The solution to the housing crisis?

Julian Boswall and **Alex Minhinick** discuss the key provisions of the Housing and Planning Bill and a number of decisions that have provided clarity on planning matters

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The Housing and Planning Bill has dominated the planning press since the summer recess. It addresses a number of issues that will shape this government's policies on planning and house-building, and appears to have been at least partially influenced by the prime minister's aspirations to leave a lasting legacy for the present generation of young British adults: for 'right to buy', think 'starter homes'.

The housing crisis is in full swing, both in the press and on the ground. The government's solutions to the crisis were published in the Treasury's productivity plan in July 2015. The key provisions of the Bill intended to give effect to elements of that plan are, in summary:

- Starter homes are the new solution for meeting housing need. Defined as a new dwelling for first-time buyers at a 20 per cent discount on market value, the provision of on-site starter homes will supplant, at least in part, existing local development plan requirements for affordable housing in new residential developments;
- Local planning authorities (LPAs) that fail to promote up-to-date development plans face the prospect of intervention from the secretary of state to accelerate the process;
- Permission in principle will be provided by development order. The Bill would create a duty for LPAs to hold a register of certain types of land, the intention being to create a register of brownfield land over which permission for small-scale residential development will be provided in principle;
- Self-build and custom-build houses require serviced plots, and local authorities will be required to meet demand by granting sufficient permissions for suitable sites;
- The planning performance regime, introduced in 2012, allowed developers to submit major applications directly to the Planning Inspectorate, rather than to under-performing LPAs. The Bill will extend this option to minor applications;
- Financial benefits of proposals which might accrue to the local area will be required to be reported to planning committees, regardless of their relevance to the planning merits of an application;
- Prior approval, part of the permitted development process, will be extended to include matters beyond the siting and design of building operations; and
- Compulsory purchase procedures have been the subject of a number of previous consultations, and this Bill introduces a number of measures aimed at streamlining or improving those.

The Bill's most significant political impact would be the tacit abandonment of the principle that sufficient housing should be built to accommodate those in housing need, and that instead 'affordable housing' now means giving first-time buyers (with a deposit) a chance to get onto the hyper-inflated property ladder, at a small discount. The most significant planning impact could be the introduction of the 'permission in principle' approach, initially intended to apply only to small-scale brownfield sites but conceptually incorporating the conventional American approach of zoning to land use planning on these shores.

Vacant building credit

In November 2014, the national planning policy guidance was amended to exempt smaller residential developments from the usual requirements to make provision for affordable housing, and any other tariff-based planning obligations. The 'vacant building credit' was >>

>> introduced at the same time: a credit equivalent to the floor space of any vacant building brought back into use could be set off against affordable housing contributions.

These new provisions have been successfully challenged in *West Berkshire District Council and Reading Borough Council v Department for Communities and Local Government* [DCLG] [2015] EWHC 2222 (Admin) on account of their inconsistency with the statutory provisions for the adoption of local planning policies and the determination of planning applications, and the government's failure to give sufficient reasons for the proposals during consultation or take responses into account. The DCLG has since been granted permission to appeal (expected to be heard in March 2016).

The decision is a stinging critique of the DCLG's attempts to introduce policies by ministerial statement which have wide-ranging, significant implications for the provision of social infrastructure without any real regard for the provisions of LPAs' local development documents, which are a result of extensive local consultation and public examination under the statutory framework. We await the Court of Appeal's views with interest.

Enforcement of planning obligations

R (on the application of Robert Hitchins Ltd) v Worcestershire County Council [2015] EWCA Civ 1060 concerned two identical planning permissions: the first was granted and implemented subject to a planning obligation requiring three financial contributions to be made towards transport infrastructure, and the second permission was granted subsequent to the implementation of the first, but without the requirement to pay those financial contributions.

The issue before the court was whether or not the development (permitted by both permissions) could be completed under the second permission without payment of the outstanding financial contributions attached to the first permission.

In a decision which provides certainty to developers promoting schemes originally consented in more buoyant times, the Court of Appeal has confirmed that a developer can switch horses mid-race. That is, where there are identical permissions, a developer can elect to avoid the more onerous planning obligations attaching to the first permission.

LPAs are vigilant to ensure that planning obligations are re-imposed in full on any applications to vary a planning permission under section 73 of the Town and Country Planning Act 1990, and this case should serve to sharpen that vigilance. Particular care will need to be given to the pooling restriction under regulation 123 of the Community Infrastructure Regulations 2010, which could also come into play in these sorts of situations.

Recent EIA cases

In *R (on the application on Champion) v North Norfolk District Council* [2015] UKSC 52, the Supreme Court has laid down clear guidance for circumstances where judicial relief may be refused even where procedural irregularity has been established.

Permission was granted for a lorry park, a development falling within schedule 2 of the Town and County Planning (Environmental Impact Assessment) Regulations. The application was negatively screened on account of the council's conclusion that it was not likely to have significant effects on the environment. A flood risk assessment and a separate ecological assessment were submitted (and, in the case of the former, revised) as part of the application. The decision was challenged on the ground (among others) that it should have been subject to an environmental impact assessment (EIA) under the regulations.

The Supreme Court held that although the application should have been subject to an EIA, the failure did not prevent the fullest possible investigation of the proposal and the involvement of the public, in part through the submission of the relevant information, albeit not as part of an environmental statement (ES). This decision widens the 'very narrow' discretion available to the courts to not to grant relief where procedural irregularity under the regulations is shown.

Larkfleet v South Kestevan District Council [2015] EWCA Civ 887 concerned the relationship between two spatially linked applications and the issue of salami slicing – that is, splitting a development to avoid threshold triggers for an EIA. A link road and an urban extension were promoted in Grantham's Southern Quadrant, the former by the local authority with funding through the planning regime, the latter by a private sector developer. The link road application was supported by an ES which treated both schemes as separate projects, but assessed cumulative impacts. A rival developer challenged the grant of planning permission for the link road on the basis that the two schemes constituted a single project and the ES did not account for that.

The court held that the EIA Directive did not envisage that all schemes which had a cumulative impact would be treated as a single project for EIA purposes. The test is whether schemes are so interconnected as to comprise a single larger scheme. Here, the link road had strong policy support independently of the residential site. Both of these cases can be interpreted as evidence that the high-water mark for the controls imposed by the EIA and Habitats Directives is approaching, or perhaps indeed has already been reached. SJ

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