

## HOUSING LAND SUPPLY

### Neil Cameron QC

1. Over the recent past the perception has been that housing land supply requirements have been imposed on local communities by central government. The Localism Bill is intended to change the current arrangements and to give more power to local communities.
2. If the National Planning Policy Framework (NPPF) survives in the form of the current draft, local communities may find that meeting the full housing requirement for housing market areas is likely to lead to more onerous demands than under the system of regional plans.
3. I will consider the:
  - a. Statutory Framework: current and proposed
  - b. Policy Framework: current and proposed
  - c. Plan making
  - d. Development Control/Management
  - e. Practical Issues
4. I do not attempt to cover every relevant issue, but to provide a brief review of some issues of current interest.

### The Statutory Framework

#### The current arrangements

5. The development plan is defined in section 38 of the Planning and Compulsory Purchase Act 2004 (“PCPA 2004”).
6. The development plan is comprised of:
  - a. The regional strategy (in London the spatial development strategy); and
  - b. The development plan documents (taken as a whole) which have been adopted or approved in relation to the area (DPD’s and saved structure and local plan policies).

7. The regional strategies remain part of the development plan. The Secretary of State's purported revocation of regional strategies was declared unlawful by the High Court in R (Cala Homes) v. Secretary of State for Communities and Local Government<sup>1</sup>.
8. Following the first Cala Homes judgment the Chief Planner at the DCLG issued a letter (dated 10<sup>th</sup> November 2010) indicating that he expected local planning authorities to have regard to the Government's intention to abolish regional strategies as a material consideration when determining planning applications.
9. In the second Cala Homes case the claimant contended that it was unlawful for planning authorities to take into account the Government's intention to abolish regional strategies when determining planning applications. That challenge failed before Lindblom J<sup>2</sup> and on appeal to the Court of Appeal<sup>3</sup>.
10. The Court of Appeal (paragraph 24) also considered the requirement imposed by section 24(1) of the PCPA 2004, that local development documents must be in general conformity with the RS. The Court held that it would be unlawful for a local planning authority preparing or an inspector examining, development plan documents to have regard to the proposal to abolish regional strategies<sup>4</sup>.
11. The current position is:
  - a. The RS remains part of the development plan.
  - b. In making development control decisions the determining authority must have regard to the RS as part of the development plan and must make the determination in accordance with the plan unless material considerations indicate otherwise.
  - c. The Government's intention to abolish regional strategies is a material consideration to be taken into account when determining planning applications.
  - d. A DPD must be in general conformity with the RS – it is unlawful to take into account the Government's intention to abolish RSs when considering general conformity.
12. The requirement that a core strategy be in general conformity with the regional strategy is the principal means by which the housing requirements in the RS are carried into DPDs.

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<sup>1</sup> [2010] EWHC 2866 (Admin)

<sup>2</sup> [2011] EWHC 97 (Admin)

<sup>3</sup> [2011] EWCA Civ 639

<sup>4</sup> [2011] EWCA Civ 639 at paragraph 24

## **The proposed arrangements**

### Regional Planning

13. Clause 109(3) of the Localism Bill<sup>5</sup> will empower the Secretary of State to revoke regional strategies. Clause 109 will come into effect on a day to be appointed (clause 239(2)).
14. The Government have undertaken a strategic environmental assessment of the effects of revoking regional strategies<sup>6</sup>. It is to be anticipated that the Secretary of State will not revoke regional strategies until the strategic environmental assessment has been completed and considered.
15. The requirement that DPDs be in general conformity with the RS and that regard be had to the RS in preparing DPDs will be repealed<sup>7</sup>.

### DPDs

16. A duty on local planning authorities to co-operate in relation to strategic matters is to be imposed<sup>8</sup>.
17. The arrangements for local development schemes are to be changed:
  - a. The LDS will not have to be submitted to the Secretary of State<sup>9</sup>
  - b. The scheme will be brought into effect by resolution of the LPA<sup>10</sup>
18. The amendments proposed to sections 20 and 23 PCPA 2004<sup>11</sup> will provide some limited additional flexibility to LPAs upon receipt of an inspector's report on an examination into a DPD. The LPA will no longer have to accept every recommendation made by the inspector. The LPA will be able to adopt the DPD with modifications. However the additional flexibility is very limited – the modifications taken together must not “materially affect the policies set out in it”<sup>12</sup>.

