitable management input is made.
- Partially destroyed or destroyed: Self-explanatory.

Following the CROW Act 2000 all SSSIs in England and Wales were reassessed to create the first complete database of all the sites. The assessment revealed that only 58 per cent of sites were in favourable or recovering condition. This led to a successful programme of work and 10 years later, about 96 per cent of sites are in favourable or recovering condition. However, the situation is much more varied and more interesting than these percentages may suggest. For more detail, see the Natural England publication (NE306), *Protecting England's National Treasurers: Sites of Scientific Interest*, which may be downloaded from the NE website. The site also has a clearly written guide about SSSIs for landowners and occupiers (NE322).

Impact of CROW and the Nature Conservation (Scotland) Act

The CROW 2000 and NC(S) Act 2004 addressed several criticisms of the original SSSI designation:

- The SSSI system used not guarantee protection of sites as PDOs could only be delayed for a short time, but now the conservancies have the right to refuse consent.
- Protection can still be overridden by planning permissions, but under CROW local planning authorities have a duty to further and enhance conservation of SSSIs.
- Designation of an SSSI used to intend merely preventing damage, not positive management: sheer neglect could cause deterioration in value. Now positive management is encouraged through management schemes and plans and or local biodiversity action plans.

- Landowners and occupiers in the UK unhappy at designation on scientific grounds now have a right of appeal.
- SSSI rules used to apply only to owners or occupiers, but due to the CROW 2000 and NC(S) Acts, public bodies and any other person may have enforcement action taken against them.

Wildlife and Natural Environment (Scotland) Act 2011

Under this Act, SNH has the power to amalgamate SSSIs if appropriate, but this does not empower SNH to alter the conditions of the SSSI. SNH may also revoke an SSSI designation if the site has been irrevocably harmed by an Operation Requiring Consent. SNH may also issue a notice requiring a site to be restored. Owners and occupiers have 28 days to comply or appeal. Non-compliance may incur a fine up to £40,000 on summary conviction or a fine on indictment.

Wildlife and Natural Environment (Northern Ireland) Act 2011

A new third-party offence is committed by anyone who intentionally or recklessly damages any feature of an ASSI. Public bodies must notify the Department of the Environment (NI) if their work is likely to damage the significant features of an ASSI and failure to do so in an offence. Change of ownership must be notified to the DOENI. DOENI has the authority to install signs on an ASSI, unauthorised removal of which is an offence.

The Habitats Directive 'NATURA 2000' (SAC and SPA)

Conservation of natural habitats and wild flora and fauna – Directive 92/43 (OJL206, 22 July 1992). This is an extension to the Birds Directive 79/409 which created the SPA designation and like the Birds Directive is a consequence of the Berne Convention of European Wildlife and Natural Habitats 1979.

The Directive is implemented in the UK under the Conservation (Natural Habitats etc.) Regulations 1994 (1995 in Northern Ireland) and enabled by the European Communities Act 1972. It created the SAC designation.

This is an important conservation measure, intended to maintain biodiversity in the Community and to maintain or restore 'favourable conservation status' for habitats and wild species of flora and fauna identified as being of Community interest. The Directive will result in a 'coherent European ecological *network*' of important sites including both SPAs (bird sites) and Special Areas of Conservation (SAC) under the title Natura 2000.

The EU LIFE + Nature programme is a major instrument for direct action to protect, restore and maintain species diversity in Europe. More information about this is available from http://ec.europa.eu/environment/nature/info/pubs/natura2000nl_en.htm.

Special Areas of Conservation (SAC)

SACs are areas that support rare endangered or vulnerable natural habitats and species of plants or animals (other than birds). SACs are terrestrial and marine. They require protection and positive management in the interests of the habitats or species for which they are established. Selection criteria are set out in Annex III of the Habitats Directive. SACs make a significant contribution to conserving the 189 habitat types and 788 species identified in Annexes I and II of the Directive (as amended). The listed habitat types and species are those considered to be most in need of conservation at a European level (excluding birds – which are dealt with by SPAs). Of the Annex I habitat types, 78 are believed to occur in the UK. Of the Annex II species, 43 are native to, and normally resident in, the UK.

UK government policy is that all Natura 2000 sites must first be designated SSSIs or ASSI. The schedule of potentially damaging operations associated with SSSIs can be amended with immediate effect if proposed operations are incompatible with the conservation objectives of the Natura 2000 site.

The Habitats Regulations 1994 require government departments, local authorities and other public bodies to:

- Establish necessary conservation measures including, if necessary, development and management plans, and appropriate administrative and contractual measures.
- Take appropriate steps to avoid deterioration of habitats or significant disturbance to species.
- Subject any plans and projects likely to have significant impact on the site to appropriate assessment to ensure that site integrity is not adversely affected.
- Not agree to plans that have adverse impact unless: there is no alternative; there are overriding socio-economic reasons of public interest; and compensatory measures have been taken to ensure that the overall coherence of the Natura 2000 network is protected.

If the site also hosts a priority species or habitat, development may take place only for human health and safety or if it has beneficial consequences of primary importance to the environment. However the EU must give permission for the development if 'overriding public interest' is claimed.

There was concern in the UK that government plans for this Directive did not include a review of existing planning permissions which would affect any future conservation areas, but under Regulation 50 competent authorities became required to review, affirm, modify or revoke permissions once a site gains EU status. This enabled the Environment Agency or SEPA to tackle problems of

pollution or low water levels. It also allowed for by-laws, statutory management schemes on marine sites and powers to impose Special Nature Conservation Orders (SCNO) if a site or species became under threat.

There were also fears that UK legislation would lack mechanisms to prevent damage to conservation sites through neglect or poor management, or measures to restore previously damaged habitats, for example, English lowland heath. The watering down of the Directive reflected government concern that implementation of this European law would prevent road construction, building development and quarrying.

European Court decisions relating to definitions of SPAs and SACs are binding on all Member States. Moreover the Countryside and Rights of Way Act 2000 and the Nature Conservation (Scotland) Act 2004 have reinforced the commitment of the UK Government and its agencies to the principles of the Natura 2000 network and EU biodiversity objectives.

Candidate SACs are sites which have been identified to the European Commission, but not yet approved. At 14 February 2014 there were 652 confirmed SACs and 270 SPAs in the UK (www.jncc.gov.uk).

Special Protection Areas for Birds (SPA)

This designation was required by EC Birds Directive 79/409 (Annex IV) and amendments. It provides Community-wide protection for all wild birds and their habitats. SPAs form part of the Natura 2000 network. SPAs are selected on the basis that the site and its habitat support either:

- 20,000 waterfowl or seabirds;
- 1 per cent of the GB population of birds in Annex I of the Birds Directive;
- 1 per cent of the biogeographical population of a migratory species.

Once designated, Member States must take '*appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds*'. Designation is carried out by member state governments in consultation with conservancies and must be notified to the Commission of European Communities. In the UK, SSSIs, NRs and NCO sites have become SPAs. The European Court of Justice has ruled that SPAs afford a greater degree of protection than that of SSSIs, etc. in that planning permission should not be given at all in SPAs.

Appropriate assessment (AA)

AA is a way of tackling the impact of development plans on Natura sites. Following a judgment against the UK in 2005 by the European Court of Justice, the Conservation (Natural Habitats) (Amendment) Regulations 2007 extended AA to cover spatial plans, including regional spatial strategies and local development frameworks. Published guidance explains when AA is required, what it should

examine, the level of detail required, ways of using the results in planning, and comparison of AA with SEA and sustainability appraisals.

AA is best used when it is integrated into plan-making from its earliest stage. At this stage potential conflicts between development and wildlife protection should be identified and resolved, rather than left to a later stage when more detailed information may be available. Deferring issue resolution casts doubt over the soundness of the plan because no conclusion has been reached on the viability of key elements of the proposals. Mitigation must be achieved by conditions or restrictions, not by substituting other habitat. Compensatory habitat is a permissible solution if the development must proceed for overriding public interest.

AA has three stages: screening – would the plan have a significant effect on the integrity of the site by itself or in combination with other projects; scoping – identification of key issues for assessment; assessment – to identify if changes to the plan are necessary. This process involves consultation with the nature conservancies.

Convention of Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar site)

This agreement is also known as the Ramsar Convention after the town in Iran where the convention was signed in 1971. Ramsar sites are now covered by legislation in the Countryside and Rights of Way Act 2000 (England and Wales) the Nature Conservation (Scotland) Act 2004, and Marine and Coastal Access Act 2009 and Marine (Scotland) Act 2010, but before 2000 there was no legal protection of Ramsar sites in the UK. However as a matter of policy, the Government chose to apply the same protection to Ramsar sites as SPAs.

The Ramsar Convention makes provisions for the protection of wetlands throughout the world, which are disappearing as a result of drainage, land reclamation and pollution. The list is maintained by the International Union for the Conservation of Nature (IUCN) who must be apprised of any changes in sites.

Sites are significant for ecology, botany, zoology, limnology or hydrology. Specifically: wetlands that are representative, rare or unique natural or near-natural wetland in its bio geographic region; species or ecological communities, plants, animals and critical stages in life cycles; sites regularly supporting 10,000 ducks or geese or 1 per cent of the breeding pair population of a species should be designated; sites important for fish or for food for fish may also be designated.

Each state identifies wetlands of international importance that they undertake to protect. Once designated, the state must positively plan and promote conservation of the site, for example, with a nature reserve and warden. Sites may be de-listed due to 'urgent national interest' but should be replaced by an alternative site.

Ramsar sites are not immune from planning permissions but planning authorities should promote their conservation and avoid their loss.

Marine Protected Areas (MPA)

Marine and Coastal Access Act 2009 and Marine (Scotland) Act 2010. These Acts establish Marine Conservation Zones (England, Wales and N. Ireland) and Marine Protected Areas (Scotland) in the UK.

MPAs comprise six designations:

- Special Areas of Conservation (SAC) and Special Protection Area (SPA) for birds. SAC and SPA form the European marine sites – see above.
- Ramsar sites – see above.
- Marine Conservation Zones (formerly Marine Nature Reserves) – see below.
- Sub-tidal Sites of Special Scientific Interest – see below.
- Scottish Marine Protected Areas.
- Northern Ireland's marine protected areas.

MPAs are the UK's response to the OSPAR Convention in which 15 governments of the western coasts and catchments of Europe, together with the European Community, cooperate to protect the marine environment of the North-East Atlantic. This approach started in 1972 with the Oslo Convention against dumping and was broadened in at the Paris Convention in 1974 to cover land-based sources and the offshore industry. These two conventions were unified, updated and extended by the 1992 OSPAR Convention. An annex on biodiversity and ecosystems was adopted in 1998 to cover non-polluting human activities that can adversely affect the sea.

The Sandford Principle (see National Parks) was not included in the UK Marine Acts – rather a *balance* is required between conservation, economic and social needs. This is possibly a fundamental flaw.

Marine Conservation Zones (MCZ) and (MPA)

MCZ will be created to conserve species of marine flora and fauna, particularly if they are rare or threatened, or for conserving or protecting marine habitats or features of geological or geomorphological interest. An MCZ may also be designated for the purpose of conserving the diversity of marine flora or fauna or habitat, whether or not they are considered rare or threatened. MCZs are to be a *network* of sites complementing Natura 2000 and may include European sites notified under the Wild Birds and Habitats Directives, Sites of Special Scientific Interest and wetland sites designated under the Ramsar Convention.

MCZs should achieve three conditions for an ecologically coherent network developed for the Convention for the Protection of the Marine Environment of the North East Atlantic (OSPAR):

- The network should contribute to the conservation of the marine environment.
- Protect features that represent a range of features present in the UK marine area.
- Allow that conservation of a feature may require more than one site to be designated.

MCZs may be designated to conserve biodiversity and ecosystems whilst minimising economic and social impacts. Where there is a choice of alternative areas which are equally suitable on ecological grounds, socio-economic considerations may prevail.

MCZ designation replaces the Marine Nature Reserves designation created by the Wildlife and Countryside Act 1981. MMR status afforded scarcely any protection because there were so many exceptions. For instance by-laws could not restrict non-pleasure boats, or even exclude such boats at all times of year. Pleasure boats were not defined. Actions to safeguard a vessel or life could not be rendered unlawful by by-laws; nor discharge from a vessel; nor activity more than 30m below the sea-bed. By-laws could not restrict activity of local authorities, the Environment Agency, water or sewerage authorities, SEPA, navigation, harbour, pilotage and lighthouse authorities, salmon fishery district boards and local fishery committees.

There were three MNRs in the UK: Lundy, Skomer and Strangford Lough. Lundy MNR has been converted into a MCZ and is the only protected sea area in the UK.

In 2014, 30 Nature Conservation Marine Protected Areas were designated around Scotland to protect marine biodiversity and geodiversity features. For England, 22 inshore and five inshore MCZs were designated in 2013. The Marine Act (Northern Ireland) 2013 provides for MCZs for marine wildlife, habitats, geology and geomorphology. The Welsh Government is reconsidering the list proposed by its 'Task and Finish' team.

Integrated Coastal Zone Management (ICZM)

ICZM is the EU context behind the new Marine Acts in Britain. The EU initiated an ICZM demonstration and research programme in 1997 which led to an EU Resolution to implement the ICZM methodology throughout Europe. ICZM is an ecosystem-based approach which includes social and economic factors such as habitat destruction, loss of fish stocks and biodiversity, pollution, economic decline and social deprivation. ICZM in Europe has eight key principles:

- a broad overall perspective;
- a long-term perspective;

- adaptive management;
- local specificity;
- working with natural processes;
- involving all the parties concerned;
- support of relevant administrative bodies;
- using a combination of instruments.

Voluntary Marine Conservation Area (VMCA)

VMCA are 14 areas of UK coastline which have some voluntary protection. They are run by a range of organisations and steering groups, often supported by community or volunteer groups.

Nature reserves

Legislation: National Parks and Access to the Countryside Act 1949 (s21), reinforced by the Wildlife and Countryside Act 1981, and the Natural Environment and Rural Communities Act 2006 (s11). Amenity Lands Act (Northern Ireland) 1965.

Nature reserves are land managed for the study, research or preservation of flora, fauna geology or physiographical features. Opportunities for education are required for designation to be approved.

Nature reserve status provides significant protection for land and habitats through by-laws and other rules. For example, orders may be made restricting or prohibiting vehicles on roads in a reserve in England or Wales. Also the conservancies must be consulted before road building or improvement in or near a reserve is initiated. Reserve land could be included in Farm Woodland Premium Schemes. Works proposed under the Animal Health Act 1981 require prior notice to conservancies and effort to minimise damage done.

Parties involved in nature reserves

Nature reserves may be set up and managed by the nature conservancies or by local authorities or the two jointly. They enter an agreement with the occupier, lessee or an owner to establish a nature reserve. Costs are born by the conservancy, the owners or jointly.

By-laws in nature reserves

The conservancies can make by-laws for protection of the site as long as they do not interfere with owner's rights or with a public right of way, statutory undertakers, drainage authorities, salmon fishery, and district boards or

telecommunications bodies. By-laws might: restrict entry or movement; prohibit fires, littering; prohibit killing/taking living creatures, eggs, and plants. By-laws may also provide permits for things otherwise forbidden.

Dedication, covenant or management agreement

These run with the land and identify any special management requirements for the site. Management agreements may stipulate works to be done, payment for works and compensation for the loss of parties' rights.

Compulsory acquisition

The conservancies may acquire a site compulsorily the site if they believe the site would be managed as a NR, say by the RSPB, or if the management agreement has not been reached on reasonable terms or has been broken and notice sent to the owner.

National Nature Reserves

If it is of sufficient importance, the nature conservancy may designate a site as a National Nature Reserve and manage it itself or by an approved body such as the RSPB. Such a site would normally be an SSSI and SPA or SAC in order to give it legal protection, but it may also have by-laws for greater statutory protection. There are 224 NNRs in England, 47 in Scotland, 69 in Wales and 47 in Northern Ireland (2014). NNRs were originally designated to protect sensitive features and provide outdoor laboratories for research, but their purpose has been widened to include public access and education.

Biogenetic reserves

This is a network of natural or semi-natural reserves selected to conserve representative examples (typical, rare, unique or endangered) of European flora, fauna and natural areas. They are living laboratories used for biological research. There are no special controls but it must be possible to manage them in the long term in accordance with fixed objectives.

Council of Europe Diploma Sites

The diploma is awarded for a five-year period for exemplary management and protection of areas of outstanding nature conservation and landscape importance where sites include social or recreational attributes Sites may include reserves, natural areas, sites or features and national parks. UK examples are Beinn Eighe and Fair Isle. Annual reports are required. The condition of sites is independently assessed and designation may be withdrawn if a site comes under serious threat or suffers damage (EU Reg (65) 1965; Resolution (73) 1973 amended in 1989).

Biosphere reserves

These are designated under the UNESCO 'Man and the Biosphere' programme. The 13 UK sites were selected from the NNRs to be representative examples of natural habitats characteristic of the world's natural regions. They are used for long-term research on ecosystems, environmental change and species diversity in the context of sustainable use.

They have three complementary functions:

- To contribute to the conservation of landscapes, ecosystems and species.
- To foster economic and human development.
- To provide support for research, monitoring, education and information exchange.

The English sites are North Devon, Moor House/Upper Teesdale and the North Norfolk Coast.

Nature Improvement Areas (NIA)

DEFRA proposed the idea of Nature Improvement Areas in its Natural Environment White Paper published in December 2010. NIAs are landscape-scale areas of 10,000–50,000 hectares, managed sustainably by local partnerships to achieve multiple benefits for people, wildlife and the local economy. The aim is not to prevent development. The idea is to achieve a step-change in nature conservation where a local partnership has a shared vision for their natural environment. Partnerships would '*plan and deliver significant improvements for wildlife and people through the sustainable use of natural resources, restoring and creating wildlife habitats, connecting local sites and joining up local action*'.

Sites suitable for NIAs are selected according to their potential to achieve significant improvement to existing ecological networks by linking existing 'core sites' such as SSSIs and nature reserves by enhancing links such as hedges, tracks and rivers. The hope is to achieve multiple benefits, for example, supporting water environment and Water Framework Directive objectives, flood and coastal erosion risk management and the low-carbon economy; and bring benefits to urban areas and communities.

NIAs should contain the following elements in an ecological network:

- core areas, especially existing wildlife sites (National Nature Reserves, Sites of Special Scientific Interest, Local Nature Reserves, Local Wildlife Sites, and other semi-natural areas of high ecological quality);
- corridors and stepping stones;
- restoration areas, where priority habitats are created to provide (in time) more core areas;

- buffer zones, that reduce pressures on core areas;
- surrounding land that is sustainably managed, including for food production, in a wildlife-friendly way.

The initial 12 NIAs in England came into being on 1 April 2012. They were identified in a competitive bidding process and received 'seed corn' funding of £7.5m from DEFRA and Natural England which attracted about £40m in funds and in kind support from other sources. Further NIAs can be established by Local Nature Partnerships following the criteria outlined above and given in more detail in: *Criteria for Local Authorities, Local Nature Partnerships and Others to Apply When Identifying Nature Improvement Areas* (DEFRA, September 2012, PB13824).

PROTECTED SPECIES AND HABITATS

UK protection of species

Legislation: Wildlife and Countryside Act 1981 amended 1985 (replacing Protection of Birds Acts 1954 – 1967 and the Conservation of Wild Creatures and Wild Plants Act 1975). Schedules 1 (birds) and 8 (plants) (species afforded special protection) are reviewed every five years. The draft 6th review was issued in 2014. Other law is in: Wildlife (NI) Order 1985; Nature Conservation and Amenity Lands (NI) Order 1985; Countryside and Rights of Way Act 2000 (CROW Act 2000), Natural Environment and Rural Communities Act 2006 (England and Wales); SOED Circular 13/1991; Wild Mammals (Protection) Act 1996; Protection of Wild Mammals (Scotland) Act 2002; Nature Conservation (Scotland) Act 2004; Wildlife & Natural Environment (Northern Ireland) Act 2011; Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and European Wildlife Trade Regulations (EC 338/97). The purpose of this legislation is protection of wildlife, habitats and species.

Plants

Generally, all plants growing wild and native may not be intentionally uprooted. The landowner or those authorised by them are excepted. It is an offence intentionally or recklessly to pick, uproot or destroy, sell, deal in, transport or advertise Schedule 8 plants. This applies to *everyone,* including the landowner. It is an offence to plant, cause to grow, sell or advertise for sale Giant Hogweed, Giant Kelp, Japanese Knotweed and Japanese Seaweed.

The Nature Conservation (Scotland) Act 2004 made it illegal to intentionally or recklessly uproot any wild plant without the permission of the landowner. For rare

plants listed in Schedule 8 of the Act, it is an offence to advertise or sell, intentionally or recklessly pick, uproot or destroy such a plant or any seed or spore attached to it.

Birds

It is an offence intentionally or recklessly ('recklessly' added by CROW Act 2000):

- To kill, take or injure any wild bird.
- To take, damage or destroy the nest of any wild bird while that nest is in use or being built. Under the Natural Environment and Rural Communities Act 2006 it is an offence to disturb the nest of a Schedule ZA1 bird because these birds tend to reuse their nests year after year, i.e. golden eagle, white-tailed eagle or osprey.
- To take or destroy an egg of any wild bird.
- It is an offence for anyone to have in his possession or control any live or dead wild bird or any part of one, or anything derived from such a bird, or an egg or part of an egg of a wild bird (a strict liability), including birds legitimately released into the wild, e.g. red kite.
- The dependent young of Schedule 1 birds (rare birds) must not be disturbed.

Exceptions

- Game birds during season.
- Damage which is the incidental result of some lawful operation.
- For animal health, e.g. against rabies, anthrax.
- Disabled birds.
- Public health and safety.
- Under licence.

Other provisions

- Certain methods of killing are prohibited, e.g. electrical devices, poison.
- Sale of birds and laws concerning captive birds are also stipulated.

Animals

It is an offence intentionally or recklessly ('recklessly' added by CROW Act 2000) to kill, injure or take possession or control of animals listed in Schedule 5 (adder, bats, and dolphin, etc.). It is an offence to damage, destroy or obstruct an access to any structure or place which a Schedule 5 animal uses for shelter or protection, or to disturb such an animal. Some Schedule 5 animals are excepted from some of this. Selling, processing, dealing, transporting or advertising any Schedule 5 animal is an offence. It is an offence to introduce or sell an animal which must not be released etc. into the wild.

There are special provisions for bats, ground game, dogs (it is an offence to allow a dog to be at large in a field with sheep, except working dogs), deer, seals and badgers.

Badgers and setts

The Protection of Badgers Act 1992 (as amended) is the principal Act cited for planning permission in England, Wales and Scotland regarding badgers. In N. Ireland the Wildlife (Northern Ireland) Order 1985 applies instead. The Scottish update is in the Nature Conservation (Scotland) Act 2004 and the Wildlife and Natural Environment (Scotland) Act 2011. Earlier law is the Badger Act 1973, Wildlife and Countryside Act 1981 and Wildlife and Countryside (Amendment) Act 1985 and parts of the last two named still apply. European law also applies throughout the UK: Conservation (Natural Habitats, etc.) Regulations 1994.

Under the Protection of Badgers Act 1992 as amended it is a criminal offence to wilfully kill, injure, take, possess or cruelly ill-treat a badger; to attempt to do so; or to intentionally or recklessly interfere with a sett. Landowners used to be excepted but must now have a DEFRA/SGEFD licence. Badger setts became protected initially in the 1985 Act. For either killing and injuring badgers or disturbing setts, the normal onus of proof is reversed: an accused must prove his innocence (strict liability).

The Nature Conservation (Scotland) Act 2004 is much more detailed about offences against badgers and the maximum penalty is three years imprisonment and unlimited fines, compared with just six months imprisonment (and fines) in England and Wales under the 1992 Act. In Scotland the police have the power *without warrant* to enter and search property other than dwellings or lock-fast premises in pursuit of enforcing this Act. Under the Wildlife and Natural Environment (Scotland) Act 2011, a person who knowingly causes or permits an act that is illegal under existing badger law is also guilty of an offence.

Natural England has published *Badgers and Development: A Guide to Best Practice and Licensing* (IN75) as a downloadable pdf which outlines badger biology, law, planning permission procedure and policy guidance, site surveys, work on site and licensing.

Licences are issued by conservancies or agricultural ministers for: scientific or education purposes; conservation of badgers; zoological gardens; marking badgers; works following granting of planning permission; preservation of ancient monuments and archaeological investigations therein; investigations into any offence; controlling foxes in order to protect livestock, game or wildlife; to prevent spread of disease or serious damage to land, crops, poultry or other property; agricultural, forestry or drainage operation. www.naturalengland.org.uk.

Under the Wildlife and Natural Environment (Scotland) Act 2011, there has to be significant social, economic or environmental benefit and no other satisfactory solution before a licence may be issued.

Bats and bat roosts

Wildlife and Countryside Act 1981. The Conservation (Natural Habitats, etc.) Regulations 1994 (1995 in Northern Ireland). Circular 06/2005. The law applies throughout the United Kingdom. Nature Conservation (Scotland) Act 2004.

The purpose of the law is the protection of bats and their roosts. It is an offence in the non-living area of a dwelling house or any other place without first notifying the conservancies to:

- Deliberately capture, injure or kill a bat.
- Intentionally or recklessly disturb a bat in its roost or deliberately disturb a group of bats.
- Damage or destroy the breeding or resting place (roost) of a bat.
- Possess a bat (alive or dead), or any part of a bat.
- Intentionally or recklessly obstruct access to a bat roost.

The conservancies must be given reasonable time to advise. They also may issue licences if the relocation of bats is required.

The Regulations implement the 'Habitats Directive' for bats and they are a protected species under European law. The Directive prohibits disturbance of bats at any location, not just at roosts as in the Wildlife and Countryside Act. Damage or destruction of a bat roost does not require the offence to be intentional or deliberate and is an offence of strict liability and if a breeding or resting site is damaged or destroyed the offence is complete.

