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# Covid-19, viability and planning: S.106 and CIL

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FTB Planning Webinar  
July 2020

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## Adapting s.106 obligations

- **S.106BA-BC (applications and appeals re modification or discharge of affordable housing requirements): lapsed** since 2016; Business and Planning Bill does not resuscitate
- **S.106A(1)(a) - modification by agreement:**
  - At any time
  - No appeal (judicial review only)

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## Guidance: *Coronavirus (COVID-19): CIL guidance*

Where the delivery of a planning obligation, such as a financial contribution, is triggered during this period, **local authorities are encouraged to consider whether it would be appropriate to allow the developer to defer delivery.**

Deferral periods could be time-limited, or linked to the government's wider legislative approach and the lifting of CIL easements (although in this case we would encourage the use of a back-stop date). Deeds of variation can be used to agree these changes. **Local authorities should take a pragmatic and proportionate approach to the enforcement of section 106 planning obligations during this period.** This should help remove barriers for developers and minimise the stalling of sites.

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- **S.106A(1)(b): application for modification / discharge:**
  - Only after 5 years
  - Test for modification / discharge is whether obligation *"no longer serves a useful purpose"*
  - Right of appeal to SoS

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- **S.106A(1)(b) cont**

- **Onerous test:** even though obligation may render development unviable, difficult to argue financial contribution serves no useful purpose?
- **Mansfield DC v SSHCLG [2018] EWHC 1794:** ‘no useful purpose’ wider than ‘no planning purpose’
- **TCP (Modification and Discharge of Planning Obligations) Regulations 1992:** procedural

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## **New s.106s**

- **PPG Viability:** viability assessment principally for plan-making, but in decision-making circumstances may justify further assessment incl: “*where recession or similar significant economic changes have occurred since the plan was brought into force*” (10-007)
- **Incorporate review mechanisms** (10-009)
- **Reg.10A TCP (Local Planning) (England) Regs 2012 requirement for plan review every 5 years:** such circumstances may be relevant? If not done, relevant to policy weight?

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## New permissions

- **S.70**
  - Fresh application for planning permission
  - Renegotiate s.106 or redesign development to make it more valuable?
- **s.73**
  - Development without compliance with conditions previously attached (e.g. AH condition; or other condition preventing development before costly infrastructure provided)

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## CIL: existing flexibilities

- **Coronavirus CIL guidance encourages charging authorities:**
  - To introduce instalment policy (or amend existing policy)
  - To use discretion re enforcement action (e.g. CIL stop notice)
  - To take 'positive approach' to engagement with developers

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## CIL: new Regs

- CIL (Coronavirus) (Amendment) (England) Regs 2020
- Not yet in force, but in draft
- To deal with issue of mandatory interest charges for late payment of CIL



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## • Procedure for deferral of CIL payment

- Turnover not exceeding £45m
- Served with demand notice
- “Experiencing financial difficulties for reasons connected to the effects of coronavirus resulting in difficulty paying that amount”



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- Charging authority must grant deferral request if it considers appropriate in the circumstances
- For no more than six months
- Further request for period up to 31 July 2021
- **Guidance:**
  - On evidence required, incl as to turnover (accounts etc)
  - Gov't expects authorities to take 'positive' approach

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- **Credit for late payment interest:** if deferral request granted, interest accrued can be credited
- **Surcharge (which discretionary in any event):** cannot be imposed while authority considering a deferral request

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# **ftb Planning Law Seminar**

