

GROWTH AND INFRASTRUCTURE ACT 2013

THE PLANNING REFORMS

Neil Cameron QC

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The Government's Aims (1)

(as set out in the Impact Assessment for the Bill)

- drive up the performance of the planning system through giving applicants the choice to go directly to the Secretary of State where the performance of the local planning authority is very poor and strengthened powers for Planning Inspectors to award costs against unreasonable behaviour when cases go to appeal;
- provide for a more proportionate approach to information in support of planning applications, which could save applicants an estimated £6.5 million annually and will also support the efficient processing of applications by councils;

The Government's Aims (2)



- enable the development of sites that are currently stalled and economically unviable by allowing the reconsideration of the affordable housing element of Section 106 agreements;
- give applicants for large scale business and commercial development the option, subject to the agreement of the Secretary of State, of using the streamlined approach for progressing major projects set out in the Planning Act; and
- changes the current regime of fixed reviews of Mineral Permissions every 15 years to give Mineral Planning Authorities local discretion over when reviews are required thus giving authorities more flexibility and removing the need for unnecessary reviews

The Minister in charge



The Home Builders Federation



The announcement that poorly performing Local Authorities will have decisions on housing taken away from them is particularly welcome. LAs are key to the new localism based system and it is essential they abide by their responsibilities.



The Local Government Association



“more decisions on planning applications which will have a major impact on local people to be taken by bureaucrats ...”

focus on process and targets in place of constructive dialogue

The Main Planning Provisions



- Applications to the Secretary of State
- Costs
- Information Requirements
- Affordable housing



I will not deal with:

Review of mineral planning permissions and changes to the Electronic Communications Code

Sections 62A and 62B TCPA 1990 – planning application to Secretary of State (1)



An applicant may make an application direct to the S of S if:

1. The LPA has been 'designated' by the SofS;
2. The application is:
 1. for planning permission (but not a section 73 application) or for approval of reserved matters on an outline permission (section 62A(2) TCPA 1990)
 2. where the application is for major development (as defined in regulation 3 of the Town and Country Planning (Section 62A Applications) (Written Representations and Miscellaneous Provisions) Regulations 2013). The definition follows that in the DMPO.

Planning application to Secretary of State (2)



‘Connected’ applications under the planning acts can also be made to the SofS (section 62A(3))

- Listed building consent
- Conservation area consent
- Applications of a description prescribed

The application can be made if the applicant considers it is connected (section 62A(3)(b)).

The SofS can refer the application back if he considers it is not connected (section 62A(4))

- will the SofS have consider that issue in each case?

Planning application to Secretary of State (3)



Designation – section 62B TCPA 1990

- The SofS has a discretion to designate if he considers that there are respects in which the LPA are not adequately performing their function of determining planning applications, but must exercise that discretion by reference to criteria which he has set out.
- The SofS must publish the criteria lay the document before Parliament (Section 62B(1) and (2))
- The criteria are set out in Improving Planning Performance – Criteria for Designation – June 2013

Planning application to Secretary of State (4)



Designation Criteria

Speed of Decisions:

- Percentage of decisions on major applications within the statutory determination period or within an extended period if agreed.
- Assessment period: 2 years
- Threshold for designation: 30% or fewer

Quality of Decisions

- Percentage of decisions on major applications which have been overturned on appeal
- Assessment period (2 years) plus nine months
- Threshold: 20% or more
- Exemption (if LPA decided 10 or few applications for major development in the assessment period)

Planning application to Secretary of State (5)



- The Mayor of London cannot be designated (Section 62B(5))
- The Mayor of London can direct that an application made to the SofS is to be treated as having been made to **him** (section 2A TCPA 1990 and Article 26(6) of the T+CP (s.62A Applications) etc..., Order 2013)



Planning application to Secretary of State (6)