The presence of a protected species is a material consideration when considering a development proposal that would be likely to result in harm to the species or its habitat if it goes ahead. Advice is given in planning guidance on biodiversity and a downloadable Natural England guide.

The Nature Conservation (Scotland) Act 2004 made it an offence *inter alia* to intentionally or *recklessly* damage or destroy bat roosts or shelters whether bats are present or not.

The Wild Animals Protection Act 1996

This Act makes it an offence to mutilate, kick, beat, nail or otherwise impale, stab, burn, stone, crush, drown, drag or asphyxiate any wild animal with intent to inflict unnecessary suffering. There is no offence if this occurs in the course of lawful

shooting, hunting, coursing or pest control (including lawful use of snares, traps, dogs, poisons or falconry); or the action occurs during the attempted killing of any animal seriously injured, other than by that person's prior illegal act, and there was no chance of the animal recovering.

Exceptions and defence and a note on 'intention' and 'recklessness':

- It is a defence that if a wild animal was killed or injured, it was incidental to a lawful activity such as crop spraying or pest control, etc.
- Breaches of wildlife law used to refer to the word 'intentionally', but it is difficult to prove intention in court. Recent legislation uses the word 'recklessly' because recklessness can be demonstrated in law and is more easily proved than intent.

Penalties in the UK

The penalties for offences under the Wildlife and Countryside Act 1981 were increased under the CROW Act 2000 to make certain offences 'arrestable', leading to stronger search and seizure powers for the police and inspectors enabling them to enter premises to check species sales controls and require tissue samples for DNA analysis. The Act created a new offence of reckless disturbance; and enabled Courts to give heavier fines up to a maximum of £5,000 and or a custodial sentence up to six months.

Under the Natural Environment and Rural Communities Act 2006 (NERC Act) distinction is made between Group 1 and Group 2 offences. Group 1 offences are offences not covered by the Wildlife and Countryside Act 1981 and generally deal with wildlife in the wild over which no one normally has possession or control. Group 2 offences relate generally to the licensing of ringed, registered and captive birds and certain other licences for animals and plants. The NERC Act empowers inspectors to enter property in relation to Group 2 offences. New offences include obstructing a wildlife inspector (an office established under the 1981 Act) in the course of his duty, not providing reasonable assistance, failure to provide specimens available for inspection and falsely pretending to be a wildlife inspector.

The inspectors are also newly empowered to enforce four other major pieces of wildlife legislation: Destructive Imported Wild Animals Act 1932 (musk rats, coypu, and mink), Conservation of Seals Act 1970, Deer Act 1991 and the Protection of Badgers Act 1992. A Code of Conduct for wildlife inspectors will be provided. Police powers of entry have been extended to cover all these Acts, except on Crown property.

PAWS

A multi-agency body has been set up to concentrate efforts and pool resources to combat wildlife crime. The main objective of the Partnership for Action against

Wildlife Crime (PAWS) is promotion and enforcement of wildlife conservation legislation.

International law

The Habitats Directive and the Conservation (Natural Habitats, etc.) Regulations 1994. In addition to special regulations applying to SACs and SPAs (see later) the Habitats Directive has general application to European protected species wherever they occur through the 1994 Regulations.

It is an offence:

- Deliberately to capture or kill a wild animal of a European protected species.
- Deliberately to disturb such an animal.
- Deliberately to take or destroy the egg of such an animal.
- To damage or destroy a breeding site or resting place of such an animal. This is an offence of strict liability, i.e. the destructive act does not have to be intentional or deliberate for an offence to have been committed.
- To keep, transport, sell or exchange, or offer for sale or exchange any live or dead wild animal of an EU protected species, or any part of anything derived from such an animal. This applies to all stages of an animal's life cycle.
- Equivalent provisions in the Regulations apply for plants. Therefore it is an offence deliberately to pick, collect, cut, uproot or destroy any wild specimen of a European protected species of plant.
- Disturbance includes affecting animals' ability to survive, breed, rear or nurture their young, or has an impact on their distribution or abundance.

Under this Regulation, anyone proposing to develop land where protected species live has to obtain a separate licence (from DEFRA or the Scottish Executive) after obtaining planning permission and before work commences. In 2002 it was proposed that this should be streamlined so that wildlife issues should be considered from the outset of the planning permission process.

Licences may be authorised for conservation reasons, for the prevention of serious damage to agriculture, for scientific research, public health or safety, imperative reasons of public interest including social and economic considerations, and 'beneficial consequences of primary importance for the environment'. Licences may be granted only if there is no satisfactory alternative, and that the action will not be detrimental to the maintenance of the population of the European protected species concerned at a favourable status in their natural range. Badgers and bats are examples of European protected species.

Convention on International Trade in Endangered Species (CITES)

CITES applies to all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances. CITES came into force in 1975 and was strengthened in Europe by EU wildlife legislation which came into effect from 1 June 1997 to control or ban trade of over 25,000 species of animals, birds and plants (European Wildlife Trade Regulations EC 338/97).

Other provisions

Recent changes and implications for developers and landowners

Water voles and common or hazel dormice were added to the endangered species list in 1998. English planning authorities are advised to require environmental assessments for any development close to river banks, or to carry out a vole survey and state mitigating action if necessary. For hazel dormice, developers will have to use nesting boxes to ascertain whether or not dormice are present. This may delay development!

Invasive animals and plants

In 2001 it was estimated that there are over 1,300 non-native plants established in the wild in the UK. Under the Natural Environment and Rural Communities Act 2006 (England and Wales) it is an offence to release animals and plants which must not be released into the wild (invasive species). There are over 45 international instruments relating to the control of non-native species. Of these, the Convention on Biological Diversity is the only legally binding instrument that addresses non-native species across all groups, sectors and continents. Article 8(h) calls for contracting parties to 'prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species'. A guide to 'Landscaping without Harmful Invasive Plants' is available from Plantlife (www.plantlife.org.uk).

The Wildlife and Natural Environment (Scotland) Act 2011 made it an offence to allow non-native invasive species to spread. Relevant bodies (Scottish Ministers, SNH, SEPA and the FC) may issue a Species Control Order for premises where they are satisfied there is a non-native invasive animal or plant outside its normal range. They may enter an agreement with the owner or occupier to control or eradicate the species, but if no agreement is reached in 42 days, they may issue an order. Contravention of an order may lead to summary conviction and a fine up to £40,000 and imprisonment up to to 12 months. On indictment, there may be a fine and or imprisonment up to two years.

Additional protection of specific sites and species

Several of the designations outlined above include the possibility of using management agreements as a means of securing conservation aims and benefit

to landowners. For specific sites or species in particular danger, sanctuary orders, nature conservation orders or special nature conservation orders may be issued.

Management agreements

National Parks & Access to the Countryside Act 1949; Countryside Act 1968; Wildlife & Countryside Act 1981; Countryside (Scotland) Act 1981.

A management agreement is an agreement for the conservation or enhancement of the natural beauty or amenity of land in the countryside or the promotion of public enjoyment of such land. The agreement is made between a local planning authority or conservancy and any person with an interest in land (i.e. owner, tenant, etc.).

A management agreement is a deed binding both parties, i.e. it is a form of contract. It contains undertakings by either party, which are called covenants. Breach of covenant by one party enables the other to bring an action for damages and/or for an injunction to restrain that breach. The agreement runs with the land entered into by owner or tenant for life.

Agreements may contain the following:

- Restrictions on certain methods of cultivation or change of use.
- Restrictions on the exercise of rights over land, e.g. no shooting.
- Obligation on the owner/occupier to carry out certain works.
- Permission for the local planning authority to carry out works to fulfil their functions under the National Parks etc. Act 1949 or the Countryside Act 1968, e.g. picnic sites.
- Financial payments.

Management agreements may be used in the following circumstances:

- In national parks and other areas where countryside as well as farming is deemed important and where an application for a farm capital grant has been refused, a local planning authority must offer a management agreement to the person who applies for the grant.
- SSSIs.
- National Nature Reserves.
- In association with Nature Conservation Orders.
- In the Natura 2000 SAC network.

Sanctuary order

An order made by the Secretary of State to protect wild birds or specified bird, nests, eggs, or dependent young at any time or for a specified period. An order can

make it an offence for any unauthorised person to enter such an area of special protection. Owners and occupiers are consulted before the order is imposed.

Nature conservation order (NCO)

Wildlife and Countryside Act 1981. This law still applies in Scotland, but was repealed in England and Wales by Schedules 10 and 16 paragraph 7 of the Countryside and Rights of Way Act 2000.

If land is of special interest for its flora, fauna, geological or physiographical interest the Secretary of State may make a NCO for the following purposes:

- To ensure the survival in Great Britain of any kind of animal or plant.
- To comply with an international obligation.
- Where land is of national importance, to ensure its natural features of interest.

Characteristics of NCO:

- NCOs are made on the recommendation of SNH. They are most relevant to stopping third parties from damaging natural features and may be used to stop any person from carrying out an operation, even if it is otherwise lawful.
- The owner or lessee is informed of the designation and may make representation to Scottish Ministers if she or he objects or wishes modifications. The case would be decided by local public inquiry.
- NCOs come into effect immediately; therefore they are used for urgent protection, usually used in conjunction with an SSSI, European site and or other land of special interest by reason of its natural features.
- Potentially damaging operations must be specified. It is an offence for an owner, occupier or *any other person* to do the specified operation unless written notice is given to SNH and:
  - the conservancies give consent;
  - the work is in accordance with a management agreement;
  - three months have elapsed from the notice of intention (this period can be extended – unlike in SSSIs);
  - no offence is committed if work is in an emergency or with planning permission.
- Compensation may be available to an owner/tenant affected by a NCO.
- If a prohibited operation is carried out unlawfully, the offender can be prosecuted and obliged to restore the land to its previous condition.
- In Scotland, Scottish Ministers must review each NCO every six years.

Special nature conservation orders

The Wildlife and Countryside Act 1981 and Conservation (Natural Habitats, etc.) Regulations 1994 apply throughout the United Kingdom. SNCOs are used to protect Natura 2000 sites.

This is the most stringent protection law available. No time limits are specified after which an owner or occupier can carry out a potentially damaging operation (compare with NCOs). A PDO can be carried out only with written consent of conservancies or in accordance with a management agreement.

UK Biodiversity Action Plan (UKBAP)

Following the 1992 UN Convention on Biodiversity, the UK Biodiversity Action Plan (UKBAP) was published in 1994 and endorsed by the government in May 1996. The UKBAP was created 'to conserve and enhance biological diversity within the UK and to contribute to the conservation of global diversity through all appropriate mechanisms'. It helps to coordinate and drive conservation at all scales from national to local, by identifying priorities for action and biological targets for the recovery of habitats and species.

Under the Countryside and Rights of Way Act 2000 and the Nature Conservation (Scotland) Act 2004 Ministers of the Crown, any government department, the National Assembly for Wales (NAW), the Scottish Executive and any public agency must have regard to the conservation of biological diversity. The Secretary of State and NAW must publish lists of species and habitats that are of principal importance for biodiversity and where possible, further their conservation.

The UKBAP includes Species Action Plans (SAPs) for 391 species and Habitat Action Plans (HAPs) for 45 habitats. SAPs and HAPs include a summary of objectives, targets and actions required to maintain or enhance populations and habitats. The UKBAP covers Britain's most rapidly declining and endangered species and habitats. It included ambitious targets for recovery, for example, to halt loss of biodiversity by 2010 – a target which has been missed.

Despite missing the 2010 target, the UKBAP achieved real progress and consequently species and habitat priorities and targets were reviewed in 2005 and 2008. Reviews included a 'reporting round' integrating national and local information; revision of targets for UK priority species and habitats; and updating the UK priority lists. This was coordinated by the Biodiversity Reporting and Information Group (BRIG) on behalf of the UK Biodiversity Partnership.

Several agencies redirected money towards the UKBAP including the Forestry Authority (Woodland Improvement Grants), Environment Agency (river biodiversity action plans), Nature Conservancies, local wildlife trusts and the Ministry of Defence. So far schemes have had most take up on marginal agricultural land, rather than prime agro-industry areas.

The UK was ahead of the EU which adopted the EU Biodiversity Strategy in February 1998. The aims of the EU strategy are '*to anticipate, prevent and*

attack the causes of significant reduction or loss of biological diversity at source'. Objectives are approached through 'sectoral action plans', for example, for agriculture, fisheries and regional policies. The Habitats Regulations 1994 also required local planning authorities to review existing incomplete planning applications likely to have significant impact on an EU/Natura site and then affirm, modify or revoke permissions.

The Natural Environment and Rural Communities Act 2006 requires all public authorities (government department, local authority and local planning authority) in England and Wales to have regard to conserving biodiversity in so far as this is compatible with their functions.

The Wildlife and Natural Environment (Scotland) Act 2011 requires all public bodies to report on their actions for biodiversity within three years of the Act coming in to force (7 April 2011) and every three years thereafter.

Scottish wildlife legislation

The Protection of Animals (Scotland) Act 1912

This deals with cruelty to domestic and wild animals.

The Protection of Wild Mammals (Scotland) Act 2002

The Protection of Wild Mammals (Scotland) Act 2002 was intended to protect wild animals from being hunted with dogs. Use of dogs to stalk and flush game from cover for permitted purposes is still lawful. Use of dogs in falconry and shooting is also legal.

Offences under this Act include deliberately hunting a wild mammal with a dog or dogs; for an owner or occupier knowingly to permit such hunting on their land; for a dog owner or someone having responsibility for a dog to permit the dog to be used to deliberately hunt a wild animal. This excludes rabbits and rodents. This Act ended the use of dogs for fox hunting, but stalking and flushing wild animals for subsequent immediate shooting or falconry is permitted; this includes fox, mink, hare and (by use of a single dog) orphaned cubs below ground.

The Criminal Justice (Scotland) Act 2003

This made wildlife crime in Scotland liable to prosecution.

The Nature Conservation (Scotland) Act 2004

The Nature Conservation (Scotland) Act 2004 allowed bigger fines and longer sentences. This Act made it illegal to intentionally or recklessly kill, injure or take any wild bird; or for any person to intentionally or recklessly damage or destroy the nest of any wild bird while it is being built or used, or prevent a wild bird from using its nest. It is also an offence to take or destroy an egg of any wild bird, or

to cause or permit any of these acts. It is an offence to possess or control any live or dead bird or any part thereof; or any egg or part of an egg of any wild bird. It is an offence to disturb a Schedule 1 bird on a lek (capercaillie) or its young or harass a Schedule 1A bird (white-tailed eagle). It is an offence if people bring into Scotland any bird or egg, if the killing, taking or selling of that bird or egg would have been illegal if it had taken place in Scotland.

It is an offence to intentionally or recklessly kill, injure or take any wild animal fully protected under Schedule 5 of the Wildlife and Countryside Act 1981, or to possess or control any live or dead animal in that Schedule.

Butterflies and moths, and their larvae and pupae, dead or alive may not be intentionally or recklessly killed, injured, taken, possessed, controlled, sold or advertised for sale in any stage of their life cycle. It is an offence to knowingly cause or permit these offences. Fully protected (i.e. rare) butterflies and moths also have legal protection of their habitat while occupied for shelter or protection. Penalties are up to £5,000 per offence and or six months imprisonment.

All native amphibians are protected from sale under the Wildlife and Countryside Act 1981 and the Nature Conservation (Scotland) Act 2004. It is not illegal to collect the spawn of the common frog, common newt and palmate newt for your pond as long as you have the landowner's permission. Freshwater mussels, natterjack toad and great crested newt have full protection under UK and EU law.

Statutory vicarious liability

The Wildlife and Natural Environment (Scotland) Act 2011 introduced the concept of statutory vicarious liability: where, on or in relation to any land, a person (A) commits a relevant offence while acting as the employee or agent of a person (B) who (a) has a legal right to kill or take a wild bird on or over that land, or (b) manages or controls the exercise of that right, then B is also guilty of an offence unless he can prove they didn't know the offence was being committed by A or that B took all reasonable steps and exercised all due diligence to prevent the offence being committed. The Act then specifically refers to the right to kill or take wild birds, their habitat, predators of game birds and the rearing of game birds for release and shooting.

This Act makes it an offence if anyone knowingly causes or permits an illegal act in respect of the possession of pesticides or the sale of birds' eggs.

This Act contains provision for the management of wild deer, including requiring SNH to provide a Code of Practice for deer management. The Act also sets out circumstances where SNH may seek a control agreement or scheme for wild deer.

Limestone pavements and regionally important geological sites

Countryside and Wildlife Act 1981. This law applies throughout the United Kingdom. Countryside and Rights of Way Act 2000 (England and Wales only).

The purpose of these Orders is to protect '*An area of limestone which lies wholly or partly exposed on the surface of the ground and has been fissured by natural erosion and is of particular interest by reason of its flora, fauna, or geological or physiographical features.*'

Limestone pavements are identified and designated by the nature conservancies. They notify the local planning authority of the existence of limestone pavements. The Secretary of State for the Environment, Food and Rural Affairs can then make an order for the protection of these sites. The making of an order allows for an inquiry into any objections.

Consequence of designation

- It is an offence to remove limestone without reasonable excuse; maximum fine: £20,000.
- However, granting of planning permission is deemed a reasonable excuse for removal.
- Limestone pavements are protected in perpetuity and without compensation.
- There are no exclusions for the benefit of agriculture. All major and most minor areas of limestone pavement in England are now protected by Limestone Pavement Orders.

Regionally important geological or geomorphological sites (RIGS)

GeoConservation UK encourages the appreciation, conservation and promotion of regionally important geological and geomorphological sites for education and public benefit. Regional RIGS groups are trying to get RIGS status for all limestone pavements. RIGS are designated using locally developed criteria in conjunction with RIGS groups, local authorities and the nature conservancies. They are currently the most important places for geology and geomorphology outside statutorily protected land such as Sites of Special Scientific Interest.

Global geoparks

These sites are selected because they are managed in a way that:

- conserves geological heritage;
- promotes the enjoyment and understanding of geology; and
- supports sustainable development.

In the UK they usually include SSSIs and/or RIGS within a wider setting. English examples are the North Pennines AONB and the English Riviera.

In planning law there is a presumption against development in certain areas of the countryside – which areas?
Areas where permitted development rights have been withdrawn through Article 4 Direction.

ENVIRONMENTAL LEGISLATION: TOP 10 QUESTIONS

1 What legislation exists to protect the countryside?
2 When would you deal with English Nature, DoENI, SNH or NRW?
3 Your client owns an area of land and would like to plant trees on it. If the land is not being planted for commercial timber and is not an SSSI or Conservation Area, from where might your client obtain a grant?
4 What legislation underlies: (a) SSSIs, (b) Ramsar sites, (c) AONBs?
5 What is the law regarding bats?
6 What authority do English Nature, DoENI, SNH or NRW have?
7 Name three statutory designations for (a) landscape beauty, (b) protection of species or habitats, (c) active ecological management.
8 How are ancient woodlands and veteran trees protected in law?
9 Which organisation sets the boundary of a green belt in a locality?
10 Why might a SSSI be also a nature reserve? What additional protection may a nature reserve have in addition to the protection afforded to SSSIs?

9 Environmental control

CHAPTER CONTENTS

MINERALS AND EXTRACTION

Minerals

Gold, silver, petroleum and natural gas are all mineral resources of national strategic importance and great value. They are Crown property, but may be abstracted under licence. Coal and coalmines became the property of the Coal Authority (so named in the Coal Industry Act 1994, formerly British Coal Corporation and National Coal Board) by the Coal Industry Nationalisation Act 1946. Coal is abstracted under licence, but planning consent is required for open-cast mining. Other mineral extraction requires planning permission under the Town and Country Planning (Minerals) Act 1981 as amended by the Planning and Compensation Act 1991.

Rectification of subsidence and loss of amenity is covered for coal by the Coal Mining Subsidence Act 1957; for salt extraction by the Brine Pumping (Compensation for Subsidence) Act 1981; for ironstone operators in Northamptonshire and neighbouring counties by the Mineral Working Act 1951 and 1971. Guidance for landscape and restoration is given in the National Planning Framework (England), MPG7 (Wales) and PAN 50: 'Controlling the Environmental Effects of Surface Mineral Workings' guide landscape restoration conditions (Scotland).

According to the British Geological Survey (BGS), about 20 per cent of Sites of Special Scientific Interest in the UK are linked to minerals extraction. An interesting guide to restoration is: English Nature, Quarry Products Association

and Silica & Moulding Sands Association, *Biodiversity and Minerals: Extracting the Benefits for Wildlife* (Entec UK Ltd, 1999; ISBN 0 9535400 0 6). The Good Quarry website developed by the University of Leeds and others has some interesting information on minerals and related subjects in the UK (http://www.goodquarry.com).

Town and Country Planning (Minerals) Act 1981

Pre-1981 control

This is an important Act because it made open-cast mining subject to control by local planning authorities. Before this, mining was a county planning matter and a mining concern had merely to satisfy the Secretary of State for Energy (England and Wales) or Scottish Ministers that the company was not exceeding a stipulated tonnage and the workings were economic and viable. If approved a licence was granted. The licence was deemed equivalent to planning consent.

Present situation (since 1981)

A mining company applies to the Secretary of State for a licence to work minerals and to the local planning authority for planning consent. The licence is not valid unless planning consent has been granted. Owners of any interest in a mineral in the land must also be notified of any application for mineral working. In Scotland the provisions of this Act were incorporated into the Town and Country Planning (Scotland) Act 1997 and subsequent amendments.

The Environmental Protection Act 1990 and the Environment Act 1995 revised the requirements for acceptable environmental standards and restoration proposals.

Review of sites

The 1981 Act introduced the principle that every planning authority has to review all sites '*at such interval as they consider fit*'. This means that planning conditions on current workings may be updated. This review covers all permissions except where operations ceased more than five years previously and, unusually, this Act has a retrospective element.

With the 1991 Planning and Compensation Act, the Secretary of State became able to prescribe the period within which reviews must be carried out, and their contents. Planning authorities were empowered to make revocation, modification or suspension orders if required. Under the Environment Act 1995 this was standardised so that reviews should take place every 15 years. The Growth and Infrastructure Act 2013, section 10 and Schedule 3, amended this to say that the first review should take place no earlier than 15 years after planning permission was granted and subsequent reviews should take place at least 15 years after the previous review.

A landowner or mineral operator may apply to the mineral planning authority (MPA) for a postponement of review of planning conditions because existing planning conditions are satisfactory. The MPA has three months to decide if no Environmental Statement (ES) is required, or 16 weeks if ES is required (Town & Country Planning (EIA) Regs 2011. Absence of a decision is taken as consent (Environment Act 1995, Schedule 14). If postponement is granted, the MPA is 'encouraged' (by government policy ID: 27-200-20140306) to postpone reviews for 10–15 years.

Aftercare conditions

Note also that normally aftercare conditions will be imposed as a part of the development consent. Mining will be permitted if restoration conditions require the site to be brought back to agricultural, forestry or amenity use. Conditions may also impose a time limit, up to five years, by which restoration measures must be complete.

Conditions may either:

- Specify action steps to be taken.
- Require steps to be taken in accordance with a scheme approved by the planning authority.

Prohibition and suspension orders

The 1981 Act made provision for prohibition (if workings have ceased for more than two years and resumption is unlikely). A prohibition order may be made if a site has been suspended for two years for failure to provide an Environmental Statement or relevant information and the MPA considers works have permanently ceased (ID: 27-162-20140306).

If development is temporarily suspended the planning authority may require that steps shall be taken for the protection of the environment. There must have been no working for at least 12 months and resumption of work be likely. Resumption of work becomes notifiable to the local planning authority. Suspension orders must be reviewed every five years (TCP Act 1990, Schedule 9).

Compensation may be available where prohibition or suspension orders have been served and since 1987 for expenditure voluntarily incurred to alleviate damage to amenity, or for restoration. The Coal Authority is exempt (Town and Country Planning (Compensation for restrictions on mineral working and mineral waste depositing) Regulations 1997).

Old workings

The Planning and Compensation Act 1991 included provision to address problems arising from consents for mining issued between 1947 and May 1991. These consents (termed interim development orders) if implemented prior to 1979

remain valid until 2042. However planning authorities often have no record of the existence of these consents. They could be reactivated without warning and without the sort of conditions designed to safeguard the environment that would be expected today. The 1991 Act therefore required these old interim development order permissions to be registered with the local planning authority by 24 July 1992 or they ceased to have effect. For both active and dormant sites covered by this legislation which registered by July 1992, conditions for environmental or amenity amelioration works might be imposed, without compensation.

Under the Environment Act 1995 operators of dormant sites must obtain approval for their proposed scheme of operating and restoration before work may resume. Note also that in judgments arising from local plan inquiries, reporters have ruled that if a former extraction site has blended into the surrounding landscape or looks like set-aside land due to the growth of native vegetation, the land may not be held to be 'previously developed land'. As a result, prospective developers would not be able to claim that a site was 'spoilt already'. Current guidance says that an Environmental Statement may be required (i.e. the EIA procedure may be invoked by the Minerals Planning Authority). (ID: 27-180-20140306.)

Open-cast mining

Planning Policy Statements since 2000 imply that open-cast mining applications should be approved only if they have acceptable and beneficial effects on local communities and the environment which outweigh adverse impacts. Extension of existing sites is likely to be approved only if the adjoining reserves were identified in the original application.

> The National Planning Policy Framework states that *'permission should not be given for the extraction of coal unless the proposal is environmentally acceptable, or can be made so by planning conditions or obligations; or if not, it provides national, local or community benefits which clearly outweigh the likely impacts to justify the grant of planning permission*'.

Abandoned mines

Following the Environment Act 1995, mine operators have to give EA, SEPA, NRW or NIEA six months' prior notice of the abandonment of a mine or part of a mine. This should allow the agencies time to plan or advise on anticipated anti-pollution measures, especially pollution of controlled waters by accumulated mine water. This measure is important because mine water may be very toxic and cause serious damage to river life if it escapes. The local planning authority will also wish to be notified.

