PLANNING HIGHLIGHTS FROM 2016 & LOOKING FORWARD INTO 2017

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1. OVERVIEW

1.1 There is no way of getting away from it – **housing** has dominated planning changes and proposed further reform.

1.2 It represents the focus running through the Government's planning reform proposals over the last year and is set to remain the same in 2017. The political climate is to boost housing supply and move an emerging generation of renters into home ownership.

1.3 The much anticipated Housing White Paper (Fixing our Broken Housing Market) published in February is no different.

1.4 This paper does not deal with the Housing White Paper but looks at the other planning law changes that have occurred in the run up to and during 2016. If you look carefully there have been changes that affect non-residential development but they are less abundant.

1.5 We also look at what is coming up on the horizon in 2017 - some of which will be derived from matters discussed in the Housing White Paper but also initiatives that are already on the legislative books (most notably in the Neighbourhood Planning Bill ("**NPB**")) or has been the subject of other consultation by the Government. This paper also sets out some of the practical consequences and developments that have arisen out of Housing & Planning Ministerial Statements and a few changes derived from Court decisions during 2016 and early 2017.

1.6 The Government passed two principal Acts of Parliament in 2016 which make changes to the planning system:

1.6.1 The Energy Act 2016; and

1.6.2 The Housing and Planning Act 2016 ("**HPA**").

1.7 Very little practical effect on planning arises from the Energy Act 2016 and this paper focuses instead on the outcome of the HPA which gives rise to more notable changes that are coming into effect during 2017. Whilst a number of the powers in the HPA are already in force, the majority are subject to secondary legislation (regulations) before there will be any change to practice. Regulations have started to appear (for example, the new Permission in Principle system – see further below) and the Government is promising a raft of regulations and further announcements this coming Autumn.

1.8 Since the 2015 Elections, the Government has embarked upon a significant period of consultation on a number of planning matters – culminating in the promotion of the HPA and now the NPB. The following Consultations have been of particular note in dealing with a number of the more significant changes that are taking place/are proposed:

1.8.1 Consultation: proposed changes to NPPF (December 2015) and the Government's Consultation Response (February 2017); and

1.8.2 Consultation: implementation of planning changes (February 2016) and the Government's Response: to technical Consultation (February 2017).

1.9 The Government has also introduced further changes to the Permitted Development Rights ("**PDR**") regime following Consultation[1] in 2015 having only just consolidated (the then 1987) General Permitted Development Order (GPDO)[2]. Consolidation followed a number of significant changes to permitted movement since 2013. This paper summarises the nature of further changes that have been made in 2016 and early 2017.

1.10 Since September 2016, the Government has been progressing the NPB through Parliament. The third reading stage in the House of Lords has just completed and the Bill is in its final stages before it should receive Royal Assent in the coming months. The HPB proposes further changes aimed at speeding up the delivery of housing albeit there are implications for wider development which this paper also considers. The Government has been running a number of Consultations during the progressing of the Bill which are particularly relevant:

1.10.1 Open Consultation: improving the use of planning conditions (September 2016); and

1.10.2 Consultation: implementation of neighbourhood planning provisions in the NPB (September 2016) and the Government's response to consultation (December 2016).

1.11 The Government is also currently consulting upon a draft Airports National Policy Statement (February 2017) which addresses the need for a further runway in the South East of England.

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1 Government's Response to Consultation on Amendment to permitted development rights for drilling boreholes for groundwater monitoring for petroleum exploration (August 2015)

2 Town and Country Planning (General Permitted Development) (England) (Order) 2015/596

1.12 The Government also needs to address the transposition of the 2014 EIA Directive by May this year, for which it is has been consulting (Environmental Impact Assessment: Technical Consultation (Regulations on Planning and Major Infrastructure) (December 2016)).This paper looks at some of the main implications of likely changes.

1.13 All indications are that the consequence of consultation on the NPPF and the Housing White Paper will result in an update to national planning policy (NPPF). This paper summarises the key changes that have been considered and are likely to be brought forward.

1.14 Whilst the publication of the Housing White Paper has grabbed all of the headlines, at the same time the Government issued the findings of a review to look at how to better levy tax on development (currently secured under the Community Infrastructure Levy ("**CIL**") as well as use of the negotiated planning (section 106) obligations regime. Further announcements are expected later this year. This paper summarises the anticipated changes.

2. HOUSING AND PLANNING ACT 2016

2.1 The Government's objective of the HPA has been to kick-start a "*national crusade to get one million homes built by 2020"* and transform "*generation rent into generation buy*".

2.2 The powers in the HPA are therefore primarily focused on speeding up the planning system to deliver more housing. There is also a focus on home ownership with measures to facilitate new forms of housing tenure, particularly Starter Homes.

2.3 Most of the changes introduced in the HPA are subject to the introduction of secondary legislation (regulations) which are yet to be put in place. The Government's (February 2016) Consultation[3] sets out the proposed contents of regulations to support the various powers. The main provisions of the HPA include powers for:

2.3.1 introduction of a new means to secure planning consent - known as Permission in Principle (**"PiP"**);

2.3.2 to keep registers of Brownfield and other kinds of land;

2.3.3 the ability for "alternative" providers to process applications on behalf of a local planning authority ("**LPA**");

2.3.4 delivery of more Starter Homes;

2.3.5 the ability to include housing in development consent orders ("**DCOs**");

2.3.6 dispute resolution of failing Section 106 negotiations;

2.3.7 compulsory purchase reform;

2.3.8 changes to Local Plan process and powers of intervention;

2.3.9 reporting on surplus (public) land holdings; and

2.3.10 amendment to the Neighbourhood Plan process.

PiP and Local Registers of Land

2.4 PiP introduces a new way of introducing planning permission for housing-led developments. The idea is to separate decision making between the "in principle" matters of land use, location and amount of development from matters of technical detail - such as, what the buildings will look like. PiP must be followed by an application for technical details consent which will deal with the design of buildings, development layout and landscaping. Together, they equate to full planning permission.

2.5 There are two ways in which PiP can be granted:

2.5.1 the first is by virtue of the site being an allocation in either a future Local Plan, future Neighbourhood Plan or a brownfield register; or

2.5.2 direct application to the LPA.

