PLANNING BULLETIN

FEBRUARY 2016

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INTRODUCTION

As ever, there are significant changes afoot in the field of planning. The last year has seen the consolidation and amendments of the permitted development rights and the management procedure regimes. The Conservative government published its paper "Fixing the Foundations: Creating a more prosperous nation" last summer and the Housing and Planning Bill followed in the autumn. This bill is now progressing in Parliament and will make some fundamental changes to the planning system.

2015 also saw changes to the national infrastructure regime and more changes are in the pipeline. The new National Infrastructure Commission has now been created and its role will be viewed with interest. The government has recently issued its consultation document on the role of the National Infrastructure Commission. This year will also see the first set of changes to the National Planning Policy Framework since its publication in March 2012.

With an increasing focus on growth and housing delivery and the government's potential interventionist role in local plan making, 2016 offers plenty of opportunities and challenges for local planning authorities and developers alike. In this bulletin, we analyse some of these, as well as other updates, including on relevant cases.

THE HOUSING AND PLANNING BILL

This bill is at an advanced stage and is currently at the House of Lords for second reading. As the name implies, it covers matters of importance in both housing and planning terms.

Starter homes

The explanatory note to the Bill[1] refers to the drop in home ownership over recent years. It cites the government's manifesto commitment to "build more homes that people can afford, including 200,000 starter homes exclusively for first-time buyers under 40". English planning authorities will have a duty to carry out relevant planning functions (including development control under the 1990 Act and local development under the Planning and Compulsory Purchase Act 2004) with a view to promoting the supply of starter homes in England.
A **starter home** has various characteristics and will cover a new dwelling which is available for purchase[2] by qualifying first-time buyers only[3].
It is to be sold at a discount of at least 20% of the market value; and for less than the price cap[4] subject to any sale or letting restrictions set in regulations.
Regulations may provide that the planning authority may only grant planning permission for a residential development of a specified description if the starter home requirement is met.
This may provide that planning permission should only be granted subject to a planning obligation to provide a certain number of starter homes or make a payment to be used by the planning authority for providing starter homes.

Local planning

The bill will give the Secretary of State and the Mayor of London greater powers to intervene in the plan-making process. This will be by a series of further amendments to the Planning and Compulsory Purchase Act 2004. There will be further powers of direction for local development schemes, so as also to cover their subject matter. This will allow directions to examiners to suspend the examination, consider specified matters, hear from specified persons and take other specified procedural steps. The Secretary of State will be able to give a holding direction not to take any step to adopt a development plan document while he considers whether to issue a full direction (requiring the authority to modify a local development document which is unsatisfactory).
The default powers also apply if the Secretary of State thinks that a local planning authority is failing or omitting to do anything necessary to prepare, revise or adopt a development plan document.
The Secretary of State may prepare or revise the development plan document or direct the local planning authority to do so and to submit it for examination.
Other default powers enable the Secretary of State to invite the Mayor of London or a combined authority to prepare a development plan document where the Secretary of State thinks that (as applicable) a London Borough Council or a constituent authority of a combined authority is failing to do what is necessary to prepare, revise or adopt a development plan document .
The Mayor or combined authority may approve the development plan document or direct the local planning authority to consider adopting it.

Planning permission in principle

The bill will add new sections to the 1990 Act to allow planning permission in principle to be given. This will be via a development order and may be made in one of two ways:

(a) on adoption of a qualifying document; or

(b) on application to the local planning authority.

The explanatory note states that category (a) will apply to housing-led development on sites allocated through documents such as development plan documents, neighbourhood plans and

[1] These notes accompany the version of the bill brought to the House of Lords from the House of Commons on 13 January 2016. See http://www.publications.parliament.uk/pa/bills/lbill/2015-2016/0087/en/16087en.pdf

[2] a freehold or leasehold interest

[3] under 40 and with characteristics specified in the Regulations.

[4] £450,000 in Greater London and £250,000 outside Greater London.

the brownfield register[5]. It includes a plan, register or other document made, maintained or adopted by a local planning authority of a prescribed description. It will come into effect when the qualifying document is adopted or made by the local planning authority or (if later) is revised so as to allocate the land in question for development. The explanatory note indicates that category (b) is likely to be limited to minor development and that the DMPO 2015 will be amended to set out the process. The local planning authority will only be able to grant or refuse permission in principle. There is no provision to allow a grant subject to conditions.

The grant of planning permission in principle will be followed by an application for technical details consent, which the local planning authority must determine in accordance with the relevant permission in principle. This may be refused if the proposed detail is not acceptable or may be granted with or without conditions.