**6 July 2020**

**PLANNING, COVID-19 AND VIABILITY**

**Mark Westmoreland Smith and  
Hugh Flanagan**

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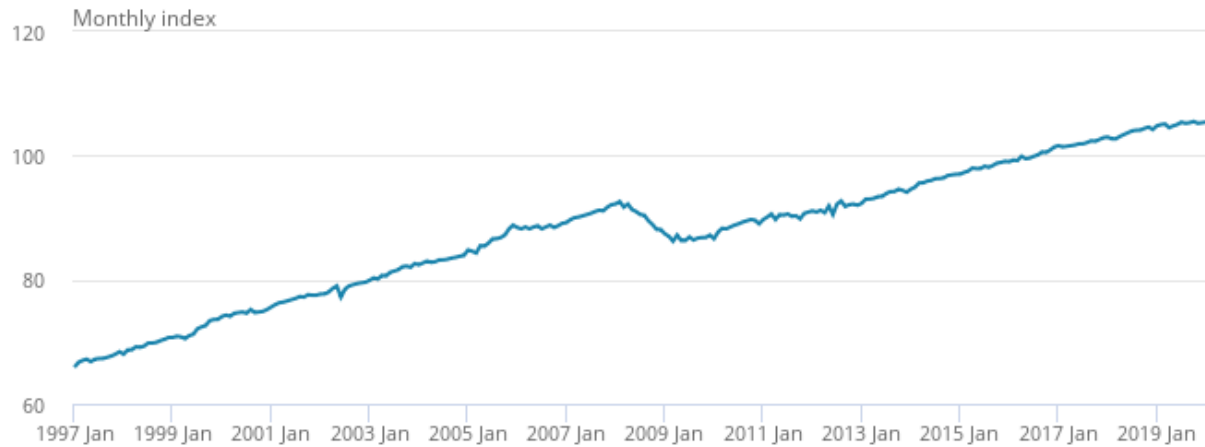
# Introduction – COVID-19, Housing delivery and HLS

- Economic impacts
- Impacts on house prices and transactions
- Impacts on construction of housing
- Immediate impacts on planning decision making
- Impacts on housing land supply; the housing delivery test; and the titled balance
- Way forward



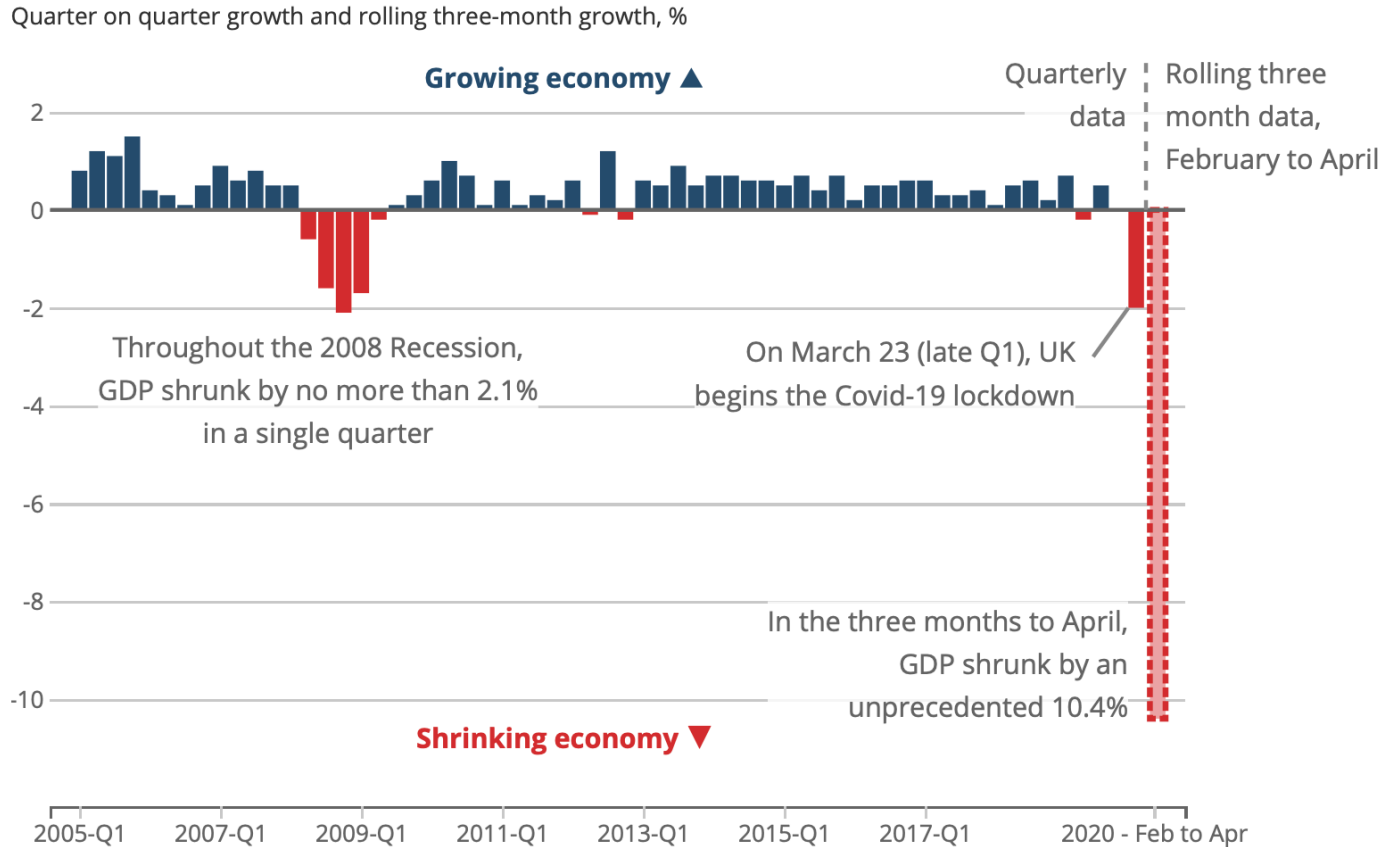
Figure 3: GDP fell by 20.4% in April 2020, following a fall of 5.8% in March 2020

