Building the future

Lucy McDonnell considers the intricacies and implications of the Bill

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Housing has become a key priority for the electorate for the first time in decades, with planning and housing appearing in the manifestos of all the major parties in the run-up to the 2015 general election. It has become a political imperative for the government to take action on the housing crisis.

The Housing and Planning Bill, which has now passed its third reading in the House of Commons and proceeds to the House of Lords, is seeking to make statutory the government's manifesto commitments to extend the right to buy, build 200,000 new starter homes, ensure local people have more control over planning and protect the green belt. The Bill is controversial, being described as the 'end of the road for affordable housing' (*The Guardian*, 6 January 2016) and viewed by some as the product of a process (including 2am debates in the House of Commons) that has moved it from being, in the words of Shadow Housing and Planning Minister John Healey, 'a bad bill [to] a very bad bill'.

The Bill introduces measures to both supply a greater number of homes and to make changes to the affordable housing system. Provisions are included to try to speed up the planning process, including giving the Secretary of State new powers to intervene where local authorities are seen to perform poorly. This article focuses on the planning elements of the Bill. This review does not cover sections on regulating landlords, rent repayment orders, recovery of abandoned premises, estate agents, rent charges, compulsory purchase orders and others.

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Starter homes

Providing discounted 'starter' homes for first-time buyers was a much publicised election promise, albeit one that has proved politically divisive.

The Bill will require local planning authorities (LPAs) to carry out their planning function with a view to promoting the supply of starter homes, and to prepare reports monitoring their compliance with this duty. Under clause 6, the Secretary of State may make a 'compliance direction' requiring a development plan policy to be ignored if an LPA has failed to carry out its function in accordance with this duty, or has an incompatible policy. That is a novel step which cuts across the localism agenda.

The Bill will allow the Secretary of State to make regulations specifying a 'starter homes requirement' which must be provided for planning permission to be granted, which is likely to be either a proportion of dwellings or a financial contribution. It has also been left to regulations to determine whether the same rules as for starter homes exception sites will apply, including an ability to sell at market price after five years. No draft of these regulations has yet been published, and it is anticipated that consultation will be carried out first. Once made, these regulations will have a significant impact, shaping the composition of housing schemes coming forward, and will be eagerly awaited by both developers and LPAs to assess their impact.

Current planning policy on starter homes on exception sites (issued in the March 2015 ministerial statement) encourages LPAs not to seek section 106 affordable housing contributions. Controversially, starter

Briefing papers references

House of Commons Library, Briefing Paper, Number 07331, 22 October 2015, Housing and Planning Bill [Bill 75 of 2015-16] – http://researchbriefings.files.parliament.uk/documents/CBP-7331/CBP-7331.pdf

House of Commons Library, Briefing Paper, Number 07398, 29 December 2015, Housing and Planning Bill: Report on Committee Stage – http://researchbriefings.files.parliament.uk/documents/CBP-7398/CBP-7398.pdf

homes seem likely to be classed as affordable homes in the context of planning obligations under the current review of the National Planning Policy Framework (NPPF), and for the replacement of high-value, council-owned homes in London, as set out below. This is likely to have a knock-on effect on the provision of other types of affordable housing. Developers may well prefer to provide starter homes rather than other forms of affordable housing, making it difficult for LPAs to meet the housing needs of the wider community, and potentially requiring existing section 106 agreements, which provide for affordable housing, to be renegotiated.

Social housing

The Bill waters down the original proposals, which would have extended the right to buy to all housing association tenants. This provision is voluntary in the sense that housing associations have agreed to comply with the right to buy, rather than being obliged to do so via legislation. There will be a presumption that housing association tenants can exercise the right to buy, but the deal envisages that there will be exceptions, for example for rural homes. Right-to-buy discounts will be provided by grants from the Secretary of State, the Homes and Communities Agency and the Greater London Authority, and also from the sale of high-value local authority homes.

The government intends that dwellings sold under the extended right to buy will be replaced on a one-for-one basis, and housing associations have agreed to this as part of the voluntary deal. The voluntary deal allows replacement homes to be built within three years, anywhere within the country, and does not require that the same type or tenure of dwelling is reprovided.