CONTAMINATED LAND

Environmental Protection Act 1990 Part IIA.

Identification of contaminated land

Contaminated land is defined as: '*Any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, or under the land that:*

- *Significant harm is being caused, or a significant possibility of such harm being caused; or*
- *Pollution of controlled waters is being or is likely to be caused.*'

With effect from July 1999, local authorities became required to inspect land within their boundaries for contamination. This takes the form of a 'pollution linkage' comprising a source of contamination, a pathway and a receptor. If the pollution linkage is 'significant' the land is classified as Statutory Contaminated Land.

Harm includes damage to the health of humans, death, serious injury, cancer or other disease, genetic mutation, birth defects or impairment of reproductive functions.

Harm to property includes:

- livestock, other owned animals, or wild animals subject to shooting or fishing rights, or crops;
- harm to buildings;
- certain habitats including SSSIs.

The local authority should determine remediation for each pollution linkage. Written strategies had to be published by June 2001.

For special sites, including those causing serious water pollution, sites with a nuclear site licence, petroleum refineries, explosives manufacturers and MoD sites, the enforcing agency is EA, NRW or SEPA, not the local authority.

Landscapes, parks and gardens are not considered to be receptors in the definition of pollution linkages. Therefore damage to vegetation on such sites could not cause land to be classified as contaminated unless humans, animals (as defined above) or buildings were also affected.

Remediation of contaminated land

Remediation is paid for by the people or organisations that caused the contamination, or by people or organisations that have acquired the land contaminated by others who are untraceable or unreachable for some reason. There is no state help, but

local authorities may become involved, particularly to aid regeneration. However businesses can claim relief from corporation tax if they clean up contaminated land, up to 150 per cent of the qualifying clean-up cost, provided that the contamination was not caused by the company or a connected person or company; that the land was already contaminated when it was acquired; and that the site is being used for legitimate business purposes. See www.businesslink.org.uk.

Under section 215 of the Town and Country Planning Act 1990 local authorities may serve a notice on the owner and occupier of derelict and unsightly land. The nature of the work required on this and any other remediation site is determined by the local Environmental Health Department.

Part IIA legislation is complicated, and despite the difficulty of enforcing it, owners of contaminated land have undertaken clean-ups even if they did not cause the contamination in order to be able to use a site as they wish.

The Environmental Information Regulations 2004

These regulations work alongside the Freedom of Information Act 2000: the right of access to environmental information may be exercised against any public authority. It may, for instance, enable a developer to read records of why decisions were made about contaminated land.

Land Restoration Trust (LRT)/Land Trust

The LRT was launched in England in 2003 as a collaboration of English Partnerships (now the Home and Communities Agency) Groundwork UK, the Forestry Commission and the Environment Agency. LRT was expected to take long-term ownership of brownfield sites that were not appropriate for commercial use. It works with councils and other local bodies on remediation, landscape and management of former industrial sites for forestry, recreation and biodiversity. Its four principles are: sustainability of design, implementation and maintenance; engagement with all the community; subsidiarity (local delivery where possible); and ecology – the local ecology will guide the approach to remediation. LRT became an independent charitable trust in 2010 and changed its name to the Land Trust. It owns and maintains a variety of land types and has moved away from brownfield restoration. See www.thelandtrust.org.uk.

AGGREGATES LEVY

This tax was introduced in 2002 on virgin aggregate quarrying (rock, sand and gravel) to reduce the environmental impact of extraction including noise, dust, visual intrusion, loss of amenity and damage to biodiversity; and to encourage recycling and use of alternatives. The tax provided the aggregates sustainability fund for environmental schemes in areas affected by quarrying.

The levy of £2 a tonne (2008 budget) applied in the UK except Northern Ireland where it was reduced to 20 per cent of the 'mainland' rate, because this tax

did not exist in the Irish Republic and therefore extraction companies in Northern Ireland were at a competitive disadvantage. The Northern Irish companies were released from the full levy in exchange for (further) significant improvements in the environmental impact of their business.

The levy was not revenue-generating and 90 per cent of it was returned to employers through reduced national insurance contributions. 10 per cent went to the Aggregate Sustainability Fund which financed work to reduce the impact of aggregates extraction.

The levy ceased on 31 March 2011. See MIRO later and British Geological Survey www.miro.co.uk and www.bgs.ac.uk. All grants given are listed on the SHAPE website at: http://shape.english-heritage.org.uk.

Aggregates Levy Sustainability Fund Grant Scheme 2009–2011

Natural England's ALSF Grant Scheme supported projects that reduced the effects of aggregate extraction on local communities and the natural environment. Grants were for landscape, nature conservation; access; health, education; and evidence gathering. It closed on 31 March 2011.

POLLUTION CONTROL

Introduction

Pollution control is relevant to landscape architects. Pollution control may impose obligations on clients and affect the management of construction sites. It may also imply challenges to design maintainable surfaces. It is directly concerned with the use of pesticides. Pollution issues may offer employment opportunities through entrust and landfill tax projects or through environmental audit.

As with planning legislation, statutes about pollution control arose from concern for public health and safety. Early Acts dealt with particular forms of pollution, for example, water, air, litter, and assigned control to separate agencies, but legislation has consolidated the different statutes and adopted the principle of integrated pollution control (IPC) under fewer but more powerful agencies.

Pollution control and waste management agencies

DEFRA

DEFRA assumed control of waste disposal and management from DETR in 2001. Waste planning as in PPS10 is still the responsibility of Communities and Local Government (ODPM).

Environment Agency

On 1 April 1996, by the Environment Act 1995, the Government created an Environment Agency in England and Wales to protect and enhance the environment by bringing together the National Rivers Authority, Her Majesty's Inspectorate of Pollution (HMIP) and Waste Regulatory Authorities.

Natural Resources Wales (NRW)

NRW came into being on 1 April 2013 and is a merger of the Environment Agency in Wales, the Countryside Commission for Wales and the Forestry Commission in Wales.

Northern Ireland Environment Agency (NIEA)

The NIEA is responsible for environmental protection including water management, industrial pollution and drinking water.

Scottish Environmental Protection Agency

The Scottish Environmental Protection Agency (SEPA) assumed the functions of HMIPI, the River Purification Boards and the Waste Regulations Authorities on 1 April 1996. Local Authority Air Pollution Control functions under Part I of the 1990 Environmental Protect Act were also handed to SEPA, although they remain with local authorities in England and Wales. SEPA, unlike EA, cannot undertake its own legal prosecutions.

The Regulatory Reform (Scotland) Act 2014 allows SEPA to take a modern and more effective, outcome-based and integrated approach to protecting and improving the environment and delivering benefits to the environment, communities and economy. The Act's provisions include enforcement, vicarious liability and contaminated land, and create an offence of 'creating significant environmental harm'.

European Environment Agency

Established on 30 October 1993 and based in Copenhagen, the agency has 10 tasks concerned with the provision of '*objective, reliable and comparable information at European level*' as a basis for environmental protection measures, to assess the results of those measures and to ensure the public is properly informed about the state of the environment.

UK Environmental Court

In 2004, DEFRA proposed the creation of a dedicated court headed by senior judges specialising in environmental law. The idea follows concern that the

legal system has failed to meet a growing threat from industry and multinational companies. The new court would have wide jurisdiction, dealing with polluters, settling planning disputes and threats to the environment including GM crops, wind turbines and airports. Rights of appeal would include third parties. Legal aid would be available. The idea is not original: Australia and New Zealand already have environmental courts. DEFRA's proposal was not implemented but the need still exists.

Integrated pollution control

The principle of integrated pollution control (IPC) was established in statute in the Environmental Protection Act 1990 and fully in force by 1996. It is a response to the cross-media movement of pollution and to the case for a unified inspectorate *'to ensure an integrated approach to difficult industrial problems at source, whether these affect air, water of land'* (*Air Pollution Control: An Integrated Approach*, Royal Commission on Environmental Pollution. 5th Report, 1976). IPC recognises that reduction of a release to one environmental medium could well have implications for another.

This British approach to IPC influenced European legislation. It established two principles that were incorporated into the IPPC Directive:

- Where more than one medium is involved the principle of BATNEEC prevails to minimise pollution to the environment as a whole. BATNEEC means the Best Available Technology Not Entailing Excessive Cost.
- If releases cannot be prevented using BATNEEC, there is a fall-back obligation to reduce releases to a minimum and render them harmless, i.e. to use the Best Practicable Environmental Option (BPEO) to reduce pollution. The BPEO principle was superseded by the Strategic Environmental Assessment process introduced in the twenty-first century.

Controlled processes

IPC covers all major solid, liquid and gaseous emissions to air, land and water from the most polluting and complex industrial processes – called Part A processes. IPC applies to 'controlled processes'. Controlled processes are:

- Emissions into the air from heavy industry (formerly controlled by the Industrial Air Pollution Inspectorate IAPI).
- 'Red list' substances, i.e. substances toxic to water and sewers in significant quantities. This list will be amended to meet the requirements of the Water Framework Directive 2000.
- Processes which produce large amounts of hazardous waste (defined in the Control of Pollution (Special Waste) Regulations 1980).

IPC applies to specific industries: fuel and power; metal production and pressing; minerals; chemicals; waste disposal and recycling, paper and pulp manufacture, di-isocyanate processes, processes involving uranium, coating processes and dye stuffs and printing ink manufacture. However these processes require an 'authorisation' under the Act only if they release a 'prescribed substance'. Once a process falls within the new controls, for example, it releases a red list substance, then all its processes whether prescribed or not, are included in IPC.

EU Directive on Integrated Pollution Prevention and Control (IPPC)

This Directive (96/91) was adopted in autumn 1997, to be fully implemented in the UK by October 1999. It is based on the UK IPC principles. It should lead to harmonisation throughout the Member States of emission standards and other pollution controls.

IPPC ranges more widely than the UK legislation and covers installations for some intensive agriculture and food production facilities as well as heavy industries. It is, like IPC, a formal legal system of regulatory control, applying to a defined range of processes and activities. It should have a major impact on land reclamation, as owners of industrial processes will have to make a final environmental audit and produce a closure and remediation plan agreed with the EA.

Operators have to:

- take all appropriate preventative measures against pollution;
- avoid waste production at source;
- recover waste where practicable; or
- deposit it in ways to minimise its environmental impact;
- use energy efficiently.

Pollution standards

Before IPC was developed, the degree of pollution in the UK was controlled by measurement against various standards. These standards still apply and include:

Specification standards

Suitable equipment may be specified; for example, under the Clean Air Act 1956 furnaces for burning pulverised or solid fuel must be fitted with suitable plant for arresting grit and dust.

Emission standards

These forbid more than a certain level of emission from a works (Clean Air Acts 1956, 1968).

Receptor standards

These restrict activities when they result in a certain level of harm (e.g. Public Health Act 1936). Keeping animals, accumulating materials, etc., which are prejudicial to health may constitute a common law nuisance.

Control of pollution

The Water Environment (Controlled Activities) Regulations 2011 replaced the Water Environment (Controlled Activities) Regulations 2005 (CAR). CAR issues relevant to landscape design include earth-moving (e.g. the risk of silt entering water courses), discharge of surface water run-off, construction and maintenance of water-bound roads and tracks and the storage and application of pesticides. All of these risk diffuse pollution.

Rural diffuse pollution arises from land-use activities such as livestock grazing, cultivation of land and forestry operations. In urban areas, pollutants include oil, household chemicals and fats. Rural and urban activities may give rise to a release of pollutants which individually may not have an impact but together, at the scale of a river catchment, may impact on water quality. The consequences of diffuse pollution include eutrophication, loss of biodiversity, silting of fish spawning grounds and impacts on human health through drinking water or bathing water pollution. Pollutants include the nutrients nitrogen and phosphorus, sediment, pesticides, biodegradable substances, ammonia and micro-organisms.

If an organisation already has authorisation to use pesticides under the Pollution Prevention and Control Regulations 2000 (COPR) new authorisation is not required under CAR.

Control of Pesticides Regulations 1986 (amended 1997)

Control of Pollution Act 1974 and Pesticides Act 1998.

The main provisions of these regulations stipulate the following:

- Pesticide: substance for destroying pests, especially insects (includes herbicides, fungicides, wood preservatives, plants and animal repellents and masonry biocides).
- Detailed requirements for aerial application.
- Users to take all reasonable precautions to protect human health, creatures and plants.
- Commercial users must be competent.
- Employers must ensure employees have reached required standard of competence.
- Conditions applied to sale, supply and storage.

- Advertising is controlled.
- Certificate of competence for storing, selling, supply pesticides required.
- Users to comply with detailed directions for use.
- Listed adjutants (wetting agents) can be used.
- Only certain products can be tank mixed.

Control of Substances Hazardous to Health Regulations 1988 (amended 2004) (COSHH)

Control of Pollution Act 1974.

The COSHH Regulations require employers, contractors, subcontractors and self-employed people to protect employees who may be exposed to health risks arising from hazardous substances they work with. The regulations require a written assessment of established risks/hazards and the action required to prevent or to control them.

COSHH requirements:

- Assess risks to health from hazardous substances arising in the workplace and determine action needed.
- Implement prevention or control programmes.
- Maintain and monitor those programmes.
- Provide health surveillance where appropriate.
- Inform, instruct and train employees in regard to work with hazardous substances.
- Keep records where required.

How COSHH affects landscape architects:

- Pesticides (check handling certificate and Certificate of Competence).
- Staining materials.
- Mulch from overseas (check bromide content).

COSHH – Safety & Liability for Pesticides:

- COSHH assessment is comprehensive. Check that all staff have been fully appraised.
- Check local water board.
- Prepare detailed specification and programme.
- Tender documents within requirements of HSE/HSC approved Code of Practice for safe use of pesticides for non-agricultural purposes.

Under the Natural Environment and Rural Communities Act 2006 it is an offence to have pesticides that are harmful to wildlife. There are exceptions under the Poisons Act 1972, the Food and Environment Protection Act 1985 and European Directives on biocides and plant protection. Defences include a danger to public health.

Biocides Directive 1988

This brought a range of insecticides, rodenticides, avicides and wood preservatives under control of the European law that already governs pesticides and veterinary products.

REACH: Registration, Evaluation, Authorisation and Restrictions on Chemicals

Introduced by Directive in June 2007, this is the unifying EU-wide system to manage chemicals produced or imported into the EU. REACH is managed by the European Chemicals Agency which became operational in June 2008. Manufacturers and importers must provide users with the risk information they need to use the substance safely. The Directive also includes a ban on aerial spraying and specific requirements for plant protection products and biocides.

Note that it is the landscape architect's responsibility to check that the contractor is complying with all pesticide regulations.

National Air Quality Strategy

Under the Environment Act 1995, local authorities have duties to manage the Local Air Quality Management (LAQM) system including assessment, planning quality control and land-use planning.

WATER AND FLOOD REGULATIONS

Responsibility for water resources

Overall responsibility for water policy, regulatory systems, conservation, quality and supply of water, sewage, inland navigation, reservoir safety and amenity rests with the Department for Environment, Food and Rural Affairs (DEFRA), the Department of the Environment Northern Ireland, the Scottish and Welsh Governments. DEFRA is also responsible for drainage, fisheries and marine waters. It works closely with the Environment Agency which manages water resources and enforces water quality standards, and the Water Services Regulation Authority (Ofwat) which is responsible for the economic regulation of the water industry.

In England the Environment Agency (EA) has independent jurisdiction over all water companies. It has responsibilities for pollution prevention; water

quality; flood defences, licences to abstract water; and discharge effluent; fishing regulation; conservation of aquatic wildlife; water recreation; navigation channels; information about rivers, coastal waters and ground-waters.

In Northern Ireland, the Northern Ireland Environment Agency Water Management Unit is responsible for monitoring and managing water quality, controlling effluent discharge and pollution control.

The Scottish Environmental Protection Agency (SEPA) has some of the same functions, but with a remit concentrating on pollution control rather than overall water resources management. SEPA took over the role of the former River Purification Boards.

In Wales, the responsibilities for water that were managed by the Environment Agency have been transferred to Natural Resources Wales.

The organisations above must execute their functions in such a way that furthers conservation, enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of interest.

The 1973 Water Act created nine regional water authorities in England; the National Water Development Authority in Wales; and water and sewerage services as a regional function in Scotland. In the 1980s the English Water Authorities became private companies: there are now 23 of them. On the 1 April 1996 the regional water services in Scotland were reorganised into three 'public' boards with limited public accountability. The Boards were recombined in April 2002 into Scottish Water (SW), which is answerable to the Scottish Executive but operates as a private company. In Northern Ireland, Northern Ireland Water Ltd, a government owned company, was set up on 1 April 2007. It manages water treatment and sewerage.

Welsh Water is a not-for-profit company set up in 2001. It is a strong advocate of Sustainable Urban Drainage Systems (SUDS) which aim to keep clean water out of sewers and treatment plants. SUDS hold back storm water in natural ways, allowing sewers to cope without causing flooding or pollution. Welsh Water also aims to reduce its carbon footprint by generating its own power from water turbines and sludge digestion.

Scottish water policy was modernised by the Water Industry (Scotland) Act 2002 which required Scottish Water to contribute to sustainable development while fulfilling its statutory functions of providing good drinking water (Water (Scotland) Act 1980) and wastewater services (Sewerage (Scotland) Act 1980). In addition, Scottish Water should manage its land and water to protect natural and cultural heritage, enhance biodiversity and encourage managed access while safeguarding water quality. It should support the economy, contribute to local communities and gain greater understanding of climate change in order to mitigate its impact and reduce greenhouse gas emissions (2007 statement).

Water companies have an express duty to take steps to secure the use of water and land associated with water for recreation (Water Act 1973). They also have legal duties under the Water Resources Act 1991 for conservation, access and recreation, together with a Code of Practice for conservation, measurement of environmental impact and consultation on wildlife.

Natural England, SNH and Natural Resources Wales have a duty to notify a water authority where it is of the opinion that the authority's operation may harm any features of special interest.

Inland Waterways Advisory Council (IWAC)

This was the Inland Waterways Amenity Advisory Council and part of the Waterways Board, but was formally separated from the Waterways Board by the Natural Environment and Rural Communities Act 2006. IWAC is supported by DEFRA and the Scottish Executive. It is empowered to advise government, navigation authorities and other interested persons about inland waterways generally. It was a statutory consultee. It was abolished by the Inland Waterways Advisory Council (Abolition) Order 2012 on 2 July 2012.

However, the Inland Waterways Association, founded in 1946, continues. It advocates the conservation, use, maintenance, restoration and development of all inland waterways for public benefit in England.

The strategic aims of fresh water management

The three main aims of strategic water management are to ensure fair distribution of limited resources, to preserve the purity of water supplies and to prevent flooding and other harm caused from accumulation or poor drainage of water.

Therefore abstraction of more than 1,000 gallons in any one or a series of operations is restricted by the Water Resources Act 1963 to those with a licence and certain other users. Land drainage and risk of flooding is addressed by the Land Drainage Act 1976. Water Company drainage authorities have the power to maintain existing water courses and drainage channels.

In addition to the three main aims, water management also includes control of pollution, conservation and recreation.

EU Water Framework Directive 2000 (WFD)

This deals with qualitative and quantitative aspects of water management in order to protect the aquatic environment and bring it to good ecological status by 2015. If this is not possible or desirable, modified status may be agreed. No deterioration in water quality in any water body should occur. The WFD covers all ground waters and surface waters, defined as rivers, canals, lakes, reservoirs, estuaries and coastal waters up to one mile from the shore of the Community.

Integrated water management plans are required for each river basin, which incorporate assessment of current status, monitoring, assessments of water needs and costs, setting objectives and public participation. These River Basin Management Plans (first round) had to be published by 2009. The Directive supplements and relates to earlier Water Directives on surface water and sampling methods, fish, shellfish and ground water.

In 2008, the EU adopted a Directive on the environmental-quality standards for surface water under the WFD. It fixes limits for over 30 pollutants including pesticides, heavy metals and biocides (D2008/105/EC, OJL 348.24.12.2008).

Flood management

The Landscape Institute website 'knowledge' menu has a useful section for designers dealing with water, SUDs, flooding, water sensitive urban design (WSUD), water management and 'blue infrastructure'. The pages have links to current UK legislation and guidance documents from the Environment Agency, SEPA and Northern Ireland's Department of the Environment.

Current legislation is contained in the European Directive on the Assessment and Management of Flood Risks (2007/60/EC) which came into force on 26 November 2007. This Directive has been transposed into UK law by the:

- Flood and Water Management Act 2010 (England and Wales)
- Water Environment (Flood Directive) Regulations (Northern Ireland) 2009
- Flood Prevention (Scotland) Act 1961 which is being replaced by the Flood Risk Management Act 2009 (Scotland) in a phased approach.

The Directive is a response to the effect of widespread flooding in Europe in recent years and the impact that the effects of climate change have had on the water environment. The Directive should help Member States establish a system to identify areas of 'potential significant flood risk' that either currently exist or can be reasonably foreseen in the future. 'Flood risk' refers to harmful consequences for human health, the social and economic welfare of individuals and communities, infrastructure, environment and cultural heritage.

Member States are required by Flood Risk Management Regulation to:

- Undertake a Preliminary Flood Risk Assessment of all river basins and coastal zones in order to identify areas that are at a potential risk of significant flooding.
- Produce detailed Flood Hazard Maps and Flood Risk Maps for those areas that are identified as being at a potential significant flooding risk.
- Produce Flood Risk Management Plans that focus specifically on 'prevention, protection and preparedness' of those areas at significant risk by December 2015.
- Coordinate efforts and cooperate with the relevant authorities in order to implement the provisions for river basin catchments.
- Encourage active involvement of interested parties in the production of Flood Risk Management Plans and coordinate this with the involvement of interested parties in the Water Framework Directive.
- Make the Preliminary Flood Risk Assessment, Flood Hazard Maps, Flood Risk Maps and the Flood Risk Management Plans available to the public.

The Directive recognised that the former method of responding to flooding by constructing defences in vulnerable areas is no longer effective or economically efficient. Instead, flood risk is to be managed in a more sustainable and affordable manner that is not focused solely on engineering solutions.

England and Wales

The Flood and Water Management Act 2010 implements the Flood Risk Management Directive and also followed the Pitt Review which examined the causes and responses to the 2007 floods in southern Britain. The Act was intended to enable comprehensive management of flood risk, particularly in the context of climate change, help safeguard against unaffordable rises in surface water drainage charges and protect water supplies.

The Act identified 'flood risk management authorities' and made it clear that they have a duty to cooperate and share data in order better to manage flood risk for communities. The flood risk management authorities are as follows.

- DEFRA has overall national responsibility for policy on flood and coastal erosion risk management and provides funding for flood risk management authorities through grants to the Environment Agency and local authorities.
- Environment Agency takes an overview of inland and coastal flooding and has published a 'National Flood and Coastal Risk Management Strategy for England'. It has operational responsibility for managing flood risk from main rivers, reservoirs, estuaries and the sea, as well as being a coastal erosion risk management authority.
- Lead local flood authorities (councils and unitary authorities) are responsible for devising and implementing strategy for local flood risk management. They have lead responsibility for managing the risk of flooding from surface water, ground water and ordinary water courses. Under section 21 of the Flood and Water Management Act they must maintain a *register* of structures and features which are likely to have a significant effect on flood risk in their area. The Act contains a provision that registered features may not be altered, removed or replaced without consent.
- District councils deal with flood risk management on minor water courses. District and unitary councils in coastal areas are also coastal erosion risk management authorities.
- Internal drainage boards, which cover about 10 per cent of England, also have a role in managing and reducing the risk of flooding.
- Highway authorities provide and manage highway drainage and roadside ditches. They must ensure that road projects do not increase flood risk.
- Water and sewerage companies manage risks of flooding from water and foul or combined sewer systems providing drainage from buildings and yards.

England now has 11 Regional Flood and Coastal Committees. They are responsible for '*ensuring coherent plans are in place for identifying,*

communicating and managing flood and coastal erosion risks across catchments and shorelines; for promoting efficient, targeted investment in flood and coastal erosion risk management; and for providing a link between flood risk management authorities and other relevant bodies to develop mutual understanding of flood and coastal erosion risks in their areas'.

Local planning authorities also have a responsibility, made clear in the National Planning Framework, to ensure flood risk management is incorporated into plans and development control.

The Flood Risk Regulations 2009 require the Environment Agency and lead local flood authorities to assess, map, report on, monitor, publish and review (at no more than six-yearly intervals) flood risks from main rivers and reservoirs in each river basin district and the sea. The EA has published a 'Fluvial Design Guide' which includes sections on ecology, landscape and heritage. DEFRA has issued draft standards for sustainable urban drainage systems which have not yet been implemented.

The Welsh Government is required to draw up a Flood Risk Management Strategy which will be prepared by Natural Resources Wales.

Northern Ireland

The Department of Agriculture and Rural Development (DARD) was charged with implementing the Directive. The Rivers Agency, as an Executive Agency of DARD responsible for drainage and flood defence in Northern Ireland, has the lead role and is responsible for the Preliminary Flood Risk Assessments of each of the River Basin Districts and will have to ensure the exchange of relevant information with the competent authority in the south of Ireland for catchments crossing the border. The Rivers Agency will also produce Flood Hazard and Risk Maps.

All Government departments in Northern Ireland, district councils and Northern Ireland Water Ltd are required to exercise their functions in a way that complies with the requirements of the Directive. Therefore, development of Flood Risk Management Plans will require cooperation and input from all these organisations.

Scotland

Under the Flood Risk Management Act 2009 (Scotland) the objective is to reduce overall flood risk in the most sustainable way. Responsibility for the new approach is shared between several parties:

- The public and communities are encouraged to be actively engaged in producing and implementing Flood Risk Management Plans, as their local knowledge and involvement in flood protection actions for their areas is regarded as a key component of flood management strategy.