Monthly index, January 1997 until April 2020



Source: Office for National Statistics – GDP monthly estimate



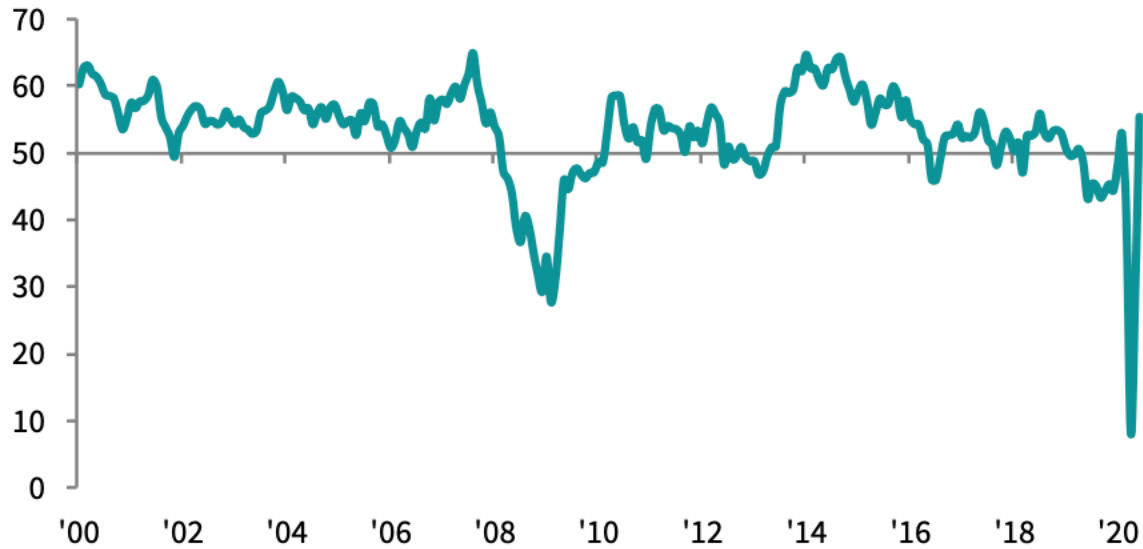


**Source: Office for National Statistics**

# IHS MARKIT / CIPS UK Construction PMI

## Total Activity Index

sa, >50 = growth since previous month



Source: IHS Markit / CIPS.

