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Briefing note February 2016

Housing and Planning Bill – More detail on "Permission in Principle" and other reforms

The Department for Communities and Local Government (DCLG) has published a Consultation Paper setting out more detail on a number of aspects of its latest planning reforms. This briefing concentrates on the proposals for a new form of "Permission in Principle" before noting some developments relating to other proposed key reforms including plans for a dispute resolution mechanism for Section 106 Agreement negotiations.

The Consultation Paper[1] covers a number of aspects of the reforms contained in the Housing and Planning Bill which is currently progressing through the Parliamentary process. It also includes discussion of some additional planning reforms. The proposals relate to England only. DCLG seeks responses to the consultation by 15 April 2016.

Permission in Principle (PiP)

The Consultation Paper sets out some of the detailed elements of the new form of "Permission in Principle" that will be prescribed by Development Order.

What is Permission in Principle?

The Housing and Planning Bill includes a new route to obtaining planning permission for certain housing-led developments through a new "Permission in Principle" (PiP). PiP will establish the principle for development on a specific site. The Government intends for PiP to apply where a site is either designated by a local planning authority (LPA) on a new brownfield land register as suitable for housing, or where a site is allocated for housing in the local development plan or neighbourhood plan. In each case, the document must identify that the site has the benefit of PiP, meaning that existing plan designations for housing would not suffice.

An alternative and separate process would be established allowing applications to be made for PiP for small sites. Under this process, the maximum amount of development permitted would be fewer than 10 units, although the Government has now announced that it will consider extending this application process to major developments.

A PiP would not in itself be a planning permission; however, a subsequent Technical Details Consent (TDC) would need to be granted in accordance with the PiP. Granting of the TDC would constitute the grant of planning permission. At the TDC stage, the LPA could add conditions and negotiate a planning agreement, and Community Infrastructure Levy would apply.

[1] Technical consultation on implementation of planning changes – DCLG February 2016

The PiP and TDC route will be an alternative to obtaining planning permission through the usual town & country planning process.

The split between PiP and TDC

A key challenge for the Government is to determine the cut-off point between matters covered by PiP and those covered by the TDC. DCLG proposes three elements that would be covered within the PiP:

- Location – this would comprise a redline boundary and parameters of the site. It is not clear what DCLG means by "parameters"; is this a reference, e.g. to the scale or positioning of any buildings (see further below in relation to EIA)?
- Uses – PiP would be given for "housing-led" development. However, the uses could also include mixed retail, commercial and community uses where these are compatible with residential use.
- Amount of Residential Development – DCLG proposes specifying a minimum and maximum amount of residential development, either by number of units or by a dwellings-per-hectare measure.

The elements of PiP listed above would then govern any application for TDC on a site within the PiP boundary. An applicant wishing to carry out a development would apply for TDC, and the TDC would fix the following types of detail:

- Design, access, layout and landscaping;
- Infrastructure provision;
- Details of open space; and
- Affordable housing.

Two issues that have a bearing on the split between PiP and TDC are the requirements for Environmental Impact Assessment (EIA) (and/or Habitats Regulation Assessment) and community involvement.

EIA / Habitats Assessment

DCLG proposes that EIA would be covered at the PiP stage (potentially in conjunction with any required Strategic Environmental Assessment). A site would only benefit from PiP if either (i) the LPA determined (following screening) that EIA was not required; or (ii) carried out an EIA and ensured that PiP is only granted if measures needed to address significant effects are in place.

The implication in the Consultation Paper is that EIA would not be needed at the TDC stage. It is difficult to see how the requirements of the EIA Directive can be fully met by the PiP stage unless the Location / Amount of Residential Development element includes the parameters of scale (height, width and length of each building) that are currently required for outline applications. It is also difficult to see how the LPA can include such parameters in the absence of common views from developers on how a site can be developed. On relevant sites, it seems likely that some form of EIA is going to be necessary at the TDC stage to overcome this issue.

At this stage, DCLG has not attempted to make a proposal on how to deal with Habitats Assessment (for European Sites).

Community Involvement

DCLG proposes that community and interested party consultation would take place at the PiP stage. It does not propose to make consultation mandatory at the TDC stage, but to leave this to LPAs to determine. Depending on the approach chosen by the LPA, this could well cause tension with potential objectors who might not, for example, be able usefully to object to detailed design proposals in the TDC. Again, it is difficult to see how in EIA cases, this approach would satisfy the Aarhus Convention[2] on access to justice and related EU legislation.

[2] On Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

Duration of PiP and TDC

DCLG proposes different lengths of duration for PiP. The application for TDC must be made before the end of this period:

- For PiP contained in plan allocations or placement in the brownfield register: 5 years from the date of allocation in a relevant plan, or its placement on the brownfield register. Any proposed extension would need to be reviewed by the LPA.
- For PiP upon application: two options are floated, either (i) three years from grant (similarly to outline planning permission); or (ii) one year from grant, to encourage rapid TDC applications.

The development would then need to be commenced within three years of the grant of planning permission resulting from the TDC application.

DCLG proposes deadlines for determining relevant applications:

- 5 weeks for PiP applications and TDC applications for minor sites; and
- 10 weeks for TDC applications for major sites.

Information requirements

For PiP minor development applications, applicants would be required to submit a nationally prescribed application form, a plan and a fee.

Similarly, a TDC application would involve submission of a nationally prescribed application form, a plan and a fee. If a LPA wishes to seek further information, it will be limited to requesting the following further documents:

- A design statement (including layout, access and architectural detail); and
- An impact statement dealing with further required assessments, e.g. in relation to contamination, flooding and drainage.

