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Briefing note May 2016

Housing and Planning Act 2016 – Starter Homes, Permission in Principle, S106 disputes and other Planning Reforms

The Housing and Planning Act 2016 has received Royal Assent. It provides framework powers for a number of significant planning reforms including the requirements to provide starter homes within residential development, a new route to planning permission through "Permission in Principle", a disputes mechanism for parties struggling to agree terms of a Section 106 Agreement, and new powers to override private rights to replace the current "Section 237" powers. In this briefing, we comment on the principle elements of planning-related reform.

Key issues

New Act contains a variety of key planning-related reforms including:

- Requirement to provide Starter Homes with residential development
- Framework powers for "Permission in Principle"
- A new dispute resolution mechanism for Section 106 Agreement negotiations
- Provisions to allow related housing in Nationally Significant Infrastructure Projects
- New powers to override private rights to replace "Section 237" powers

The Housing and Planning Act 2016 contains a wide range of planning reforms, many of which are aimed at speeding up the development of new housing stock. Additional reforms are included in relation to compulsory purchase and compensation. In many cases, the Act simply provides framework powers and the detail is still subject to consultation and secondary legislation.

Starter Homes (Part 1, Chapter 1 – England only)

The Act contains the provisions to encourage the provision of "starter homes" for first-time buyers between the ages of 23 and 40. Under the Act, local planning authorities (LPAs) must promote the supply of starter homes and this duty will be a material consideration in the grant of planning permission for residential development. A home will only qualify as a starter home if sold at a discount of at least 20% to market value, capped at £450,000 in Greater London (£250,000 elsewhere).

Framework powers are included allowing the Secretary of State to make regulations to prevent the grant of planning permission for residential development

unless a minimum number of starter homes are included or a financial contribution is paid. In March 2016, the Government published its proposed approach to regulations containing the starter homes requirement[1]:

- The starter homes requirement would be triggered for developments of 10 units or more (or on sites of 0.5 hectare and above).
- 20% of all homes delivered should be starter homes.
- Provisions would prevent sale of starter homes at full market value for 5 years following their initial sale, with tapered removal of this restriction up to 8 years (increasing proportion of market value as sale price would be allowed each subsequent year after 5 years). No renting out of these properties would be permitted during the restricted period.
- There would be a proposed exemption where provision would make the development unviable. Consideration of other exemptions for some forms of specialist housing – e.g. residential care homes, estate regeneration schemes, student housing.
- The Government will consider allowing commuted off-site sums in lieu of starter home provision if the LPA agrees, and in cases where specialist older person's housing is provided.

This measure has been particularly controversial through the Parliamentary process, which saw the House of Lords' attempts to water the requirement down ultimately resisted by the Government. From a development perspective, there are concerns that the starter homes requirement will place further pressure on house prices and simply reduce the supply of other valued forms of "affordable housing" provided through Section 106 Agreements, since developers are already in many cases required to provide affordable housing in their residential schemes up to the limit of viability of the development project. In addition, many lenders are concerned that allowing buyers to "cash-in" on the uplift in value of the property after a relatively short time period could cause instability in house prices and a move to riskier lending. This issue is likely to remain controversial as the final details are ironed out.

Permission in Principle (Section 150 & 151 – England only)

The Act contains the framework powers for the creation of a new form of "Permission in Principle" (PiP). This concept creates a new route to obtaining planning permission for housing-led developments: PiP granted by a general LPA development order (or in some cases by application to the LPA) will establish the principle for development on a specific site; a subsequent application for "technical details consent" would then be made to crystallise the planning permission for each individual development.

Regulations will flesh out the detail of how PiP will work. The Government consulted on these details in a consultation in February 2016. For further details see our Briefing "Housing and Planning Bill – More detail on "Permission in Principle" and other reforms".