- Local authorities will lead on the preparation of Local Flood Risk Management Plans for 14 local plan districts, which will supplement national plans prepared by SEPA. They will ensure that objectives and actions are locally targeted and delivered. Plans will be updated every six years.
- Scottish Water is responsible for assessing the risk of flooding from surface water and combined (surface water and foul) sewers that results from higher than usual rainfall events. Once risks are identified, Scottish Water, working with local authorities and SEPA, will seek opportunities to reduce those risks through capital investment. This will be coordinated with other work to address surface water flooding.
- SEPA will prepare National Flood Risk Management Plans. It is also responsible for delivery of information and coordination of flood risk management in Scotland in cooperation with local authorities, Scottish Water and other public bodies, stakeholders and the public. It provides flood forecasting and warning services.
- Scottish Government sets the policy framework for implementing this new approach to flooding, and is ultimately responsible for approving the objectives and actions set out in Flood Risk Management Plans.

Flood Risk Management Plans are drawn up after identifying areas most at risk from flooding, then the areas where flood waters could flow to and the damage they may cause are identified, which includes damage to people, economic activity and the environment. Flood Risk Management Plans will be produced from this information, which will identify and be used to coordinate action to tackle flood risk. The plans were scheduled to be available for public consultation in 2014.

Nitrate vulnerable/sensitive areas

This is relevant to landscape architects because the good practice guidelines to reduce nitrate pollution are very similar to good practice in preventing pollution form biocides used in the landscape industry.

The Water Resources Act 1991 includes provisions which are designed to prevent water pollution. Under section 85 of the Act it is an offence to cause or knowingly permit a discharge of poisonous, noxious or polluting matter or any waste matter into controlled waters. Defences to this offence are set out in section 88 of the Act and include consents and permits from the Environment Agency. Controlled waters include ground water and all coastal and inland waters, including lakes, ponds, rivers, streams, canals and field ditches.

The 1991 Act also includes provision for publication for the ‘Code of Good Agricultural Practice’ (downloadable from the DEFRA website). Codes are produced for each nation in the UK and have statutory force. The Environment Agency, SEPA and NIEA will refer to these Codes when evaluating infringement of guidelines or pollution incidents and when issuing discharge prohibition notices. The Codes include advice on managing soil fertility and the application of nutrients including nitrogen and phosphorus. Particular attention is paid to

these chemicals because of their polluting effect in which they may make water undrinkable and lead to eutrophication.

Eutrophication is defined as the enrichment of ecosystems by nitrogen or phosphorus. In water it causes algae and higher forms of plant life to grow too fast, thus disturbing the balance of organisms present in the water and water quality. On land, it can cause certain plants to become dominant and reduce natural diversity.

Particular care is required in Nitrate Vulnerable Zones (NVZ). An NVZ is an area of land designated in accordance with Article 3 of the Nitrates Directive as '*land that drains into waters polluted by nitrates such that the ecosystem is at risk of being disturbed*'. Implementation is by the Nitrate Pollution Prevention Regulations 2008. Every English county has NVZs (62 per cent of England and 2 per cent of Wales) and it is estimated that about 70 per cent of land drains into streams polluted with nitrogen. It is estimated that 60 per cent of the nitrogen comes from farming.

The Code explains when and where different types of fertiliser may be applied. It recommends that no fertiliser is applied near surface water, hedges, field margins or protected sites such as SSSIs, not only to prevent water pollution but also to retain biodiversity. (It is recommended that organic fertiliser is not applied within 10m of surface water including ditches or 50m of springs, wells or boreholes and manufactured fertiliser should not be applied within 2m of water.) Distinction is made between fertilisers with high readily available nitrogen content such as cattle and pig slurry, most poultry manure, and liquid digested sludge, and fertilisers with a low readily available nitrogen content such as straw-based cattle and pig manure. (See the 'Good Agricultural and Environmental Condition' guide, 14 and 15, noted earlier.)

In NVZs, farmers and land managers are recommended to analyse the nutrient content of their land every two or three years and identify a limit to the annual average loading of the total amount of nitrogen in livestock manure across the area of their land. In short, land managers are asked to monitor nutrient content and adjust the amount, timing and location of fertiliser application to ensure that no pollution takes place.

WASTE REGULATIONS AND LANDFILL

Waste regulation

The Environmental Protection Act 1990 created three new agencies: Waste Regulation, Waste Collection and Waste Disposal Authorities. Local authorities are both Waste Collection and Waste Disposal Authorities. Waste Regulation Authorities (EA, NIEA, SEPA and NRW) have a duty to inspect their area for pollution risks caused by past disposal of waste. They should take steps to prevent any pollution or risk to human health, recovering the cost from the occupier of the land unless the authority has accepted the surrender of the relevant licence.

The Control of Pollution (Amendment) Act 1989 and The Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations 1991 stipulate

that the disposal, treatment and keeping of waste requires a waste management licence from the regulation authority and there is a duty on all those producing, treating or disposing of waste to take all reasonable measures to ensure that there is no unauthorised handling or disposal of their waste. Before a licence is granted, consultation is required with the local planning authority (where relevant), the Health and Safety Executive, EA, NIEA, SEPA and NRW, and the relevant nature conservancy if an SSSI is involved. From 1 April 1993 the terms of a licence require control of emission of liquids and gases from landfill sites, both during the filling process and for a number of years following closure.

There is also planning policy guidance on waste for England and Wales, Scotland and Northern Ireland.

Waste Framework Directive 2006

Directive 2006/12/EC came into force on 5 April 2006 and established the legislative framework for the handling of waste in the Community. It defined key concepts such as waste, recovery and disposal and put in place the essential requirements for the management of waste, notably an obligation for an establishment or undertaking carrying out waste management operations to have a permit or to be registered and an obligation for the Member States to draw up waste management plans. It also established major principles such as an obligation to handle waste in a way that does not have a negative impact on the environment or human health, an encouragement to apply the waste hierarchy and, in accordance with the polluter-pays principle, a requirement that the costs of disposing of waste must be borne by the holder of waste, by previous holders or by the producers of the product from which the waste came. The Directive has been revised leading to the Waste Regulations 2011.

Waste Framework Directive 2008/98/EC (WFD)

This 2008 Directive replaced the WFD 2006 which was repealed. However, principles laid down in WFD 2006 have been retained including the basic legislative framework for the handling of waste in the EU.

WFD 2008 clarified key concepts such as the definitions of waste, recovery and disposal; strengthened the measures that must be taken in regard to waste prevention; introduced an approach that takes into account the whole life cycle of products and materials and not only the waste phase; and focused on reducing the environmental impacts of waste generation and waste management, thereby strengthening the economic value of waste. The recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources.

As noted, the WFD requires Member States to prepare waste management plans: in the UK each home nation has developed a national strategy with implementation plans prepared by the relevant waste collection and disposal authorities of each nation.

Waste (England and Wales) Regulations 2011/Waste Management Licensing (Scotland) Regulations 2011

These Regulations updated some aspects of waste controls, but the need for waste permits and authorisation for certain activities did not change. The Regulations implement the revised Waste Framework Directive 2008 (rWFD). They require that:

- Businesses confirm that they have applied the waste management hierarchy when transferring waste and declare this on their waste transfer note or consignment note.
- Businesses meet a new waste hierarchy permit condition and where appropriate a condition relating to mixing of hazardous waste.
- The Regulations introduce a two-tier system for waste carrier and broker registration, which includes those who carry their own waste.
- They introduce a new concept of a waste dealer.
- They amend the hazardous waste controls and definition (adding sensitising substances).
- They exclude some categories of waste from waste controls (animal by-products) but include a small number of radioactive waste materials.

Waste (Amendment) (Northern Ireland) Order 2007

This order updates the Waste and Contaminated Land (Northern Ireland) Order 1997. Illegal waste activity is a major problem in Northern Ireland. Such activity has provided large profits to unauthorised waste operators, including organised criminal gangs. Illegal waste activity damages the environment, jeopardises public health and weakens the competitive status of legitimate waste businesses. Clean-up costs of illegally deposited waste are also significant.

The powers in the 1997 Order were inadequate: the 2007 Order provides stronger powers for enforcement officers and additional powers for the courts to impose wider ranging and more onerous pecuniary penalties in order to combat and deter the illegal waste activity.

The new powers are similar to those in the rest of the United Kingdom. However the 2007 Order includes some unique provisions because of the nature and extent of the problems faced in Northern Ireland.

The Order gives authorities significantly increased powers to address illegal waste activities, including greater powers to stop, search and seize vehicles. There are higher financial and custodial penalties for offences as well as new powers for the courts to impose other forms of financial penalties on offenders, including the forfeiture of vehicles.

The Order tackles waste collection and disposal, and enhances district councils' powers to deal with those who fail to use waste receptacles correctly. District councils have a new power to serve notice on the owner of land to take steps to remove waste illegally deposited on that land.

Measurers for transport of waste introduce enhanced enforcement powers to stop, search and seize vehicles. They also allow new requirements for registration of carriers to be introduced through regulations.

The Order gives the Department of Environment Northern Ireland (DOENI) powers to introduce by regulations a new system requiring the preparation of site waste management plans for construction or demolition projects. DOENI also gained stronger powers of entry and a new power to stop a vehicle on a road.

Scotland's Zero Waste Plan

The revised Waste Framework Directive has been implemented through the Waste (Scotland) Regulations 2012 and incorporates Scotland's Zero Waste Plan. The Zero Waste Plan is a comprehensive approach to managing resources and the value of waste, in support of the economy. It includes a target of 70 per cent recycling by households and businesses by 2025. The Scottish Waste Regulations stipulate a higher degree of separation of recyclable materials than before by businesses and local authorities in support of householders.

Duty of care and transfer notes

The principle is that if you have waste you have a legal 'duty of care'. The statutory duty of care set out in the Environmental Protection Act 1990 applies to everyone involved in handling the waste, from the person who produces it to the person who finally disposes of or recovers it. People are required:

- To prevent any other person committing the offences of depositing, disposing of or recovering controlled waste without a waste management licence; contrary to the conditions of a licence; or in a manner likely to cause environmental pollution or harm to health.
- To prevent the escape of waste, i.e. to contain it;
- To ensure that, if the waste is transferred, it goes only to an 'authorised person' or to a person for 'authorised transport purposes'.
- When waste is transferred, to make sure that there is also transferred a written description of the waste that is good enough to enable each person receiving it to avoid committing any of the offences under the first two points above. Copies of transfer notes must be kept for a minimum of two years.
- A declaration is signed on the transfer note to indicate that the waste management hierarchy of options has been applied.

Hazardous waste

The EU Landfill Directive: Landfill (England and Wales) Regulations 2002 introduced important changes into UK law.

- Most waste should be treated before landfill to reduce its volume or aid recovery.
- Landfill is separated into three types: hazardous, non-hazardous and inert waste. Inert waste includes concrete, bricks, tiles and ceramics, some glass, soil and stones, but not topsoil, peat, plastics or metal.
- From July 2003, landfill operators are not allowed to accept certain kinds of waste including liquid waste, certain hazardous wastes, unidentified and new chemical substances and tyres unless shredded or from bicycles or over 1400mm in diameter.
- Regulations in detail at www.legislation.hmso.gov.uk/si/si2002/20021559.htm.

New standards for deposition of hazardous waste, introduced in 2005, require DEFRA's Waste Acceptance Criteria to be met by all hazardous waste being disposed of as landfill. Businesses will have to be able to describe exactly what their waste contains.

Consolidation of licences

A single environmental permit for industry was introduced in England and Wales in 2008 as part of new Environmental Health Permitting Regulations. This included the Waste Management Licence and Pollution Prevention and Control system which is required for industrial and waste activities that may harm human health or the environment. Forty separate legal instruments were combined, saving an estimated £76m over the next 10 years.

Landfill tax

This tax was introduced by the Finance Act 1996 and defined in the Landfill Tax Regulations 1996. It applies throughout the United Kingdom. Landfill tax is intended to reflect the environmental impact of landfill and to promote more sustainable waste management practices. From April 2015 this tax will be continued in Scotland under the provisions of the Landfill Tax (Scotland) Act 2014.

Landfill sites are licensed under the terms of the Environmental Protection Act 1990 and the Pollution Control and Local Government (Northern Ireland) Order 1978.

Landfill tax is levied on material designated as waste deposited on a landfill site on or after 1 October 1996. The tax is paid by the landfill site operator. Disposal is considered to be landfill if it is deposited on the surface of the land, on a structure set into the surface or deposited beneath the surface. Subject to certain conditions, disposal of material is not taxable if it is obtained by dredging, by dredging for navigational purposes or obtained during the course of sand or gravel extraction from the seabed. Deposits are not taxable if they result from commercial mining operations, reclamation of contaminated land, or deposits of dead domestic pets.

Tax credits are available for waste that landfill operators send for recycling, incineration or reuse, or to another landfill site. Landfill operators may be able to claim a tax credit if a customer does not pay the charges for landfill taxable waste. The credit covers the amount of landfill tax charged to the customer.

Initially (from 1 April 1999) the tax was £2 a tonne for inert waste and £10 a tonne for everything else (the standard rate), but there have been planned increases in tax of £1 in most years. For 2015– 16 the rates are £2.60 a tonne for inert waste and £82.60 a tonne standard rate. From 1 April 2016 the standard rate will be £84.40 a tonne and the lower rate will be £2.65 a tonne. The standard will rise by at least £8 a tonne each year, and from 2014–15 to 2019–20 the standard rate will not fall below £80 a tonne (www.gov.uk/topic/business-tax/landfill-tax).

Environmental Body Tax Credit Scheme and Environmental Trusts

A tax credit of up to 90 per cent is given to landfill site operators against their donations to environmental bodies (EB). Donations are capped at 5.6 per cent of the landfill operator's (LO) landfill tax liability. LOs and organisations receiving money from the Landfill Communities Fund (LCF) for environmental projects must register with ENTRUST, which regulates the process on behalf of HMRC. EBs receiving LCF must be not-for-profit and nothing to do with local authorities or landfill operators. The LCF may be sourced via distributive environmental bodies (DEB) (DEBs represent LOs and help organisations to obtain landfill tax money from them) rather than by approaching LOs directly. More detail and a searchable database of funders by region are at www.entrust.org.uk. See also, for example, www.staffs-environmental.co.uk: the Annual Report 2012 is a short and readable document explaining how the system works with project examples.

Environmental bodies are formed for purposes that may include:

- research and development of sustainable waste management practices;
- collection and dissemination of information about sustainable waste management;
- remediation and restoration of sites unable to support economic or social activity, harmed previously by waste management or other industrial activities;
- creation of habitats, wildlife and conservation areas within landfill sites;
- school education programmes to raise awareness of waste and its management.

Landfill Communities Fund money may be used for six objects:

- remediation or restoration of derelict land;
- reduction of pollution e.g. mitigating the impact of mine waste;
- provide or improve a public amenity;
- protect or enhance a species or its habitat;
- restoration or religious buildings or historic structures;
- provision of support services by one organisation enrolled with ENTRUST to another.

Environmental permitting regulations

The European Union (EU) Directive 2010/75/EU on Industrial Emissions requires qualifying premises to have permits to operate. These regulations apply an integrated environmental approach to the regulation of industrial activities that mange or produce waste or emissions that pollute water, air or land. This means that emissions to air, water (including discharges to sewer) and land, plus a range of other environmental effects, must be considered together. Regulators must set permit conditions with the aim of achieving a high level of protection for the environment as a whole, based on the use of the best available techniques (BAT), which balances the costs to the operator against the benefits to the environment.

The Environmental Permitting Regulations (England and Wales) (Amendment) 2014 replaced the 2007, 2009 and 2010 Regulations. The 2007 Regulations created a single regulatory framework for waste management licensing and pollution, prevention and control activities. Their scope has since been widened to include water discharge and groundwater activities, radioactive substances and provision for a number of Directives, including the Mining Waste Directive, Batteries Directive and some provisions of the Waste Framework Directive.

From January 2013, applications for permits in Scotland were made under the Pollution Prevention and Control (Scotland) Regulations 2012.

Statutory nuisances

The Environmental Protection Act 1990 significantly improved the law of statutory nuisances. The following are statutory nuisances (but only when they are prejudicial to health): smoke; fumes (including airborne solid matter smaller than dust) or gases; premises in a state of disrepair; dust, steam, smell or other effluvia arising on industrial, trade or business premises; any accumulation or deposit; noise (which includes vibration) emitted from premises.

Enforcement of the law is the duty of local authorities. They must take action if satisfied that a statutory nuisance exists or is likely to occur or recur. An abatement notice will be served on the person responsible, owner or occupier, specifying what steps must be taken to deal with the nuisance. This may affect the management of construction sites.

Litter

The leaving of litter was confirmed as a criminal offence in the Environmental Protection Act 1990, with the potential for local councils to serve fixed-penalty notices on offenders. Local authorities, educational institutions and statutory undertakers are placed under a duty to ensure that their land is as far as practicable kept clear of litter, and this duty may be enforced by any person aggrieved by the defacement of land by litter seeking an order from the courts.

ENVIRONMENTAL CONTROL: TOP 10 QUESTIONS

1. There is effluent leaking from your client's rubbish tip – what legislation is relevant to this?
2. What legislation covers the reclamation of land after mining?
3. What is the difference between contamination and waste?
4. Who pays for cleaning up contaminated land?
5. What is the purpose of landfill tax?
6. Why is it important to control water from abandoned mines?
7. Why is the Control of Pollution Act relevant to landscape architects?
8. Who are 'flood risk management authorities'?
9. What statutory guidance is there about the application of fertilisers near surface water, hedges, field margins or protected sites such as SSSIs?
10. When did the aggregates levy apply?

10 Construction contracts

CHAPTER CONTENTS

CONTRACTS

What is a contract?

A contract is an agreement between individuals, which can be enforced by law. It is the legal relationship between the parties. If it is breached the law gives remedy. (Refer to Chapter 3 for more information on contract law.)

Essentials of a valid contract

There are three main essential criteria when determining if a contract exists:

- Intention to create legal relations.
- Consideration.
- Agreement.

How are contracts discharged?

Contracts may be discharged by:

- *Agreement*: A mutual decision by both parties to bring their relationship to an end.

- *Performance*: Each party has fulfilled their obligations under the contract. Refusal or failure to perform is classified as a breach of contract.
- *Breach*: Either because one party fails to perform their part of the agreement or repudiates their liability. The injured party may request damages or treat the contract as discharged.
- *Frustration*: When performance of the agreement proves to have been impossible after its inception and it is therefore a discharged contract, e.g. illness of one party.
- *Contractual Stipulation*: The parties may expressly stipulate the circumstances which extinguish their obligations; e.g. when a contract is entered into for a specified period of time it is discharged at the end of that period.
- *Lapse of Time*: Parties who have contracts of indeterminate duration (employment or partnerships) have a 'contract at will'. Either party may determine such contracts by giving reasonable notice. The contract is discharged by the lapse of this time.

Contracts in writing

Verbal agreements are recognised by law as contracts. However it is easier to decide the terms of the contract if it is written. The Housing Grants Act imposes adjudication as the first-tier dispute resolution process on all construction contracts. The Act states that parties can only have recourse to adjudication if the contract is in writing.

However, the Act defines that an agreement can be a 'contract in writing' whether or not it is signed (if it is made by exchange of written communications) or if it is an oral agreement evidenced in writing even by a third party. The use of the words 'subject to contract' in written agreements should be avoided, as the fact that the agreement is written may be the overriding provision. The Landscape Institute's Code of Standards of Conduct and Practice Standard 8 requires landscape architects to agree their terms in writing with the client.

Letters of intent

Letters of intent are often used in the construction industry when a strict programme has to be adhered to and the setting up of a formal contract will eat into that programme. They can be a major area of risk, especially if the client wishes a contractor to start works prior to a contract being prepared.

A letter of intent may create a binding contract, but that is unusual. Putting in place a letter of intent suggests that the parties intend to create a contract at a later stage and not by way of the letter as a substitute to the contract. However if the contract is not created at a later stage and dispute arises the court will seek to enforce whatever the parties 'intended' to agree. It therefore follows that clarity

and consistency in written negotiations and in any letter of intent is very important. They should include as a minimum:

- Certainty as to the key terms.
- An offer and acceptance.
- Intention to create legal relations.

The London Law Society has now created a template for letters of intent which includes:

- The works to be covered.
- Areas still to be agreed in the formal contract.
- The time frame for the letter to be valid.
- The financial limitation including VAT.
- No quantum merit payments.
- Dispute resolution.
- The name of the authorised person to instruct the works.

The letter must be signed and issued by the employer.

Agency

Private clients may appoint landscape architects to act as their agent in setting up contracts with a third party. This would include preparing a contract between the client and contractor to undertake the construction work of the landscape architect's approved design proposals.

The term 'agency' implies the relationship which comes into being when one party (the agent) is employed by another (the principal) to make legally binding contracts with a third party on behalf of the principal. The extent of authority is governed by the type of agency. 'Special agency' is usual with landscape architects where the agent and principal contract for one particular commission.

Authorisation and liability

An agent's duty is to apply reasonable skill and diligence to all he has been employed to do. The degree of liability depends on the type of agency. As a rule, the principal is bound only to the extent that the agent acted within the scope of his authority, whether that authority was express, usual or implied. The agent owes to the principal the following duties:

- To act in the principal's interests (not his own).
- Not to make secret profits or take bribes.
- Not to delegate his authority.

Every act the agent performs on behalf of the principal must be within the scope of his authority and is binding in law on the principal. (NB: This is different from a contract of service.)

Within the JCLI Form of Agreement, the 'agent' is named, and the scope and extent of his authority is set out clearly. (Refer to Chapter 11.)

TYPES OF CONSTRUCTION CONTRACT AND PROCUREMENT

Many types of procurement exist within the landscape and construction industry.

Procurement types

- Traditional.
- Management.
- Design and Build.
- Partnering.

Traditional

This is the situation where a client prepares contract documents, including specification and drawings, and the contractor carries out the work for an agreed price.

Fixed price/lump sum

Landscape architects when working on simple landscape contracts will in most cases use lump sum contracts. These are usually procured through the traditional methods of tendering. Lump sum contracts are used when the client requires total control of the costs and a firm price at the outset.

Measurement contracts

A bill of approximate quantities is used and the work is remeasured upon completion.

Cost reimbursement

Contracts whereby work goes ahead on the basis of machinery and labour and a target cost is aimed for.

Management contracts

If the client is looking for speedy completion of the project, a management contract is the best option. The contractor works alongside the design team and cost consultants providing a construction management service on a number of professional bases. The management contractor does not undertake the design or construction work directly. The design is not detailed when the contractor is engaged, therefore the design evolves as work proceeds. The design requirements are met by letting each element of the construction to specialist subcontractors/subconsultants.

Design and Build or 'all in' contracts

Where the contractor is designing and building the works, a Design and Build contract is used. The burden of the risk is with the contractor. Landscape architects can be commissioned to work with the contractor from the beginning but are often 'novated' to the contractor and paid by him at the implementation stage of the works.

Advantages

- Single point of responsibility through the whole project.
- Final cost is virtually guaranteed.
- Procurement period is likely to be shorter.
- Fewer claims are likely.

Disadvantages

- Contractor's design decisions (cost reductions, more profit), i.e. quality of design may be sacrificed.
- Employer's requirements need to be very sturdy.
- No relationship between client and professional team, therefore design quality can be lower.
- Landscape design can be done by subcontractors, i.e. soft landscape contractors doing planting plans.

Partnering

A relatively new approach to procurement which came about as a result of the Latham Report 'Constructing the Team' (1994). Landscape architects working on large multidisciplinary projects would perhaps be involved in this kind of project, but it is unusual to be involved in a purely landscape project by this method. There are various types:

- Joint venture.
- Consortium.
- Alliance project.

- Project partnership.
- Strategic partnership.
- PPP (Public Private Partnership).
- PFI (Private Finance Initiative).
- PRP (Performance-Related Partnering).
- DBFO (Design, Build, Finance and Operate).

Partnering is a concept whereby all parties work in collaboration to the same end. It should inspire a commitment to cost reduction that will eventually lead to expenditure on research and innovation to capitalise on the benefits that continuity of work provides. It can begin earlier than the tender stage or at the construction stage of a contract. It is not an alternative means of procurement nor is it an alternative process of tender.

As a landscape architect you will be part of a team of professionals, such as engineers and architects, working for a contracting company and/or developer in a multidisciplinary team.

The usual approach with PPPs or PFI-type projects is as follows:

- Client seeks tenders through Public European Tender.
- Client chooses shortlist of tenderers to work on a competitive proposal or submission.
- The tenderers (consortia of possible developers and contractors) appoint design teams to work on a design proposal and financial submission.
- A preferred bidder is chosen by the client.
- The preferred bidder then has a period of time in which to confirm the process and tighten up the design through the 'contractor's proposals'.
- An agreement/contract is formed.
- The consortium and its team work together with the client to design and build the scheme.

FORMS OF CONSTRUCTION CONTRACT

Why have standard forms?

Certainty

The required performance of each party involved in the contract is known and clearly stated.

Standardisation

Wide use of standard forms enables contractors and professionals to be familiar with the rules laid down. This saves time, helps avoid confusion and provides a tried and tested framework for the successful completion of a contract. However, note that tact and cooperation between contractor and landscape architect/contract administrator are still necessary for success.

Suited for purpose

There are several standard forms of agreement. Each has been designed for a particular kind of project. Part of the professional's job is to choose the appropriate form of agreement for the job in hand.

(NB: Organisations do produce other forms of agreement. These are either based on a standard form, and revised for a particular job or client, or are bespoke for one specific project. They can take time to produce, require legal checks, are costly to produce and do not reflect the criteria demonstrated as above.)

Forms of agreement/forms of contract

Below are listed some of the more commonly used forms in the construction industry.

- ICE
- ICC
- NEC
- ECSC
- GC
- JCT
- JCLI
- BCC
- PPC

All standard forms of agreement/contract were updated in 2011/12 to ensure compliance with construction legislation, as the Local Democracy, Economic Development and Construction Act 2009 amends the Housing, Grants, Construction and Regeneration Act 1996. One of the aims of the Act is to secure the flow of cash down the construction chain through payment provisions. The other main issue is with regard to resolving disputes.

