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NEWS

Housing planning news, May 2018

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Headline news

Government's design quality conference

On 25 April, MHCLG hosted a conference, 'Achieving Well-Designed Places', which brought together 'key stakeholders' from the Government and practice to design quality. The Secretary of State and the Housing Minister both delivered speeches at the event.

The conference follows the Housing White Paper's references to driving up the quality and character of new development', supporting custom build homes, encouraging 'better use of Local Development Orders and area-wide design codes', and good design being 'fundamental to creating healthy and attractive places'. These policy approaches are reflected in the draft NPPF, which has a chapter devoted to 'Achieving well-designed places'.

Prior to the conference, MHCLG issued a press release which said Ministers would:

'[...] call on industry to embrace the latest innovations to make sure we are building the good quality homes that our country needs.'

It was intended that the conference attendees, including local authority planners, developers and design professionals would 'share their expertise to ensure how homes look becomes just as important as the number delivered'.

The Housing Minister focused on the importance of good design and it being intrinsic to the success of a scheme rather than being solely about appearance, and referred to the Government's view that well-designed schemes, brought forward with community support, are less likely to be opposed by that community.

He also emphasised that high quality design need not necessarily cost more, which he considered to be:

'[..] one of the key points that we need to demonstrate through research as government, and you need to demonstrate in your practice in terms of rolling out and deploying modern methods of construction.'

The Minister referred to high density schemes that have good community facilities being associated with increasing positive social interaction. He also promoted examples of international design policy, including the New South Wales 'Better Placed' policy:

'[...] it is quite similar with our view that design is not just what a place look like, but also how it works and feels to the people already living in it.'

Ministry of Housing, Communities & Local Government, Government champions innovation in bid to build well-designed homes

Ministry of Housing, Communities & Local Government, speech delivered by Secretary of State for Housing Communities and Local Government at the Design Quality Conference

Ministry of Housing, Communities & Local Government, speech delivered by Housing Minister Dominic Raab at the Design Quality Conference

Quote of the month

Let's face it, the more attractive the new homes are, the more likely we are to carry communities with us, and the less pressure there will be on local authorities to oppose residential development.

That's got to be the win-win we're striving for in this room.

I have got no doubt that a focus on quality can drive up the quantity of new homes delivered.

Housing Minister, Dominic Raab, speaking at the Design Quality Conference, 25 April 2018

High Court judge confirms uncertainty must be overcome on how viability assessment should properly be carried out

In a long-running saga regarding residential redevelopment proposals for the former Territorial Army Centre site in Parkhurst Road, Islington, London, Holgate J has dismissed a High Court challenge relating to viability issues, following a June 2017 decision dismissing the appeal. There had also been a dismissed appeal for the site in 2015, which although it had been dismissed on other grounds, LB Islington at the time had been very concerned about the approach taken by the Inspector to viability assessment in order to determine whether the maximum reasonable amount of affordable housing was being provided. The Council had contemplated making an application for judicial review; pre-action protocol correspondence was exchanged but proceedings were not commenced.

In the 2017 appeal, the main issues had related to the amount of affordable housing and 'suitable planning obligations'. The Inspector had concluded:

'The proposed residential development would accord with a number of development plan policies and objectives, particularly those that promote the delivery of housing. However, the appeal proposal would not provide the maximum reasonable level of affordable housing and the submitted planning obligation does not provide a suitable means for a viability review.'

Widely differing approaches had been taken by the parties to viability at the

2017 inquiry; LB Islington had submitted that the site was 'exactly the type of site that should be making a substantial contribution towards affordable housing' - the existing use was redundant therefore the existing use value (EUV) was 'negligible'. There was no alternative form of development which could generate a higher value for an alternative use (AUV) than the development proposed by Parkhurst Road Ltd. (PRL), and there were no abnormal constraints or costs; therefore there was 'considerable headroom in the valuation of such a site enabling it to provide a substantial amount of affordable housing in accordance with policy requirements'. Their view was that the achievement of that objective was however being frustrated by PRL's use of 'a greatly inflated' benchmark land value (BLV) for the site, which failed properly to reflect those requirements; PRL had used a figure updated from the purchase price it had paid for the site as an input into its viability analysis, representing 'a fixed acquisition cost' (Paragraph 8).
Three grounds of challenge were considered in the High Court, all of which necessitated detailed analysis of the 2017 inquiry proceedings, and particularly the methods of valuation that had been employed each party and how these had led the Inspector to take the view that PRL's approach 'had failed to give adequate effect to policy requirements for affordable housing' (Paragraph 24). Tellingly, the Inspector had concluded:

'I do not accept the appellant's position that the level of affordable housing provision is not relevant to determining land value, as any notional willing land owner is required to have regard to the requirements of planning policy and obligations in their expectations of land value.'