2.6 Regulations[4] for the process of allocation by brownfield register have just been issued (March 2017) and will come into effect on 15 and 16 April 2017 respectively. Regulations for the other routes are awaited.

2.7 It is not immediately clear what advantage using the application to LPA route will offer over the existing outline planning application process - albeit the intention has been that conditions cannot be imposed on a PiP (they will only be allowed on technical details consent) and that the range of considerations at this first stage appear to be narrower than on an outline

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3 Consultation : implementation of planning changes : technical consultation (February 2016)

4 The Town and Country Planning (Permission in Principle) Order 2017/402; The Town and Country Planning (Brownfield Land Register) Regulations 2017/403

planning application (for example, access details?) but that is yet to be seen. It is to be suspected that there will be little practical difference by the time regulations are put in place.

2.8 The potential for the principle of development to be established by PiP through a "qualifying document" - in other words an allocation in a development plan document or brownfield register has more potential to create a practical change.

2.9 The HPA introduced a new duty for local authorities to keep a register of brownfield land within this area. The new Regulations set out the process and criteria for LPAs to prepare, publish and maintain a register of "*previously developed land*" (utilising the NPPF definition in Annex 2) which is suitable for residential development. The Government's view is that LPAs already collect information on housing land supply, including brownfield land, as evidence for Local Plans - but do not necessarily collate and/or make that information accessible. The proposals in the Regulations are intended to require LPAs to identify suitable sites broadly using the same approach required by Strategic Housing Land Availability Assessment (**"SHLAA"**). The Regulations set out the requirement for the brownfield register in two parts. Part 1 requires the land to meet a long list of criteria, whereas Part 2 confirms that the land has first been the subject of mandatory publicity and consultation to take account of representations from the public and statutory consultees.

2.10 The Part 1 criteria requires that land is:

2.10.1 more than 0.5 hectares or capable of accommodating more than five dwellings;

2.10.2 *"suitable"* meaning that it is either:

2.10.2.1 allocated for residential development in a Local Plan;

2.10.2.2 already has the benefit of residential planning permission;

2.10.2.3 already has a PiP;

2.10.2.4 or in the opinion of the LPA, is “appropriate” for residential development having regard to:

(a) any adverse impact on the natural environment or the local built environment (including heritage assets);

(b) any adverse impact on local amenity; and

(c) any relevant representations (received as part of the consultation stage relating to Part 2 of the register);

2.10.3 *"available"* meaning that either the landowner or developer expresses an intention to develop the land or the LPA considers that there are no issues with ownership or other legal impediments to delivery;

2.10.4 *"achievable"* meaning that the development is likely to come forward within 15 years; and

2.10.5 the land is not exempt – is not an EIA developments requiring an environmental statement or caught by the Habitat Regulations.

2.11 There is also to be a process of mandatory publication and consultation of any land that meets the Part 1 criteria before it can be included in Part 2 of the register.

2.12 Taken together, the process of finding land suitable to go on the register is likely to be akin to that requiring the development of Local Plan allocations and is arguably likely to lead to disagreements, complications and need for third party resolution. The basis for appeal is not immediately clear.

2.13 Once land is capable of being included in both Parts of the register, it is automatically deemed to have the benefit of PiP. The Regulations also allow LPAs to stipulate the date upon which the PiP comes into effect - which can be at a later date than it first appears in the register. From this point there will be a default period of five years in which to submit any technical details application. This period can be reduced at the discretion of the LPA.

2.14 The Regulations also introduce a mandatory requirement on LPAs to consult on technical detail applications (unlike, for example, reserved matters approval applications). The Explanatory Memorandum with the Regulations suggests that this further consultation process will be "*more light touch*" than at the PiP stage. The determination period at the details stage is five or 10 weeks on a minor and major application. The Memorandum confirms that Guidance on the application of the Regulations will be introduced by June 2017.

2.15 The Government's decision to impose duties to keep a register of particular kinds of land was initially intended to also include a register of "small sites" (expected to be one to four plots in size). However, in its February 2017 Response to Consultation, the Government announced it would not go ahead with the requirement for local authorities to keep a small sites register at this time "*given the views and concerns raised*".

Starter Homes

2.16 As part of the Government's drive to give renters an opportunity to buy, a large part of the HPA and subsequent changes being suggested in the Housing White Paper is aimed at bringing Starter Homes within the definition of affordable housing and encouraging the bringing forward of more of this type of tenure.

2.17 The HPA provides a general duty on all LPAs to promote the supply of Starter Homes - the detail of which is to be set out in regulations which are yet to be put in place. Starter Homes are those which are:

2.17.1 sold at a discount of at least 20% of market value;

2.17.2 available to first-time buyers under the age of 40;

2.17.3 up to a price cap of £250,000 (out of London) and £450,000 (in London).

2.18 Following its Consultation in March 2016 on Starter Homes[5], the Government in its Response (in February 2017)[6] has decided not to implement a compulsory Starter Homes requirement on local authorities. Proposals (which will be brought forward in regulations late in 2017) are set out in the Housing White Paper which suggest that:

2.18.1 restrictions will be imposed on sale and re-use - requiring a discount to be paid back within the first 15 years unless sold to a qualifying person;

2.18.2 the imposition of a further eligibility cap based on purchaser income (of £80,000) (or £90,000 in London);

2.18.3 delivery is likely to be secured through negotiated planning obligations (section 106 agreements) which will stipulate the minimum amount of units required etc; and

2.18.4 the potential for exemption sites for under 10 units.

2.19 The current proposed definition for Starter Homes is also set out in the Housing White Paper (is not yet in force) and is proposed as an amendment to the definition of "Affordable Housing" which will appear in an updated Annex 2 definition in the NPPF.

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5 Starter Homes Regulations: Technical consultation (March 2016)

2.20 The proposal for "exemption sites" for Starter Homes was consulted upon as part of the consultation in March 2015 with the proposal that brownfield land sites brought forward would be exempt from community infrastructure levy (CIL) or provision of other forms of affordable housing where Starter Homes are provided at 20% discount or more. Further announcements are awaited as to whether this will be brought forward.