Please also note the Construction Contract Amendment Act (Northern Ireland) 2011.

(NB: All main contracts are written in English law but all have a Scottish equivalent. As a professional landscape architect you use, know and understand the contract relating to the law of the country you are working in.)

What factors would you take into account when selecting an appropriate form of contract?

- Type of work.
- Size of contract.
- Complexity of work.
- Soft or hard landscape (or both).
- Degree of risk.

Institute of Civil Engineers Contract (ICE)

This is a family of standard conditions of contract for civil engineering works produced by the Conditions of Contract Standing Joint Committee (CCSJC). The ICE Conditions of Contract, which have been in use for over 50 years, were designed to standardise the duties of contractors, employers and engineers and to distribute the risks inherent in civil engineering to those best able to manage them. (NB: They have now been withdrawn officially but are still used. The Infrastructure Conditions of Contract will supersede them – see below.)

- ICE Measurement Version, 7th edition – 1999.
- ICE Design and Construct, 2nd edition – 2001.
- ICE Term Version, 1st edition – 2002.
- ICE Minor Works, 3rd edition – 2001.
- ICE Partnering Addendum – 2003.
- ICE Tendering for Civil Engineering Contracts – 2000.
- ICE Archaeological Investigation, 1st edition – 2004.
- ICE Target Cost, 1st edition – 2006.
- ICE Ground Investigation, 2nd edition – 2003.

The Infrastructure Conditions of Contract 2011 (ICC)

These are based on the ICE conditions.

- ICC Measured Version.
- ICC Term Version.
- ICC Target Cost Version.
- ICC Minor Works.
- ICC Design and Construct.
- ICC Ground Investigation.
- ACC Archaeological Investigation.
- ICC Partnering Addendum.

The amendments between the two families of contracts relate to those arising from the Local Democracy, Economic Development and Construction Act. They include all previous amendments to the ICE conditions published by the ICE. There is no change in risk allocation or contract procedures. The exception is Minor Works where more detailed amendments have been made.

New Engineering and Construction Contract (NEC) 2013

Produced by the ICE, the NEC represents a non-adversarial approach to contracts. It is a family of standard contracts that embraces the concept of partnership and encourages Employers, Designers, Contractors and Project Managers to work together; this is achieved through both a powerful management tool and

a legal framework of project management procedures to facilitate the creation of engineering and construction projects of all sizes. Its fundamental aim is to minimise disputes through flexibility, clarity and good management.

Advantages are:

- Intention of contract:
  - it can be used on building and civil work;
  - flexibility.
- Innovative:
  - facilitates teamwork;
  - there is a choice of contract strategies;
  - there is a fair allocation of risk.
- Contract attempts to meet client's project objectives:
  - quality/performance;
  - time;
  - cost.
- Benefits contractors:
  - should increase profits (the client pays out more but finances are offset by fewer disputes, saving money overall).

It includes a series of different documents based on a project management system to suit different procurement arrangements selected by the Employer. There are six main options in NEC3 ECC:

- Option A – Priced Contract with Activity Schedule.
- Option B – Priced Contract with BoQ.
- Option C – Target Contract with Activity Schedule.
- Option D – Target Contract with BoQ.
- Option E – Cost Reimbursement Contract.
- Option F – Management Contract.

The contract strategy is further refined by selecting from 15 secondary options depending on the main option selected.

The latest versions of the NEC3 suite of contracts (2013) should make it easier to include new industry requirements such as BIM:

- NEC3 Engineering and Construction Short Contract.
- NEC3 Engineering and Construction Short Subcontract.
- NEC3 Professional Services Contract.
- NEC3 Professional Services Short Contract.
- NEC3 Adjudicator's Contract.
- NEC3 Term Service Contract.
- NEC3 Framework Contract.

A risk register and early warning system is set up by the project manager to identify events which may trigger risk; an early warning register is put in place which links to compensation events which are matters which may affect the price of the work or cause a delay to the work.

Most local authorities use NEC3 for procurement of consultants and construction contracts.

Engineering and Construction Short Contract (ECSC)

The ECSC has been specially produced for use with contracts that do not require sophisticated management techniques, comprise only straightforward works, and impose only low risk on both the employer and the contractor.

Government contracts (GC)

The GC Works family of contracts are standard government forms of contract intended for use in connection with government construction works. (NB NEC contracts are now becoming the contracts favoured by the UK Government and this set of contracts is no longer being updated.)

- *GC/Works/1* (1998 and 1999) – a standard form of contract for major UK building and civil engineering works, available with Model Forms and Commentary, in the following versions:
  - With Quantities (1998);
  - Without Quantities (1998);
  - Single-Stage Design and Build (1998);
  - Two-Stage Design and Build Version (1999);
  - With Quantities Construction Management Trade Contract (1999).
- *GC/Works/2* Contract for Building and Civil Engineering Minor Works (1998).
- *GC/Works/3* (1998) – for mechanical and electrical engineering.
- *GC/Works/4* (1998) – for small building, civil, mechanical and electrical work.
- *GC/Works/5* (1998) – procurement of professional services. Designed for use with the (1998) and (1999) editions of GC/Works contracts for the appointment of the relevant consultancy services associated with the construction works.
- *GC/Works/5* General Conditions for the Appointment of Consultants: Framework Agreement (1999) – designed for use with the (1998) and (1999) editions of GC/Works contracts for the appointment of consultancy services (associated with the construction works) on a 'call-off' basis over a three- to five-year period.
- *GC/Works/6* General Conditions of Contract for a Daywork Term Contract (1999) – applicable to work of a jobbing-type nature. Based on a three- to five-year contract period. Payment is relatively straightforward: labour at schedule of rates; materials at cost plus a percentage addition.

- *GC/Works/7* General Conditions of Contract for Measured Term Contracts (1999) – based on a schedule of rates, with orders being placed with the contractor as necessary/required over a three- to five-year contract period.
- *GC/Works/10* General Conditions of Contract for Facilities Management (2000) – this standard form of contract is intended for procuring Facilities Management services. The introduction in the contract advises that the facilities management contractor can either be appointed as a one-stop-shop or as a managing agent.

JCT Standard Form of Building Contract 2012

Incorrectly also known as the RIBA form. Now a very complex document in a variety of forms, i.e. with/without quantities, approximate quantities; phased completion variants. Used for building contracts. There are also various forms for nominated subcontractors (NSC):

- *SBC* – Standard Building Contract for traditional procurement.
- *DB* – Design and Build Contract for Design and Build procurement.
- *IC* – Intermediate Building Contract with contractor's design for works of smaller value and less complexity.
- *ICD* – Intermediate Building Contract for works of smaller value and less complexity and where the contractor assumes responsibility for the design of discrete parts.
- *MW* – Minor Works Building Contract for works of a minor nature that are relatively straightforward. This form is much simpler and easier to understand than JCT Standard. Involving less administration, it is also cheaper to use than JCT Standard. There is no provision for nominated subcontractors and therefore it is not appropriate where specialist subcontractors are required.
- *MP* – Major Project Construction Contract for major works where the employer regularly procures large-scale construction work.
- *CM* – Construction Management Agreement for construction management procurement.
- *MC* – Management Building Contract for management contracting procurement.
- *MTC* – Measured Term Contract for use where the employer requires maintenance works to be executed on a regular basis.
- *FA* – Framework Agreement for the procurement of construction-/engineering-related works over a period of time.
- *HOB* – Home Owner's agreement.

There are three variants of SBC for use in different circumstances:

- *With Quantities* – works are defined in the BoQ and the design is provided by the employer through his agent – the architect.

- *Without Quantities* – as above, but the works are not defined in the BoQ but more typically through a schedule of rates.
- *With Approximate Quantities* – used where the works have been substantially designed but not completely detailed so the quantities are approximate and subject to remeasurement.

(NB: In Scotland SBCC is the relevant legal contract.)

JCLI Agreement for Landscape Works (JCLI LWC) 2012

Similar to JCT Minor Works with additional clauses for vandalism, certification, fluctuations and nominated subcontractors. Appropriate for use:

- for simple hard and soft landscape contracts;
- with a value of approximately £200,000 or less;
- where the work is designed on behalf of the client;
- where the landscape architect (contract administrator) is to administer the contract;
- where drawings and/or specification and/or schedules define adequately the quality of the work.

This contract is not appropriate where provision for a named specialists is required, i.e. nominated subcontractors, or where detailed control procedures are required. It is specifically designed for dealing with soft landscape issues such as

- dealing with living materials;
- seasonal effects;
- dealing with payment issues relating to malicious damage of plant material.

This contract does not provide for establishment/maintenance of plants unless it is signed and tendered with the JCLI Maintenance Contract. At the time of preparing tender documents a decision has to be made with the client as to whether the contractor or the client is responsible for the care of trees, shrubs and grass after practical completion. If the client is responsible for care and defects, Clause 2.10B applies. If care and defects are required to be included in the contract by the contractor, then Clause 2.10A applies and the maintenance contract is used in conjunction with the works contract.

(NB Practice Note 8 recommends that maintenance is included, otherwise the contractor is not responsible for defects of soft works, and explains the contract in more detail. Standard forms and certificates can be downloaded from the Landscape Institute website.)

JCLI Maintenance Contract (JCLI LMWC) 2012

The JCLI Agreement for Maintenance Works is appropriate for use in three different circumstances:

- With the LWC to cover maintenance during the plant rectification period.
- With another form of construction contract to cover maintenance during the rectification period.
- For landscape maintenance works not associated with a construction contract.

The standard form of agreement for maintenance works has been produced to cover the issues relating to maintenance of soft landscape works particularly, such as:

- Repetitive operations.
- The quality of the work, including performance bonus payments for doing a quality job.
- The timing of the work.
- Failures of plant material.
- Extended contract periods.
- Penalties for not doing a specific task at the right time – i.e. it is essential that certain tasks are carried out at certain times. Liquidated damages can be applied for failure events.
- Inflation due to long period of contract.
- Annual payments.

The contract can be formed on the basis of performance or operations. This has to be decided at pre-tender stage as it affects the type of specification, contract administration and inspection, and processing of valuations and payments.

The 2012 agreement covers the changes to the payment certificates as per the works contract, however liquidated damages are deducted on the payment certificate.

(NB Practice Note 9 explains the contract in more detail.)

JCLI with Contractor's Design (JCLI LWCD) 2012

Suitable for contracts of approximately £200,000 or less for which an element of contractor's design is required. Appropriate for use:

- For works under £200,000 in value.
- Where the work involved is simple in character.
- Where the work is designed, and the requirements for the contractor's design of discrete parts are detailed by or on behalf of the client, and where the contractor is required to design those parts of the work.

- Where the client is to provide drawings and/or specification and/or work schedules to define adequately the quantity and quality of the work.
- Where the landscape architect/contract administrator is to administer the contract conditions.

It is not appropriate as a Design and Build contract, or where provisions are required to govern work carried out by named specialists, nor is it useful where detailed control procedures are required.

JCLI Landscape Contract for Home Owners (JCLI HLC/C) 2012 Amendment 1 2013

Appropriate for a home owner/occupier who has appointed a consultant to oversee the work on a garden in a personal (non-business) capacity. (For more detail refer to Practice Note 10.) The document is a 16-page agreement which is simple and easy to understand. There are no liquidated damages in this contract and CDM Regulations do not apply to the client. (NB The Scottish Supplement 2013 applies for all JCLI forms of agreement. These are usable in Scotland with the standard forms and Scottish law applies.)

Built Environment Collaborative Contract (BCC)

Issued by 'Collaborating for the Built Environment' formed in 2002. The aim is a standard form of contract that is shorter, simpler and easier to administer than current JCT Forms. The BCC seeks to encourage collaboration within the contract rather than having a separate partnering agreement. The 'Overriding Principle' is '*to work together with each other in a co-operative and collaborative manner and in good faith and in the spirit of mutual trust and respect*'.

It comprises two basic elements:

- a purchase order – which is signed by both parties and includes the project details and the services to be provided;
- the collaborative construction terms – i.e. the contract conditions.

There are two payment options: target cost (with or without GMP), or fixed price. There is no provision for retention.

Project Partnering Contract 2000 (PPC)

Published by the Association of Consultant Architects, the PPC is the first standard form of project partnering contract and is a radical change. It is a single multi-party contract where the employer, the contractor and all consultants work together under the same terms and conditions. Each partnering team member owes responsibilities to all other team members.

PPC 2000 provides for key performance indicators with milestones.

CONTRACT DOCUMENTS

The tender documents become the contract documents when the contract is signed.

The agreement

This consists of the following:

- Parties: Parties to the contract are named.
- Recitals: Recitals identify the project, the items which form the contract documents (including the conditions of contract), name of the quantity surveyor if used, and refers to warranty.
- Articles: Articles state in principle what each of the parties to the contract will do.
- Witnesses: Witnesses to the agreement.

Conditions of contract

In a simple contract such as JCLI or JCT Minor the clauses listed here are usually included.

1.0 Definitions and Interpretation

2.0 Carrying Out the Works

- Contractor's obligations – build the works in accordance with the contract documents.
- Commencement and completion dates.
- Contract administrator's duties – administer contract to the limit of power given in the contract: issue certificates, issue instructions and further information, list defects.
- Correction of inconsistencies in contract documents.
- Adjustment of completion date/extension of time.
- Defects (possible establishment and maintenance of soft materials – JCLI).
- Progress certification.

3.0 Control of the Works

- Subletting.
- Instructions.
- CDM Regulations.

4.0 Payment

- Certificates.
- Failure to pay.

- Payment notices.
- VAT.
- Tax.

5.0 Injury, Damage and Insurance

- Contractor's and client's responsibilities.

6.0 Termination

- Insolvency.
- Default by Contractor or Client.
- Consequences and procedures.

7.0 Settlement of Disputes

Specification

Information about the quality of materials and standard of workmanship. It should clearly indicate where approval of work is required. There are different types of specification relating to the various contracts, i.e. NBS Landscape specification.

Schedule or bill of quantities

Quantitative details:

- Preliminaries – list of items affecting works as a whole.
- Preambles – introductory clauses to assist estimation (ICE).

Drawings

Illustrative information. The drawings should be as accurate as possible.

SUBCONTRACTS

Nominated subcontracts

Used when:

- Specialist techniques are required.
- Early ordering is necessary.
- Work of a particular quality is essential.

With nominated subcontracts either:

- a single firm is nominated within the document, *or*
- a list of subcontractors is given.

For a single nomination the contractor enters the value of his work plus 2½ per cent (normally), which is the contractor's discount.

Where there is a list of nominations either a prime cost sum or a provisional sum is stated. In both cases, either before letting the main contract or during its early stages, the landscape architect invites tenders from a number of firms he thinks capable of performing the nominated subcontractor works. Then he instructs the main contractor to accept a firm as a nominated subcontractor.

Nominated subcontractors are no longer commonly used due to updated methods of measurements and conditions of contract.

The conditions of contract for the subcontractor must be no more and no less onerous than those binding the main contractor and the client. This applies also to insurance.

NSC forms (relating to the JCT Form of Contract)

Several forms known by the letters NSC (nominated subcontractor) are used in association with JCT. The versions applicable in Scotland have the suffix 'Scot.' added

- NSC/T: Standard form of nominated subcontractor tender with three parts:
  - invitation;
  - tender;
  - conditions.
- NSC/A: Agreement between nominated subcontractor and contractor.
- NSC/N: A nomination instruction.
- NSC/C: Standard conditions of nominated subcontract.
- NSC/W: Employer and nominated subcontractor warranty agreement.

If a nominated subcontractor delays completion of the works, the main contractor is entitled to an extension of time. Equally the client suffers a loss of right to apply liquidated and ascertained damages if a delay is due to a nominated subcontractor.

Domestic subcontracts

The contractor chooses the subcontract and is responsible in all ways. He lists the subcontractor in the tender, though the landscape architect may have the right to disapprove him (depending on the form of agreement).

The contract administrator will have nothing to do with a domestic subcontractor and is not responsible for payments to the subcontractor. The contractor and subcontractor usually have a good working relationship.

(NB: Listed or named subcontractors are treated as domestic subcontractors.)

Payment of nominated subcontractors

It is usually stipulated that subcontractors must be paid within 14 days of certified completion of their works. If the nominated subcontractor is not paid, the landscape architect is entitled to raise this issue with the main contractor as follows:

- The subcontractor is bound by the same contractual conditions as the main contractor.
- The valuation has been certified and therefore the subcontractor must be paid. If there is no action by the main contractor then the landscape architect advises the client to pay the subcontractor directly and issue certificates directly to the subcontractor.

Named subcontractors

Specific to the JCT Intermediate Form of Contract (IFC). The firm you require to do the work is named in the specification. The contractor enters a subcontract with the named firm. The contractor has the right to object to the named firm. The subcontractor becomes a domestic subcontractor.

The JCLI Form of Agreement does not allow for nominated subcontractors but states:

> '*For some projects where it is intended to use the Contract, the Employer may wish to seek to control the selection of subcontractors for specialist work.*'

This may be done by naming a person or company in the tender documents or in instructions on the expenditure of a provisional sum, but there are no provisions in the contract which deal with the consequences of such naming. Such control of selection could be better achieved by the client entering into a direct contract with the specialist.

CONSTRUCTION CONTRACTS: TOP 10 QUESTIONS

1 What types of contract are there?
2 What constitutes a contract?
3 What forms of agreement are available for Landscape Architects?
4 What are the advantages of the JCLI Form of Agreement?
5 What is the difference between a nominated subcontractor and a domestic subcontractor?
6 How does the JCLI form of contract differ from the JCT Minor Works contract?
7 When would one use the ICC Form of Contact?
8 Why have standard forms of agreement?
9 What do contract documents consist of ?
10 What is the purpose of a JCLI Maintenance Contract?

11 Pre-contract and tendering

CHAPTER CONTENTS

TECHNICAL DESIGN (PRODUCTION INFORMATION) AND TENDER DOCUMENTS

Introduction

The new Landscape Consultant's Appointment document aligns itself with the RIBA Plan of Work 2013 which is based on a set of unified industry stages agreed through the Construction Industry Council (CIC). This includes seven work stages from Strategic Definition to In Use. Stage 4 is Technical Design and encompasses Detail Design to Production Information (the former work stages E–F).

Technical Design information can include the following elements, grouped by function:

Illustrative – Drawings.
Qualitative – Specification.
Quantitative – Schedule of Rates/Works, Bill of Quantities (BoQ), Bill of Approximate Quantities (BoAQ).

Tender documents

The provision of one or all of these elements for tender purposes on a construction project is dependent on the procurement method adopted and the form of

agreement used, but in each case the output is structured and documented to enable the tendering and pricing of materials, equipment and resources to undertake the construction work.

Unless this information is complete, accurate and coordinated it will not be effective and, no matter how good the design is, it will not be satisfactorily realised on site. Poor production information causes delays, extra costs and poor quality, which in turn gives rise to disputes over who is responsible for the problems. Good production information is thus of vital importance to the success of a project.

Drawings (illustrative)

All construction contracts require some drawings which may form part of the contract documents. Drawings illustrate the layout of the project and the construction and assembly of the specified materials. They provide an accurate representation of the work required in a consistent and clear format to communicate effectively with all members of the design and construction team. Ideally all drawings are issued at the date of the contract, however, dependent on the form of agreement being used, they may vary in detail and timing of issue, such as Design and Build contracts and management contracts.

Specification (qualitative)

What is a specification?

A specification provides information to the contractor about key requirements for construction and detailing. Depending on the procurement route adopted the specification can describe the final product in terms of either its quality and workmanship or its future performance.

Types of specification

- Descriptive/method specifications.
- Performance specifications.

Descriptive/method specifications

A descriptive specification is a written document that describes the works generally and provides the detailed description of the quality required in terms of construction, workmanship and materials. The final product is described in terms of component materials, dimensions, tolerances, weights, colour, finishes and required construction methodology including equipment type. Descriptive specifications enable final finishes and quality to be combined with technical criteria, which the contractor must complete in accordance with the contract documents, and which can then be checked by the contract administrator.

Specifying materials

- By type – quality/minimum standard.
- By British Standards, Codes of Practice or International Standards.
- By naming – this restricts competition but you get exactly what you want. If the project is governed by public procurement rules there are restrictions on naming products.

Specifying by workmanship

- By finished effect.
- By British Standards, Codes of Practice or International Standards.
- By method, i.e. exactly what is required such as maintenance of plants/ hand weeding.

In traditional procurement methods this type of specification is linked to the form of agreement used and is divided into work sections which link with the bills of quantities and drawings. This system was originally known as the Common Arrangement of Works Section (CAWS) which was set up under the government initiative, Co-ordinated Project Information (CPI), adopted in 1979 for drawings, specification and bills of quantities, aiming to produce a coordinated set of documents. This has now been replaced by Uniclass2 Work Results Table (Unified Classification for the Construction Industry) which coordinates with the requirements for BIM.

The specification can be bound together with the bill of quantities or can be a separate document. The specification forms part of the contract documents, whether individual or contained within the BoQ. In JCLI it is written into the contract whether the specification is a separate contract document or if it forms part of the BoQ.

In a JCT Without Quantities form of agreement the specification is the overriding description of the quality and scope of the work required.

Performance specifications

Performance specifications define the performance characteristics of the final product, and link them to construction, materials and other items under the contractor's control. They are used where future performance of a product can be estimated using key construction tests and measurements linked to the original design. This allows a contractor to deliver that element in any way he sees fit, in terms of materials and structure, as long as it fulfils the basic outlined requirements in terms of longevity, robustness, strength, etc. This type of specification can be used in Design and Build procurement or for projects advertised under the Public Procurement Regulations through the *Open Journal of the European Union* (*OJEU*).

In a Design and Build contract the specification acquires particular significance because it must set out the employer's requirements with which the contractor's design, or the detailed design, must comply. The statement of 'employers requirements' can, at the employer's choice, be anything from a three-line performance specification to a completely developed scheme design with outline specification and drawings. In the JCT Contractor's Design form of agreement the concept of contractor's proposals is included. These are drafted by the prospective contractor in response to the employer's requirements and supplied together with the tender figure.

Administration

Specifications are classified as design under Construction Design and Management Regulations. Specifications are prepared by the designer. If sub-consultants are employed for the design of parts of the works they should prepare the specification for the part for which they are responsible.

Rules regarding specifications for public contracts

- The European Public Contracts Directive (2004/18/EC) bought into effect the Public Contracts Regulations 2006 (Amendment 2011) in England, Wales and Northern Ireland. This is due for update by the Public Contracts Regulations 2014 as a result of the European Public Contracts Directive 2014/21/EC.
- The Public Contracts (Scotland) Regulations 2012 will also be updated as a result of the European Public Contracts Directive 2014/21/EC.

Section 2 of the Public Contract Regulations

Gives the requirements for technical specifications to be used in public contract documents. The following order of preference is given:

- British Standards transposing European standards;
- European technical approvals;
- common technical specifications;
- international standards; or
- other technical reference systems established by the European standardisation bodies.

In the absence of these specifications reference may be made to the following technical specifications:

- British standards;
- British technical approvals; or
- British technical specifications relating to the design,

provided that each reference is accompanied by the words 'or equivalent'.

Bills of quantities (illustrative)

A bill of quantities is a document used in tendering in the construction industry in which materials, parts and labour (and their costs) are itemised. It also details the terms and conditions of the construction contract and itemises all work to enable a contractor to price the work for which they are bidding.

- It forms a list of items describing the works which are quantified for pricing.
- When priced the total value equals the tender figure.
- It is prepared according to predetermined rules called methods of measurement.
- When used it forms part of the contract documents.

The function of bills of quantities

The primary function relates to their use with lump-sum contracts. They:

- Enable tenders to be submitted on the same basis.
- Assist in the preparation of interim and final valuations.

In addition they can:

- Assist in the evaluation of tenders.
- Are a basis for valuing alterations.
- Assist the contractor in assessing material, labour and plant requirements.
- Provide information for future estimates.

Contents of bills of quantities

Layout and contents will vary but generally BoQs are set out under the following headings:

- Preliminaries.
- Measured Works.
- Prime Cost and Provisional Sums.

These are all priced and the figure taken forward to the General Summary.

Preliminaries

The preliminaries cover the specific circumstances of the project under which the work will be carried out and which are not covered elsewhere in the tender documents. They comprise a list of items affecting the works as a whole, which are priced by the contractor, and these costs are carried forward to the general summary in the BoQ. The preliminaries form the backbone of the contractor's understanding of the working arrangements of the project and may influence their tender price.

Examples of preliminary items

- Site description.
- Access and egress.
- Site security.
- Statutory approvals.
- Team accommodation/equipment requirements.
- Site meetings.
- Disturbance to third parties (noise, dust, cleaning of roads, access over land, temporary road closures).
- Warranties and bonds.
- Quality checks and samples.
- Health and safety.
- Programme.
- Valuation and payment dates.
- Record drawings.
- Guarantees.
- **Dayworks.**

Payment of these items is due in the month/valuation period that they are expended. Normally they are paid as a proportion of the contract duration as it is unusual for the contractor to provide a breakdown of each item in his tender price.

Dayworks

Dayworks are works which cannot properly be measured and priced in accordance with the bill of quantities and therefore have to be dealt with on a labour, materials and plant basis, plus a percentage for profit and overheads:

- Current agreed national rates for construction workers are used to value labour costs.
- Materials are valued as actual cost.
- There are set rates for plant costs published by the RICS and ICE. The method used should be stated in the dayworks section of the BoQ.
- The tenderer states his percentage profit in the dayworks section of the BoQ.

Measured works

This is the 'quantities' section of the bill of quantities and summarises information from drawings and specification. It is prepared in accordance with predetermined rules of measurement to produce a national general standard. (Rules of

measurement relate to how items are quantified and how the bill of quantities is laid out.) The method of measurement is stated in the form of agreement used.