Brownfield Register

The Government intends that 90% of suitable brownfield sites will have planning permission for housing by 2020. As mentioned above, the Housing and Planning Bill will require LPAs to maintain a brownfield register of sites suitable for housing. Regulations will set out what makes a site suitable for housing and relevant criteria will be drawn from the National Planning Policy Framework. To be suitable for housing, sites will need to be:

- Available (either deliverable within 5 years or developable and likely to come forward within 5 -10 years);
- Capable of supporting 5 or more dwellings or more than 0.25 hectares; and
- Unaffected by constraints that cannot be mitigated.

However, where a site is subject to an allocation for another use which is supported by compelling evidence, that site is unlikely to be considered suitable. Subject to these criteria, LPAs will be expected to include all brownfield sites unless there is no realistic prospect of a potential site being suitable for new housing. DCLG proposes that LPAs use up-to-date Strategic Housing Land Availability Assessments to begin the process of identifying suitable sites for brownfield registers. Consultation requirements will be set out in regulations.

The register will need to include all sites suitable for housing, but not all of these will benefit from PiP. DCLG does not make it clear how the process to include sites benefiting from PiP in the brownfield register would operate, and in particular, how this would be distinct from the process of allocating such sites in a local development plan.

Other reforms

Dispute Resolution mechanism for Section 106 Agreement negotiations

The Housing and Planning Bill has been amended to include provisions establishing a mandatory dispute resolution mechanism for negotiations relating to Section 106 planning obligations. The Consultation Paper proposes that the mechanism could be triggered by the applicant, the LPA, or any prescribed person. This could only be done after the end of

the relevant statutory timeframe for determining the planning application (8, 13 or 16 weeks depending on the type of application). For major applications in particular, this would seem to be a very early stage to allow a disputes mechanism to be triggered. Indeed many authorities are not even currently prepared to discuss Section 106 Agreement drafting before a resolution to grant permission has been made.

Following a two-week "cooling-off period", the Secretary of State would appoint an independent body (IB) to seek to resolve outstanding issues in dispute between the parties. The IB would set a deadline for producing a report[3]. Where the parties fail to agree terms within the relevant time, the IB will issue its report containing recommendations for appropriate planning obligations.

Following receipt of the report, the parties will have a period (possibly between two and four weeks) to enter into a Section 106 Agreement. If the LPA refuses to enter into a Section 106 Agreement which is consistent with the report, the applicant could, if it wishes, enter into a unilateral undertaking under Section 106 containing the recommended obligations, and the LPA will not be permitted to refuse the application on the grounds of inappropriateness of the obligations entered into. If, for any reason, no planning obligation is entered into, the LPA must refuse the application. The applicant will be entitled to appeal against refusal and the Inspector must consider the report of the IB, although it is not binding on the Inspector.

While the disputes resolution process is underway, the applicant will not be able to appeal against deemed refusal, and the LPA will not be able to refuse the application. The parties would have to cooperate with the IB, and the IB would have the power to award costs for unreasonable behaviour of either party.

This form of dispute resolution mechanism will put some pressure on the parties to come to an agreement. However, it would seem to be sensible to include additional pressure on the LPA to come to an agreement by imposing a costs requirement on appeal following refusal, where the Inspector supports the IB's recommendations for planning obligations, and where failure to enter into the Section 106 Agreement is not the fault of the applicant. Much will also depend on the detail on timings for the stages of the process, which will be contained in regulations. Ultimately, it remains to be seen whether this stage will simply add more delay to the conclusion of Section 106 agreements where the parties remain intransigent.

Planning Application Fees and Planning Application Outsourcing Pilot

The Government is proposing to increase planning fees in line with inflation since the last rise in 2012. However, it would like to apply the rise only to LPAs that are performing satisfactorily. The Consultation Paper suggests two options for application of the rise: it could withhold the rise from any authority that has been formally designated as under-performing in its handling of major planning applications. Alternatively, the rise could given only authorities in the top 75% of performance in relation to both speed and quality of decisions.

An alternative approach, which DCLG does not favour at this stage, is simply to leave LPAs to set their own planning fees. As DCLG rightly notes, where an LPA decides to increase planning fees, this might not lead to improved decision-making performance.

DCLG is also seeking views on other methods for streamlining planning processes. These include provision of fast-track services within the LPA in return for additional fees. Also, DCLG proposes piloting competition in some LPA areas in relation to management of planning applications. Essentially, the LPA would allow an approved external provider to carry out all stages of the planning application management process, including negotiating the Section 106 Agreement, up to the final decision making. The external provider would make a recommendation and provide a report to the LPA, but the final decision on the application would remain with the LPA. The applicants could choose whether to have their application

[3] A period of 4 weeks is suggested as an appropriate time for most cases, although the consultation paper also suggests that regulations would deal with timing of the report, which appears inconsistent.

managed by the external provider or the LPA, and each body could potentially set their own planning fees to encourage competition.

Other measures

The consultation document also contains further detail about proposals to:

- Require local authorities to provide a register of small sites which can potentially be developed;
- Speed up the neighbourhood planning decision-making process;
- Set the priorities for intervention by the Secretary of State in the local plan-making process for under-delivery of housing, or slow progress on, or out-of-date, local plans;
- Expand the ability to apply for planning permission directly to the Secretary of State when local planning authorities are designated as underperforming: from major development to non-major development;
- Require inclusion of information about financial benefits of development proposals in LPA planning reports;
- Extend permitted development rights for state-funded schools; and
- Change the approach to extensions of time for statutory consultees to respond to planning proposals.

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