Planning solutions to the housing crisis

Julian Boswall and **Alex Minhinick** discuss government proposals for the delivery of housing, the progress towards a devolved planning system in Wales, and recent decisions on the NPPF

Julian Boswall is a partner and Alex Minhinick an associate in the planning and compulsory purchase team at Burges Salmon
@BurgesSalmon
www.burges-salmon.com

In December 2015 (SJ 159/45), we reported on the Housing and Planning Bill, which continues its passage through the House of Lords. In the meantime, the government continues to promote solutions to the current housing crisis that the Bill will underpin. Measures to support those solutions were announced in the chancellor's Spring Budget, with a series of recent consultation documents also having been published by the Department for Communities and Local Government (DCLG).

Starter homes continue to be the star of the show. Following its December 2015 consultation on the proposals within the Bill, the government continues to promote starter homes as England's affordable housing solution. Starter homes would be available as new-build houses to first-time buyers under 40 at a 20 per cent market discount.

£1.2bn is pledged in access to funding through the starter homes land fund in the Budget, together with the bringing forward of £250m of capital spending for the early delivery of 13,000 affordable houses in the next two financial years.

In addition to those fiscal measures, a DCLG technical consultation has been launched on starter homes regulations, closing in May 2016. The headline proposal is the starter homes requirement: that at least 20 per cent of all residential developments in excess of ten units should be provided as starter homes.

Further planning reform is the subject of another technical consultation running until mid-April 2016. The technical consultation on the implementation of planning changes explores the manner in which many of the planning reforms outlined in the Budget – permissions in principle, registers of brownfield land, and a host of procedural matters relating to planning fees and performance – are to be implemented.

Local plans are the bedrock of the planning system and have long been identified as a sticking point in the delivery of housing and the smooth operation of the planning system. In addition to its exploration of permissions in principle and the zoning of certain types of land for housing (i.e. brownfield land), a panel of experts was appointed in September to examine 'what measures or reforms may be helpful in ensuring the efficient and effective production' of local plans.

That expert panel, the Local Plan Expert Group (LPEG), duly reported its findings and recommendations in March 2016. The most eye-catching recommendation is that any local authority failing to submit a local plan for examination before March 2017, where its extant plan predates 2004, should be deemed to have no existing policies relating to housing supply after that date. The general theme of the LPEG's recommendations is of increased support, simplicity, and timeliness in the content and delivery of local plans.

Relevant policies

'Relevant policies for the supply of housing' is a loaded phrase within the National Planning Policy Framework (NPPF), closely linked to the reforms recommended by the LPEG. Also published in March was the Court of Appeal's decision on the meaning of that phrase within paragraph 49 of the NPPF.

In *Richborough Estates Partnerships LLP v Cheshire East Borough Council and the Secretary of State* [2016] EWCA Civ 168, it was held that paragraph 49 should be interpreted widely. That is, where a local planning authority (LPA) cannot demonstrate a sufficient five-year housing supply of deliverable housing sites, the policies relating to the supply of housing that are to be considered as not up to date (as paragraph 49 directs) are to be approached with a broad scope.

Policies relating to where housing may not be sited are likely to fall within that broad scope.

This will be a considerable shot in the arm for developers promoting housing sites in areas where the LPA is unable to demonstrate a five-year housing supply.

Garden settlements (whether villages, towns, or cities) make up the final piece in this broad patchwork of measures relating to the delivery of housing. After many broad expressions of support for the principles (or aspirations, perhaps) of new garden cities, the DCLG has now published a prospectus, 'Locally-led garden villages, towns and cities', which calls for expressions of interest from local authority-led groups for new garden villages (1,500 to 10,000 dwellings) and new garden towns or cities (above 10,000 dwellings).

Two key aspects of this call for sites strike a chord with the wider housing narrative: that proposals should be local authority-led, and that, in return for new garden settlements, the local authority will be granted 'planning freedoms', a phrase we understand to mean the ability to resist other residential proposals in less appropriate locations.

Among the outpouring of policy announcements, funding streams being made available, and long-term electioneering politics that have emerged over the last several months, it is difficult at times to step back and see the wood for the trees. What is clear is that the planning system in England is being pushed to deliver low-cost (a relative term) starter homes as part of a wider drive to free up new housing land as a series of new settlements or significant urban extensions.

The implicit message from the government to LPAs is that where housing is delivered in sufficient volumes, local politicians will thereafter have a freer hand to determine planning applications in what are considered by an LPA to be less favourable sites.

Welsh planning regime

The Planning (Wales) Act 2015 made extensive changes to the planning regime as it applies in Wales. Significant practical changes have now been introduced to secondary legislation as amendments to the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 (DMPO) and a number of statutory instruments relating to the new category of developments of national significance (DNS). The changes to the DMPO became effective from 1 March and those in relation to the DNS on 16 March 2016.

The DMPO has been amended to include new requirements for pre-application consultation for major development, and for a developer to demonstrate how concerns raised during that consultation have been addressed in the scheme eventually submitted. Design and access statements are now only required for proposals for major development and for proposals which include more than one dwelling. Developers must now notify an LPA once development has commenced and LPAs will maintain 'live' decision notices to ensure that they reflect the most up-to-date planning position – meaning decision notices will record whether planning conditions have been discharged, partially discharged, or removed or varied.

Thresholds for DNS, where the planning application needs to be made directly to the Welsh ministers, are provided for in the Developments of National Significance (Specified Criteria and Prescribed Secondary Consents) (Wales) Regulations 2016. Broadly, the DNS regime includes any onshore generating station with a generating capacity between ten and 50 megawatts, together with a range of transport and infrastructure projects.

In a quirk caused by the decision of the government to remove all onshore wind generating stations (whether in England or Wales) from the Planning Act 2008 regime for nationally significant infrastructure projects, the DNS regime will include any onshore wind generating station in Wales with a generating capacity in excess of ten megawatts but without an upper limit.

Time limits on judicial review

In the case of *R (Gerber) v Wiltshire Council* [2016] EWCA Civ 84, the Court of Appeal overturned the decision of the High Court to quash planning permission for a solar farm following an application for judicial review made out of time. By the time of the High Court decision, the development had been built at a cost of £10.5m and would have cost £1.5m to dismantle.

In the High Court, Mr Justice Dove excused this delay because Mr Gerber only became aware of the planning application when he saw development starting, and should have been directly notified by the council due to a legitimate expectation derived from the council's Statement of Community Involvement (SCI).

The Court of Appeal ruled, however, that it was not appropriate to extend time to bring judicial review 'simply because an objector did not notice what was happening'. The council had correctly met its obligations for publicising the proposal and major financial detriment would be caused if the planning permission remained quashed. The SCI had not created a legitimate expectation that Gerber should have been directly notified of the application.

This judgment overturned a surprising decision to allow a claim for judicial review over a year out of time, and reiterates the importance of engaging promptly (within six weeks) with any decision that has been made. **SJ**

> **Local plans have long been identified as a sticking point in the delivery of housing**