Because the two appeal decisions had since 'generated a good deal of interest amongst planning professionals' – they had been used by different parties ever since, as if they provided guidance of more general application on the approach to be followed where development viability and affordable housing contributions were in issue – Holgate J underlined how this was inappropriate (in Paragraph 27):

'The Inspector's task is to resolve the issues which have been raised on the evidence produced in that appeal. The Inspector is not giving guidance on what course should generally be followed, even in cases raising the same type of issue. First, the application of policy often involves a good deal of judgment and second, the circumstances of an appeal (and the evidence produced) may differ quite considerably from one case to another [...] There is a risk of attaching too much importance to the decisions of individual Inspectors, particularly where their conclusions were heavily dependent upon the circumstances of the cases before them and the nature of the evidence and submissions they received, with all their attendant strengths and weaknesses specific to that appeal.'

Following a detailed analysis of how the parties' rival valuation contentions were addressed at the 2017 inquiry - particularly by LB Islington in relation to national policy and guidance, the Mayor's and LB Islington's planning policies and supplementary planning documents/ guidance, and the 'RICS Professional Guidance: Financial Viability in Planning' - the judge rejected all of PRL's grounds of challenge, first on the basis that the Inspector had correctly understood the way in which LB Islington had used the EUV Plus valuation method in accordance with the RICS Guidance Note, leading to his

endorsement of it (he had in parallel criticised PRL's 'purely market based approach'). Secondly, although the 2017 decision letter did contain a legal error relating to LB Islington's valuation case made (their witness's approach did not overcome the problem of comparison between land prices affected by differences in the levels of affordable housing provided, or by assumptions and circumstances affecting other sites which were inapplicable to the appeal site), Holgate J concluded that the decision letter was untainted by the legal error he had identified. The Inspector's decision to reject the adequacy of the proportion of affordable housing proposed would 'inevitably have been the same if he had not made that error' (Paragraph 121). He also found that the Inspector had given adequate reasons for his decision.

As an important postscript to his ruling, Holgate J categorically pronounced on the ongoing issues arising from uncertainty as to how viability assessment should properly be carried out. He stated the following, concluding too that he 'hoped that the court is not asked in future to look at detailed valuation material as happened in these proceedings':

'One of the key objectives in our planning system is efficiency in decision-making, in order to avoid delay in bringing about necessary or beneficial development. In this context the present case strikingly illustrates the importance of seeking to overcome uncertainty on how viability assessment should properly be carried out. Similar schemes on the same site have been approached by two different Inspectors in very different ways. That is not in itself unlawful, but from a practical perspective it does make it more difficult for practitioners and participants in the planning process to predict the likely outcome and to plan accordingly. It also leads to a proliferation of litigation [...] Appeal decisions which are said to support rival positions are seized upon as part of an increasingly adversarial process. Decisions of the High Court are also subjected to intense scrutiny and added to the forensic palette, whilst overlooking the point that the court's role is limited to review on public law principles, and not to determine whether a decision was right or wrong on its merits.

[...]

According to the basic principles set out in the NPPF and the NPPG, it is understandable why a decision-maker may, as a matter of judgment, attach little or no weight to a developer's analysis which claims to show a "market norm" for BLV by doing little more than averaging land values obtained from a large number of transactions within a district. If those values are inflated by, for example, a misjudgement about a site's development capacity and/or by a failure to factor in appropriate planning requirements, such an exercise does not establish a relevant "norm" for the purposes of paragraph 023 of the PPG. Such data should be adjusted (subject to any issues about reliability and cross-checking). A failure to obtain adequate information about comparables relied upon (including the planning context and circumstances influencing bids and the transacted price) would not be acceptable where development appraisal or viability is dealt with in the Lands Chamber or in an arbitration, and it is difficult to see why the position should be different where the same type of issue arises in the present type of case.

On the other hand, it is understandable why developers and landowners may argue against local policy statements that BLV should simply conform to an "EUV plus a percentage" basis of valuation, especially where the document has not been subjected to independent statutory examination prior to adoption.

[...]

It might be thought that an opportune moment has arrived for the RICS to consider revisiting the 2012 Guidance Note, perhaps in conjunction with MHCLG and the RTPI, in order to address any misunderstandings about market valuation concepts and techniques, the "circularity" issue [this being developers recovering the excess paid for a site through a reduced level of affordable housing provision] and any other problems encountered in practice over the last 6 years, so as to help avoid protracted disputes of the kind we have seen in the present case and achieve more efficient decision-making. The High Court is not the appropriate forum for resolving issues of the kind which the Inspectors dealing with the Parkhurst Road site had to consider.' (Paragraphs 142 to 147)

Parkhurst Road Limited v Secretary of State and LB Islington

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Raab reportedly says immigration puts up house prices

In the context of soon-to-be-published, post-Brexit immigration proposals, the Times on 8 April reported Housing Minister Dominic Raab as declaring:

'Immigration has put up house prices by 20% over the past 25 years and Britain's post-Brexit border rules must take account of demand for affordable homes.'

