

<b>Overview and Scrutiny Committee</b>		
Title	Update on the provisions of the Housing and Planning Bill, and on case law in relation to viability in Development Management	
Contributor	Interim Head of Planning	Item 6
Class	Part 1 (open)	25 January 2016

## **1 Purpose**

1.1 This report updates the O&S Committee on:

- the planning provisions in the Housing and Planning Bill and their potential implications on the development of Affordable Housing, and
- the latest practice and case law in respect to viability appraisals.

## **2 Recommendation**

2.1 That the committee notes the update.

## **3 Background**

### Housing and Planning Bill

3.1 The Housing and Planning Bill<sup>1</sup> was published in October 2015 and delivers many of the planning proposals outlined in the Treasury's report "*Fixing the foundations: Creating a more prosperous nation*"<sup>2</sup> (15 July 2015). The detail is yet to be published but in relation to land use planning it will be developed through Statutory Instruments, revisions to the National Planning Policy Framework (NPPF) and Planning Practice Guidance (PPG) or via Ministerial Statements.

3.2 The summary of the main provisions of the Bill are set out in appendix one. The main implications of the Bill on the delivery of affordable housing and the likely impact on secondary or NPPF/PPG/Ministerial Statement implementation is included in the rest of this report.

### Viability

3.3 Since publication of the NPPF in March 2012 there has been a significant growth in viability arguments around planning applications, often around levels of affordable housing. This has become controversial in a number of cases leading to either communities or rival developers seeking to see published what are generally treated as confidential viability appraisals.

## **4 Housing and Planning Bill proposals and potential implications**

### **Starter Homes**

4.1 It is recognised that government are keen to make market housing more affordable through Starter Homes, with a 20% reduction on the normal market price. The Government's intention

<sup>1</sup><http://www.publications.parliament.uk/pa/bills/cbill/2015-2016/0075/16075.pdf>

<sup>2</sup><https://www.gov.uk/government/publications/fixing-the-foundations-creating-a-more-prosperous-nation>

is that this reduction will be fixed only for 5 years and after 5 years the owner can sell at open market value. These homes will not be subject to CIL or s106 provisions.

- 4.2 The implication for affordable housing is that the Government intends that in meeting affordable housing obligations 'starter homes' will be the first in the queue before other forms of affordable housing. This will be monitored with the council having a duty to ensure their provision through the Authority's Monitoring Report. This policy will impact on the type of affordable housing delivered.

### **Self Build and Custom Build**

- 4.3 Self Build and Custom Build could provide around 2% of the overall housing numbers projected. Despite their modest contribution, these provisions place a considerable additional burden on local authorities to identify (via Local Plans) and grant sufficient permissions on serviced plots to meet the needs identified by those self/custom builders registered with Councils via the provisions in the Self Build and Custom Housbuilding Act 2015.
- 4.4 There is mention of fees being introduced, designed to cover costs. These are likely to be set by government, so it is therefore vital that the fees provide for full cost recovery so this new additional duty can be self-funding.

### **Local Planning**

- 4.5 This contains a raft of powers for the Secretary of State to ensure that Local Planning Authority's (LPA) have Local Plans in place giving the Secretary of State the power to intervene and put a plan in place himself. As the council has a local plan in place this will not impact.
- 4.6 Some of the powers in the Bill give the Mayor of London those powers the Secretary of State would have outside London, such as amending a LPAs Local Development scheme.

### **Local Register and Permission in Principle**

- 4.7 This is a significant change to the planning system with two new provisions:
- A duty to hold a register of brownfield land capable of being developed for housing
  - The concept of a permission in principle
- 4.8 The brownfield register attempts to unlock land to build new homes and if implemented the council will be able to use the existing Strategic Housing Land Availability Assessment (SHLAA) process that is carried out as part of Local Plan making to form the register. There may be slight differences in the definition of land that is required to be registered. The existing requirement is to "consider all sites and broad locations capable of delivering five or more dwellings ... on sites of 0.25ha (or 500m<sup>2</sup> of floor space) and above" whereas the new announcement talks of merely 5 dwellings. This may pose additional burdens on the council.
- 4.9 The concept of permission in principle has its roots in the Lyons Housing Review where the cost of obtaining outline planning permission was seen as a barrier to entry for small house builders and this would include small Registered Providers. Government sees this sector as needing support to increase the supply of housing overall. Small house builders have reduced over years in the face of dominance of the industry by the big national and regional house builders. This will mean that planning authorities will grant "permission in principle" and then in a separate process approving the details.
- 4.10 This new concept (Permission in Principle) will automatically attach to sites on the Brownfield Register and can be granted on application to small sites (less than 10 units). This is a

provision that is just aimed at housing sites. Most sites are mixed use developments and this must be accommodated otherwise there could be severe unintended consequences of poor quality placemaking.