RULES OF MEASUREMENT CURRENTLY USED

- RICS Standard Method of Measurement of Building Works (SMM7)
- RICS New Rules of Measurement (NRM) – replace SMM7
- Civil Engineering Standard Method of Measurement (CESMM)
- Code for the Measurement of Building Works in Small Dwellings
- Method of Measurement for Road and Bridge Works

RICS STANDARD METHOD OF MEASUREMENT OF BUILDING WORKS (SMM7)

SMM7 is based on the Co-ordinating Committee for Project Information (CCPI) Common Arrangement, adopted also for drawings and specifications (e.g. National Building Standard (NBS)) to produce a coordinated set of documents. Any departures from the standard measurement conventions must be specifically drawn to the attention of the tenderer. With SMM7 measurement is approached systematically through each work or building trade's section (e.g. site clearance, bulk earthworks, topsoiling, cultivations, seeding and turfed areas, shrub and tree planting). This is now being replaced by NRM2 for all contracts entered into after January 2013.

RICS NEW RULES OF MEASUREMENT (NRM)

NRM is a suite of documents issued by the RICS Quantity Surveying and Construction Professional Group, in three volumes.

RICS New Rules of Measurement

- *NRM 1* – order of cost estimating and elemental cost planning for capital building works.
- *NRM 2* – detailed measurement for building work; a replacement for SMM7 brought out in January 2013. The new rules remove the Common Arrangement of Work Sections for building works codes (CAWS) from the Work Section headings which makes the BoQ quicker and simpler to prepare. The NRM2 set of rules can be a stand-alone document used where CAWS is not used. JCT issued a New Rules of Measurement Update requiring NRM2 to be used instead of SMM7 for all contracts and subcontracts entered into on or after January 2013.
- *NRM 3* – order of cost estimating and cost planning for building maintenance works – still to be published.

CIVIL ENGINEERING STANDARD METHOD OF MEASUREMENT (CESMM):

With ICE contracts bills of quantities are shorter than standard building contracts and the method of measurement used is more concise. Complex and difficult operations may be described and measured as one item. For example, construction of a tunnel may be measured as a single item per linear metre.

Prime cost, provisional and contingency sums

Prime costs have been redefined under the New Rules of Measurement (NRM2).

The prime cost (PC) sum is

'*A sum of money included in a unit rate to be expended on materials or goods from suppliers (e.g. ceramic wall tiles at £36.00/m² or door furniture at £75.00/door). It is a supply only rate for materials or goods where the precise quality of those materials and goods are unknown. PC sums exclude all costs associated with fixing or installation, all ancillary and sundry materials and goods required for the fixing or installation of the materials or goods, subcontractor's design fees, subcontractor's preliminaries, subcontractor's overheads and profit, Main Contractor's design fees, Main Contractor's preliminaries and Main Contractor's overheads and profit*.'

An example of a PC sum in landscape works is now unusual. Originally PC sums were associated with nomination for works, goods or services to be carried out or supplied by either the contractor, nominated subcontractor or nominated supplier for which the details were known at the time of tender. This would have included an exact piece of work for an exact sum of money. An example of this could include bespoke stainless steel gateway signs to a business park. It is now more likely that a defined or undefined provisional sum will be used for this type of work (see below).

The new definition of a PC sum refers to a supply-only rate for materials or goods, where the precise quality of those materials and goods are unknown.

Provisional sum

A sum allowed in the bill of quantities for works or goods which cannot be accurately quantified or detailed entirely at the time the tender documents are issued. The contractor allows the sum plus percentage profit, except with the JCLI Form of Agreement where no percentage is allowed for profit. Provisional sums are identified under SMM7 as either defined or undefined.

Provisional sum: defined work

'Provisional sum: defined work' is work not completely designed but includes information on the nature and construction of the work; approximate quantities that indicate the scope and extent of the work. In this instance the contractor will be deemed to have made due allowance in his programming, planning and pricing of the preliminaries (e.g. sketch proposals for signage).

Provisional sum: undefined work

'Provisional sum: undefined work' is work where no information is available. The contractor will not be deemed to have made any allowance in his programming, planning and pricing of preliminaries (e.g. additional drainage).

Contingency sum

A sum allowed in the bill of quantities for works or costs required as a result of that which could not have been foreseen or accounted for by either the landscape architect or the contractor. A contingency sum can only be expended in part or in whole on the written authority of the landscape architect.

There are two ways of expressing contingency sums:

- a specific sum entered in the bill of quantities;
- a sum calculated on a specific percentage of the contractor's tender (2.5–5 per cent is usual).

General summary

This is a summary of totals from each section of the BoQ. The total of the general summary is carried to the 'form of tender'.

Are bills of quantities always required?

No – other options to quantify work include:

- Bills of Approximate Quantities.
- Schedules of Works.
- Schedules of Rates.

Bills of approximate quantities

Bills of approximate quantities (BoAQ) are an alternative form of bills of quantities prepared early in the design process before a firm design is available. They allow early appointment of a contractor and access to experience in terms

of his programming and buildability skills, and enable an earlier start on site to be made than with traditional bills of quantities. They can incorporate Design and Build and performance specified works if required.

Bills of approximate quantities do not establish a firm cost for the work at the time the contractor is appointed, thus there is less price certainty. This is because the actual cost of the works is calculated only when the design is available and detailed remeasurements have been made. The client proceeds to the construction stage at greater risk, despite a check being made at the tender stage by means of bids being submitted by the tendering contractors.

Bills of approximate quantities are appropriate for projects for which an early start on site is required or where the design is reasonably well-defined, or alternatively where the work is of a repetitive nature following on from other similar projects (allowing assessments to be made of the quantity of works from previous experience), but where time is not available for full bills of quantities to be prepared.

Standard forms of agreement such as JCT with Approximate Quantities use bills of approximate quantities.

Schedules of works

A schedule of works document lists all of the main sections of work to be undertaken by the contractor. It is read in conjunction with the specification and the drawings and is required to be priced by the tenderer on a lump-sum basis. Quantities, if provided, are for guidance only and the contractor is required to make his own measurements in order to prepare his tender bid.

Often, in addition to the schedule of works, the contractor is requested to price a 'unitary' schedule of rates relating to the principal items to be carried out. This can assist in the valuation of variations that may be later instructed. It is appropriate for use on small to medium-sized projects. The use of schedules of works is not particularly appropriate where change post-contract can be foreseen.

What are the advantages and disadvantages of schedules of works?

Advantages

- The lump-sum price is firm, subject only to variations which may be instructed during the course of the contract works.
- Client risk tends to be avoided because the contractor prepares his own measurements and quantities.
- Can incorporate Design and Build and performance specified works if required.

Disadvantages

- The design must be reasonably well advanced (as would be required for bills of quantities) in order that tender documentation can be prepared.

- When variations occur, the valuation of changes can be more difficult to agree with the contractor than if firm bills of quantities exist, because individual prices for items of work do not exist unless a 'unitary' schedule of rates has been requested as part of the tender.
- It is more difficult to compare tenders than when using bills of quantities, because the tendering contractors may interpret and price risk in the schedule of works document in different ways.

Schedules of rates

A schedule of rates is used where the actual work required is not known at the outset and is remeasured and valued only when it has been completed. A schedule of rates is usually used for serial tendering/measured-term contracts.

A comprehensive schedule of rates that includes all that is likely to be required may often be little less than a bill of quantities without the quantities. Under such circumstances it would be useful to include 'notional' quantities based on approximation of the area or volume envisaged. Although the work must be remeasured on completion the tender rates quoted are more likely to be accurate.

A schedule of rates can be used alongside a fixed quoted lump sum for the works (usually with very small projects using the JCT Minor Works Contract). The schedule will be used to value any additional works over that for which the lump sum has been quoted.

Quantity surveyor pre-contract period (traditional procurement)

Appointment

The need for a quantity surveyor is ascertained by the landscape architect or the client at the outset of a project. A quantity surveyor is employed when the service he renders will be of value and economy in respect of the project.

- Not if the value of the contract is below the normal rate he deals with.
- Not if the landscape architect is competent to provide the service.
- Definitely for large contracts where proper cost control is essential.

The quantity surveyor is either employed by the client or the landscape architect, and is either paid directly by the client or the cost is included by the landscape architect in their fee. The quantity surveyor is named in JCT forms of agreement.

Role of quantity surveyor

Dependent on the quantity surveyor's level of appointment they can be responsible for:

- Pricing the landscape architect's proposed scheme to enable the employer to evaluate all the aspects of the design.
- Preparing the bill of quantities by extracting the amounts of work from the landscape architect's drawings and descriptions in the specification.
- Preparing pre-tender probable costs.
- Checking the priced bill of quantities submitted by the successful tenderer.
- Reporting to the client via the landscape architect on the tenders recommended for acceptance or not.
- Amending or negotiating with the lowest tenderer.

The training of quantity surveyors includes contract administration and legal studies and consequently they can become involved in claims and disputes.

PRE-CONTRACT PROCUREMENT STRATEGY

Introduction

On most projects, clients through their advisers will start the procurement process by devising a project strategy. The strategy entails weighing up the benefits, risks and budget constraints of a project to determine what the most appropriate procurement method is, and what contractual arrangements will be required.

Factors influencing procurement choice

The following factors should be considered when evaluating the most appropriate procurement strategy.

External factors

Factors that may influence the project, the client's business and the construction team during the project's life cycle can include economic, commercial, technological, political, social and legal issues such as changes in legislation or interest rates.

The client – resources, experience and risk aversion

- Whether the client is public or private sector, as public procurement in the UK (including procurement of professional services or construction) is now strictly controlled entirely by EU rules (refer to Chapter 4).

- A client's own knowledge and experience of procuring construction projects and the degree of client involvement is a key consideration in the procurement strategy adopted.
- The environment within which the client's organisation operates and their degree of risk aversion will also influence the choice of procurement route.

Project characteristics

The size, complexity, location and uniqueness of the project should be considered as this will influence time, cost and risk.

Ability to make changes

Changes in scope invariably result in increased costs and time, especially if they occur during construction. It is important at the outset of the project to consider the extent to which the design can be completed and the possibility of changes occurring.

Cost issues

The need for price certainty by the client should be assessed, as the extent to which the design is complete will influence the cost at the time of tender. If price certainty is required, the design must be complete before construction commences and design changes avoided.

Timing

Most projects are required within a specific time frame. It is important that an adequate design time is allowed, particularly if design is required to be complete before construction. Planning approvals can influence the progress of the project. If early completion is a critical factor then design and construction activities can be overlapped so that construction can commence earlier on-site. Time and cost risks should be evaluated.

Risks

The chosen strategy should balance risks against project objectives at an early stage. The key criteria for most clients are:

- Time (speed or certainty of completion date).
- Cost (price level or cost certainty).
- Quality (functionality and performance).

No procurement methods will achieve all three criteria and the client and advisers need to determine which is most important.

Procurement methods

There are various recognised procurement routes (refer to Chapter 9 for more detail):

- Traditional (bills of quantities, schedules of work, specification and drawings).
- Target cost.
- Design and Build; and target cost Design and Build.
- Design, manage and construct.
- Management contracting.
- Construction management.
- Turnkey.
- PFI and PPP.
- Partnering.

TENDER PROCESSES

Introduction

Construction tendering is the process of submitting a proposal (tender) to undertake, or manage the undertaking of, a construction project in accordance with the conditions of the contract and the contract documents. (Contract documents are covered in Chapter 10.)

A tender is treated as an offer to do the work for a certain amount of money (firm price), or a certain amount of profit (cost reimbursement or cost plus).

The type of tendering method selected may be determined by the procurement method agreed with your client. Procurement is the term used to enable the process of creating a contractual relationship.

Tendering methods

- Selective (single- or two-stage).
- Negotiated (single- or two-stage).
- Open.
- Serial.

With the exception of partnering, all of the procurement routes named above can be used with these tendering processes.

Selective tendering (single-stage and two-stage)

Single-stage selective tendering

The single-stage process is the conventional process of procurement. Tenders are sought from a number of contractors based upon tender documents (usually bills of quantities, specification and drawings). Tenders are assessed and a contractor appointed based upon criteria defined to suit the project. In most cases the criteria involved in selecting the contractor will be based upon the most economic cost, but can also be based upon programme, quality of design solution (in the case of a Design and Build tender) or a mixture of these criteria.

Where clients need lump-sum cost commitment from their contractor and they have the time available, single-stage tendering continues to be a viable route for obtaining good-quality bids. However, in an increasingly time-driven and consolidated tender market and with a greater transfer of design responsibility to the supply chain, many clients find themselves having little option but to go down the two-stage route. In the final analysis, whether the two-stage route adds value will depend more on the quality of the design information and post-contract relationships than on the basis on which the contract was bought.

Two-stage selective tendering

Two-stage tendering is a procedure typically used to achieve an early appointment of a contractor to a lump-sum contract. For the first stage, the objective is to competitively appoint, on the basis of limited information, a preferred contractor for further negotiation.

Why would a client adopt a two-stage tender option?

- To achieve early appointment of the main contractor ahead of the completion of design, and potentially a quicker start on site.
- To secure the involvement of a contractor for pre-contract services on a competitive basis, to obtain input on buildability, sequencing and subcontractor selection.
- To transfer a greater degree of design and other construction risk to the contractor.
- To ensure the efficiencies generated by enhanced coordination between design consultants and subcontractors.
- To retain greater client involvement in the pre-selection and appointment of subcontractors.
- To harness the contractor's purchasing power and commercial relationships with key subcontractors.
- To ensure the efficiencies generated by long-term working relationships with key subcontractors.
- To retain the contractor's experience in the effective and efficient sequencing of works.

- To use the contractor's ability to locate alternative products and systems offering better value for money.

The first stage

The first stage is similar to single-stage competitive tendering, except in the level of information provided. It is based on deliverables including a construction programme and method statement, detailed preliminaries pricing, and overheads and profit. The first stage may also include the competitive tendering of some work packages, together with lump sums for pre-construction services, design fees, risk margins for work that will not be tendered in the second stage, and so on. The first stage concludes with the appointment of a preferred contractor either on the basis of the provisions of the contract (such as GC Works) or a separate Pre-Construction Services Agreement (PCSA) prior to the completion of a contract at the end of stage two (such as a JCT contract).

The second stage

The second stage involves negotiation between the employer and the preferred contractor and relies upon competition between second-tier contractors for work packages.

Two-stage procurement does not establish a firm contract sum until the end of stage two. It involves collaboration between the design team and the selected contractor in finalising the design and development of production drawings, the health and safety plan, and the bills of quantities for the works, and will result in a final agreed sum for the works through open-book negotiation. It will also include methods of working, value engineering, advice by the contractor on 'buildability', negotiation and allocation of risk, management of the site, detailed programming, and the procurement of subcontractors and suppliers.

The second stage is concluded with the agreement of a lump-sum contract sum, typically based upon the competitive tender of between 70 and 80 per cent of the value of subcontractor work packages.

This process clearly relies upon an element of cooperative negotiation during the second stage. The abuse of a negotiating position during the second stage can have a damaging effect on the conduct of the entire project. In addition public authorities may have restrictive rules which may limit their negotiating power.

Two-stage tendering suits the following types of client/project teams:

- Clients that are not driven by the objective of securing an absolute least-cost bid.
- Clients that have a genuine need to follow a two-stage route, either because of programme constraints or a specific requirement to actively involve the contractor in the design and procurement process.

- Projects that are sufficiently well defined at first-stage tender to enable a programme and firm preliminaries to be prepared, together with a client and design team who have the discipline to complete the design to an appropriate level of detail in the second stage.
- Clients and design teams that have the capability and resources to actively engage in negotiations with the preferred contractor during the second stage.
- The contractor has the opportunity to work with the client's designers ahead of novation, enabling relationships to be developed, and giving the contractor the opportunity to contribute to the design process on buildability, sequencing and so on.

Negotiated tendering

The contract price is negotiated between the client and contractor and is used when:

- The contractor has an established working relationship with a client.
- Time for construction is limited.
- There are specialised building techniques involved and the contractor's expertise could be valuable.
- An existing project involves additional work.

Single-stage negotiation

In single-stage negotiation the contractor prices prepared tender documents. The quantity surveyor will check the rates and prices and note any contentious items. These will be the items discussed during the negotiation stage, all other items being accepted as priced. This process considerably speeds up the negotiation. When agreement on all the items is reached a contract will be entered into based on the revised, negotiated tender sum.

Two-stage negotiation

In two-stage negotiation the selected contractor will negotiate his preliminaries and uplift or percentage profit at stage one. In stage two the contractor will obtain tenderers for the required selected work packages from subcontractors.

Two-stage negotiation is often used to select a management contractor or where it is important to have a contractor on board before all the design work is completed. As part of the design team, a management contractor usually charges a fee for managing construction work, whilst not actually carrying out the work itself. The management contractor will provide the 'preliminary' services such as cranage, hoisting and lifting facilities, scaffolding, welfare accommodation, lighting, security, power, and management staff. The management contractor is

not responsible for the final cost, but it is incumbent upon him to work with the design team and to use his best endeavours to try and ensure that the project is completed on time and within the estimated cost.

Open tendering

This is covered by public sector procurement rules generally. The project is advertised (normally in the *Open Journal of the European Union*) and all who request tender documentation will be invited to submit a tender. There is no pre-qualification questionnaire or shortlisting stage prior to invitation to tender – this information is requested as part of the tender itself. The open tender procedure is normally only used where the known marketplace is limited, and the client needs to seek out extra interest, or where the timetable does not allow a two-stage tender procedure to be followed.

The JCT Tendering Practice Note 2012 (refer to this chapter) states that it is generally accepted in the construction industry that open procedures are not practical due to the excessive numbers of resultant bids.

Serial tendering

Serial tendering is a combination of competitive and negotiated tendering often used where there will be a number of similar repeat contracts. The contractor tenders for a project knowing that, if their performance is satisfactory, they will be awarded subsequent contracts. The contract sum for the subsequent contracts will be negotiated from the original tender updated for any fluctuations in labour rates, materials, fuel, tax, etc. since the date of the tender. It is suitable where a number of similar projects will follow on from each other, such as drainage upgrade works where similar materials and details are used. The similarity of the works produces a learning curve for the contractor, providing the client with time and cost savings.

This type of work would probably now be covered in public sector works under framework agreements (refer to Chapter 5).

Partnering as a procurement route and a tender process

Partnering is a form of collaborative working between all members of the project team including the client, design team, contractor(s) and the underlying supply chain. Management of a partnership arrangement is proactive and all parties work together to identify optimum solutions and to anticipate and resolve problems in a constructive and collaborative way. This creates a framework to deliver demonstrable (through key performance indicators, KPIs) and continuing economies over time – better design and construction, lower risk, less waste (time, material, etc.) – and as a result avoid disputes.

Partnership arrangements can be advertised in the *OJEU*, bids invited and a rigorous selection method used. A partnership arrangement is generally thought to offer better value for money than separate contracts for each individual piece of work (where contractors would be looking for higher profit margins).

What are the advantages and disadvantages of alternative types of tendering?

Single-stage selective tendering

Advantages

- This process reduces abortive aggregated costs of estimating.
- Tenderers should be capable of carrying out the works and be in a favourable financial situation.
- Tenderers should have confidence that they are in a group facing similar conditions.

Disadvantages

- Cost level of tenders tends to be slightly higher – tendering by several firms, each with its own subcontractors, will result in about 90 per cent of the resources committed to the process being wasted, since there is only one winning main contractor. This waste of resources adds to overall costs.
- More upfront work is required by the employer in putting the tender package together.
- Inflexible and no negotiation allowed for.
- Possibility of malpractice due to price fixing (there are still a few sectors of the industry and geographical locations where 'cartels' exist and price fixing, cover bidding, bid suppression and bid rotation are practised). The Office of Fair Trading is currently clamping down on anti-competitive activities.

Two-stage selective tendering

Advantages

- The design does not require to be finalised at tender stage and therefore the process is more flexible.
- The process is most suited to large-scale complex projects.
- The design can be developed with the contractor which increases the scope for value engineering.
- This method reduces scopes for claims that result from inadequate designs or specifications.
- Better project management by the contractor means that costs of changes are minimised.

Disadvantages

- No obligation on the employer to award contract.

- The price is likely to increase during the second stage as the approved stage one contractor has heavy bargaining power and the scope of work and the design is not finally determined until stage two.

Open tendering

Advantages

- Competitive prices are usually obtained.
- Provides opportunities for firms wishing to diversify.
- Eliminates potential malpractice (each firm knowing other tenders) and restricts price-fixing rings.
- Eliminates the potential charge of favouritism against a client in drawing up their selected list.

Disadvantages

- Lowest tender may be submitted by a contractor who is inexperienced in tendering and therefore has made a number of errors.
- Lowest tenderer may be unsuitable for the type of project or be financially unsound. Obtaining references may offset this slightly.
- It can be an expensive method of tendering for both the tenderers and the client as the numbers tendering are unrestricted, which requires more resources on the part of the client. The chances of winning a tender this way are limited and the total cost of tendering is increased as all tenderers have to recoup costs eventually in successful tenders.

Negotiated tendering

Advantages

- Useful when time is limited and an early appointment of contractor is desired.
- Allows potential cost or time savings by using the contractor's expertise and skills during the design and planning stage.
- Useful when contractor's expertise is known and required for design development.
- Useful when client/design team and contractor have an established relationship.

Disadvantages

- May lead to higher pricing.
- Design uncertainty at the appointment stage can lead to cost uncertainty.

GUIDANCE ON TENDERING PROCEDURES

The JCT Tendering Practice Note 2012

The JCT Tendering Practice Note 2012 replaces JCT Practice Note 6 (2002) and the NJCC Codes of Procedure for Single Stage or Two Stage Selective Tendering.

It is a guidance document which covers the selective tendering process, including single-stage, two-stage and competitive dialogue procedures, e-tendering, as well as the process of pre-qualification and assessment criteria. It sets out the rules that govern selective tendering, including EU rules, that should be adhered to for projects over a certain value, to obtain fair and competitive tenders. They do not however have to be followed unless it is stated in the tender documents that they are to be used.

The JCT Tendering Practice Note 2012 covers three main areas

- *The Preliminary Enquiry* – which includes the project information schedule and pre-qualification questionnaire.
- *The Invitation to Tender and Tender* – which covers the documents involved, the criteria and compliance.
- *Assessment and Award* – covering assessment, examination of priced documents, alternative provisions and notification to tenderers.

The Practice Note features model forms which are intended for use in both the public and the private sector when using any JCT main contract. With adaptation, they may also be used both for subcontract and framework tendering and with other construction contracts. The forms also incorporate or suggest adaptations for different procedures, such as electronic tendering.

NBS Guide to Tendering: For Construction Projects 2011

The guide is a direct result of the UK Office of Fair Trading investigation into 103 construction firms who were found to have colluded with competitors in breach of the Act; £129.2m was imposed in fines. One of the key findings of the investigation was the lack of clear rules concerning how the procurement process was managed.

The guide covers procurement strategies, establishing a tender list, tender rules, tender assessments and contract award, and includes as appendices standard letters that can be used. It focuses principally on single-stage selective tendering.

Tender rules are now incorporated into clauses within NBS.

PROCEDURE FOR SINGLE-STAGE SELECTIVE TENDERING

(This follows JCT Tendering Practice Note 2012 procedure.) Single-stage selective tendering is primarily appropriate where the client's requirements are sufficiently defined to enable the work to be priced.

Practice and use of across the UK is fairly consistent for tendering. Where a JCT contract is governed by Northern Ireland law it should incorporate Adaptation Schedules such as those published by the Royal Society of Ulster Architects. In Scotland tendering procedures have historically been more diverse but where a JCT contract is being used the Scottish Standard Building Contract (SBCC) version should be used.

Establishing a tender list

Advance information

The object of establishing a list is to be confident that each contractor will be able to meet the eligibility criteria, i.e. has the ability to successfully carry out the work if they are awarded the contract. The competitive element of tendering is then restricted to the tendering process itself.

A list of prospective tenderers may be compiled in different ways depending on the procurement route adopted. The criteria for the initial selection assessment should be established before expressions of interest are invited (or in public procurement before the *OJEU* notice).

Advance information is useful to advise prospective tenderers that a construction project is in development. This enables them to decide whether to bid for the work and allows them to express an interest. If it is a public works contract the form, timing and location of the notice will normally be prescribed by the public authority's procurement rules. If it is a project that exceeds a certain financial threshold a prior information notice is required by the Public Contracts Regulations and it must be placed in the *Official Journal of the European Union*.

Pre-qualification questionnaire (PQQ)

The objective of selection is to make a list of firms any one of which could be entrusted with the job. If this is achieved then the final choice of contractor will be simplified. Pre-qualification must not be confused with two-stage tendering. With pre-qualification the tenderer must prove their capacity before being invited to tender; with two-stage selective tendering the tenders are partially evaluated against a set of criteria before proceeding to the next stage which has a further set of criteria.

The purpose of the pre-qualification questionnaire is to simplify the tendering process by:

- Setting basic eligibility criteria for prospective tenderers thus reducing the likelihood of non-compliant tenders.
- Saving time and effort by reducing the need for unnecessary repetition of information for each tender.

Pre-qualification questionnaires criteria should be limited to matters of financial strength, technical capability and resources to carry out the project successfully, as well as references. Headings include:

- General experience, skill and reputation, with examples.
- Technical and management structure.
- Competence and resources in respect of health and safety.
- Environmental credentials.
- Capacity at the relevant time.

Tender lists may be compiled in the form of approved lists of contractors for specific types of work, values or geographical locations. For a simpler one-off project it is more cost effective to request that this information be submitted with the tender and form part of the tender evaluation.

How would you prepare a list of tenderers for a private client?

- From your own, your colleagues' or your client's knowledge/experience of the contractor.
- BALI listings/Construction Line.
- The client's previous preferred contractors.
- Requesting references from previous employers and landscape architects.

The preliminary enquiry (see appendix A of the JCT Practice Note)

The review of the PQQ process will result in a list of potential tenderers. Before continuing it is prudent to check whether they are still interested in competing for the work; this can be covered in an enquiry letter.

Model form of preliminary enquiry

This is contained within the Practice Note and consists of a letter, project information schedule and questionnaire.