During the recent debate in the House of Lords, the government stated that the proposals for planning in principle would be locally driven. The opposition pointed to the need for adequate resources to be provided to planning authorities.

Planning obligations

Section 106 of the 1990 Act will be amended to include a dispute resolution mechanism. This is available if section 106 negotiations are apparently causing delays. The Secretary of State will also have the power to make regulations relating to the appointment of the person dealing with the dispute resolution. This may include payment of fees. The appointed person will prepare a report setting out the unresolved issues and what steps should be taken to resolve them. They must take account of any template or model terms published by the Secretary of State. If obligations are entered into in line with the report, the local planning authority cannot refuse planning permission for reasons relating to the appropriateness of the planning obligations. If no obligations are entered into, the application must be refused.The Secretary of State will be able to introduce regulations imposing restrictions on the enforceability of planning obligations on affordable housing or prescribed descriptions of affordable housing. Here **affordable housing** means new dwellings in England that:

(a) are to be made available for people whose needs are not adequately served by the commercial housing market; or

(b) are starter homes (regulations may allow the Secretary of State to modify this definition.

Compulsory Purchase Orders

Part 7 of the bill provides for changes to the compulsory purchase regime. This provides new general power, available to all acquiring authorities, to enter and survey or value land in connection with a proposal to acquire an interest in or a right over land. Currently only some acquiring authorities (e.g. local authorities, Urban Development Corporations and the HCA) have such a power. The Secretary of State will have to publish one or more timetables in relation to the steps to be taken by confirming authorities (other than Welsh Ministers) in confirming a CPO. A confirming authority may appoint an inspector to act instead of it in relation to the confirmation of a CPO.

There is clarification of the time limits for service of a notice to treat and the execution of a general vesting declaration. Notices to treat are to be served and general vesting declarations are to be executed within 3 years of the CPO becoming operative. There is a change to the procedure to be undertaken to obtain a general vesting declaration; in that a preliminary notice of intention to vest is no longer required but instead a prescribed statement should be included in the confirmation notice relating to the CPO.

The time period before taking possession under the notice to treat / entry procedure is to be extended from 14 days to 3 months (subject to certain exceptions). A new provision will enable a person on whom a notice of entry has been served and whom is in possession of such land, to serve a counter-notice requiring possession to be taken on a specified date. Regulations may define how claimants must make their compensation bids. There are changes to the advance payments system and an extension of the time period allowed to implement a CPO where a high court challenge has been made to that CPO pursuant to section 23 of the Acquisition of Land Act 1981. Finally, there is a new power extending the power to override easements and other rights to acquiring authorities

[5] This is set out in proposed clause 137. For purposes of brevity, we are not analysing this in detail in this Bulletin

NATIONAL INFRASTUCTURE COMMISSION (and consultation paper)

In October last year, George Osborne launched the National Infrastructure Commission (NIC). On 7 January 2016, the government issued a consultation document seeking views on the proposed structure, governance and operation of the National Infrastructure Commission.

It is proposed that the National Infrastructure Commission will be a non-departmental public body (NDPB) created by primary legislation, which would be answerable to the Treasury with a chair and commissioners appointed for five-year terms, renewable once, by the Chancellor. It will be responsible for its own recruitment and will be funded by a grant in aid from the government. Lord Adonis has been appointed as chair and the CEO will be Philip Graham from the Department for Transport.

The purpose of the National Infrastructure Commission is to assess the UK's infrastructure needs and it is to take a long term view as to what those needs are over a 10-30 year period. It will be independent of government so it will be able to tackle potentially controversial issues. Its remit will cover the same sectors as the Planning Act 2008 namely energy, transport, water and waste but in addition, it will cover flood defences and digital communications. However, the commission will not reconsider existing processes.

It will be informed as to what assumptions it should make regarding existing infrastructure spending and will be provided with guidance on the government's proposed infrastructure spend on items such as transport and flood defences going forward so as to prevent an undue burden being placed on taxpayers by its conclusions. By working with regulators in sectors within its remit, it will also be able to protect consumer bills from unaffordable increases.

The National Infrastructure Commission will be expected to produce long-term needs assessments (National Infrastructure Assessment (NIA) and detailed reports on specific issues.

The NIA will be submitted once per Parliament. It will set out the commission's conclusions and propose solutions to the most pressing infrastructure issues. The reports will be a series of priority infrastructure studies. Recommendations from these could be regulatory as well as infrastructure-related.

The government won't have to do what the National Infrastructure Commission recommends, but it will have to say either how else it will meet the identified needs, or how it thinks the assessment is wrong. If the recommendations of a priority infrastructure study are endorsed by the government, they will become government policy as 'Endorsed Recommendations.' It is further proposed that National Policy Statements will be revised in response to the commission's recommendations if they are endorsed by the government.