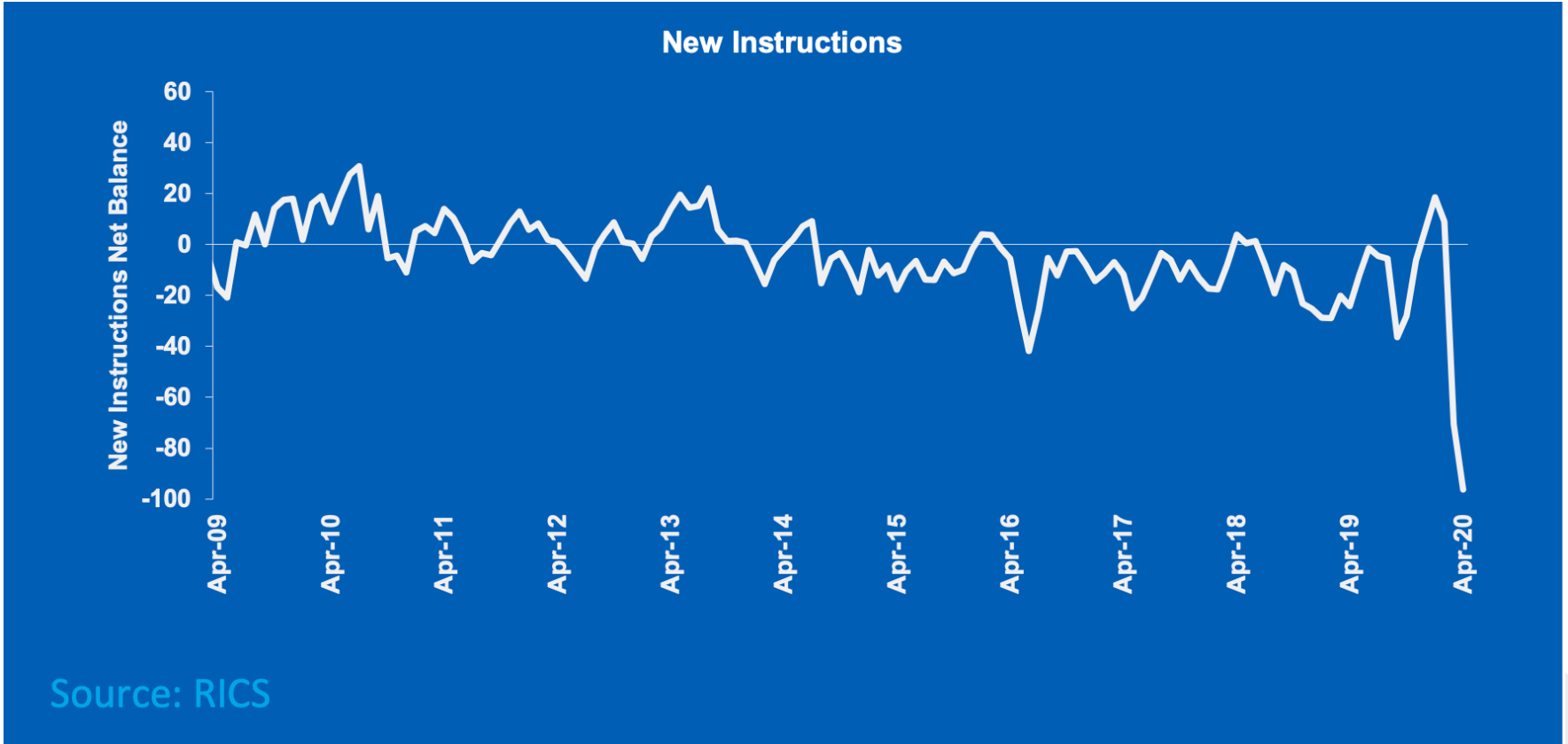


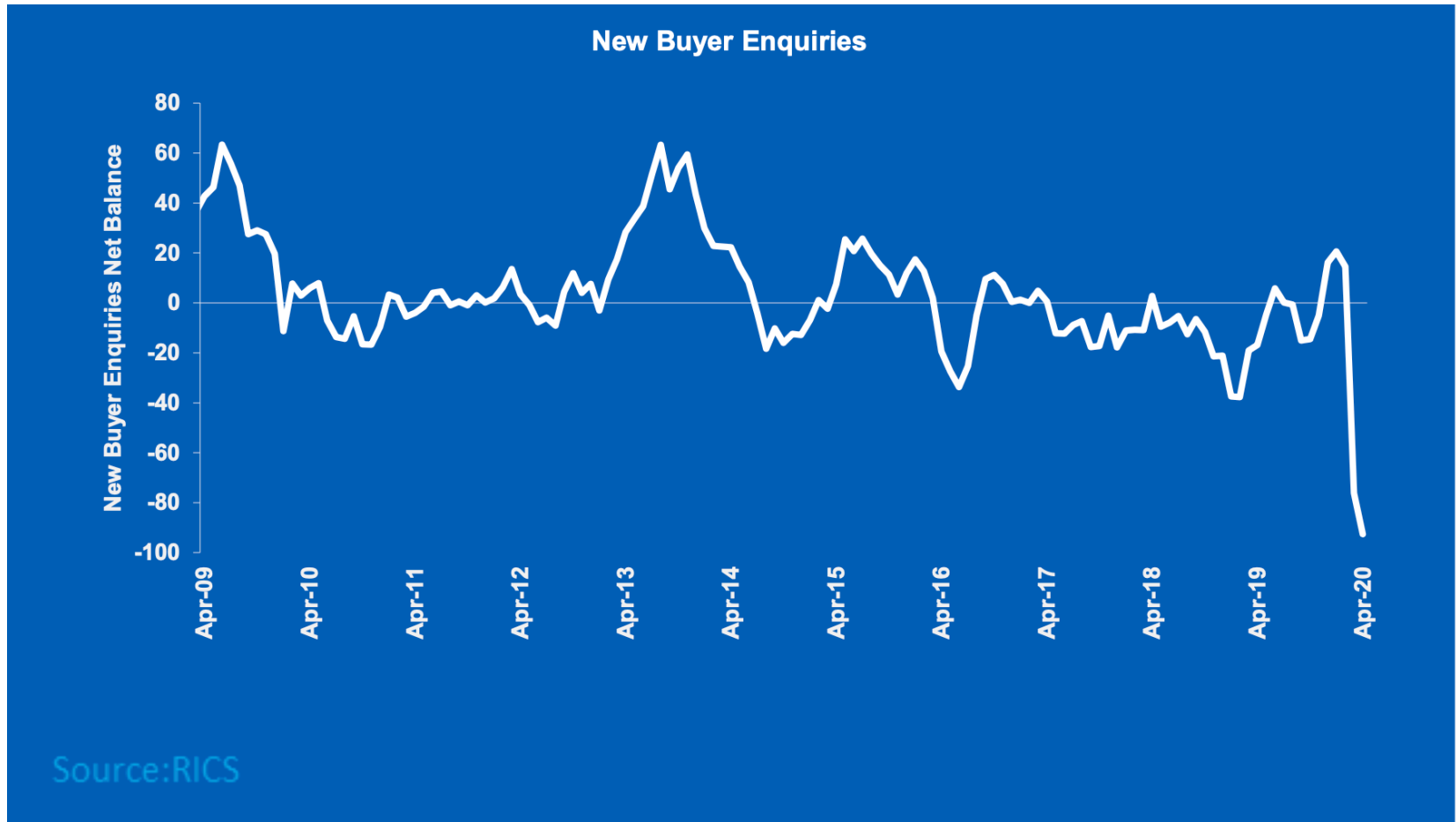


# House prices – Nationwide – June 2020

Headlines	Jun-20	May-20
Monthly Index	428.3	434.6
Monthly Change	-1.4%	-1.7%
Annual Change	-0.1%	1.8%
Average Price	£216,403	£218,902