Local plans

2.21 The HPA gives the Secretary of State ("**SoS**") further powers to intervene in the Local Plan making process where an LPA is failing or omitting to do anything necessary in connection with the preparation, revision or adoption of a Local Plan.

2.22 The Government's consultation at the time of the Bill for the HPA (in February 2016) suggested that the focus of this power would be to prioritise intervention where:

2.22.1 there is under-delivery of housing in areas of high housing pressure;

2.22.2 least progress in plan-making has been made;

2.22.3 plans have not been kept up to date; and/or

2.22.4 intervention will have the greatest impact in accelerating Local Plan production.

2.23 This power is subject to regulations which are yet to be put in place.

2.24 Since the HPA, the Government has indicated that its preferred solution to Local Plan intervention is likely to be the powers that it is now proposing in the Neighbourhood Planning Bill.[7] It remains to be seen how the powers of the HPA and currently being proposed in the NPB will be utilised – see further below.

Alternative providers for processing planning applications

2.25 The HPA gives the SoS power under regulations (not yet in place) to introduce pilot schemes for the processing of planning applications by alternative providers to the relevant LPA. Applicants will essentially be able to choose whether to submit their applications to their Local Authority or another provider, which could be a specialist entity or another LPA. The alternative provider would only be able make a recommendation to the relevant LPA and the

6 Government response to the technical consultation on starter homes regulations (February 2017)

7 Implementation of neighbourhood planning provisions: Government response to consultation (February 2017)

recommendation would not be binding on the determining LPA. This is certainly one of the more controversial powers available under the HPA and drew comments of concern during the Government's consultation (February 2016). For example, there is no indication that the determining LPA would receive any benefit from the planning fee and will clearly have some duty as part of its decision making such that it cannot simply adopt the recommendation of the alternative provider. The Government has decided in its February 2017 Consultation response to put this scheme on hold whilst it further consults.

Section 106 planning obligations (and community infrastructure levy)

2.26 The HPA introduces a power to enable the SoS to introduce a dispute resolution process to address failing negotiations for section 106 agreements.

2.27 The Government's February 2016 consultation suggests that certain criteria will need to be met in order for the process to apply which will be based on the LPA having first resolved to grant planning permission. After the process is triggered by either party, the normal right to appeal for non-determination and for the LPA to refuse will be stayed until the outcome of the dispute resolution. Awaited regulations will deal with the detail of the process which will include timings and the identity of a person who can be appointed to resolve the dispute.

2.28 In parallel to the HPA, the Government appointed a Community Infrastructure Levy Review Group (**"CIL"**) to make recommendations (i) on options for reforming the system of developer contributions and (ii) as to the effectiveness of CIL as a mechanism for funding infrastructure. The findings[8] were reported to the Government in October 2016 - the outcome of which is that the Government has decided to now delay the bringing into effect of the dispute resolution power until further combined announcements are made later in the year, expected as part of the Autumn Statement 2017.

2.29 The CIL Review was informed by research, undertaken by Three Dragons and The University of Reading, as part of which various CIL stakeholders were interviewed.[9] The research revealed mixed attitudes towards CIL but several key themes emerged. A general sense of frustration over the complexity and uncertainty of the regulations was apparent, and there were warnings about the strain CIL was putting on Councils' resources, particularly in relation to the production of charging schedules. In areas with comparatively low land values, CIL was not seen as a viable option. However, on a positive note there was a perception that CIL

8 A new approach to developer contributions: a report by the CIL review team (October 2016)

provided more certainty to developers and there was also evidence that CIL had incentivised certain parish and town councils to pursue Neighbourhood Plans to access the money made available through CIL.

2.30 In summary, the CIL Review Group's report recommends creation of a twin track system for an infrastructure tariff regime which will consist of a Local Infrastructure Tariff ("**LIT**") and a Strategic Infrastructure Tariff ("**SIT**"). The latter will be used for combined authorities dealing with the delivery of strategic/cross-boundary infrastructure.

2.31 In 2016, the Courts had to determine a noteworthy case on CIL[10] in which Swindon Borough Council was told that it should not have treated two separate planning permissions as one set of combined works for the purpose of determining whether CIL was payable. Each planning permission in isolation did not meet the threshold triggering CIL liability. In other words, it is open to a developer to "salami slice" applications for development, which may be adjacent etc, in order to avoid the payment of CIL. Other case law, however, tells us that salami slicing is not an acceptable practice when determining whether a development is EIA development, requiring an environmental assessment and is not to be applied when determining the provision of affordable housing.[11]

Housing as part of NSIPs

2.32 Development consent orders ("**DCO**") for nationally significant infrastructure projects ("**NSIP**") cannot per se grant consent for housing. The HPA introduces a power so that a DCO can now grant consent for housing where it is linked to an application for an NSIP (for example, as part of a transport or energy project).

2.33 DCLG has issued Guidance[12] this month setting out the circumstances in which it expects that the power may be utilised and which comprises two circumstances, namely where there is:

2.33.1 a functional need for housing linked to the NSIP (for example, worker accommodation); and

2.33.2 no functional link but there is geographical proximity (within 1 mile) (for example, developments around rail interchanges/hubs).

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9 The value, impact and delivery of the Community Infrastructure Levy: Technical Annex (February 2017)

10 *R (Orbital Shopping Park Swindon Limited) v Swindon Borough Council* [2016] EWHC 448.

11 New Dawn Homes Ltd v SoS CLG [2016] EWHC 3314

2.34 The power can also be used to provide associated infrastructure (i.e. local roads) if it is required in association with the housing. Affordable housing policy requirements, as required by Local Plans, are to be complied with.

2.35 The Guidance confirms that it does not expect applications including more than 500 dwellings to be promoted using this power.

Compulsory purchase reform

2.36 The HPA has introduced a number of changes to the compulsory purchase process as well as the application of the compensation regime (specifically in relation to advanced payments).