New Dispute Resolution Mechanism for Section 106 Agreement Negotiations (Section 158 and Schedule 13)

Significant delay in concluding Section 106 Agreements has been a perennial bugbear for successive governments. The Act contains framework powers for a dispute resolution mechanism for Section 106 Agreements which will aim to resolve this problem. In brief, if either the applicant or the planning authority so requests, the Secretary of State must appoint an independent person to determine appropriate terms for the Section 106 Agreement if:

- He thinks the authority would be likely to grant permission (assuming satisfactory obligations could be agreed); and
- A prescribed period has passed.

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1 Starter Homes Regulations - Technical consultation - March 2016 - Department for Communities and Local Government

The appointed person would consider the case and most likely hold meetings with the parties. He would then make a binding recommendation on the appropriate form of planning obligations to impose. Assuming that the applicant subsequently enters into planning obligations on this basis, the authority would not then be able to refuse the application due to the inadequacy of the planning obligations. Significantly, once the process is triggered, the applicant would be prevented from appealing, and the authority from refusing, the application until the resolution process has run its course. Much detail remains to be determined by secondary legislation, e.g.:

- For how long the parties must try to reach agreement before the process can be triggered;
- The types of development which can benefit from the process (e.g. will it be only major development?);
- Which bodies or types of qualified individual could act as the "appointed person"; and
- The fees that the appointed person can charge and who must pay them.

The ability for either party to trigger the process and temporarily prevent the other from appealing or refusing the application could provide a useful stick to encourage the parties to get on with their negotiations, especially if a fee award can be made to penalise a party who has acted unreasonably. For further discussion of the Government's original consultation proposals on the detail application of this mechanism, see our Briefing "Housing and Planning Bill – More detail on "Permission in Principle" and other reforms".

Related Housing within Nationally Significant Infrastructure Projects (Section 160 – England only)

The Act allows housing associated with a Nationally Significant Infrastructure Project (NSIP) to be consented as part of the Development Consent Order (DCO) for the main project.

The Government has confirmed that construction worker housing and housing for key operational phase workers would be included. This provision could also potentially allow consent to be granted for an element of residential development that is unrelated to the main project, e.g. in the immediate vicinity of a mixed use business and commercial NSIP. Government guidance will limit the amount of housing which can be included in a DCO to 500 dwellings; the Government has said it is very unlikely that it would agree to increase this limit in any particular case.

Compulsory Purchase (Part 7 of the Act – England & Wales)

Overriding Easements and other private rights

Section 203 of the Act provides a new framework for powers to override easements and other private rights over land that has been compulsorily acquired, or acquired or appropriated for planning purposes, by a relevant authority. These powers will replace the existing provisions of Section 237 of the Town & Country Planning Act 1990 which are often used to overcome restrictions (such as rights of lights) which would otherwise hinder or prevent the carrying out of works or use of land in a development project. The Government's main aim was to extend the categories of authority that benefit from these powers (e.g. to include statutory undertakers) as opposed to changing the substance of the powers. The new framework has, however, also made some substantive changes; these are partly beneficial but also leave some uncertainty as to how the framework will operate. In brief:

- Where an authority acquires land, or appropriates land for planning purposes, after Section 203 comes into force, it will need to demonstrate that the authority "could acquire the land compulsorily for the purposes of the building or maintenance work" in order for the powers to apply[2]. Case law has previously dictated that authorities prepare a public

[2] Where the powers are required for a use of land as opposed to works, the authority must demonstrate that it could acquire the land compulsorily for the purposes of erecting a building or carrying out works for that use. As currently, planning permission is also needed for the relevant works and / or use.

interest case when appropriating land with an intention of using Section 237 powers, and this change will set this requirement out more formally. Guidance will be needed to describe what an authority needs to do in these circumstances.