# Impact on construction

**Table 1** Regional impact of construction shutdown

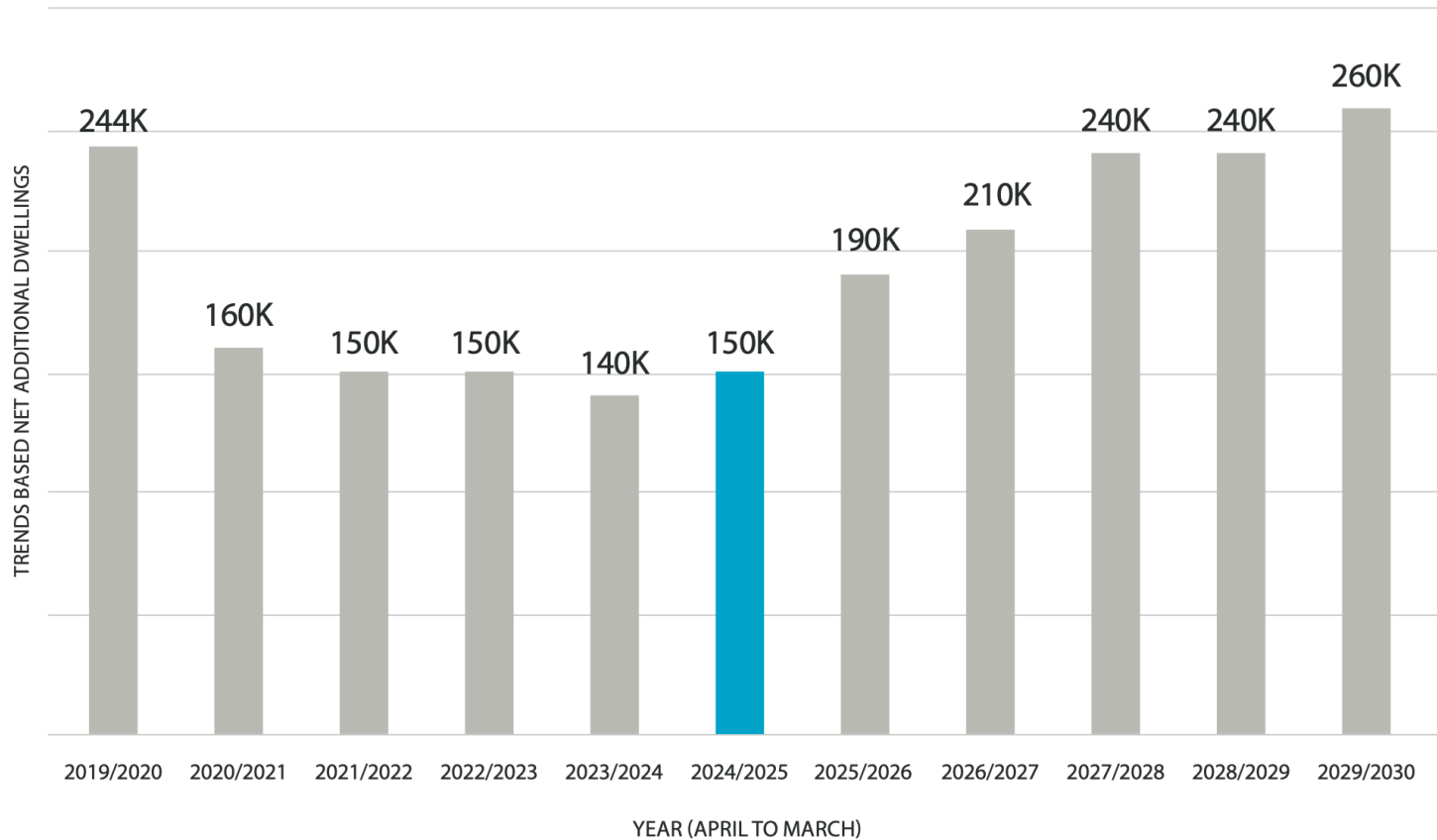
Region	Number of units on which construction is halted	2018/19 Net Additional Dwellings
London	28,598	36,161
South East	36,165	41,570
East of England	28,739	29,834
South West	15,976	26,395
East Midlands	16,026	22,326
West Midlands	21,504	24,940
Yorkshire and Humber	13,803	20,124
North West	22,767	29,945
North East	10,391	10,040
Scotland	18,992	21,292
Wales	8,558	5,777