2.37 These reforms apply to both England and Wales and follow the intention of Government set out in its October 2015 Consultation (Compulsory purchase process: Government response to consultation). The changes represent a series of relatively small improvements designed to address issues that have been problematic in practice. Further changes are proposed in the NPB (see further below). The key changes are:

2.37.1 introduction of a standard power of entry for survey purposes to be used by all acquiring authorities "*in connection with"* the making of a CPO. The power is already in force and removes the exercise of a number of pre-existing powers of entry that are particular to acquiring authorities - the intention being to have a common approach to the exercise of powers of entry. There have been concerns that the transposition of the new power may not be open to acquiring authorities promoting DCOs, as was intended;

2.37.2 powers to introduce targets and clearer timetables for dealing with the confirmation stage of the order process. This power is not yet in force and will be subject to further details;

2.37.3 power for the SoS to appoint an inspector to determine confirmation of a CPO - similar to the situation that occurs currently in respect of planning applications. This is not yet in force and the precise circumstances and details are not yet known;

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12 Planning Act 2008: Guidance on Nationally Significant Infrastructure Projects and Housing (March 2017)

2.37.4 clarification (in line with the common law position) of the period in which the CPO can be exercised. It is now clear that a notice to treat ("**NTT**") or a general vesting declaration ("**GVD**") must be made within three years from the day that the CPO becomes "*operative*"; and

2.37.5 changes to the periods and process for the vesting and taking possession of land. Regulations[13] came into force on 2 February 2017 and transitional provisions apply - applies to all CPOs made after 3 February 2017 (save for those under the authority of Welsh Ministers where 6 April 2017 is the relevant date). Essentially, there is no longer a requirement to serve a two month prior notice of intention to make a GVD. However, the minimum period to be stipulated in a GVD has now increased from 28 days to three months. The earliest point before land can be vested has therefore not changed but the process is different. However, in the case of notice to treat/notice of entry ("**NTT/NOE**"), the minimum period for taking possession is three months rather than 14 days. Under the new powers, an acquiring authority can no longer serve a GVD after serving an NTT (unless the NTT is withdrawn). A new process has also been introduced that enables the landowner to serve a 28 day counter notice requiring possession to be taken if the acquiring authority has not taken possession by the expiration of the date in the NoE. The NoE can be extended by agreement between the parties at any time.

2.38 There have also been changes to the process affecting the compensation regime which are yet to be brought into effect and comprise:

2.38.1 a power for the SoS to prescribe the form and content of claims and advanced payment requests. The intention to make clearer the information required to enable acquiring authorities to determine claims and therefore to deliver a quicker outcome;

2.38.2 coupled with this is a defined short period of 28 days for acquiring authorities to indicate to the claimant if they feel that they do not have enough information to deal with the request; and

13 The Housing and Planning Act 2016 (Compulsory Purchase) (Corresponding Amendments) Regulations 2017.

2.38.3 corresponding changes to the advanced payment process is intended to result in earlier payment. Payment will no longer be subject to the acquiring authority having taken possession or having vested the land. Instead the date of payment must be no later than the earlier of:

2.38.3.1 at any time after the CPO is being confirmed, within two months of receipt of a request or two months from the provision of further information required by the acquiring authority; and

2.38.3.2 by the end of the day of the serving of a NoE or making of a GVD.

2.39 Acquiring authorities will therefore have less time to turn around requests for advanced payment, which will otherwise still be based on 90% of its own valuation. The new process will potentially require the acquiring authorities to make advanced payments before they have determined whether or not to exercise the CPO and/or some time in advance of doing so. This will have a financial bearing on promoters. The HPA has also introduced provision requiring the repayment of advanced payments where there has been an overprovision - once the final determination of the amount of compensation is made or agreed. The powers also make clear that the requirement to repay runs with the land such that it will be a liability for the owner at that time. Therefore in practice, purchasers of land affected by CPO will need to make enquiries as to the history of any advanced payments as this will otherwise form a liability for the successor in title if any of it is to be repaid. Certainly, there are likely to be practical issues for acquiring authorities and their developer partners in recovering sums that are paid, particularly if the money is offshored.

2.40 The powers also introduce an ability for the Treasury to introduce regulations to apply interest on late advanced payments and also upon the excess required to be returned to an acquiring authority where there has been an overpayment. The rates are for Treasury's determination and are not yet known or in force.

Duty to report and dispose of surplus land holdings

2.41 This is a power in the HPA which applies to England and Wales but is not yet in force and is subject to regulations.

2.42 The intention is that public authorities will be required to publish details of any land that it has held for more than two years which it deems to be surplus and explaining why it has not

disposed of it for redevelopment. The SoS is expected to bring in guidance to steer authorities on the subject of what is to be considered surplus.

2.43 A corresponding new power enables the SoS to direct public authorities to dispose of that land and regulations are expected to direct the circumstances in which disposal will be required.

Improving efficiency and sustainability of local authority buildings

2.44 The HPA introduces a duty upon local authorities to prepare an annual assessment report on the efficiency and sustainability of its buildings. The report must set out its progress towards energy efficiency targets that will be set. This provision is not yet in force and will be subject to guidance introduced by the Government.

Changes to Neighbourhood Planning

2.45 The HPA introduces powers that will enable the SoS to make further changes to the neighbourhood plan process, principally designed to give more teeth to those preparing neighbourhood plans ("**NPs**") by ensuring the performance of the LPA. The powers are designed to:

2.45.1 impose timescales on LPAs to deal with NP proposals put to them; and

2.45.2 powers for the SoS to intervene with the LPA's decision on whether or not to hold a referendum - being the last stage before a NP can be made (i.e. is finally adopted) and is given full weight.

2.46 The changes are believed to be a response to concerns that there are often tensions between the LPA and the parish councils/neighbourhood plan forums (preparing NPs) - particularly regarding the extent to which the NP may be sufficiently in "general conformity" with its Local Plan policies (one of the 4 basic conditions that NPs must satisfy) but may cut across the LPA's ability to meet its housing numbers across its wider administrative area. In the case of R (Kebbell Developments Limited v Leeds City Council [2016] EWHC 2664 the Court confirmed that whilst the NP has to be in general conformity with the strategic policies of the adopted Local Plan, *"taken as a whole"* - it does not therefore have to be consistent with every Local Plan policy and the basic conditions do not require conformity with the LPA's emerging plan, only its adopted Plan.