Project information schedule

A model form is contained within the Practice Note which can be tailored to Design and Build contracts using JCT Building Contracts (with contractor's design), a two-stage tendering process or partnering.

Project information schedule – the model form

- Description of the project and location.
- The employer, the professional team and contact information.
- Estimated price range.
- Duration of the works including anticipated start date.
- Access to the site.
- Identified risks.
- The tendering procedure to be used and the medium.
- The programme including dates for pre-selection interviews, issue of tender documents and tender submission.
- The requirements for any contractor design.
- Any applicable BIM requirements.
- The contract to be used.
- The completed contract particulars including any requirements for collateral warranties, third-party rights, bonds, contractor's insurances.
- Any amendments/modifications to the contracts and their conditions.
- Any guarantees required.
- Mode of execution (deed or simple contract).
- The basis and criteria for pre-selection including weightings.
- The basis of contract award (price or quality) and an indication of weighting or other means of assessment.
- Whether procedure Alternative 1 or Alternative 2 is to be used in the event of errors in priced tender documents. (NB Alternative 1 cannot be used with two-stage selective tendering or partnering.)

Questionnaire

A model form requests the following information:

- Corporate particulars.
- Financial standing.
- Technical capacity and record.
- Management and personnel.
- Insurances.
- Subcontractors and supply chain.
- Good standing, litigation, etc.
- References.

The aim of the preliminary enquiry and questionnaire is to make assessment of the eventual tenderers as straightforward as possible.

In the case of public sector procurement above the relevant threshold, responses must be received within 37 days of the date of the *OJEU* notice. This reduces to 30 days if the notice is transmitted electronically.

In the case of private sector procurement the timescale may be reduced substantially and for single-stage selective tendering 14–21 days may be adequate where the questionnaire is straightforward.

Numbers of tenderers and feedback

A shortlist of tenderers is drawn up from the initial selection process. Guidance is given on numbers in the Practice Note. Numbers should be restricted as abortive costs of preparing and evaluating tenders are an overhead cost and an inefficiency that is ultimately carried by the industry. Generally between three and six should be sufficient. If there is likely to be extensive quantification, specification, specialisation and calculation or the contract is Design and Build then it should be a maximum of four.

Feedback should be provided on request to contractors who have not been selected to go forward to the tender process. This could include a scoring matrix.

The invitation to tender (see appendix B.1 of the JCT Practice Note)

Documents to be included in the invitation to tender

Form of invitation to tender.

- Project title and location.
- Drawings listed on the attached schedule.
- Specification/schedules of works/BoQ/BoAQ* (delete as applicable).

Employer's requirements* (delete as applicable).

- Outline construction phase plan (health and safety).
- Reference to preliminary enquiry information and any additional documents including information changed from the preliminary enquiry information, award criteria and weightings, any guarantee requirements.
- Model form of tender (see Practice Note 6 appendix B.2 for pro-forma).
- Tender return envelope, including tenderer's name if not electronic submission.
- Instruction to tenderers (tendering procedure, date and time of return of tenders).
- Signature and date.

Tender return

The tenderer should complete the form of tender enclosed with the invitation and return it within the time specified. A minimum period should be allowed for the return of tenders, and stated in the invitation to tender. This should be a minimum of 28 days for a private sector project or a minimum of 40 days with public sector

jobs as required by EU regulations. This can be extended during the tender period, as stated in the tender documents, if an error in the tender documents is notified by a tenderer or a change is made by the employer.

All tenders are opened/reviewed on the specific date and at the time stated in the invitation to tender (usually 12 noon). Tenders received after time should not be admitted to the competition.

A list of openings is prepared and witnessed depending on the procedures of the employer. In some local authorities tenders go to the Chief Executive. The chairman of the committee which authorises funding of the project signs the tenders and accepts them subject to checking.

There are rules regarding withdrawal and lapse of tenders, and Scots law differs as any undertaking to keep an offer open for a definite period is binding and cannot be recalled within that time. However an offer will lapse if not accepted within the specified time.

Qualification of tender

Tenderers should not qualify their tender as this will vary the equal basis of the tender process. A tenderer who submits a qualified tender should be given the opportunity to withdraw the qualification without amendment to his tender or his tender should be rejected. Negotiation of a non-compliant tender is contrary to the principle of equal treatment.

Examination of priced documents and errors in tender prices

The object of examining priced documents is to detect errors of computation before a contractor's offer is accepted. Tenderers sometimes make mistakes in their tender prices. Good tendering procedure demands that a contractor's price should not be altered without justification.

If errors are found in a tender they should be reported to the contract administrator who, in conjunction with the employer, should take action to implement the appropriate procedure.

The JCT Practice Note and the National Building Specification (NBS) Guide recommend two simple alternative procedures for dealing with errors, which are specified in the formal invitation to tender and the form of tender. This is also contained within NBS as an alternative clause.

Alternative 1: Confirm or Withdraw – This is suitable for public sector procurement as correction of the overall tender price is not permitted – the tender price reported at the committee for approving the tender remains the same and there is no chance of any negotiation occurring with the tenderer. However, it may be inconsistent with a partnering approach and is not appropriate for two-stage tendering procedures.

Alternative 1: Confirm or Withdraw

The tenderer is informed of the errors and given the opportunity to confirm or withdraw his offer.

- If the lowest tenderer withdraws, then turn to the second lowest tender.
- If the tenderer confirms the tender as it stands, then an endorsement is added to the priced bill of quantities. This indicates that all rates or prices (excluding preliminary items, contingencies, prime cost and provisional sums) are considered reduced or increased in the same proportion as the corrected total of priced items exceeds or falls short of such items. E.g. if there is a 10 per cent error each valuation is reduced or increased by 10 per cent. Both the client and tenderer sign the endorsement.

Alternative 2: Confirm or Amend – Correction of the overall tender price is permitted and the final tender price can vary. It is important to ensure that it is genuine error and not negotiation, otherwise Alternative 2 becomes open to abuse if not properly supervised.

Alternative 2: Confirm or Amend

The tenderer is given the opportunity to confirm his offer or amend it to correct genuine errors.

- If the tenderer confirms, proceed as for the second option under Alternative 1 above.
- If the tenderer chooses to amend his offer, check that the new price does not exceed the next lowest tender. If it does, turn to the new lowest tender.
- If the amended price is still the lowest tender, the tenderer must either be allowed access to his original bill of quantities to correct the details and initial them, or confirm all the alterations in a letter. If he is subsequently successful in his tender this letter should be joined with the acceptance and the amended tender figure and the rates in it substituted for those in the original tender.

Tender report

Contents of a tender report

- A statement of what the project comprises.
- The form of tendering that was used.
- A list of the tenderers and, if necessary, an explanation of any tenders not made or withdrawn.

- The range of tender prices.
- The quality assessments if applicable.
- A note of obvious errors and the modifications made as a result.
- Amendments made to the tender documents during the tender period.
- A comment on rates in the context of the present state of the market.
- Confirmation that the tenders were fairly, accurately and consistently priced.
- Recommendation.

Tender recommendation

If price is the main criterion then the lowest tender is recommended for acceptance. Only in exceptional circumstances should the landscape architect recommend other than the lowest compliant tender, because all are supposed to be suitable.

If all tenders are over-budget, discussions with the lowest tenderer can occur to bring the price within the budget. Negotiations are not permitted to take place with more than the lowest tenderer unless the lowest tenderer does not create the savings required. Then discussions may commence with the second lowest.

In Best Value assessments the overall score relating to price and quality factors will be the deciding factor.

Acceptance of tender

The tender report is issued to the client for their approval of the recommendation. If the client accepts, then either the client or their consultant writes to the tenderer accepting his offer.

Public procurement has a 'standstill period' where contracts cannot be entered into, to enable any challenge to the award to be made.

The acceptance of an offer initiates a contract.

POST-TENDER PERIOD

Notification of tenderers

Once the contract has been let the JCT Model Form of Invitation to Tender provides for post-award notification to tenderers with a list of those tendering (alphabetical order) and a separate list of tender prices (in ascending order). These prices should not be attributable to individual bidders.

In terms of Best Value assessments contractors need to know how they have performed against the various criteria; each should, on request, be supplied with their own individual scores and the range of scores relating to each of the criteria.

Contract preparation – letting the contract

Upon receipt of the letter of acceptance from the client, all documents become contract documents and the tenderer becomes the contractor. All the contract documents are signed and witnessed (two witnesses are required in Scotland).

If the project is notifiable under the CDM Regulations the contractor cannot commence work until the Health and Safety Executive has been notified (Form F10) and the contractor's construction phase health and safety plan has been approved.

PRE-CONTRACT AND TENDERING: TOP 10 QUESTIONS

1 What are the preliminaries in bills of quantities?
2 What are dayworks?
3 What is a provisional sum and a contingency sum?
4 Would you always need bills of quantity? When would you not use them?
5 What types of tendering processes exist?
6 What is the procedure for single-stage selective tendering?
7 What is included with the tender documentation?
8 What courses of action could be taken if an error was discovered in a tender?
9 What should a tender report contain?
10 What do you do about unsuccessful tenderers?

12 Contract administration

CHAPTER CONTENTS

This chapter generally discusses contract administration in the situation where the contract is traditional and the contract administrator (CA) is the landscape architect. References are to the JCLI Form of Agreement unless otherwise stated.

DUTIES OF ALL PARTIES

In traditional landscape contracts there are the following teams.

The design team

- Client.
- Landscape architect or contract administrator.
- The project manager.
- Quantity surveyor.
- Other consultants.
- The clerk of works.
- The CDM coordinator.

The contractor

- The contracts manager.
- Site agent/foreman.
- H&S representative.
- Subcontractors.

The client, the landscape architect, the quantity surveyor, the contractor, the nominated subcontractor and the clerk of works are all mentioned in the JCT Standard Form of Building Contract and the JCLI Form of Agreement. Other consultants are not and their position/duty will depend largely on what form of agreement they have with the client or the landscape architect.

The client

A private client may be unaware of the sequence of the design and construction process or of the functions and responsibilities of those engaged in a landscape contract. He or she also has additional responsibilities under CDM Regulations. The landscape architect, as the client's agent, should advise him of his role.

The client as the employer will:

- Either decide the functions which the scheme is to fulfil or instruct the landscape architect to investigate these functions and thereafter agree them with him.
- Decide the approximate outlay which can be expended. In some cases this expenditure may be regulated by the amount of a government loan.
- Appoint a landscape architect; also a quantity surveyor and a clerk of works or other professionals if required, and understand the delegation of responsibility to the professional person as his agent.
- Sign the legal agreement or contract which contains the clauses governing the conduct of the parties to the contract, namely the employer and the contractor.
- It is the client's duty to appoint a competent CDM coordinator and principal contractor under the CDM Regulations and ensure that sufficient resources will be allocated to enable the work to be carried out safely.
- During the course of, and at the end of the contract the employer will pay any money due for services directly to the contractor, the amount being shown on certificates issued by the landscape architect, and within the time specified in the contract.

The landscape architect/contract administrator

The landscape architect is the 'agent' of the employer and is appointed by him directly. The landscape architect (contract administrator during the contract implementation) is required, in accordance with the Landscape Consultant's Appointment or his agreement with the client, to:

- Advise the client on the appointment of the contractor, and the responsibilities of the client, the contractor and the landscape consultant under the terms of the contract documents.
- Prepare the contract documents and arrange for them to be signed by the client and the contractor and provide technical information as required by the contract.

- Administer the contract during operations on site, including control of the clerk of works where appointed, including:

Contract administrator's responsibilities

- Administer change control procedures.
- Issue instructions and progress certificates.
- Consider claims.
- Chair meetings.
- Issue progress reports.
- Agree commissioning and testing procedures.
- Agree procedures for reporting defects.
- Collate and issue schedule of defects.
- Issue payment certificates.

- Visit the site at intervals appropriate to the contractor's programmed activities to inspect the progress and quality of the works.
- Check and certify the authenticity of accounts.
- Make periodic financial reports to the client, identify any variation in the cost of the works or in the expected duration of the contract.

In addition the landscape architect (CA) must:

- Ensure that the client understands his responsibility regarding CDM Regulations, including notifiable work and the appointment of a CDM coordinator.
- Carry out all design and specification work in accordance with CDM Regulations and prepare a risk assessment. Provide information to the CDM coordinator.

The project manager

For larger, more complex projects a project manager is employed by the client. Project management is defined as the overall planning, coordination and control of the project from inception to completion. A project manager's key role is to motivate, manage, coordinate and maintain the morale of the whole project team.

The project manager is responsible for:

- Acting on behalf of and representing the client.
- Providing a cost-effective and independent service.
- Managing different disciplines and expertise.
- Satisfying the objectives and provisions of the project brief from inception to completion.

The quantity surveyor – contract period

The quantity surveyor will be responsible for:

- Measuring work carried out on site and valuing any materials held on site, at intervals.
- Agreeing, with the contractor's representative, the value of the interim measurement.
- Preparing and submitting these valuations to the landscape architect, who will use the figures to prepare interim certificates.
- Giving estimates of the cost of additional work involved and also of any consequential savings of work omitted because of variation orders.
- Agreeing the value of such work with the contractor.
- If requested, preparing variations to the bill of quantities to cover such work.
- Measuring and calculating the value of work carried out, and agreeing this value with the contractor on completion of the works through the final account or annual account (maintenance contract).
- Submitting the valuation to the landscape architect.
- Generally advising the landscape architect/client of financial aspects and implications of the labour and material costs, insurance charges, etc. involved in any design or change of design in construction.

The clerk of works

The clerk of works is engaged by either the client or the landscape architect. He will work under the supervision of the landscape architect and his duties will include the following:

- Maintain a register of drawings and all contract documentation.
- Notify the landscape architect of any errors or discrepancies in the contract documents.
- Notify the landscape architect immediately of any significant problems on site or if any decisions or variations are required.
- Inspect materials and goods for compliance with the stated standards and ensure that they are properly stored and protected. Inspect delivery notes and obtain necessary certificates.
- Inspect work for execution in accordance with the contract documents and with any instruction or variation orders; witness and record any tests.
- Issue verbal instructions. They must be confirmed in writing by the landscape architect within two days.
- Maintain a daily diary recording such things as weather, instructions issued, details of attendance at dayworks, labour on site, delays, records of any tests.
- Submit weekly reports on the state and progress of the works completed against the master programme.

- Attend site progress meetings and confirm accuracy of the contractor's progress report.
- Observe health and safety requirements with particular reference to CDM Regulations.
- Measure/inspect work (which may be buried) if required.

The CDM coordinator

The CDM coordinator has overall responsibility for ensuring that the CDM Regulations are adhered to by all parties.

Other consultants

Consultants act purely as advisers to the landscape architect on specialist aspects of design or construction. They act under the landscape architect and cannot issue instructions directly.

The main contractor

The contractor enters into a legal agreement with the client and signs the contract document. He will be responsible for:

- Carrying out and completing the works in accordance with the contract documents and to the satisfaction of the landscape architect.
- Providing materials, goods and workmanship in accordance with the contract documents.
- Complying with statutory requirements and local by-laws.
- Ensuring that all the requirements of necessary legislation and regulations such as HASAW, CDM and building regulations are complied with – such as registering with HSE for notifiable work, training employees in health and safety, and ensuring that adequate funds are made available for health and safety.
- Appointing a health and safety officer and preparing the health and safety plan in accordance with CDM Regulations. Ensuring that other subcontractors carry out a risk assessment of operations on site. Providing information to the CA and for the health and safety file.
- Complying with the landscape architect's instructions or variations.
- Providing appropriate insurances and certificates.
- Organising the sequence of the works and preparing the detailed programme.
- Coordinating the works of all subcontractors and suppliers.
- Keeping a competent person in charge of the works.
- Giving notice of expected delays and the reasons for them.
- Making good any defects.
- Paying wages/deducting income tax for all employees.

Site agent/foreman/manager

The site agent is the contractor's representative and will be responsible for all items listed under the main contractor applied to the working of the site, and also for the following:

- Taking charge of the drawings, specification, bill of quantities, etc.
- Laying out of site including any plant and huts.
- Organising the labour teams, and day-to-day running of the site.
- Supervising the work.
- Phasing the delivery of materials.
- Receiving instruction from the landscape architect.
- Presenting the firm's policy to the workers.
- Feeding back information to the firm.
- Feeding back any complaints he cannot deal with.

In a Design and Build situation the landscape architect's professional responsibility is to the client (contractor), end users and ultimate client and covers the following:

- Prepare design and specification in accordance with the employer's requirements and specimen designs.
- Advise client with regard to design decisions, i.e. statutory permissions, health and safety issues, legislation.
- Involvement at all work stages to ensure a good standard of end product and value for money.

CONTROL OF THE WORKS

Contract administrator

Contract administrator

The contract administrator is the individual responsible for administering the construction contract.

The CA can be the landscape architect, project manager, engineer or architect depending on the type of contract. The CA could be the lead consultant, the cost consultant or a client representative. NEC contracts describe the CA as the project manager, ICE contracts refer to the engineer, and Design and Build contracts refer to the employer's agent.

(NB: On a construction management contract the role of the CA may be attributed to the construction manager. On management contracts the management contractor will perform the role of contract administrator.)

The contract administrator must administer the contract in a fair and timely manner. In order to achieve this the following are essential for the CA to control the works:

- Read the form of contract and understand what it requires. Check that it is up to date with the correct supplements.
- Ensure that the contract form is completed properly, correctly executed and try to have all documents signed, sealed or initialled as appropriate before work starts on site.
- Establish clear responsibilities and create the right atmosphere with the contractor at the outset for site inspection, site management and site planning. Agree a policy for issue of instructions, site visits, progress meetings and communications generally. Also agree procedures with consultants. This can be done at the pre-start meeting or within the sub-consultancy agreement.
- Remember that implied terms may exist in addition to the express terms indicated in the contract.
- Follow the rules laid down in the contract meticulously – they have been designed to assist contract administration and are contractual obligations.
- Always allow time for contract administration.
- Be meticulous, careful and accurate, fair, decisive and timely whenever contract rules require action or where the contractor might otherwise be unable to fulfil his obligation. Avoid the risk of claims and allegations that the employer is in breach of contract through the CA.
- Do not exceed the authority stated in the contract conditions. Where the contract refers to agreement by the employer it means precisely that. If the employer wishes you to act for him get this in writing.
- Keep accurate records of all important discussions, visits, meetings, decisions and instructions. Ensure all emails, letters, site-inspection notes, records of telephone conversations, letters and certificates are saved in accordance with your office systems. You or future members of staff may need to refer to them not only during the life of the contract, but also throughout the rectification period, maintenance period and beyond.
- Use a clerk of works for day-to-day inspections and information.
- Use samples of workmanship and materials to guard against you and the contractor having different understandings about the specification.
- Always keep the client informed of progress.

Inspections and meetings

How do you report to the client on progress?

- Minutes of site meetings.
- Letters/emails.
- Financial reporting – regular cost reports.
- Site meetings.

- Site reports.
- Progress meetings.

Typical agenda for a pre-start meeting?

1. Introductions.
2. Project works.
3. Contract.
4. Statutory obligations.
5. CDM/Health and Safety issues.
6. Contractor's matters.
7. Clerk of Works' matters.
8. Consultant's matters.
9. Quantity Surveyor's matters and payment.
10. Communications and procedures.
11. Meetings.

The pre-start or pre-contract meeting is a very important method of ensuring that the contract is organised to run smoothly. If chaired well, it sets a standard for the rest of the contract. It is a tool which ensures all parties are aware of their role within the contract and what is required to achieve the end goal.

When the contractor has been appointed by the client and the contract placed, an initial project meeting with the contractor and all others concerned should be arranged prior to works commencing on site. The meeting is held to establish contract procedure and administration, standards and quality, and is usually chaired by the contract administrator.

1.0 Introductions: Introduce the representatives of the parties to the contract and the design Team. Clarify their roles and responsibilities, e.g. client, contractor, landscape architect (CA), client's representative, contractor's site agent, quantity surveyor, clerk of works, and other consultants such as the planning supervisor. Also indicate any specialist appointed by the client for the contract, e.g. for quality control.

2.0 Project works: Whilst the project works are set out in the contract documents it is worthwhile reiterating exactly what is included in the works. Briefly describe the project and its principals and objectives. Give details of the site and any special restrictions such as access.

3.0 Contract.

3.1 Formalities: Ensure the formalities of the contract have taken place, i.e. the exchange of letters between the contractor and client.

3.2 Contract under seal: If the contract is under seal, it is essential that both parties produce the documents that are under seal before proceeding.

3.3 Documents: Describe the present position with regard to preparation and signature of documents.
3.4 Technical information: Hand over all technical information necessary for carrying out the works. Ensure that the contractor will have these documents on site. Review the situation for issuing other information.
3.5 Confirmation of insurance documents: Request that insurance documents be available for inspection immediately. It is the landscape architect's responsibility to ensure that the client receives all necessary evidence to his satisfaction that the contractor is properly insured throughout the course of the contract until the issue of practical completion. Also remind the contractor to check the subcontractor's insurance.
3.6 Tax exemption: Check the contractor's tax exemption certificate.
3.7 Bond: Confirm requirement of a bond.
3.8 HSE registration: Check that the client has registered with the Health and Safety Executive for contracts over a certain length of time and in accordance with CDM Regulations.
3.9 Timing: Confirm and note:
- Date of possession (note JCLI and JCT Minor do not have clauses for possession by contractor).
- Date of commencement.
- Date of completion.
- Maintenance period.

4.0 Statutory obligations: Confirm the need to comply with statutory requirements regarding noise, safety, building regulations, local by-laws and restrictions.
5.0 CDM/health and safety issues: Health and safety will be discussed and the CDM coordinator will highlight the roles of the individual parties.
6.0 Contractor's matters.
6.1 Work programme: Note that the work programme supplied by the contractor must be in the form required, e.g. bar chart. It must:
- Contain adequate separate work elements to measure their progress and integration with service installation.
- Allocate specific dates for nominated subcontract work.
- Relate to the landscape architect's instructions and be kept up to date.

6.2 Site organisation: Agree such issues as the location of site compound and facilities, including services and access to the site.
6.3 Quality control: Define:
- Contractor's duties to supervise.
- Landscape architect's (CA's) duty to inspect.
- Duties of the clerk of works/supervisory staff in connection with the works.

6.4 Domestic subcontractors: The contractor must obtain the landscape architect's agreement before appointing a domestic subcontractor.
6.5 Specialist works: Review outstanding requirements for information to or from the contractor in connection with specialist works. Clarify that the contractor is responsible for coordinating specialist works, and for their workmanship and materials.

6.6 Testing: The contractor must provide for competent testing of materials and workmanship as set out in the contract document.
6.7 Services: Establish contractor's responsibilities.
7.0 Clerk of works' matters: Clarify that the landscape architect's inspections are periodic and explain the supportive nature of the clerk of works' role. The contractor must provide the clerk of works with adequate facilities as well as all relevant information, on-site staff, equipment and operations for his weekly reports to the Landscape Architect. Explain procedures for quality checks through:
- Certificates, vouchers and samples of material.
- Samples of workmanship.
- Test procedures set out in the bill of quantities.
- Adequate protection and storage.
- Visits to suppliers/manufacturer's works.

8.0 Consultants' matters: Emphasise that consultants will liaise with nominated subcontractors only through the contractor. All instructions will be issued by the contract administrator. Discuss information required by the contractor and establish a timetable for specialist drawings to be issued.
9.0 Quantity surveyor's matters/payments.
9.1 Procedures for valuations: Agree procedures for valuations in accordance with the client's instructions regarding timing and what is written into the contract documents regarding payment.
9.2 Percentage retention: Clarify the percentage retention (this should be in the tender document).
9.3 Percentage value of goods and materials: Confirm the percentage value of goods and materials to be taken into account (should be in the tender document).
9.4 Dayworks: Clarify that dayworks will only be accepted on written instructions and that day sheets are required within seven days for signature by the landscape architect.
9.5 VAT: Agree VAT requirements for both client and contractor.
10.0 Communications and procedures.
10.1 Information sharing: Establish the following information-sharing procedures:
- Requests for information should be in writing.
- The landscape architect will respond to queries quickly.
- Technical queries are raised with the clerk of works initially.
- Policy queries and discrepancies are referred to the contract administrator for resolution.

10.2 Standard forms: All information issued by the contract administrator will be via standard forms, certificates and notification.
10.3 Distribution of information: Agree distribution and numbers of copies of drawings and instructions required by recipients. Agree method of information transfer.
10.4 Issue of instructions: Clarify that only written instructions from the landscape architect are valid and all oral instructions will be confirmed in writing

within 48 hours. The contractor must notify the contract administrator of any written confirmations outstanding.

10.5 Claims: Claims are to be strictly in accordance with the terms of the contract. Any events should be raised immediately the relevant conditions occur.

11.0 Meetings: Establish the types of meetings required, e.g. progress, site or design-team meetings and their frequency. Establish procedure for meetings including:

- Agenda to be circulated beforehand.
- Circulation of minutes.
- Minutes to be taken as directions for action.
- Any dissent must be notified within seven days.
- All persons attending will have authority to act.
- Agree copies and distribution of minutes.

Why hold progress meetings?

Progress meetings are held to ensure that all parties to the contract are kept informed of technical issues and progress of the works throughout the contract period.

Typical agenda of progress meeting

1. Parties present.
2. Minutes of last meeting.
3. Matters arising.
4. Contractor's progress.
   - 4.1. General report.
   - 4.2. Subcontractor's report.
   - 4.3. Progress and comparison with programme.
   - 4.4. Percentage of main items complete.
   - 4.5. Causes for delay.
   - 4.6. Claims arising.
   - 4.7. Information received since last meeting.
   - 4.8. Information and drawings required.
   - 4.9. Instructions required.
5. Clerk of works' report.
   - 5.1. Site matters – weather and general.
   - 5.2. Quality control.
   - 5.3. Lost time.
6. Consultant's report.
7. Quantity surveyor's report.
   - 7.1. Valuation and measurement.
8. Health and safety matters.