## **5 Viability in Development Management**

- 5.1 There is recent case law in relation to viability assessments that has shaped the council's approach- two main Information Commissioner (IC) cases and, a recent case in the High Court.
- 5.2 In Greenwich, the local community sought release of viability information where a developer wanted to be released from providing the level of affordable housing that they had previously agreed on a 10,000 home Greenwich Peninsular development. The IC determined that this information should be released in full, primarily because he considered that due to the passage of time (the decision on which it was based was taken several years before) any commercial sensitivity was now no longer of paramount importance and the balance lay with disclosure in the public interest.
- 5.3 In Southwark the local community sought release of viability information relating to the redevelopment of the Heygate Estate in the Elephant and Castle. This involved the sale of a Council asset to the developer and the IC considered that this distinguished the case from a public interest point of view from a more "normal" housing development on private land. Nevertheless, when released the commercially sensitive parts of the financial appraisal were redacted with the IC's approval.
- 5.4 The Croydon case related to a developer's application to redevelop a shopping centre. This required a compulsory purchase order and potential developers whose land was to be required pursued a vigorous campaign to have viability information made public. The approach adopted by the developer was to produce a viability appraisal that was capable of being made public (although they did not agree to its release until after the planning decision was made by Croydon) but the detailed and commercially confidential/sensitive financial information upon which it was based was only ever held or seen by the Council's viability consultant (Deloitte). Officers of the LPA were able to verify (if necessary) any of the withheld information via a "data room". This was a restricted and secure website facility where data could be viewed but not copied, printed or saved. Confidentiality Agreements had to be signed.
- 5.5 The High Court case centred (inter alia) around the fact that the members of the determining planning committee at Croydon Council only had limited financial information upon which to base their decision. They only had the word of their officers and could not see for themselves the financial data.
- 5.6 The case was dismissed and it was held that the approval was sound in law. It was held that financial information can be commercially sensitive and it is right and proper to keep it so when the public interest balance test supports it. LPAs are guided in making their judgements by the advice of a whole range of experts, including financial advisors, who have a wealth of market information, data analysis, financial models that informs their advice. That they hold all this information and expertise and the client does not is perfectly normal: it is the advice that is being commissioned. Officers of the LPA had sufficient information to come to their conclusions and make their recommendations. The members of LPA were sufficiently informed and advised and were able to come to a sound decision.
- 5.7 There is a move with some LPAs to require all viability reports to be public. This approach is understandable, however the implications of this need to be understood. Such reports are likely to contain generic rather than development specific data. Generally generic data is less

accurate and over estimates financial costs because it is non-development specific and therefore contains the quantity surveyor's normal contingencies to deal with design uncertainty. Generally, where financial information in relation to construction costs, financing facilities are specific to a particular scheme, those costs come down as there is a greater degree of specificity and certainty. This will impact on the viability assessments of the development.

- 5.8 It can be seen from the Croydon High Court case that a more nuanced approach is both acceptable in law and may better serve the Council's interests. The commercially sensitive information stays confidential but a report is prepared that can be released to the public. The LPA's viability consultant (and officers where necessary) can view and verify the commercially sensitive data and he/she can advise the LPA accordingly.
- 5.9 We need to have an approach that produces fair and accurate viability assessments in order to maximise the funding envelope for planning obligations and thereby enable us to optimise the level of Affordable Housing (AH) provision. The implication of full disclosure and transparency on viability information is that more generic and cautious assessments are conducted. This will not be in the interests of the local authority or its residents. We need to understand the implications of public disclosure of financial appraisals as from experience it has been shown to reduce the funding envelope for planning obligations. In these negotiations it is affordable housing (a policy requirement) that is the casualty as other obligations generally relate to necessary supporting infrastructure (often now through CIL) or other mitigation that are more difficult to avoid given the National Planning Policy Framework (NPPF).
- 5.10 A report to Mayor and Cabinet on 13 January 2016 responding to the Sustainable Development Select Committee makes the same case.