2.47 At the same time there are concerns that the general quality of the evidence supporting NP proposals should be better when coupled with what is a less rigorous examination process (when contrasted with the "soundness" test applied to the examination of Local Plans). The case of Crownhall Estates Limited v Chichester District Council [2016] EWHC 73 is a reminder that the NP examination process does not require the same rigor as that supporting a Local Plan and is based upon "*proportionate evidence*". This case can be compared and contrasted with the decision in R (Stonegate Homes Limited) v Horsham District Council [2016] EWHC 2512 which suggests that the courts are looking to raise the bar in terms of the required quality of evidence supporting NPs and of the quality of the examination process itself.

2.48 Given the status that NPs occupy as part of the statutory development plan, they have serious implications for the shaping of development. For a while there was general scepticism that they would have any real effect. As the making (and coming into effect) of NPs is rapidly rising, there is a real need for developers to engage fully in the process in the same way as they do in Local Plan promotion.

2.49 There is no sign of the force of NPs fading into the background. On the contrary more protection for the NP process is proposed by the NPB, particularly in light of changes that have been sought by the House of Lords who have added more requirements on LPAs to assist in their production (see further below).

2.50 A planning application that conflicts with an adopted NP is normally expected to be refused permission (Para 198 NPPF). At the same time, "policies for the supply of housing" in development plans (which includes NP policies) are deemed to be out of date, if the LPA cannot demonstrate a five year supply of deliverable housing sites (Para 49 NPPF) - triggering the (Para 14 NPPF) presumption in favour of sustainable development. The influence (or weight) of NPs can be quickly diminished and communities put under pressure to accept more housing, as a consequence of failure to deliver housing land elsewhere in the area. In December 2016, The Housing and Planning Minster, Gavin Barwell, controversially announced (in his Written Ministerial Statement) (**"2016 WMS"**) that unlike Local Plans, NPs were not to be automatically deemed out of date under Para 49 where:

2.50.1 the 2016 WMS is less than two years old;

2.50.2 the NP allocates sites for housing; and

2.50.3 the local authority can demonstrate a three year supply of deliverable housing sites.

2.51 The Minster's intention is to give NPs greater weight and longevity in the decision making process - even if it will effectively place greater burden on the LPA to make up the shortfall in housing land elsewhere in its area or in another local authority area (through the "duty to co-operate").

2.52 A consortium of 25 of the UK's house builders launched a judicial review challenge (in January this year) to the 2016 WMS on the grounds that this announcement amounts to a change to national policy (essentially amends the NPPF) without the Government having carried out any consultation – and noting that the change has instant effect and is contrary to the Government's agenda to boost housing supply. So far DCLG has indicated that it considers that it was under no duty to consult on the content of the 2016 WMS. The Government has nonetheless chosen to include the substance of the 2016 WMS amendment in the Housing White Paper – seemingly as rear-guard action to take the wind out of the judicial review claim. The Courts decision on whether or not to give permission to hear the case is currently awaited.

2.53 As an aside, the question of the proper interpretation of what is meant by a "relevant policy for the supply of housing" (for the purpose of Para 49 NPPF) has been the subject of a significant amount of case law over the last two or three years. During 2016, a (nearly[14]) definitive view has emerged in the combined cases of Suffolk Coastal District Council v Hopkins Homes Limited: Richborough Estates Partnerships Ltd v Cheshire East Borough Council [2016] EWCA Civ 168 in which the Court of Appeal decided that the wider and more purposive interpretation is correct. In other words, the NPPF read in its full context, is to deliver the Government's aim in providing the supply of more housing. Para 49 therefore captures policies that "affect" or "influence" the supply of housing by restriction - including policies for the Green Belt and general protection of the countryside.

2.54 The Court of Appeal also confirmed that a policy that is determined to be "out-of-date" as a consequence of Paragraph 49 is not automatically irrelevant in the decision making process. It is a matter for the decision maker as to how much weight it should be afforded. Clearly it must be less than full weight and the Court gave an indication of how that weight may be attributed:

2.54.1 regard to the extent of which those policies fall short at providing a five year supply of housing;

2.54.2 the action being taken by the LPA to address the shortfall; and

2.54.3 the particular purpose of the restrictive policy and its continued relevance.

2.55 The Court of Appeal gave permission for its decision to go to the Supreme Court. The Court hearing took place last month - the final decision of the Supreme Court is awaited. The findings of the Supreme Court should determine once and for all how Paragraph 49 is to be applied.

2.56 This controversy has overshadowed the second element of the 2016 WMS which is to extend the ability for the SoS to recover (for its own determination) planning appeals that include proposals for residential development of over 25 dwellings in areas where a NP proposal has been put to the LPA (for consultation and referendum) but has not yet been made. Subject to further extension, this will now run to the beginning of June 2017. A number of appeals have been recovered under this power and developers can expect that trend to continue in light of the clear political aim to give NPs more effect.

14 Pending the decision of the Supreme Court

3. PERMITTED DEVELOPMENT RIGHTS

3.1 The Government introduced a significant number of changes to Permitted Development Rights ("**PDR**") between 2013 and 2015 before consolidating all earlier amendments in an updated GPDO[15]. The changes represent a shift towards greater deregulation on the movement between use classes to "*support growth in the economy*" in England.

3.2 PDR essentially removes the requirement to submit applications for express grant of planning permission. The application of PDR is subject to a number of detailed limitations and exclusions. Some of the recent changes are temporary and will time expire. In broad terms, the changes over the last 3 years can be summarised as:

3.2.1 changes to facilitate greater conversion of buildings to residential - from a range of uses including retail, professional services, office, storage/distribution, agricultural buildings, HMOs, amusement arcades, casinos, betting offices and pay day loan shops;

3.2.2 greater interchangeability of high street uses (and the erection of "click and collect" facilities as well as the enlargement of shopping loading bays); and

3.2.3 larger permitted rear household extensions as well as two shops, office and industrial warehouses.