- Transitional provisions have been included: These are intended to ensure that land which has already been compulsorily acquired, or acquired or appropriated for planning purposes, by a relevant authority before the date Section 203 comes into force can still benefit from the overriding powers under Section 203 (Since Section 237 TCPA will be repealed). However, in order for this to be the case, the authority must again demonstrate that it "could acquire the land compulsorily for the purposes of the building or maintenance work"[3]. It seems likely that this test has to be considered at the time the works are being carried out[4] (rather than at the time when the acquisition or appropriation took place). This is unlikely to be problematic where the acquisition or appropriation has been effected in recent times where best practice has been followed, but could prevent or hinder the subsequent use of Section 203 powers based upon historical CPOs, acquisitions or appropriations.
- In addition, there has always been a query over the extent to which a historical CPO or appropriation of land could be used as the basis for application of Section 237 powers in respect of a later and different scheme. Section 203 codifies the requirement (already required by case law) that the purposes of the works being carried out, or proposed use, must be related to the purposes for which the land was originally acquired or appropriated.
- It is now clearer that any person (including successors in title, e.g. a local authority's development partner) will be able to benefit from the "overriding" powers.
- There is now no clear right for works other than building or maintenance works to benefit from the powers. Section 203 allows "building or maintenance work" or a "use of land" in reliance on these powers. However, it is not clear that, for example, geotechnical investigation works would clearly come under either head[5].

No explanatory notes to the Act have yet been published; it is possible that, once published, they might provide some clarification on these points.

Other CPO Reforms

A number of other reforms to compulsory purchase procedures are proposed in the Bill including primarily:

- A requirement for the Secretary of State to publish timetables setting out the steps for confirming compulsory purchase orders (CPOs).
- New powers for Inspectors to confirm CPOs even where objections remain (previously only the Secretary of State could confirm these).
- Removal of the "Preliminary Notice of Intention to make a General Vesting Declaration (GVD)" stage of CPO procedure.
- Additional notice requirements where details of additional owners or occupiers are discovered after service of notice of entry.
- An extension of the minimum period following GVD before possession can be taken, from 28 days to 3 months (with a new counter-notice mechanism where a person in possession of land wishes possession to be taken on an earlier date).
- Clarification that GVDs can only be made within three years of the CPO becoming operative (in line with the "notice to treat" route). This had been uncertain under case law.
- An extension of the three year time limit for serving notice to treat or executing a GVD in the event the CPO is challenged in court.

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3 The requirements set out in note 2 above also apply.

4 Or the proposed use is to be implemented.

5 Section 237 currently allows "the erection, construction or carrying out, or maintenance of any building or work on land".

- A power to allow decisions to confirm a CPO to be challenged (not simply the CPO itself). This would allow a CPO to be redetermined if a decision to confirm was quashed.
- General rights for all acquiring authorities to survey or value land in relation to compulsory purchase proposals.
- New procedures dealing with owners' objections to only part of a land-holding being included in a GVD or notice to treat.

Additional Provisions (Generally only applicable to England)

A number of other areas of important planning-related reform are included in the Act covering:

- Powers for the Secretary of State and / or the Mayor to intervene to prepare a local plan where a local authority has not yet adopted one (30% of authorities are understood not to have done so). The Government has said it would use these powers where authorities have not adopted a local plan by 2017.
- Powers to allow greater flexibility for the application of the Mayor of London's powers to intervene in planning decisions to be based on reference to the London Plan as it changes from time to time.
- Measures aimed at speeding up and facilitating the process of designating Neighbourhood Areas, Orders and Plans.
- Powers to review the enforceability of planning obligations relating to affordable housing, which follows the Government's decision not to renew the specific powers to appeal against non-viable affordable housing obligations.
- Framework powers to allow planning applications to be processed (but not determined) by providers outside the LPA.
- Powers for new "Planning Freedoms Schemes" to be put in place in certain areas which disapply normal planning powers where the LPA wishes to facilitate provision of housing in its area.
- A new requirement to include details of financial benefits of a proposed development within the "report to committee" which is prepared before a planning decision is made.
- Local authority planning duties in relation to self-build and custom housebuilding.
- Additional powers in relation to disposal of surplus public land.

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