In addition to grants, the government seeks to fund the voluntary right to buy by requiring LPAs to sell high-value homes that become vacant. The mechanism will require councils to make a payment to the government which is equivalent to the value of high-value homes likely to become vacant in that year, less the council's expenses. There is a lack of clarity about how valuations will be carried out, how regional variations will be dealt with, and how shortfalls between receipts and grants will be met. There is particular concern about the ability of LPAs in areas with high land values to continue to provide social housing, and in particular larger homes, when subject to this duty; a report by Shelter in September 2015 ('Report: the forced council home sell-off') estimated that 97.1% of Kensington and Chelsea's existing stock would be considered high value and therefore subject to a requirement to sell. In April 2015, the Conservative party published figures showing the values over which homes could be sold (Briefing Paper, Number 07331, 22 October 2015, see reference box above), although at the committee stage Brandon Lewis, the Housing and Planning Minister, stated that thresholds would be set following research currently being undertaken (Briefing Paper, Number 07398, 29 December 2015, see reference box above). At the report stage, an amendment was accepted which would require London boroughs to provide two new affordable homes for each high-value home sold, which will include starter homes.

Provisions are also included for high-income social tenants to 'pay to stay'. Following a voluntary scheme which allowed social landlords to charge tenants with a household income of more than £60,000 higher rents, the Bill will make 'pay to stay' mandatory. The Bill will give the Secretary of State the power to make regulations, which are expected to require households earning more than £30,000, or £40,000 in London, to pay market or near market rents, with the uplift paid to the government.

Taken as a whole, these changes to social housing provisions suggest that

The starter homes duty (clauses 1-7)

New dwellings, for first-time buyers under 40, at a 20% discount to market value:

- Cost-capped at £450,000 in Greater London and £250,000 elsewhere.
- Duty on all local authorities to promote the supply of starter homes and to prepare reports about the actions they have taken under the starter homes duties.
- The Secretary of State has powers to:
  - issue compliance directions requiring policies that are thwarting starter homes delivery to be ignored; and
  - set a size for residential development, above which all applications must be accompanied by a section 106 obligation securing a set amount of starter-home provision.
- These are combined with proposed changes to the National Planning Policy Framework that would:
  - encourage starter-homes development on previously developed green belt; and
  - exempt starter homes from s106 and affordable housing tariffs.

renegotiation of section 106 agreements may be desirable or necessary, and that more flexible mechanisms to deal with affordable housing will be required in the future. These changes are also likely to impact on viability assessments, having further consequential impacts on affordable housing provision.

Local plans

There is currently no duty on LPAs to prepare local plans. In some areas, this has led to 'planning by appeal', where, without a current local plan showing a five-year housing land supply, schemes are refused planning permission by the LPA, only to be granted permission on appeal.

The Bill includes a range of measures to incentivise local plan making, by giving the Secretary of State greater control over the plan-making process (see box below). This reflects the government's target of ensuring that all LPAs have 'prepared' a local plan by early 2017.

These changes largely amend existing powers, but provide greater flexibility and a clear political marker that the Secretary of State may be willing to make an example of some LPAs by stepping in. The changes may provide an incentive for other authorities who have not yet made local plans or who have defective plans. They may incentivise further dragging of heels as under-resourced authorities and local politicians accept that government will intervene.

There are missing links that will mean the process is still constrained, though, as there is no power for the Secretary of State to undertake evidence-base work, to determine objectively assessed housing needs. Without the ability to control the evidence base, the power to direct may be frustrating in practice.

The Bill introduces provisions to designate neighbourhood areas if the local planning authority (LPA) does not decide an application for designation in time.

The Bill was amended during the House of Commons committee stage to allow the Secretary of State to invite the Mayor of London (or a combined authority) to prepare or revise a development plan document where the LPA is failing or omitting to take the necessary steps to prepare it. The Mayor or combined authority will be reimbursed for their expenses by the LPA. The Secretary of State will also have powers to intervene in the preparation of these plans.

Neighbourhood plans

As well as increasing pressure from the Secretary of State on local plans, the Bill also introduces measures to speed up LPA involvement in neighbourhood planning. The Bill introduces provisions to designate neighbourhood areas if the LPA does not decide an application for designation in time, and will impose a timetable for the consideration of neighbourhood plans and neighbourhood development orders.

Strengthening the Secretary of State's supervision over the planning function of LPAs, neighbourhood forums or parish councils will be able to ask the Secretary of State to intervene in neighbourhood plan making where the LPA does not make a decision on holding a referendum within the specified time, does not follow an inspector's recommendation, or makes modifications other than those specified. The Secretary of State will then be able to exercise the functions of the LPA in relation to the neighbourhood plan and direct that certain actions are taken. The Bill also provides for neighbourhood forums to ask to be kept informed of planning applications made within their area.

These provisions highlight the importance of neighbourhood planning to the government. These measures seek to increase the pressure on LPAs to progress neighbourhood plans where proposals are put forward. Developers should consider engaging with emerging neighbourhood plans at an early stage, both to seek to get their sites allocated and to avoid objections when making subsequent planning applications in designated neighbourhood areas.