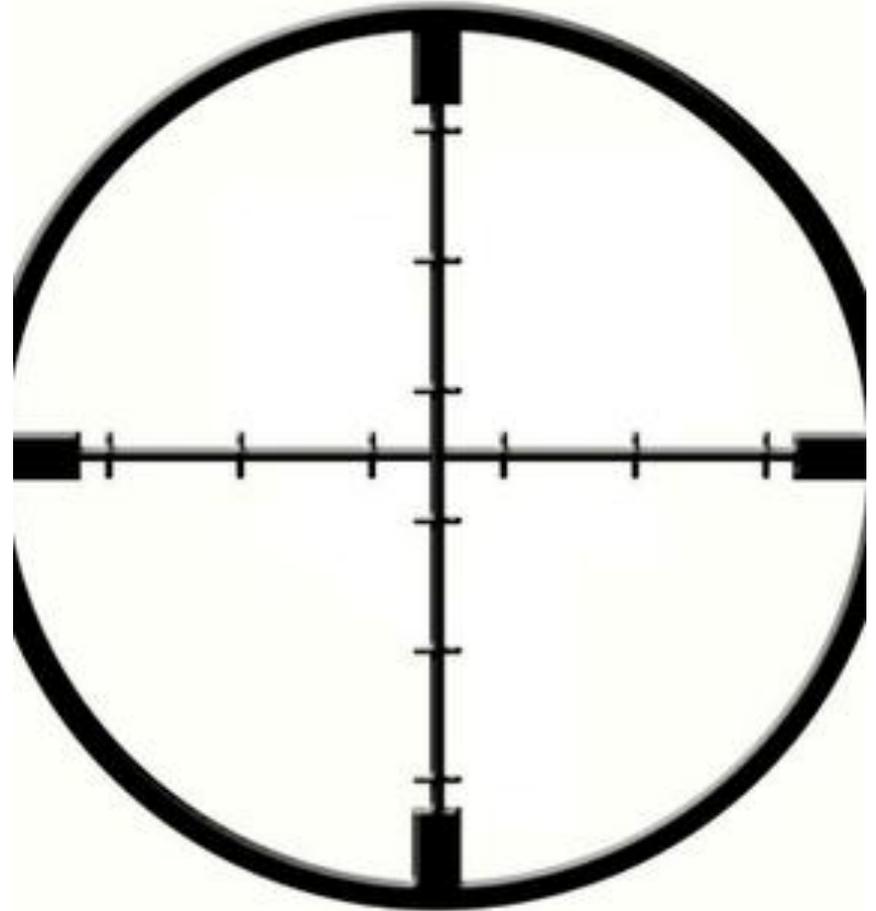
Candidates for Designation

Initial designations Oct
2013

Blaby

Halton

Worthing



Planning application to Secretary of State (7)



- It is envisaged that the SofS can give pre- application advice and provision is made for charging for that advice (section 303(1A)(b))
- It is not envisaged that PINS will not ‘share’ pre-application advice with LPA (paragraph 110 Planning Performance and the Planning Guarantee)
- It is difficult to see how the inspectorate will be able to give pre- application advice and not give the appearance of bias (although the position may be said to be similar to a decision take by a LPA officer under delegated powers)

Planning application to Secretary of State (8)



How will applications be determined?

- SofS to determine whether inquiry, hearing or written representations (Section 319A(2) and (7)(za) TCPA 1990)
- Regulations made for written representations (The T+CP (Section 62A Applications) (Written Representations and Miscellaneous Provisions) Regulations 2013)
- Rules made for hearings (The T+CP (Section 62A Applications) (Hearings) Rules 2013)

Will the designation powers achieve their objectives?

- The developer has a choice
 - It can apply to the LPA or SofS
- Disadvantages
 - How will negotiations take place?
 - How can amendments be made?
 - There is no appeal (save for a High Court challenge)
- Advantages
 - Decision making may be speeded up

The risk of not being able to appeal may outweigh the advantages except in cases where the development plan is clear
- Is the real aim to encourage LPAs to avoid designation?

Costs –Sections 2 and 3 GIA 2013 (1)



The perceived mischief

(Impact Assessment for the Bill
Page 20):

The problem with the current system is that appellants are disincentivised from appealing for an award of costs. This is because of the cost of taking the appeal for costs to the courts and the fact that organisations are often not willing to damage their relationship with the local planning authority.



Costs –Sections 2 and 3 GIA 2013 (2)



The policy objective is to support development by encouraging all parties in the planning process to behave reasonably; for example by refusing applications only where there are sound reasons to do so; pursuing appeals only where there are good arguments why the council's decision should be overturned; and providing adequate information and/or evidence in line with appeal deadlines

Costs – Sections 2 and 3 GIA 2013 (3)



Section 2 – planning proceedings (Amendments to TCPA 1990 etc..)

The Secretary of State will be able to recover his costs (in whole or in part) in cases which are not determined by inquiry, or when an inquiry is cancelled.

The existing power for the SofS to recover all the costs (section 42 of the Housing and Planning Act 1986) is rarely used.

The Impact Assessment for the Bill indicates that it is envisaged that the power will be used in ‘exceptional cases’ (page 21)

Costs –Sections 2 and 3 GIA 2013 (4)



The Secretary of State is empowered to make regulations (for written representations cases) and the Lord Chancellor to make rules (for hearings and inquiries) as to the circumstances in which orders for costs are to be made (section 2(5) and (6)).

PINS Procedural Guide (August 2013) (1.2.5)

appeals received on or after 1 October 2013; and
called-in planning applications where the date of the call-in
letter

is 1 October 2013 or later;

costs may be awarded at the initiative of the Inspector.

Costs –Sections 2 and 3 GIA 2013 (5)



How will it work in practice?