3.3 The nature and extent of the limitations and exclusions can be punishing and require careful consideration. Many also require the "prior approval" of the LPA - which is essentially an application to the LPA albeit for the determination on a more limited number of considerations. Only some of the permitted changes of use include an automatic right to carry out the necessary external (operational development) changes to facilitate that conversion.

3.4 Following the Government's further consultation in 2015, a number of changes have been made to the GPDO through two Amendment Orders in 2016[16] and a further Order (most recently) in 2017[17]. The further changes provide further widening of PDR as follows:

3.4.1 conversion from laundrettes to residential (except where the cumulative floor space of the existing building changing use under Class M exceeds 150m²/or the

15 Town and Country Planning (General Permitted Development) (England) Order 2015/596

16 Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2016/332; Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2016/1040

development (together with any previous development under Class M) would result in more than 150m² of floor space in the building having changed use under Class M);

3.4.2 conversion of light industrial to residential (gross floor space cannot exceed 500m²) (expires in September 2020);

3.4.3 making permanent the right to convert office to residential (external noise is also added as a new consideration to take into account as part of prior approval);

3.4.4 the drilling of bore holes for ground water and seismic monitoring and identifying the location and condition of wells for potential petroleum exploration (designed to assist fracking);

3.4.5 clarification over the application of restriction to residential extensions;

3.4.6 extends the temporary use of a building as a state funded school from one to two academic years;

3.4.7 the erection of temporary school buildings on vacant commercial land for a period of up to three academic years; and

3.4.8 extensions to rights for telecommunication operators.

3.5 In the case of conversion to residential, DCLG has issued statistics[18] which indicate that approximately 7% of all delivered housing units between 2015/2016 were delivered under this mechanism. This PDR can give rise to tensions due to incompatibility with Local Plan policies on employment areas, particularly around town centres. When the temporary right was introduced, a number of city centre areas (including Manchester City Centre) were exempt as protected zones (Article 2(5) land). The recent changes in 2016 will remove that protection from May 2019. Those LPAs will need to consider promoting Article 4 Directions if they are to continue to protect those zones. LPAs are encouraged to utilise the Article 4 Direction process if they have justifiable policy reasons to protect employment zones.

3.6 One of the benefits of this PDR is that it avoids the policy requirement to provide affordable housing - this can have a significant benefit in terms of value to the developer. It is not

17 Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2017/391

18 DCLG: Housing Statistical Release - November 2016.

unknown for developers to argue the application of this PDR as a fall back to applications for full planning permission for residential development - leaving LPAs to determine what weight to attribute to that potential in the knowledge that this PDR does not benefit from automatic rights to carry out external changes and/or to demolish and rebuild. In other words, is reliance on the PDR a realistic prospect that should be factored into an application for express permission?

3.7 For corporate occupiers, the availability of the PDR can be useful for valuation purposes, for example, to leverage greater financing - even if there is no intention to redevelop. There may be advantages in submitting applications for prior approval in order to crystallise that certainty.

3.8 The Government as part of its recent consultations considered other changes that were being called for but that have not yet progressed:

3.8.1 further protection for pubs (Use Class A4) not held as Assets of Community Value ("**ACV**") removing the ability to switch to other ("A" Class) retail uses - however see recent proposals in the NPB; and

3.8.2 limitation on the use of charity shops in a town centre (by imposing an upper limit). There are concerns that too many charity shops changes the character of an area. The Government is not so far persuaded to intervene.

4. REASONS FOR GRANTING PLANNING PERMISSION

4.1 Prior to June 2013, LPAs were under a statutory duty to include a summary of their reasons for granting planning permission.[19] This requirement was repealed[20] leaving only a general common law principle of procedural fairness. There was no change to the requirement to give reasons when refusing planning permission.

4.2 During 2016 there have been a number of cases that have considered the extent to which the common law principle still requires LPAs to give reasons for granting planning permission and the circumstances in which that might arise.

4.3 In the case of R (Hawksworth Securities Plc) v Peterborough County Council [2016] EWHC 1870 (Admin) the Court decided that even if it was appropriate to provide reasons for

19 Article 31(1) of the Town and Country Planning (Development Management Procedure) Order 2010/2184.

20 The Town and Country Planning (Development Management Procedure) (England) (Amendment) Order 2013/1238.

granting permission the standard required would be different to that given by the SoS or his inspector in an appeal decision. In that case, the view was that the need to give reasons would only arise "*exceptionally*" to meet the requirement of fairness.

4.4 The Court in R (CPRE Kent) v Dover District Council [2016] EWCA CIV 936 deviated from Hawksworth by finding that where there would be substantial harm to an AONB, the LPA had to give substantial reasons for doing so. In that case, the planning committee had also departed from the planning officer's recommendation to refuse.

4.5 Another case of R (Shasha) v Westminster City Council [2016] EWHC 3283 (Admin) found that the position is different where the decision to grant permission in under the delegated authority of an officer owing to a different statutory duty.[21]

4.6 Then followed a case of Oakley v South Cambridgeshire District Council [2017] EWCA Civ 71 in which the Court restated that whilst there is no general obligation to give reasons, the tendency is increasingly to require them rather than not. This was a case, similar to CPRE Kent, involving a protected area (in this case development on Green Belt) and where the planning committee had departed from the officer's recommendation. The Court took the view that "*reasons should be given unless there is proper justification for not doing so*".

4.7 The decision in CPRE Kent has been appealed to the Supreme Court such that the final position on this set of rulings may be subject to further change. However, at this stage it appears that LPAs should be cautious in not providing a summary of reasons for the granted permission despite the removal of a statutory duty to do so.

4.8 The current position can therefore be summarised as follows:

4.8.1 there is still a statutory duty to give reasons for:

4.8.1.1 refusing planning permission;

4.8.1.2 the imposition of planning conditions;

4.8.1.3 when granting permission for EIA development;[22]

4.8.1.4 the grant of planning permission under delegated powers.

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21 The Court found that Regulation 7 of the Openness of Local Government Bodies Regulations 2014 (SI2014/2095) required reasons to be given in that case.