Source Savills Research using MHCLG, Glenigan





# Barton Wilmore projection



# Impact on decisions - PINS and COVID-19

The Planning Inspectorate, change in the number of open cases, by week, numbers  
1 November 2019 – 24 April 2020



Source: Horizon and Picaso

## HLS, HDT – the context

- NPPF, paragraph 11 d): where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date<sup>7</sup>, granting permission unless:
  - (i) the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or
  - (ii) any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.
- Footnote 7: this includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73); or where the Housing Delivery Test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous three years. Transitional arrangements for the Housing Delivery Test are set out in Annex 1.

## HLS, HDT – the context (cont.)

- Deliverable: To be considered deliverable, sites for housing should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years. In particular:
  - b) where a site has outline planning permission for major development, has been allocated in a development plan, has a grant of permission in principle, or is identified on a brownfield register, it should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years.



# Effect on HLS

- Positive?
- Downside risks:
  - (1) Economy
  - (2) House prices
  - (3) Viability
  - (4) Land-banking
  - (5) Local plan delays
  - (6) Standard Methodology
  - (7) Deliverability



# Inspector's decisions

- **Nine Mile Ride (Ref.: APP/X0360/W/19/3238048):**

*109. The Covid-19 pandemic is likely to have implications for the housebuilding industry as with other sectors of the economy. The evidence indicates that a number of developers are temporarily closing their construction sites to protect employee and customer welfare. For those remaining open, the lockdown will impact on the availability of support services. Customer confidence is also likely to be reduced with a consequent effect on the buying and selling of property.*

*110. The Appellant has concluded that the effects would be felt for a 3 to 6 month period, which does not seem unreasonable. On that basis the conclusion is that a further 168 dwellings should be removed from the trajectory to take these factors into account. Whilst it is contended that this is an optimistic assessment, it is equally possible that a bounce back will occur once the crisis ends. Indeed, it is reasonable to surmise that housebuilders and their suppliers will be keen to rectify losses if it is possible to do so.*

*111. At this stage the economic effects of Covid-19 cannot be known. However, even if all of the impacts suggested by the Appellant are accepted, the Council would still be able to demonstrate about 5.2 years supply of deliverable sites*