It is proposed that the National Infrastructure Commission will just cover UK government areas, but can be invited by devolved administrations to work on their areas too, in which case it would be up to them to accept or reject any recommendations.

The consultation will end on 17 March 2016.

NATIONAL PLANNING POLICY FRAMEWORK CONSULTATION

The Government has just finished consulting on the proposed changes to the National Planning Policy Framework (NPPF). The implications of some of these proposals are significant and have been argued by some developers to have the potential to slow down delivery in the short-term.

Of most significance is the broadening of the definition of affordable housing so that starter homes are included in the definition. The current proposals are that the definition could include 'discount market sales' and new models of rent-to-buy housing. Local authorities will also be expected, in both plan-making and in taking planning decisions, to require higher density development around commuter hubs wherever feasible. This policy change is in line with previous Government announcements in relation to commuter hubs. Similarly the Government is proposing to amend the NPPF to make it simpler for local planning authorities to plan for new settlements and for them to work with developers to identify new settlements subject to the sustainable developments objectives. Also consulted on is the proposed encouragement of development on brown-field and smaller sites. Substantial weight to the benefits of using brownfield land for housing is to be given again subject to conflicts with local plans or the NPPF. Developers and planning authorities will need to consider such sites as areas for development but should take into account infrastructure (and the resulting local employment opportunities) on those sites.

Separately a housing delivery test is being proposed which would compare the number of homes set out by a planning authority in its local plan against the net additions in housing supply in the local planning area. The government sought views on how this test would work. The consultation also proposes to support the delivery of starter homes on unviable and underused commercial and employment land, within mixed use commercial developments, in rural areas, and in land designated as Green Belt. Under these proposals the NPPF would explicitly state that unviable or underused employment land should be released unless there is significant and compelling evidence to justify why such land should be retained. Needs assessments and analysis of market demand would be requested. A release of brownfield land in the Green Belt is something that is also being given consideration by the Government.

The consultation finished on Monday 25 January 2016.

CASE UPDATE

This section has been co-written with Phillip Patterson of 4-5 Gray's Inn Square: ppatterson@4-5.co.uk

Dartford Borough Council v Secretary of State for Communities and Local Government & Local Government & ORS (2016) (unreported)

Sharpe Pritchard acted for the local planning authority in this case, where the Administrative Court considered whether to quash a decision of the Secretary of State to allow a retrospective change of use of land to that of a private traveller site.

The inspector originally allowed the appeal, finding that there was a need for traveller sties in the borough, few alternative sites and the change of use did not impact on the purposes of the green belt. The land was found by the Inspector to be 'previously developed land' as defined in the NPPF and was not excluded from that definition as a 'private residential garden' in a built-up area.

The local authority argued that:

i the inspector made an error in finding the site's compliance with the core strategy policy allowed for the contribution to the justification of very special circumstances:

ii very special circumstances; the site fell into the exclusion of private residential gardens from the definition of 'previously developed land'; and

iii the reasoning regarding the 'previously developed land' decision was unclear.

The court found in favour of the Secretary of State on all three issues:

- The inspector gave good reasoning in stating he had found that a search for alternative sites would not find a more suitable location. Compliance with a policy could be part of the bundle of very special circumstances.
- The NPPF definition of 'previously developed land' did not exclude private residential gardens that were not in built-up areas. To do so would be to contradict the definition's clear words.

The decision to exclude the gardens was deemed by the court to be rational with the Court distinguishing the case of *Redhill Aerodrome V Secretary of State for Communities and Local Government [2014] EWCA Civ 1386.*(3) Finally the court found that there was no basis for finding that the inspector had assumed that the entire curtilage should be developed.

- The case serves as an excellent reminder of the types of considerations which can be taken into account when assessing 'very special circumstances' which justify the grant of planning permission for inappropriate development in the green belt.

Woodcock Holdings Ltd v Secretary of State for Communities and Local Government [2015] EWHC 1173 (Admin)

The outgoing Secretary of State for Communities and Local Government received a largely critical judgment in this case, last May.

The claimant sought outline planning permission from Mid-Sussex District Council to build 120 dwellings, community facilities, office space, a care home and retail units in Sayers Common, West Sussex. Permission was refused by the council and the claimant appealed to an inspector at a planning inquiry.

The Secretary of State wrote to the parties directing that he would decide the appeal due to what he considered to be important and novel issues of development control.
The inspector produced a report for the Secretary of State recommending that the claimant's appeal be allowed. Despite accepting the inspector's assessment of the merits of the proposal, the Secretary of State dismissed the appeal, finding that the proposal conflicted with and was premature in relation to the emerging Neighbourhood Plan (NP) for the area.