22 Regulation 24 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011/1824.

4.8.2 There is a common law duty (of fairness) to give reasons for the grant of planning permission in (fact specific) cases for which the following is likely to be relevant:

4.8.2.1 where the application is complex, controversial or finely balanced;

4.8.2.2 there is a recommendation from the planning officer of refusal which is not followed;

4.8.2.3 the development is in a sensitive location (for example, the Green Belt or an AONB); and/or

4.8.2.4 there is significant local objection.

4.9 The message is, if in doubt, provide a summary of reason for grant.

5. RETAIL PLANNING

5.1 There have been a couple of notable cases in 2016 on the application of the sequential test (in Paragraph 24, NPPF) associated with retail development.

5.2 In Aldergate Properties Limited v Mansfield District Council [2016] EWHC 1670, the Court decided that a retailer's existing presence in the search area for the retail sequential test was not a relevant consideration. In other words, suitability and availability of sites for retail uses is to be judged according to the type of retail use for which permission was sought in a purely objective sense. The fact that the retailer already held a presence was not a reason to direct retail out of town.

5.3 In R (Skelmersdale Limited Partnership) v West Lancashire Borough Council [2016] EWCA Civ 1260, the Court determined that it is lawful for an LPA to impose conditions that prevent a retailer from occupying new out of town development unless and until they have committed to retaining their retail presence in the existing town centre.

6. NEIGHBOURHOOD PLANNING BILL

6.1 The two stated key aims of the NPB are to:

6.1.1 identify and free up more land to build homes; and

6.1.2 speed up the delivery of new homes - particularly addressing the period between the grant of permission and commencement of development.

6.2 The Bill has been through both the Houses of Commons and Lords and the next stage in the process of the Bill is for the House of Commons to consider the Lords' amendments in a process called "ping pong". Royal Assent will then follow, once that stage is completed. This is expected within the next few weeks.

More changes to Neighbourhood Planning

6.3 Despite its title, the NPB does relatively little for neighbourhood planning – or at least it did at the start of the Bill. At the outset, the main proposals were:

6.3.1 to introduce a new procedure to allow for the amending and updating of NPs;

6.3.2 to require full weight to be given to NPs that have reached post-examination stage (but are still subject to referendum); and

6.3.3 for the NP to become part of the Development Plan after the referendum, unless the LPA subsequently decides not to adopt it.

6.4 These changes alone are not particularly ground-breaking. There have been a number of amendments made by the House of Lords, proposed to address some of the difficulties and tensions that are currently arising in neighbourhood planning. They are to:

6.4.1 require LPAs to notify neighbourhood planning groups automatically of any planning applications in its neighbourhood area, once a NP has successfully passed independent examination;

6.4.2 allow the SoS to introduce regulations which set out matters that the LPA must address in their Statements of Community Involvement - essentially to provide assistance to neighbourhood planning groups in connection with their proposals; and

6.4.3 clarify the definition of a "post-examination" NP.

6.5 The Courts have confirmed in the recent past that an up-to-date Local Plan does not need to be in place in order for a NP to be made. The absence of a new Local Plan is not therefore a barrier for the promotion of NPs by parish councils/neighbourhood plan forums - albeit it can present challenges for those engaged in the process where there is likely to be a lack of an agreed Objectively Assessed Need (OAN) for an area and common ground with the LPA and

developers as to how much housing the particular NP area should provide. The changes proposed by the Lords may go some way to trying to address these issues.

Pre-commencement planning conditions

6.6 The NPB proposes a power that will require LPAs to use pre-commencement conditions only where they have the written agreement of the developer.

6.7 If the developer does not agree (in writing or is deemed to consent having not responded within a set period of time) then the LPA has the option to refuse planning permission.

6.8 Whilst the detail of this reform will be subject to regulations, it is difficult at this stage to see how there will be much practical benefit associated with this proposal. In practice, developers are likely to continue to accept pre-commencement conditions in order to secure planning permission and to deal with their discharge post-consent. Rather, developers say that the real issue is the resourcing available within each LPA to determine a discharge of conditions quickly and effectively.

Further compulsory purchase reforms

6.9 The Bill provides further proposed changes to the compulsory purchase process which essentially comprise:

6.9.1 the ability for acquiring authorities to take temporary possession of land (rather than have to acquire it permanently) together with a duty to provide compensation for that temporary interference. This is an approach that is already available to the promoters of development consent orders (**"DCOs"**) and will be extended to Acquisition of Land Act CPO orders; and

6.9.2 an attempt to clarify the definition of the "no-scheme world" principle[23] relevant to the assessment of compensation. This will introduce a list of statutory planning assumptions that are to be engaged once a no-scheme world has been established.

(The timing of this provision coincides with the Supreme Court's determination of the case of Homes and Communities Agency v J S Bloor (Wilmslow) Housing [2017] UKSC 12 in which it expresses hope that the NPB will achieve its stated

23 By inserting, through current clause 30, new sections 6A to 6E into the Land Compensation Act 1961.

aim of "clarifying the principles and assumptions for the "*no-scheme world*". The Court noted that application of the general law "*Pointe Gourde*" principle and the statutory assumption tests in the Land Compensation Act 1961 can result in perverse and different outcomes depending upon the circumstances.

Local Plan making

6.10 Following the recommendations[24] from an "expert panel", appointed by the Government to review simplification of the Local Plan process, the House of Commons introduced further clauses in the NPB aimed at addressing changes to the way in which Local Plans are made. A number of the proposals have also been subject to discussion in the Housing White Paper and are summarised as:

6.10.1 provisions to enable the SoS to direct two or more LPAs to make a joint Local Plan;

6.10.2 a requirement for each LPA (out of London or in a non-mayoral area) to identify strategic priority policies for its area;

6.10.3 requirement for Local Plans to be reviewed at regular intervals, at a time to be prescribed (a period of at least every five years is suggested in the House White Paper; and

6.10.4 the ability for the SoS to invite a County Council to prepare a Local Plan where a district council has failed to do so.

6.11 Subject to the passing of the Bill all of these powers will require further regulation and guidance, the detail of which is awaited.