### Neighbourhood Planning (Schedule 9)

19. A new tier of planning policy will appear in the form of neighbourhood development plans .

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<sup>5</sup> The Localism Bill referred to in this paper is the version as amended after the report stage in the House of Lords (19<sup>th</sup> October 2011)

<sup>6</sup> The SEA Environmental Reports were published on 20<sup>th</sup> October 2011 and are open for consultation until 20<sup>th</sup> January 2012.

<sup>7</sup> Paragraphs 9 and 10 of schedule 8 to the Localism Bill

<sup>8</sup> Section 33A PCPA 2004 as inserted by clause 110 (1) Localism Bill

<sup>9</sup> Section 15(3) PCPA 2004 will be repealed by clause 111(2) of the Localism Bill

<sup>10</sup> Section 15(7) PCPA 2004 as replaced by clause 111(5) of the Localism Bill

<sup>11</sup> Clause 112 Localism Bill

<sup>12</sup> Section 23(2) PCPA 2004 as inserted by clause 112(3) of the Localism Bill

20. Section 38 of the PCPA 2004 will be amended , neighbourhood development plans will be added to the definition of the development plan<sup>13</sup>.

### **The Policy Framework**

21. Practitioners will all be very familiar with PPS3.

- a. Requirement: Paragraph 53 indicates that LPAs should identify broad locations and specific sites that will enable continuous delivery of housing for at least 15 years from the date of adoption of plans, taking account of the RS requirements.
- b. Supply:
  - i. Sufficient specific deliverable sites should be identified to deliver housing in the first five years. Sites should be available, suitable and achievable. (paragraph 54)
  - ii. A further supply of specific deliverable sites should be identified for years 6-10, and where possible years 11-15 (paragraph 55)
  - iii. Allowances for windfalls should not be included in the first ten years of supply unless LPAs can provide robust evidence of genuine local circumstances which prevent specific sites being identified (paragraph 59).
- c. Determining planning applications:
  - i. It is for LPAs to demonstrate an up to date five year supply of deliverable sites. If they cannot do so applications should be considered favourably having regard, in particular to the advice in paragraph 69 (paragraph 71).
  - ii. The tension arises when there is a deficiency of housing land, but the proposed development is not in line with wider policy objectives (5<sup>th</sup> indented point in paragraph 69).

22. The SHLAA Practice Guidance gives advice on issues relating to identification of the supply. A staged process is identified.

### **Proposed Arrangements**

23. The draft National Planning Policy Framework envisages that:

- a. LPAs will prepare a Strategic Housing Market Assessment and a Strategic Housing Land Availability Assessment (paragraph 28).
- b. The five year housing land supply should include an additional allowance of at least 20% (paragraph 109).

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<sup>13</sup> Paragraph 6 of schedule 9 to the Localism Bill

- c. The presumption in favour of sustainable development is stressed in paragraph 110.
24. The PINS advice to inspectors on the draft NPPF suggests that the 20% additional allowance envisages bringing forward the provision of housing over the plan period, not making an addition to the requirement.

## Plan Making

### The Current Arrangements

25. It is necessary to consider the requirement and the supply at the plan making stage.
26. At present section 24(1) of the PCPA requires a core strategy (“CS”) to be in general conformity with the regional strategy.
27. All subsequent DPDs have to be in conformity with the CS<sup>14</sup>. As a result the main issues relating to housing land supply, and in particular the requirement to be set for the LPA’s area, will have to be resolved in the core strategy.
28. At present the requirement is to be derived from the RS. The issue to be considered at the stage of plan preparation is whether the CS is in general conformity with the RS.
29. The meaning of “general conformity” in a different context, namely general conformity of a local plan with a structure plan<sup>15</sup>, was considered in Persimmon Homes v. Stevenage BC<sup>16</sup>. Laws LJ held that to read “general conformity” as meaning “in character” with was too broad a construction<sup>17</sup>. He went on to state that local plan policies must “respect” the structure plan policies as they are, while allowing for the possibility that they may be changed.
30. Section 20(5) PCPA identifies the purpose of independent examination of a DPD:

*The purpose of an independent examination is to determine in respect of the development plan document -*

*(a) whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;*

*(b) whether it is sound.*

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<sup>14</sup> Regulation 13(6) of The Town and Country Planning (Local Development) (England) Regulations 2004 (“the Local Development Regulations”)

<sup>15</sup> Section 36(4) TCPA 1990

<sup>16</sup> [2005] EWCA Civ 1365

<sup>17</sup> [2005] EWCA Civ 1365 at paragraph 28

31. The “legal requirements”, at (a) are independent of the soundness requirement. It is for the inspector to consider “general conformity” in addition to consider whether the DPD is sound.
32. If a person making representations seeks to argue that the DPD has not made provision for the level of housing set out in the RS, the point can and should be taken as a “general conformity” point.
33. The obligation to achieve general conformity might be satisfied by providing a housing requirement in a CS which is either higher or lower than the level set in the RS. For example the inspector examining the South Oxfordshire Core Strategy made a ruling following an exploratory meeting in which he held that provision for part of the district within 10% of the figure derived from the RS for that part of the district was sufficient to achieve “general conformity”<sup>18</sup>.

#### **The proposed arrangements**

34. Following enactment of the Localism Bill and revocation of regional strategies there will no longer be a requirement for DPDs to be in general conformity with the RS. Arguments as to the appropriate levels of provision for the district will have to take place at the CS examination.
35. The guidance given in the draft NPPF gives some indication of the range of issues to be considered at CS examinations held under the new regime:
  - a. Paragraph 28 advises that LPAs should prepare a Strategic Housing Market Assessment to assess their full housing requirements. A Strategic Housing Land Availability Assessment should be prepared to meet the identified requirement for housing over the plan period.
  - b. Paragraph 109 of the draft NPPF indicates that LPAs should “use an evidence-base to ensure that their Local Plan meets the full requirements for market and affordable housing in the housing market area ..”.
36. If, as suggested in the NPPF, the full housing requirements for a housing market area should be provided for in DPDs, there is likely to be considerable debate at examinations as to whether those full requirements have been met.
37. The RS approach took account of housing requirements but did not, in the main, seek to provide for the full requirement.

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<sup>18</sup> South Oxfordshire Core Strategy: Inspector’s Conclusions After the Exploratory Meeting: 23<sup>rd</sup> May 2011. Paragraph 3 on page 4.

38. If the NPPF survives in the same form as the draft, CS examinations are likely to concentrate on whether or not provision has been made for the full housing requirements.
39. Those who were concerned about the “top down” approach may soon learn that meeting the full housing requirements in their local housing market area is likely to lead to many more green fields being built upon than under the RS system.

### **Development Control/Management Decisions**

40. The requirement is set in the relevant development plan documents, currently the RS and DPDs. In future the requirement will be set in DPDs. As a result the matters at issue at the development control stage are likely to turn on issues relating to supply.
41. However, debate about the requirement is not entirely absent from development control decisions. The Bude decision<sup>19</sup> is an illustration of that point.
  - a. The development plan consisted of the 2001 RS (RPG 10), the 2004 Cornwall Structure Plan and the 1999 North Cornwall District Plan (DL 10).
  - b. There was no up to date development plan housing target against which to measure land supply (DL 21).
  - c. There was 12.9 years supply in relation the Structure Plan target for the former district (DL 21).
  - d. There was 7.8 years supply for Cornwall as a whole measured against the RPG10 housing target (DL 21).
  - e. There was 3.47 years supply measured against the proposed changes version of the draft RS (DL 22).
  - f. There was 4.4 years supply measured against the Council’s response to the RS proposed changes (DL 22).
  - g. Curiously the Secretary of State attached no weight to the proposed changes (DL 22) but noted that there was 4.4 years supply for the former district against the Council’s response to the proposed changes (DL 22).
  - h. The Secretary of State referred to three options put forward in the Council’s Core Strategy options and noted that there was 5.5 year supply based upon low growth and less than five years supply based on the medium and high growth options (DL 23).