- Allowing a decision maker to decide to award costs when no application has been made will give rise to procedural issues:
 - Fairness is likely to demand that the party against whom the order is made is given a chance to put its case
 - At what stage will the inspector come to a decision
 - Will the inspector indicate a preliminary view and then invite submissions

Costs –Sections 2 and 3 GIA 2013 (6)

- If an inspector expresses a view towards the end of an inquiry will the parties be permitted time to make their submissions?
- Will parties be more willing to make costs applications?
- Will LPAs be deterred from refusing to grant planning permission?
- Will Applicant's be deterred from appealing?
- Will the procedures delay decision making?

Costs –sections 2 and 3 GIA (7)

Section 3 – CPO inquiries

The power to award costs is extended to cases where:

1. An inquiry is arranged but does not take place;
2. A party does not attend an inquiry

Information requirements (1)

Addition to section 62 TCPA 1990

“(4A) Also, a requirement under subsection (3) in respect of an application for planning permission for development of land in England—

(a) must be reasonable having regard, in particular, to the nature and scale of the proposed development; and

(b) may require particulars of, or evidence about, a matter only if it is reasonable to think that the matter will be a material consideration in the determination of the application.”

Information requirements (2)

Resolution of disputes

- Article 10A DMPO – an applicant can serve notice on the LPA specifying the particulars or evidence requested that does not meet the section 62(4A) requirements (as set out at Article 29(4)(bb) DMPO
- The LPA remain under a obligation to give notice of their decision or determination on a non-validated application
- The Appellant has the ability to appeal against non-determination of a non-validated application

Affordable Housing (1)

Section 106BA and 106BB are inserted into TCPA 1990

Provision applies to “an English planning obligation that contains an affordable housing requirement” (section 106BA(1))

An obligation enforceable by a local planning authority in England

Requirement relating to the provision of housing that is or is to be made available to people whose needs are not adequately served by the commercial housing market

The provisions do not apply to rural exception sites (106BA(12))

Affordable Housing (2)

The first application to the LPA (1)

(Section 106BA(3) and (5))

The requirement can be:

- Modified
- Replaced
- Removed
- The obligation can be discharged (if it relates only to AH)

Affordable Housing (3)

The first application to the LPA (2)

If the AH requirement renders the development economically unviable the LPA must, modify, replace, or remove it, or discharge the obligation, so that the development becomes economically viable.

If the requirement does not render the development economically unviable, the requirement is to remain in place (106BA(3)(b))

The changes may not make the obligation more onerous. (106BA(6)(b) and (c))

The LPA must have regard to guidance given by the Secretary of State (106BA(8)(a))

Affordable Housing (4)



Second or subsequent application

The provisions relating to economic viability to do not apply (106BA(4))

The provision that an obligation is not to impose a more onerous requirement on the person making the application does not apply, but the determination must not make the development economically unviable (106BA(7))

Affordable Housing (5)



Appeals

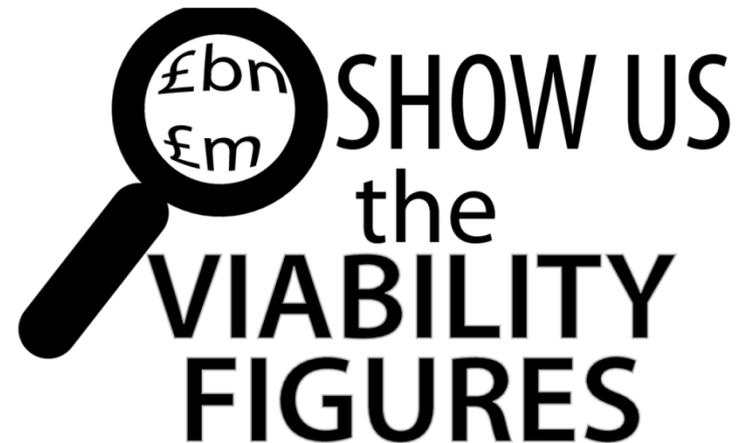
Section 106BC provides for appeals against the decision of the LPA or against non-determination

An appellant is given three years to take advantage of any modification (106BC(13))

Affordable Housing (6)

Guidance (April 2013)

- No viability methodology prescribed (para. 9)
- Costs – current cost (10)
- Developer to provide evidence on build out rate (10)
- Open book basis encouraged (13)
- Same policy assumptions as the permitted scheme (18)
- Advice on variables: Annex A



Affordable Housing (7)



Uncertainties

- Methodology to be employed when assessing viability
- Approach to 'land value' (Guidance Annex A)
- Position of the developer does not take an 'open book' approach (Guidance paragraph 15)
- How long will developers have to carry out development after a change is made by a LPA
- The same policy assumptions are to apply as at the time of the original application (Guidance paragraph 18)

Affordable Housing (8)



Consequences

A developer might obtain planning permission with AH, and the AH might have been a material consideration that tipped the balance in favour of granting PP.

It can then make an application under section 106AB and secure the removal of the AH requirement on the basis that it renders the development unviable.

Conclusions

- Applications direct to the SofS –high risk
- Information –will the LPA back down?
- Costs – inspector's are unlikely to relish their new role.
- AH – in excess of 315 appeals were expected