The Administrative Court found four separate reasons to quash the Secretary of State's (SoS) decision.

- The SoS gave too much weight to the fact that the proposal was in conflict with the scale of housing proposed in the draft NP and inadequate weight to the fact that the scale and density of the proposal were acceptable, the location was sustainable and the proposal overcame any infrastructure concerns.
- The SoS had failed to apply the presumption in favour of development, which did apply to housing supply policies in a draft development plan.
- The reasoning for departing from the inspector's recommendation on the grounds of prematurity was sparse and inadequate to justify such a departure.
- The SoS had paid insufficient attention to paragraph 216 of the NPPF which dealt with the weight to be given to an emerging plan.

Turner v Secretary of State for Communities and Local Government [2015] EWHC 375 (Admin)

Here, the Administrative Court considered two procedural questions of significance in the context of controversial or difficult planning applications.

Collins J held that the developer was not obliged to disclose to a planning inquiry a report which found that only 20% affordable housing at the site could be achieved without making the site economically non-viable. A group opposed to the development had argued that disclosure was required in order that the local authority's assessment could be checked or challenged. The court found that, in the event of a call-in, the planning officer's report can be produced but, subject to the developer's requirement to disclose sufficient to make out their case, no further disclosure is required of them.

The court was also asked to consider submissions that the inspector displayed an apparent bias. These submissions focused on different aspects of the inspector's conduct during the inquiry. Collins J gave the following assessment of the evidence relating to that conduct and the applicable test for bias in such a context:

> *"The fair minded and informed observer will be taken to know that the inspector will have been provided with and have read the documentation lodged by the parties. Inevitably, he will have formed some provisional views. Equally, he will try to ensure that parties keep to that which is relevant and so interventions designed to avoid irrelevancies are proper. The essential requirement is that whatever preliminary views he may have formed, he keeps an open mind and is prepared to be persuaded by the evidence produced if it shows his preliminary views are wrong. It is clear that in this case the inspector's conduct fell short of that which should have been displayed."*

In spite of this criticism, the court found that the conduct fell short of establishing apparent bias. This confirms that the test for apparent bias remains a very significant hurdle.

R (on the application of Luton BC v Central Bedfordshire Council [2015] EWCA Civ 537

In this case, the Court of Appeal gave a useful interpretation of paragraph 83 of the NPPF and the circumstances in which permission may be given for development in the green belt.

Central Bedfordshire Council granted outline planning permission for a major development on 262 hectares of open fieldsimmediately to the north of the Luton/ Dunstable/Houghton Regis conurbation, lying between the existing conurbation and a major road, the M1-A5 link road. Luton BC applied for judicial review of this decision.

Sales LJ made clear that paragraph 83 of the NPPF did not create a presumption or a requirement that the boundaries of the green belt had first to be altered via the process for changing a local plan before development might take place on the green belt area in question. The NPPF envisaged that development could be carried out on the green belt, provided "very special circumstances" existed.

The grant of planning permission in this case was, therefore, held to be lawful.

HOW WE CAN HELP

It is important to be well-informed on the constant changes to the world of planning. In this bulletin, we have drawn attention to a number of key areas. Both planning practitioners and local authorities will be keen to understand the effect of these changes and to ensure that planning remains a key to achieving sensible sustainable development. We hope that our commentaries and analysis will help to demystify much of the jargon.

We continue to act for clients on a broad range of matters, with an emphasis on complex Section 106 agreements, environmental law issues and their effects on major planning applications and on highways law. This has included important mixed use developments, sites in opportunity and growth areas and a number of important sports facilities, including an international cricket venue. We continue to work closely with solicitors in the firm dealing with other specialities particularly where large regeneration schemes are involved where advice is frequently required on development agreement and property related aspects. This includes compulsory purchase orders, procurement issues, state aid and company law, and judicial review claims. We also work closely with the firm's parliamentary agents, who in turn deal with significant schemes and developments.

We act for London councils, county councils, district councils and unitary authorities, housing associations and NHS trusts and a number of private clients. We also regularly attend planning committee as legal advisors.

We provide training, write articles on planning topics and prepare webcasts. This has covered planning law and updates, new developments, Community Infrastucture Levy and section 106 agreements and other topics. Our publications have appeared in Westlaw's online portal, Local Government Lawyer and Planning magazine.

We continue to be highly ranked in Planning magazine's list of top 50 planning solicitors (currently ranked 15th)[6]. Our planning department is ranked band 5 in Chambers UK 2015 and Brian Hurwitz is personally ranked. We are also ranked in the Legal 500.

[6] See Planning Magazine 27 March 2015

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