9. Communication and procedures.
10. Contract completion date.
11. Any other business.
12. Date, time and place of next meeting.

All parties with the exception of the CDM coordinator should attend these meetings; minutes should be copied to the CDM-C. The important aspect of a progress meeting is to ensure that:

- Contractual issues can be dealt with on time.
- The contractor is carrying out the work in accordance with the contract documents.
- Information is being shared.
- If deviations from the contract period or quality of the work occur, the contract administrator has the information to take action.
- The client is kept informed.

(NB: If the progress meeting minutes get longer, then the contractor isn't performing or the CA isn't running the project efficiently.)

The clerk of works

Who employs a clerk of works?

The clerk of works is engaged by either the client or the landscape architect.

The clerk of works will work under the supervision of the landscape architect and his duties are outlined under duties of the parties on p. 415 of this chapter.

It is important to note that the clerk of works has no jurisdiction within a contract and that the contract administrator can overrule his decision or instruction. It is the contract administrator's responsibility to confirm the clerk of works' oral instructions in writing within two days.

If the client employs a clerk of works who knows about building but not about landscape work, what would you do?

Go through the drawings, bills and specification with him/her to make sure he/she understands what is involved and what is important. Show him/her what a sample of good-quality top soil looks like. Have all plants delivered to the site labelled by species, or at least have a labelled sample of each species to hand for comparison, or ensure that you have checked them or tagged them at the nursery.

Insurance

All construction contracts require both the client and the contractor to be insured. It is the CA's responsibility to check the required cover and dates for the contractor's insurance.

Alternative insurance provisions

- *Insurance of the works* is covered by the contractor in the name of the contractor and the client.
- *Insurance of the works and existing structures* is covered by the client or the contractor in joint names.
- *Existing structures* are covered by the client in their own name.

Instructions and Variations

What is an Instruction?

Instruction

A written instruction to proceed with, omit or change any aspect of the works.

It can also be used to omit prime cost and provisional sums. It is issued by the contract administrator on a standard form and must follow a verbal instruction within two days under the JCLI Form of Agreement.

The contractor must carry out the works under this Instruction within seven days, otherwise the employer may pay someone else to do the work.

Variations

The contract administrator can issue instructions for:

- The expenditure of any prime cost.
- A provisional sum.
- Any addition.
- Any omission or change in the works.
- A change which is necessary to the order or period in which works are to be carried out.

If it involves time or money or a decision by the client, it is called a Variation. Variations are issued on the same forms as instructions.

It is the contract administrator's or quantity surveyor's responsibility to value Variations, but usually these are agreed between the contract administrator or quantity surveyor and the contractor on the basis of:

- The same work under similar conditions at the contract rate and prices.
- Similar work under different conditions based on contract rates.
- Different work for which no rates exist, at fair and reasonable rates (dayworks).
- Works that cannot be measured at dayworks rates.

Certificates, Valuations and Final accounts

Certificates of Payment/Payment Notices

Interim payment certificate: the contract conditions require the contract administrator to certify progress payments at intervals of not less than four weeks (or at certain specified stages of the work) in respect of:

- the value of the works properly exercised (as agreed by the landscape architect);
- materials on site;
- deduction of retention money.

The amount due to the contractor is written on a standard form and a copy is sent to the contractor, quantity surveyor and client. The client must pay within the time specified in the contract (14, 30, 60 days). They must also no later than five days after issue of the certificate give written notice to the contractor specifying the amount to be paid. Certificates must be issued even if the amount is £0 or less..

If using the JCLI Maintenance Contracts, payment is calculated in the following manner:

- Work is valued from day zero.
- Certificates are advanced payment.
- There is an annual account at the end of the year.
- There is a failure event if the contractor does not comply with the contract or instructions; failure events must be calculated and the final bonus reduced accordingly.
- Inflation adjustments can apply.
- Payless notices can apply.
- Payments are monthly, therefore there are 13 certificates (including the final payment certificate) over one year.

(NB: Payment by operation is not recommended. Payment by performance is recommended.)

Penultimate certificate

Within 14 days of issuing the certificate of practical completion the contract administrator must issue a penultimate certificate of payment. It is priced on the basis of:

- 97.5 per cent of the contract sum adjusted for the cost of variations, prime cost and provisional sums and any fluctuations to which the contractor is entitled.
- The release of half the retention money.

(NB: The valuation of this certificate must be accurate since the contract does not provide for the issue of any other before the final certificate.)

Payless notices

Payless notices are issued in the form of certificates. The contract administrator can issue a payless notice not less than five days before the final date for payment against a certificate or a contractor's notice. The payless notice states the amount due at the date of the notice and has to be paid by the final date for payment instead of the certificate or the contractor's notice.

- *Payless Notice Type 1* is a notice against an interim or final valuation.
- *Payless Notice Type 2* is a notice against a contractor's notice to reduce the amount of the contractor's notice.

Final account and final payment certificate

Final account and final payment certificate: having received from the contractor all the necessary documentation within three months (or the period specified in the contract) of practical completion, the contract administrator must issue a final certificate.

In many cases the final valuation is a result of the quantity surveyor and the contractor agreeing a final account.

This must be issued within 28 days and will cover the balance due to the contractor. This should be honoured by the client within the period specified in the contract.

The amount specified will include:

- all outstanding monies, and
- the final half of the retention money.

It will be issued on a standard form and copied as before.

(NB: It is important to ensure that the contractor has provided all adequate information for the health and safety file before this certificate is issued.)

Practical Completion, Defects and Rectification Periods, Maintenance Period and Certification

Certificates of progress

- Certificate of Practical Completion.
- Certificate of Non-completion.
- Certificate of Making Good.

Certificate of Practical Completion

The contract administrator must certify the date when, in his opinion, the works have reached practical completion, i.e. is the work is sufficiently complete to be safely used for the purpose for which it was designed?

There is a standard form for most contracts but with ICE conditions a letter is issued.

Implications of Practical Completion are:

- All parties know that the works are finished.
- Contractor is no longer required to carry insurance for the works.
- Contractor can apply for release of bond.
- Contractor can apply for half of the retention money.
- Period of final measurement may start.
- Rectification period begins. (In theory there should be no defects as the contractor should present a fully complete contract. However this is rarely achieved and a list of defects is issued with the certificate.)

Certificate of Non-completion

A certificate of non-completion is required to start the liquidated and ascertained damages (L&A) damages process; this must be issued if the date for completion is not met by the contractor.

Certificate of Partial Completion

This can be issued by the contract administrator if the client wishes to take over a substantial part of the finished works. It is used, for example, where planting is required to be carried out during the planting season and the rest of the works are complete.

The Rectification Period

This is the period of time written into the contract documents (usually 12 months) following practical completion when the contractor must make good at his own

cost any defective works that were listed at practical completion or that become apparent during that specified period of time.

In JCLI contracts, only if the contractor is responsible for the maintenance of the soft works will he be required to make good any defects within a specified time after practical completion.

Certificate of Making Good

The contractor has to make good any defects both in the hard works and soft works (pre-practical completion) within a specified period after practical completion. The contract administrator has a duty to certify when the contractor has made them good with a Certificate of Making Good.

The Maintenance Period

This is a period of time set out in the contract documents following practical completion whereby the contractor maintains the works. The maintenance items are specified and the contractor is paid for his work. (NB JCLI Practice Notes recommend the lengths of maintenance periods for JCLI contracts.)

Refer to p. 377 for more information on JCLI forms of contract in relation to maintenance and rectification periods.

Latent Defects

After the end of the defects period the client and/or user do not have a contractual right to insist that the contractor rectifies defective work. They must seek redress in action for damages, breach of contract or negligence. Refer to Chapter 3 for more information.

Delays, Penalties and Disputes

Delays to contracts

Contracts provide for the contractor to notify the contract administrator if it becomes apparent that the works will not be completed by the contract completion date 'for reasons beyond the control of the contractor'. This requires an 'extension of time' or 'adjustment of the completion date' to the contract.

In JCLI and JCT Minor it states 'for reasons beyond the control of the Contractor including compliance of any Instruction of the Contract Administrator whose issue is not due to a default of the Contractor'.

In ICE/ICC reasons given are postponement of the works, variations or increased quantities, exceptional adverse weather conditions or other special circumstances.

In JCT there are 13 relevant events:

1. Architect's variations.
2. Architect's instructions relating to: discrepancies, postponement, provisional sums (except defined works), antiquities, opening up of works.
3. Deferred possession.
4. Approximate quantities where quantities are inaccurate.
5. Suspension by the contractor.
6. Default, omission, prevention by the CA, QS or employer.
7. Delay by statutory undertakers.
8. Exceptionally adverse weather conditions.
9. Specified perils.
10. Civil commotions, terrorism.
11. Strikes, lock-outs.
12. Exercise of statutory powers by UK Government.
13. Force majeure.

The contract administrator must make in writing an extension of the time/adjustment to the completion date that is reasonable. (An event which causes delay does not automatically result in an extension; it must cause delay to the critical path of the contract.) In addition the CA must ascertain the amount of loss and expense involved to the contractor, if notified by the contractor, and include it in any progress payments.

Compensation events

In NEC contracts compensation events apply. A compensation event is a matter which affects the price of the work, or delay in completion or achieving key dates. The delay to progress is assessed and is the basis for time and costs evaluation under a compensation event. Quick agreement should be reached. Compensation events roll up variations, extra time and prolongation costs, therefore there will be a rolling final account. The final account is agreed within two months of the project completion.

The programme is used as the basis for assessing compensation events.

Main compensation events include:

- Changes to the works information.
- Employer delaying access to the site.
- Late provision of something indicated in the programme.
- Instruction to stop or not start on a key date.
- Delays in works by employer or others.

- Late reply to communication.
- Objects of historical interest.
- Change of decision by project manager or supervisor.
- Withholding an acceptance.
- Searches for defects.
- Tests of inspection causing a delay.
- Physical conditions.
- Weather.
- Events at employer's risk.
- Early taking-over.
- Employer's failure to provide materials.
- Correction of an assumption by the project manager.
- Breach of contract by employer not covered elsewhere.
- Prevention (should be force majeure).

Secondary compensation events include:

- Changes in the law.
- Changes in partnering information.
- Delay in making the advance payment.
- Correction of defect not the contractor's responsibility.
- Supervision under the Construction Act.

Under JCT and JCLI if the contractor delays the contract without a valid reason, the contract administrator must issue a non-completion certificate on the day the contract should have been complete. This will allow for liquidated damages to be applied.

Penalties

Contracts provide for penalties to be applied to the contractor for late completion or for non-completion as follows:

Bond: A bond requirement is written into the tender documents and is a financial guarantee that the contractor will perform. The 'indemnitor' is usually a well-respected financial institution such as a bank or insurance company. The indemnitor will take a counter indemnity from the contractor to ensure that the contractor will carry out and complete the contract under the conditions of that contract. The bond is 'called' if the contractor does not perform.

Retention money: A deduction from each interim certificate of payment. Usually 5 per cent of the contract. Half is given back at practical completion and half at the end of the rectification period.

Liquidated and Ascertained damages (LADs): An assessed predetermined sum of money calculated prior to tender issue which is to be paid by the contractor if he fails to complete the works in the period of time required. It is based on an assessment made by the client of loss due to non-use or non-trading on the site. It is written into the contract documents as a 'pre-estimate'. There is no need to prove an actual loss through the contract with LADs.

- *Liquidated*: failure to operate, i.e. bank loan amount or failure/loss of revenue.
- *Ascertained:* specific failure, i.e. 10 car parking spaces × amount per car. It is an exact amount.

Liquidated and ascertained damages can only be applied for with a Certificate of Non-completion. If the contract administrator fails to take off L&A damages, the client is entitled to do so. The Payless Notice Type 1 is used to take LAD monies off the payment certificate. The calculation should be the sum of three figures – an amount of the cost of administering the contract during the delay period, an amount for notional lost interest and any expected loss due to late completion. (NB Practice Note 8 provides an example calculation.) With maintenance contracts L&A damages are predetermined and calculated before tender and enforcement. To apply liquidated damages the contractor has to fail to do something by a specific time (deadline, time and breach). There will be a schedule of liquidated damages by area or feature.

Set off: This is the refusal by the employer to pay the contractor's claim for payment on the grounds that the employer has a cross-claim that could reduce or extinguish what is owed in payment.

Dispute resolution

Disputes can occur for many reasons including the following:

- *Money claims*: measurement, outright non-payment, a variation to an account, or attempted set-off applications.
- *Delay and disruption*: if the client prevents the contractor from carrying out the works efficiently, resulting in possible unproductive labour costs, wasted materials and site supervision and disruption costs.
- *Extension of time*: claims can be complicated and may lead to disputes in relation to time and money.
- *Specific performance*: e.g. whereby the contractor has failed to carry out an instruction or to carry out a specific aspect of the contract works.
- *Defects*: what constitutes a defect can lead to financial or specific performance claims.

The majority of disputes are resolved by dialogue and negotiation. In order to establish the existence of a dispute, it may be necessary to exchange information

or hold meetings with the contracting parties; that process itself could lead to a settlement. If this does not occur the following are methods of dispute resolution:

Conciliation

An impartial, independent conciliator is involved to precipitate an agreement by persuasion and suggestion.

Quasi-conciliation

A variation of the above. It comes about by one party appointing a professional to obtain a second opinion.

Mediation

A form of extended conciliation where the mediator will make recommendation to settle the dispute.

Private enquiry

Used for highly technical disputes where the issue to be resolved is sensitive. An independent professional is appointed. He produces a report. The parties then negotiate and a settlement is reached.

Mini-trial

This involves the presentation of cases by the parties to the dispute to a board consisting of senior executives/members of the two organisations, and the board makes the final decision.

Adjudication

Until recently, a party wishing to pursue a dispute beyond the contract administrator had two options:

- to go to arbitration;
- to begin court proceedings.

Under the Housing Grants, Construction and Regeneration Act 1996 a party to a construction contract has the right to refer to an independent third party through 'adjudication'. This is a relatively speedy and inexpensive procedure and results in a decision binding on both parties. In order to satisfy the Act, all major contracts were revised to:

- Enable a party to give notice at any time of the intention to refer a dispute to adjudication.
- Provide a timetable to appoint the adjudicator and refer the dispute within seven days of notice.

- Require the adjudicator to reach a decision within 28 days.
- Impose a duty on the adjudicator to act impartially.
- Enable the adjudicator to take initiative in ascertaining facts.
- Provide that the adjudicator's decision is binding unless and until the dispute is determined by legal proceedings, arbitration or agreement.
- Provide that the adjudicator is not liable for anything done or omitted.

Adjudication process

- The party seeking adjudication serves written notice on every other party to the contract.
- A copy of the notice is sent to the named adjudicator in the contract or an adjudicator nomination service.
- No longer than seven days after the adjudicator is appointed, the referring party services a notice on the adjudicator (copies sent to all parties).
- The adjudicator can demand documents from all parties.
- Adjudication is binding unless and until the dispute goes on to arbitration or litigation.

Arbitration

Arbitration can only arise when certain conditions are met:

- There is a genuine dispute or difference between parties.
- A binding contractual agreement must exist.
- A reference to arbitration must exist in the conditions of contract.

An arbiter is empowered to decide only those disputes which are specifically referred, and those that fall within the scope of the arbitration agreement; other disputes will go to litigation.

Arbitration process (Arbitration Act 1996)

Parties to the contract must agree to use the arbitration procedure. There are three different procedures:

- Rule 9 – Construction Industry Model Arbitration Rules 1998.
- Rule 8 – the arbiter makes a decision on the basis of written statements, documents, letters, site minutes, expert reports and a site inspection; appropriate if 'oral' evidence is not required.
- Rule 7 – the 'short hearing'; disputes are settled primarily by the arbiter inspecting work or materials and a possible 'hearing'.

Litigation

Any dispute arising between the parties to a contract may be settled by an action in court. In practice, building and civil engineering cases of any appreciable size are tried in the Technology and Construction Court (a specialist subdivision of the Queen's Bench Division of the High Court).

An important difference between arbitration and litigation is that parties whose dispute is heard in court may be able to invoke two very powerful remedies, not readily available at arbitration:

- In clear-cut cases, the power to obtain 'summary judgment'. The claim can be decided once and for all on the basis of affidavit evidence (i.e. written statements on oath). This avoids the expense and delay of a full-scale trial and can save 80 per cent costs and two years of waiting.
- 'Interim payment' may be claimed by the claimant.

Advantages of arbitration as opposed to litigation:

- Cost.
- Speed.
- Technical complexity.
- Convenience.
- Privacy.
- Commercial expedience.

Advantages of litigation:

- When third parties are involved.
- Legal aid.
- Legal complexity (if the dispute is a point of law).
- Decisiveness (arbiters may 'split the difference' whereas in litigation the side is likely to be awarded 100 per cent).

Termination and suspension

Suspension

The contractor can suspend the works after seven days if the employer fails to pay the contractor the required amount within the specified time for payment and within the subsequent seven days from a written notice by the contractor.

Termination

Default by contractor

If the works are suspended by the contractor for no reason, if he fails to proceed regularly or diligently, or fails to comply with CDM Regulations, the contract

administrator may give the contractor notice specifying the default. If the default continues for seven days from receipt of the notice the client may send a further notice to the contractor to terminate the contractor's employment.

Insolvency of the contractor

If the contractor is insolvent, the client may at any time by notice to the contractor terminate the contractor's employment.

Corruption

If the contractor has committed an offence under the Prevention of Corruption Acts 1889 and 1916 the employer is entitled to give notice of termination of the contract.

Consequence of termination

The client may then employ and pay other persons to carry out and complete the works. The contract administrator will inform the client as to what monies are due to the contractor and what is owed to the employer as a direct loss because of the termination, i.e. consultant's fees, retendering etc.; if necessary the contractor will pay the employer the monies due.

Default by the client

If the client does not pay by the final date for payment the full amount owed to the contractor (including VAT), interferes with or obstructs the issue of any certificate, or fails to comply with CDM Regulations, the contractor may give notice to the employer specifying the default.

If the works are suspended due to an instruction for longer than one month, or if something occurs due to the employer or contract administrator being negligent, the contractor can give notice to the client. If the specified fault or suspension continues for seven days from receipt of the notice the contractor may within ten days from the expiry of that notice, by further notice, terminate the contractor's employment.

Insolvency of the client

If the employer is insolvent the contractor may by notice to the employer terminate the contractor's employment.

Termination by either party

If the works are suspended for one month or more due to force majeure, CA's instructions, loss or damage by specified perils, civil commotion or terrorism, or

an exercise of the UK Government's statutory powers which affects the works, either party may upon the expiry of the period of suspension give notice to the other that, unless the suspension ceases within seven days after receipt of the notice, the contractor's employment is terminated.

Consequence of termination by either party or the contractor

The contractor prepares an account setting out the total value of the work executed and materials on site, costs of removing site equipment, and direct loss/damage caused by the termination.

The client should then pay the contractor the amount due within 28 days of its submission by the contractor.

In situations where you have to deal with delays and disputes, the contract administrator should:

- Keep the client informed; you must act on their agreement.
- Assess any financial implications of any decision made. Set out especially in a dispute to act with balanced judgement and act reasonably.
- Act quickly (discuss the matter with colleagues).
- Not hesitate to bring in outside advice or expertise.
- Keep the fullest possible documentation of your contract. The clarity and precision of the documentation before going to tender is important as well as that during implementation.

SCENARIO QUESTION

You are a landscape architect working for a small company in the UK. You have been involved in a small project in the south of the country which involves landscape proposals for a housing estate, including hard and soft landscape and SUDs features.

It is a week before your summer holidays and you are winding down, dreaming of sun-drenched beaches and surf, when your boss reminds you that tenders are due out for the project at the end of the week.

You have agreed the form of contract with your client and you have prepared the tender documentation working with a consultant quantity surveyor. The project will be tendered competitively through single-stage selective tendering.

Summarise the situation, then make assumptions to enable you to answer the following questions:

- South of England.
- You will be acting as contract administrator.
- Hard and soft landscape.
- SUDs features.
- QS employed.
- Agreed form of contract – assume JCLI?
- Tendering – single-stage selective.

What are the tender documents?

- Technical information – drawings, specification and bills of quantities/ schedules.
- Form of contract.
- Invitation to tender.
- Certificate of non-collusive tendering.
- Location plan.
- Return tender envelope.
- Any other information.

How did you select the right form of contract for the client?

- Size of contract.
- Type of work.
- Hard and soft landscape.

How do you proceed to find a suitable tender for the project?

- Shortlist (presume that the shortlist has already been drawn up and a preliminary enquiry sent out due to timing).
- Invitation to tender.

Following a wonderfully relaxing holiday, you return to work to find a note on your desk drawing your attention to the fact that one of the tenderers phoned to say there was a discrepancy between the drawings and the bill of quantities. Tenders are not due back for another week. You immediately phone the QS.

What would your discussion entail?

- What is the discrepancy?
- How will it affect the tenderers' prices?
- Will you or the QS contact tenderers to let them know which is the right document to use?

- Do the documents need to be reissued?
- If necessary provide an extension to the tender period.

You receive tenders back, the tender report is submitted to the client and the client has approved the final tender figure. You need to arrange a pre-start meeting but the client cannot attend on the day you had arranged.

What would you do and why?

Rearrange and make sure he/she can attend as it's essential to establish ground rules and communications.

How would you cover quality control, information sharing, timely delivery of work and adherence to programme and budget at the pre-start meeting?

Refer to agenda for the meeting:

- Cover clerk of works role – adherence to specification.
- Agree testing and inspections, e.g. soil testing, nursery visits, labelling of plant material, sample panels.
- Arrange regular progress meetings.
- Approval of programme.
- Emphasise penalties for non-adherence to programme.
- Agree information sharing.
- Cover QS role; QS to agree price for variations in advance of instructing.
- No dayworks unless absolutely necessary.
- Regular measurements and valuations – timing to be agreed with client.
- Cost reports.

Following a satisfactory meeting and a day spent writing up the lengthy minutes, the contractor contacts you to say heavy rain has prevented commencement of works on site, therefore he wants an extension of time/ adjustment of the completion date.

Is he entitled to one?

Appraise the situation:

- Location – south of England.
- Time of year – Summer/early Autumn.
- Is it inclement weather?

- What should he have done at this stage of his programme? (Just had pre-start meeting – it is unlikely to have affected his works on site.)
- Has it prevented him carrying out his work? Can he catch up – critical path and implications on future programme.

Given the facts – make a fair decision:

- In this case – No.

A month later at the regular progress meeting, the contractor reports that the client has asked him to provide a cost for a 'natural play area' as they have received extra funding for the project. You are aware that this has not been designed or included in the contract.

What would be your course of action?

- Speak to the client.
- Ask the client to deal directly with yourself as the CA and 'agent' to the client.
- Agree what is required for the play area – establish a brief, budget, programme etc.
- Agree a fee with the client if you haven't already done so.
- Prepare drawings and specification.
- Establish costs (using existing rates or negotiate fair and reasonable rates).
- Ensure client approval to the extra cost.
- Instruct as a variation to the contract.

Having issued the necessary instruction and drawings to the contractor, he tells you that he was delayed because the redesign affected ground excavations and soiling works in that area of the site and he had to tell his subcontractor to leave the site whilst awaiting instruction.

Is the contractor entitled to an extension of time/adjustment of the completion date?

Appraise the situation:

- How long was the delay due to lack of instruction?
- Could the subcontractor have worked elsewhere?

If you believe he is entitled, assess the cost and time implications and let all parties know that he has been awarded an extension of time.

A fortnight later the clerk of works telephones you to say that topsoil delivered to site that morning looked to him more like hardcore or at least subsoil and he told the contractor to take it away again. The contractor's reply was unrepeatable and the clerk of works asks if you can come to site straight away as all work has come to a halt. You can't get to the site until the next day but when you arrive you find that the topsoil looks just adequate.

What do you tell the contractor to do?

- At the pre-start meeting you discussed notice to be given for issues on site (you cannot drop everything to be on site straight away – usually agree 24 hours unless a real emergency) and topsoil samples/testing.
- Topsoil sample – check against soil on site.
- Clerk of works has no jurisdiction within the contract – CA can overrule the clerk of works.
- Tell the contractor to spread the topsoil and ensure cultivations comply with the specification.

Following the incident with the topsoil, you are feeling pretty confident that the contract will now go smoothly. The client phones to let you know that he will be paying the contractor next week. You haven't issued a certificate of payment and find that the contractor has invoiced the client directly.

Is this right?

No.

What is the normal contractual procedure for payment to the contractor?

- Site measurement (measured works and materials on site).
- Valuation (agreed with QS).
- Certification.
- Client payment to contractor.

Y*ou *eventually sort out the payment issues and you are told by the contractor that the site is almost complete. You check the site with the clerk of works and the contractor. The clerk of works says that the new avenue of limes looks dead to him, but the contractor says that they are fine and demands a certificate of practical completion otherwise he is terminating the contract! The lime trees are dead.

Is he entitled to a certificate and can he terminate the contract?

No.

What do you do?

- Agree what are the defective items.
- Are the lime trees a substantial part of the works? If not add them to the defects.
- Write a list of defects and circulate to all parties.

The practical completion certificate is issued. The contractor is to maintain the soft landscape for one year.

What do you request from the contractor?

- Maintenance schedule and programme.
- Date for when he is replacing the lime trees.

Upon completion of the 12 months maintenance period (which is also the end of the rectification period), further certificates are required to be issued.

What are they?

- A certificate of making good defects.
- A final payment certificate.

CONTRACT ADMINISTRATION: TOP 10 QUESTIONS

1 What are liquidated damages?
2 Describe when you would need a variation to a contract.
3 What would you recommend at practical completion to your client regarding maintenance?
4 How do you calculate progress payments?
5 What would you discuss at a pre-start meeting?
6 What is retention and is it always 5 per cent?
7 What is the difference between the defects rectification period and the maintenance period?
8 Describe practical completion and its implications.
9 What reasons can be given for determining a contract?
10 What role does the clerk of works have on site?

Index