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<sup>19</sup> The Secretary of State’s decision letter dated 28<sup>th</sup> July 2011. Appeal reference APP/D0840/A/09/2115945

- i. The Secretary of State concluded that there was not a five year supply of housing land (DL 23) and that the proposal should receive favourable consideration in accordance with the advice in paragraph 71 of PPS3 (DL 24).
42. On the supply side there is often a dispute as to how any shortfall which has arisen in the first few years of the plan period should be made up. This issue arose in the Andover appeal decision<sup>20</sup> :
  - a. Over recent years completions have, in many areas, lagged behind the requirement.
  - b. The residual method is adopted in order to calculate the requirement that remains for the balance of the plan period.
  - c. Disputes often arise as to whether the shortfall should be made up over the first five year period, over the medium term, or over the entire plan period.
  - d. The Secretary of State has indicated that any shortfall should be addressed in the short to medium term rather than over the entire plan period (Andover appeal decision DL 11).
43. The main issue arising on supply is likely to turn on the LPA's assessment of deliverability. Sites should be tested for suitability, availability and achievability, as referred to in paragraphs 37-41 in the SHLAA Practice Guidance. In many cases the appellant and the LPA will seek information from developers of major sites. The outcome of the exercise will often depend upon the optimism or pessimism of those who respond to such enquiries.
44. A local planning authority's failure to demonstrate a five year supply of housing land will not necessarily lead to planning permission being granted, as is demonstrated by the following two Secretary of State decisions:
  - a. CALA Homes, Winchester<sup>21</sup>: Despite having succeeded in quashing the Secretary of State's decision to revoke RSs, and despite establishing that a five year housing land supply could not be demonstrated, CALA lost their planning appeal. The Secretary of State rejected his inspector's recommendation and dismissed the appeal; he gave greater weight to the fact that the proposal would undermine the Blueprint policy making process for Winchester (DL 20 and 41).
  - b. Fox Strategic Land, Sandbach<sup>22</sup>: The Secretary of State accepted the inspector's recommendations and dismissed the appeal notwithstanding the Council's failure to demonstrate a five year housing land supply, as he considered that a decision to

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<sup>20</sup> The Secretary of State's decision letter dated 30<sup>th</sup> June 2011. Appeal reference APP/X3025/A/10/2140962

<sup>21</sup> The Secretary of State's decision letter dated 28<sup>th</sup> September 2011. Appeal reference APP/L1765/A/10/2126522

<sup>22</sup> The Secretary of State's decision letter dated 29<sup>th</sup> September 2011. Appeal reference APP/R0660/A/10/2141564



grant permission would pre-empt decisions on revised settlement boundaries (DL 25).

## **Practical Issues**

### **The Requirement**

45. Developers with strategic land holdings should engage in the CS process if they wish to influence the requirement.
46. At present the requirement in a CS will be derived from the RS. The requirement to achieve general conformity can be relied upon when making representations on the CS. There is likely to be less debate on the requirement when considering site allocation and other DPDs as they have to be in conformity with the CS.
47. In the future there is likely to be considerable debate about the requirement in the CS preparation process. Developers and landowners will have to grapple with household growth projections, and to consider the “full requirement”. It will be interesting to see whether the hearing system allows sufficient opportunity for full and detailed examination of the methodology and the figures.
48. At the planning application stage the requirement is unlikely to be in issue if there is an up to date development plan. However if there is no up to date development plan the requirement is likely to be difficult to ascertain as is demonstrated by the Bude decision.
49. If there is no up to date development plan, applicants may wish to consider figures proposed in draft plans and household growth projections.

### **Supply**

50. LPAs cannot rely purely on their SHLAA and annual monitoring reports. They should be in a position to demonstrate that the sites relied upon are deliverable when judged against the criteria in the SHLAA practice guidance.
51. Applicants will wish to test the assumptions made in the SHLAA and in the AMR.
  - a. Completions are unlikely to be in dispute.
  - b. Extant planning permissions merit careful consideration, particularly those which are nearing the end of their life without any sign of implementation.

- c. Delivery rates on large sites should be examined. Other developers may be over optimistic, particularly if that optimism will lead to the conclusion that there is a five year supply and rejection of a rival's application.

### **Five year land supply**

52. Much time and effort is often spent in demonstrating that there is or is not a five year housing land supply. Those engaged in that exercise should always remember that other factors may be critical in determining the appeal, particularly those identified at paragraph 69 of PPS3, as CALA found to their cost in the Winchester decision.

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