Further changes to PDR

6.12 During the House of Lords' period of review, further changes have been proposed to the PDR regime.

6.13 The first is to require the SoS to make regulations to remove the PDR that currently entitles existing pubs (which are not ACV) to be demolished or changed to other retail uses without

24 Local Plans: Report to the Communities Secretary and to the Minister of Housing and Planning (March 2016)

planning permission. The Government did not support this amendment but has agreed to a review.

6.14 There has also been a clause added to require a register of "prior approvals" of PDR to be held by LPAs.

6.15 During the Third Reading stage (15 March 2017) a proposal has been included by the Lords in which the SoS will not be able to limit an Article 4 direction made by a LPA where it is meeting 100% of its housing delivery requirement and is continuing to do so.

7. (LIKELY) CHANGES TO THE NPPF

7.1 Having regard to the Government's Response to its consultation on the NPPF and changes that are proposed as part of the Housing White Paper, the expectation is that the NPPF will be updated later in the year and further announcements are awaited. The known or likely changes can be summarised as:

7.1.1 requirement for a statement of common ground between LPAs to supplement the "duty to cooperate";

7.1.2 support for use of "rural exception sites" for Starter Homes;

7.1.3 support for higher-density housing around commuter hubs;

7.1.4 support for small (less than 10 unit) sites for housing next to existing settlements;

7.1.5 release of vacant/unviable/underused non-strategic employment land for Starter Homes. This will include land that has been in that condition for five years or more;

7.1.6 release of unviable and underused (retail, leisure and non-residential institutional) brownfield land for housing;

7.1.7 use of brownfield land for Starter Homes in the Green Belt, if it does not lead to substantial harm to openness;

7.1.8 widening of the Annex 2 definition of "Affordable Housing" - to include Starter Homes and other forms of tenure and products;

7.1.9 support for the increase of new Built to Rent homes;

7.1.10 a Paragraph 14 NPPF style presumption in favour of brownfield land (in existing settlements);

7.1.11 introduction of design expectations for NPs;

7.1.12 LPAs to provide housing requirement figures to neighbourhood plan groups for the purpose of NP preparation;

7.1.13 greater emphasis on climate change measures;

7.1.14 greater regard to potential for nuisance from existing noisy neighbour uses as a material consideration in planning decisions; and

7.1.15 greater support for new settlements (garden town/villages).

8. ENVIRONMENTAL IMPACT ASSESSMENT

8.1 At present, development in England that falls within the scope of 2011 EU Directive on EIA is subject to the Town and Country Planning (Environmental Impact Assessment) Regulations 2011.

8.2 The EU Directive was amended in 2014[25] which makes changes to the requirements for assessment of significant environmental effects. Member States have until 16 May 2017 to transpose those amendments into domestic law.

8.3 The Government published a number of consultations (including the Environmental Impact Assessment: Technical Consultation (Regulations on Planning and Major Infrastructure)) in December 2016 seeking views on the necessary changes to the existing UK legalisation. The Consultation ended on 1 February 2017. Quite a lot of the requirements of the amended 2014 EU Directive are already captured by the existing 2011 EIA Regulations and in other cases, best practice is adopting a number of the required measures. However, some changes are expected which can broadly be summarised as:

8.3.1 a requirement for a co-ordinated/single assessment for EIA assessment where the Habitats and/or Wild Birds Directives are engaged. Currently, EIA development applications are accompanied by a Habitat Regulations Assessments which is taken into account as part of the overall determination of the application. It is not strictly necessary for particular change in this approach, albeit it would be open to

the Government to suggest a single process for incorporation in the EIA assessment;

8.3.2 a change to the description of EIA assessment scope. There is the addition of a requirement to take into account the risk of major accidents and/or disasters. Otherwise, there is different emphasis on the wording of the description rather than a requirement to take account of materially different environmental effects;

8.3.3 requirements to standardise the type and level of information required to be provided as part of request for a screening opinion/direction;

8.3.4 there is still to be no requirement for a scoping opinion but an applicant will now be required to base its EIA assessment on a scoping opinion if one is sought and provided;

8.3.5 there is a requirement that all EIA development is prepared and reviewed by "competent experts". There is likely therefore to be a requirement for statements of compliance together with details of qualification and experience of contributors to be submitted as part of an assessment. This will also place potential additional burdens on LPAs in assuring that suitably qualified persons are reviewing EIA assessments submitted with applications;

8.3.6 publishing EIA information electronically will become mandatory. This is likely to be best dealt with by placing information on either the LPA and/or project websites or on a portal;

8.3.7 there is to be more emphasis on requirement and details of monitoring where mitigation is required and secured as part of EIA development decisions. The EIA assessment itself is likely to be required to explain the approach to monitoring in much greater detail; and

8.3.8 a requirement to notify (publicise) public and consultation bodies of decisions, additional information and results of consultations undertaken. This may reflect best practice to a large extent but will require information to be made available (again likely to be provided on a website or portal). There will be need for a clear understanding as to information that is required to be published. It is not

25 Directive 2014/52/EU.

presently uncommon for LPAs to want to re-consult on all additional information provided as part of an EIA development application, whether or not it is actually "further information" for the purpose of the EIA Regulations. The difference in requirements will need to be understood to avoid a never ending cycle of consultation and re-consultation on representations that are made.

8.4 The fallout of Brexit is unlikely to affect the requirement for changes to the EIA Regulations in the short or medium term - not least as the EU Directive is derived from international conventions, to which the UK will remain a party going forward.

9. AIRPORTS NATIONAL POLICY STATEMENT

9.1 At the beginning of February 2017, the Government published its draft Airports NPS which was accompanied by a number of technical reports and a formal consultation.[26] The Consultation closes on 25 May 2017 and is expected to come into effect by the end of 2017/into 2018 following a debate and scrutiny in Parliament.

9.2 The airports NPS will form the policy basis for assessing future planning applications for airport extensions in the South-East and sets out:

9.2.1 the need for additional airport capacity;

9.2.2 why it is believed that the need is best met by a north-west runway at Heathrow Airport; and

9.2.3 specific requirements that an application for a new north-west runway will need to meet in order to gain development consent.

26 Consultation on draft airports National Policy Statement: New runway capacity and infrastructure at airports in the South-East of England.