In response to the ensuing outcry regarding the evidence justifying this statement, on 13 April the Ministry of Housing, Communities and Local Government (MHCLG) published 'ad hoc' analysis that 'attempts to illustrate the individual relationships between some important housing market determinants and house prices'. However, the MHCLG summary notes that the analysis 'is not intended to be exhaustive in its explanatory power and throughout this release references are made to limitations'.

The analysis is very heavily caveated, acknowledging that 'changes to house prices are due to the interaction of many demographic, economic and societal factors'. It indicates that international migration caused house prices to rise 21% between 1991 and 2016.

Ministry of Housing, Communities & Local Government, Analysis of the determinants of house price changes

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Lichfields Use Classes Order table update reflects April 6 permitted development rights' amendments

Lichfields' 'Guide to Use Classes Order in England' has been updated.

As reported in the April edition of the England Planning News and in force since 6 April, the principle changes made by the latest amendment Order for permitted development rights (PDRs) relate to the extension of the change of use right from Class B8 to residential, and to Class Q for changing the use of agricultural buildings to residential.

Lichfields, Guide to Use Classes Order in England

The Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2018

The Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2018, Explanatory Memorandum

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Chief Planner's 'Planning Update Newsletter' announces upward extension permitted development right summer consultation

The Government is to carry out a consultation this summer on a new PDR to extend existing buildings upwards to create new homes, according to the most recent planning update newsletter to chief planning officers.

The Planning Directorate Newsletter summarises this proposal alongside the Government's recent programme of planning reforms covering: changes to policy & law; consultations; and local plan interventions.

The current NPPF consultation had already announced that there would be a consultation on such a PDR; there is already proposed policy support for such upwards extensions in the draft Framework. Upward extensions were also mentioned in the Housing White Paper. That proposal itself flowed from an even earlier consultation regarding potential ways in which upwards extensions in London might be supported through policy and/ or legislative changes. These moves are all clearly giving an indication of the Government's growing interest in making it easier for such extensions to obtain express or deemed planning permission throughout England.

Ministry of Housing, Communities & Local Government, Planning Update Newsletter (Planning Directorate Newsletter), April 2018

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Labour releases Housing Green Paper: Housing for the Many

Labour's Housing Green Paper, 'Housing for the Many', was launched on 19 April and framed by Jeremy Corbyn as 'a starting point in a conversation about how to fix our broken housing system'.

The proposals for discussion include:

1. Reducing the ability to agree an affordable housing contribution based on the viability of a proposal, providing national guidance on s106 agreements and making independent viability experts available to local planning authorities;

2. Minimum space and energy standards, with Lifetime Homes criteria a potential condition for public funding;

3. A presumption that there is no development (presumably housing development) without affordable housing – including rural and small sites, and development granted planning permission via PDRs;

4. Affordable housing to be comprised of social rent, living rent (no more than one third of average local incomes), and low-cost ownership ('FirstBuy' with mortgage payments capped at one third of average local household incomes);

5. Scrapping affordable rent (up to 80 per cent of market rents) and Right to Buy;

6. A target of 1 million affordable homes over ten years, with 100,000 built by the end of Labour's first five-year term; prior to the next election, an assessment would be undertaken of how the target can be reached more quickly;

7. Resetting national housing investment to £4bn a year;

8. Consideration being given to enabling local authority mortgage lending;

9. A new duty to deliver affordable homes and a possible increase to the New Homes Bonus' affordable homes premium;

10. An English Sovereign Land Trust to work with local authorities to 'enable more proactive buying of land at a price closer to existing use value' and potentially changing compensation rules;

11. Encouraging off-site production of new homes;

12. A Chief Architect for affordable housing, to advise on new developments; and

13. Fire safety measures, likely to be informed by the Hackett Review.

Comment: With regard to no. 1 above, Labour proposes to 'reduce the viability loophole which allows developers to dodge the affordable housing system'. The 'loophole' that Labour is suggesting is not clear, but given the apparent reference to the NPPF's paragraph 173 which anticipates a return for developers, one could infer that the 'loophole' is either in relation to the reasonable return or the viability assessment (note that the text in paragraph 173 is currently proposed for deletion from the NPPF, with no similar replacement text).

The terminology is poor, because it is not a 'loophole' but rather government policy (and local policy in many instances). Furthermore, the suggestion that there will be 'standard guidance on the s106 agreement process' (although already available) and independent viability experts to back up councils (often already appointed by the local planning authority and at the developer's expense) suggests that Labour envisages that some negotiation will still take place. One might speculate that this element of the Green Paper is informed by the Mayor of London's approach to viability in the draft London Plan and the 'Homes for Londoners Affordable Housing and Viability' supplementary planning guidance.

Labour Party, 'Where We Stand, Housing For The Many' – Green Paper

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The Lichfields perspective

As one might expect, the Labour Party's Housing Green Paper proposes a big role for the State in the delivery of housing. Perhaps more surprising is Labour's underlying viability position - that the level of affordable housing in a scheme should not be influenced by how much was paid for the site. This is already a theme of the Government's draft planning practice guidance on viability.

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