## **6 Legal implications**

- 6.1 There are no direct legal implications arising from the implementation of the recommendation in this report, however, there may be legal implications arising from the changes that flow from the implementation of the provisions in the Bill and these will need to be considered in due course.

## **7 Financial implications**

- 7.1 There are no specific financial implications arising from the implementation of the recommendation in this report, however, there are likely to be financial implications arising from the changes that flow from the implementation of the provisions in the Bill, which will need to be considered in due course.

## **8 Further implications**

- 8.1 There are no specific equalities, sustainability or crime and disorder implications arising from the implementation of the recommendation in this report, however, matters that may arise from the changes that flow from the implementation of the provisions in the Bill will need to be considered in due course.

## **9 Appendix One**

Summary of Housing and Planning Bill provisions

For further information about this report contact Mike Kiely, interim Head of Planning on 020 8314 8706

## **Appendix One**

Government have published a detailed guide to the bill <sup>3</sup>. The main provisions of the Bill are as follows:

### **Part 1: New Homes in England**

- Starter Homes – providing a statutory framework for the delivery of starter homes
- Self-build and custom housebuilding –requiring local authorities to meet demand for custom-built and self-built homes by granting permissions for suitable sites

### **Part 2: Rogue landlords and letting agents in England**

- Private rented sector – providing greater powers for local authorities to identify and tackle rogue landlords

### **Part 3: Recovering abandoned premises in England**

- Private rented sector – reforming abandonment to more effectively recycle rented property

### **Part 4: Social housing in England**

- Right to acquire – extending Right to Buy discount levels to housing association tenants
- Vacant high value local authority housing – requiring local authorities to manage their housing assets more efficiently, with the most expensive vacant properties sold and replaced with new AH in the area
- Reducing regulation – allows the Secretary of State to reduce regulations on Housing Associations
- High income social tenants – requiring tenants in social housing on higher incomes (over £40,000 in London and over £30,000 outside London) to pay market rate, or near market rate, rents

### **Part 5: Housing, estate agents and rent charges: other changes**

- Housing needs in England – simplifying the legislation governing the assessment of housing and accommodation needs of the community, whilst ensuring that the needs of all members of the community are assessed on an equal basis
- Regulation and enforcement – a more stringent ‘fit and proper’ person test for landlords letting out licensed properties, such as Houses in Multiple Occupation, to help ensure that they have the appropriate skills to manage such properties and do not pose a risk to the health and safety of their tenants; allowing financial penalties to be imposed as an alternative to prosecution for certain offences; requiring Tenancy Deposit Scheme data to be shared with local authorities; and amending the Estate Agents Act 1977 to allow the Secretary of State to appoint the regulating authority
- Enfranchisement and extension of long leaseholds –makes provision for the valuation of minor intermediate leasehold interests in leasehold enfranchisement and lease extension cases to continue to be possible when using the legislation
- Rent charges – allowing the formula for calculating the amount needed to redeem a rent charge to be amended by secondary legislation

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<sup>3</sup><http://www.publications.parliament.uk/pa/bills/cbill/2015-2016/0075/en/16075en.pdf>

## **Part 6: Planning in England**

- Neighbourhood planning – simplifying and speeding up the neighbourhood planning process to support communities that seek to meet local housing and other development needs through neighbourhood planning
- Local planning – giving the Secretary of State further powers to intervene if Local Plans are not effectively delivered
- Planning in Greater London – devolving further powers to the Mayor of London
- Local registers of land and permission in principle – creating a duty for local authorities to hold a register of various types of land, with the intention of creating a register of brownfield land to facilitate unlocking land to build new homes; and giving housing sites identified in the brownfield register, local and neighbourhood plans planning permission in principle, and providing an opportunity for applicants to obtain permission in principle for small scale housing sites
- Planning permission etc – levelling up the power which enables conditions to be attached to development orders for physical works so that they are consistent with those for change of use; extending the planning performance regime to apply to smaller applications; and putting the economic benefits of proposals for development before local authority planning committees
- Nationally significant infrastructure projects – allowing developers who wish to include housing within major infrastructure projects to apply for consent under the nationally significant infrastructure planning regime
- Urban development corporations – creating a faster and more efficient process for creating Urban Development Areas and Corporations whilst ensuring that those with an interest locally are properly consulted at an early stage

## **Part 7: Compulsory purchase etc**

- Improving the compulsory purchase regime, so it is clearer, fairer and faster