Planning permission

A recent controversial amendment to the Bill introduced a pilot scheme for the processing (rather than the determination) of planning applications to be outsourced by LPAs. The Bill will enable the Secretary of State to make regulations, allowing applicants to elect for their application to be processed by a 'designated person' rather than the LPA. The clause states that designated persons could be authorised to take any step in processing a planning application apart from determining it, while the detail of how this would work, including the fees and sharing of information, is left for the regulations.

The Bill would also extend the Secretary of State's ability to decide any application for a poorly performing LPA, rather than only those for major development, as is the current situation.

Wider powers for the Secretary of State to decide applications and the

Secretary of State's powers

The Secretary of State's powers will include the ability to:

- direct amendments to a local development scheme, requiring a timescale for full local plan coverage;
- pause and control local plan examinations;
- direct changes to parts of plans and then release the holding directions; and
- charge LPAs the Secretary of State's costs for intervening, examining and 'correcting' the plan.

potential involvement of third parties in processing planning applications demonstrate the government's objective to speed up the planning process. However, the impact of the provisions that centralise control depends on the willingness of the Secretary of State to take action, and consequently the extent to which this acts as a deterrent to improve LPA performance. It may be that some overstretched LPAs accept the Secretary of State deciding some of their applications as a way of lightening their administrative burden, and similarly may welcome the ability to outsource the processing of applications. Equally, some LPAs may prefer for the Secretary of State, rather than their officers and members, to make controversial decisions.

The Bill also introduces the concept of 'permission in principle' for land allocated in a qualifying document, such as a brownfield land register, local plan or neighbourhood plan for small-scale development. Brandon Lewis said at the committee stage that the intention was for 'permission in principle' to be limited to housing-led development (Briefing Paper, Number 07398, 29 December 2015). However, the legislation is not limited to this, and it could be used for zoning and wider permitted development. It is not clear which technical details will be required, and whether 'permission in principle' can be made subject to conditions. It also remains to be seen how 'permission in principle' will satisfy assessment requirements under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. The government has stated in the same briefing paper that they do not intend for 'permission in principle' to exist in perpetuity, and will consult on a suitable duration.

Under provisions included within the Bill, the Secretary of State will be able to require LPAs to keep registers of land, which in the first instance is likely to be brownfield land. However, this could be expanded to include public-sector land, or land with unimplemented planning permission. Land entered on these registers could then be subject to 'permission in principle'. It is not yet known how environmental assessments and deliverability will be considered for developments of this type, and the government intends to consult on the criteria, to be included in regulations, against which land will be assessed before it is entered on these registers (see 29 December briefing paper for further details).

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Clause 115 of the Bill introduces a new requirement for LPAs to provide information about the 'financial benefits' of any planning application when reporting it, and to state whether the financial benefit is material or not. This will require more planning officer time, and materiality in particular is likely to be tricky to decide, as LPAs consider the relationship between the contribution and the scheme. There are concerns that this may lead to an increased risk of judicial review. This may provide the opposition with extra material to assess for evidence of illegal, irrational or immaterial issues, ignored material issues, or procedural unfairness.

NSIPs

The Bill will amend the existing legislation to allow development consent for nationally significant infrastructure projects (NSIPs) to cover 'related housing development'. This will not allow housing-only development, but will allow an element of housing in any NSIP in England, where the housing is either in proximity to the site or is required by the NSIP development.

Guidance in a briefing note issued in October 2015 (DCLG, 'Housing and Planning Bill: Nationally Significant Infrastructure Projects and Housing – Briefing Note') suggests that housing in the proximity of the NSIP development should be located within one mile, and there is an expectation that developments should include affordable housing, including starter homes. For both nearby housing and housing required due to the development, it is unlikely that consent for more than 500 homes will be granted.

These provisions would allow specific housing to be consented under an infrastructure-based regime. It may provide an interesting precedent for the provision of housing consents under non-housing planning regimes. For example, could the NSIP process be adapted to provide consents for garden cities where the government may prefer central control of the process? ■

Conclusion for practitioners

- The Bill contains a vast number of changes, seeking to put the Conservatives' election manifesto on a statutory basis.
- The Bill will have a significant impact on housing, in particular affordable housing, reflecting the importance made of the housing issue during the general election.
- It is clear that the devil will lie in the detail (which a large number of statutory instruments are intended to provide).
- Following controversy in the House of Commons, it is likely that the Bill will continue to prove contentious in the Lords, before its true impact is known.