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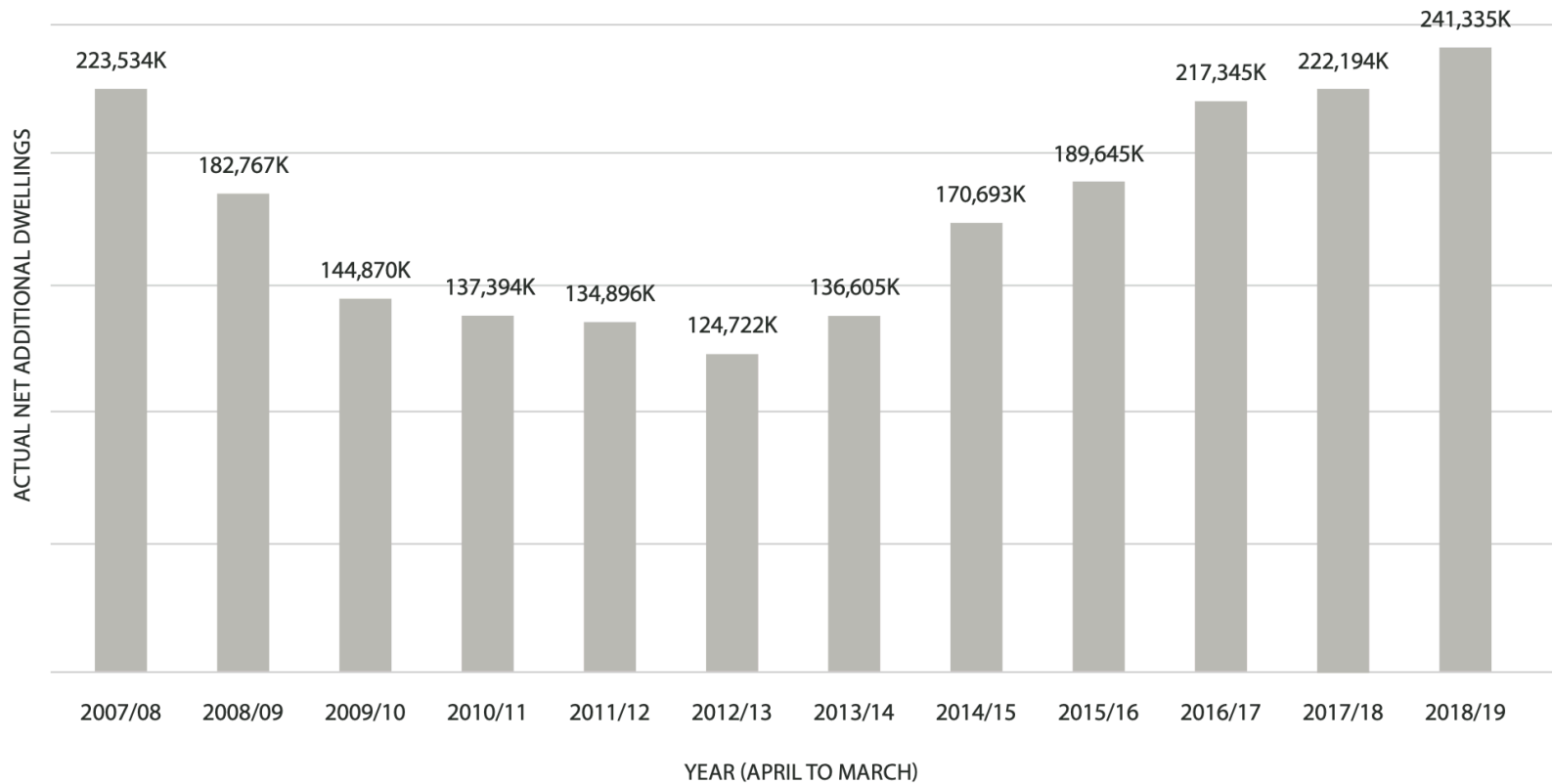
## Way forward?

- Responses have varied
- A discernible difference between LPAs and developers
- LPA understandably concerned about the undermining of the plan-led system
- Developers concerned to continue to be able to deliver housing on a viable basis and looking to market stimulus and benign planning policy environment





# Housing delivery following introduction of NPPF





# Way forward?

- Titled balance is an important tool
- Undoubtedly economic impacts of development likely to be given material weight by decision makers as those considerations were following the 2008 recession
- If policies of protection provide a clear reason then titled balance will not apply and so environment protections persist
- LPAs need to be proactive
- HDT Action Plans should be utilised as a tool to encourage delivery
  - Likely to affect decision makers approach to balancing exercise.





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