PLANNING POLICY AND LEGISLATION UPDATE

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INTRODUCTION

1. For this introduction I have taken as my theme the following; whether the raft of new legislation, policy and proposals emanating from Government is likely to aid delivery of development.

2. In the time I have for this brief summary I'm unable to do more than to sketch in the provisions of the proposals. They're by my side, flagged as you can see for if we need to refer to them.

NICK BOLES AND THE GREEN BELT?

3. I want to start with what has the *potential* to be the most important proposal of all.

4. I'm referring to Nick Boles' speech on 10th January- the speech headed "Housing the next generation".

5. It is unclear at this stage exactly where this is leading. To many, the arguments he makes about the need for new housing delivery will be pretty convincing. One might even say that very few people around the country are likely to disagree with him. I think he puts the need for more housing quite graphically by suggesting that the baby boomers have reaped all the benefits of the increase in house prices, leaving the up-and-coming generation to suffer. I was

struck by his point that in Germany real house prices have remained constant since 2000, which is hardly the case here, even out of London where house prices have fallen recently. I was also struck by his reference to the situation in our nearest neighbours, where he states that during what he happily describes as the "Noughties", the Netherlands built 4.4 new homes for every thousand inhabitants, France built 5.6, and we built 2.9.

6. So what is he advocating? I am not wholly clear. He says that we're going to have to build on previously undeveloped land. He says he's no intention to be the hammer of the green belt, but that local authorities will have to produce "credible plans to meet local housing need", or they'll find that the "presumption in favour of sustainable development will trump local decisions."

7. But what will be behind this, by way of guidance? Without central targets contained in an RSS, I can't help thinking that Councils will still have very wide discretion as to how they define local housing need and the extent of it, and I can't help thinking that if they get their arithmetic right, an inspector will find it hard to criticise.

8. In the vacuum left by RSS figures, local authorities, developers and planning firms are having to come up with their own ways of assessing housing needs into the future. At this stage I'll offer a free plug to the planning firm Nathaniel Lichfield, who have produced a model which looks at natural increase in population, migration trends, economic development trends and

other matters. Their approach has been accepted by a number of local authorities. There are, of course, other models and methods emanating from various quarters. All of this creativity may produce the increase in housing completions that the Government is seeking. But it may not. At present, it seems to me, we have no idea.

9. Boles might say that what will drive councils to decide that local housing needs are more substantial than they might otherwise accept, would be local incentives and neighbourhood planning. He has announced that neighbourhoods which accept new development will receive 15% of the proceeds of the community infrastructure levy (up to a maximum of hundred pounds per household) and that if a neighbourhood approves a neighbourhood plan it will get 25%, with no limit. Here is how you fund your municipal swimming pool or community shop.

10. Will that be enough to motivate local authorities to provide realistically and their plans for true housing need? And what policy is in place to ensure the housing is built in the right place from the point of view of overall planning policy? Then again, what does the "duty to co-operate" really mean, and how can it be proved that a local authority has not fulfilled the duty? I would be interested in your view.

11. Personally, I doubt that the words of the Minister will lead anywhere in the absence of new policy guidance backing this commitment to more housing development, or, perhaps, the revival of central targets.

PLANNING POLICY

12. Some of what government is currently proposing seems eminently sensible to me, even if it is hard to see that it will necessarily increase delivery. A major example, to my mind, is the review of planning practice guidance following Matthew Taylor's report. I think that Taylor is right to point out the mess that is existing policy guidance. It is truly extraordinary that even after the NPPF has been put in place, with its own substantial reduction in the number of separate policy documents, there is still in existence, according to Taylor more than 200 documents of existing DCLG guidance, with over 7000 pages. Not always, but quite frequently, those advising developers and local authorities find it very hard to navigate their way round this raft of guidance, even if they've been involved in the trade for decades, like me. It must make sound sense to do as Taylor prescribes. A whole lot of material, such as old chief planning officer's letters and many of the old circulars, can simply be withdrawn.

13. Before I continue, it is perhaps worth remarking that the simplification of policy in the NPPF may lead to more, rather than fewer, disputes. For example, now PPG 24 (noise) has been withdrawn, what standards in that regard should we apply to new development?

14. One particular example on which Taylor alights is guidance from the Planning Inspectorate. Taylor recommends that Inspectorate guidance is incorporated into the new single coherent guidance resource, and the Government has

proposed in its review of planning appeal procedures that there should be a single streamlined clear procedural notes on appeals (paragraph 57). The consultation paper points out that the Inspectorate has issued no fewer than 17 good practice advice notes. This is something that has arisen only in the last few years, and when I was Chairman of the Planning Bar, I complained to the Inspectorate about it, for two reasons; (a) because at least some of the guidance was issued without proper consultation and (b), once it had been issued, it was difficult even for an expert to find. So I would welcome the existence of one document only.

15. Before I leave the Taylor report and its recommendations, let me mention two proposals it makes about the issue of new guidance (see paragraph 18). To begin with, it recommends updating the Strategic Housing Market Assessment (SHMA) guidance, and the Strategic Housing Land Availability Assessment (SHLAA) guidance. Some developers I know would welcome that very much. Another aspect on which new guidance is recommended is guidance about "viability". My own view is that this could only help. There is still a good deal of confusion around about how you assess viability, perhaps particularly in the context of the ability of a development to afford infrastructure contributions and affordable housing. For example, what is Existing Use Value? If what you have is a green field, is EUV simply green field agricultural value, or should you add some hope value for the hope of policy changing; for example, changing in such a way that the site can be developed, one day, without affordable housing and other contributions? Or is it reasonable to use the price the developer paid instead of EUV? Some well-written guidance might have

the kind of benefits that I think have been provided by the retail practice guidance, albeit that I note that Taylor thinks that guidance is too long. I think Taylor is probably wrong about that last point. The retail guidance and refers to a large number of my cases (!)

16. Earlier in the year the Government consulted on taking forward the Taylor Review recommendations. So far as I am aware it has yet to publish a response to that consultation.

STREAMLINING THE PLANNING APPLICATION PROCESS

17. In January 2013 the Government issued this document. I highlight two proposals. First, it is planned to simplify the DAS process. To begin with, a DAS would be required only for "major development" eg 10 houses or more. Secondly, the information in a DAS wouldn't have to explain the specific design principles and concepts that have been applied to amount, layout, scale, landscaping and appearance. This seems to allow developers to submit applications on a much more "outline" basis than has been the case recently. And it goes along with the recent amendments to the Development Management Procedure Order, removing the requirement for developers to state approximate location of buildings, routes and open spaces if layout is a reserved matter, and to state upper and lower limits for height, width and length of buildings where scale is a reserved matter. Is all this a good thing? To this old lag, yes, I think. Is there anyone here who would oppose it?

18. Next, it is proposed to remove the requirement to give reasons for the grant of permission. Again, from my point of view this would be good, because the requirement to give reasons for granting permission has been useful mainly to residents group who want to challenge the permission, and inadequacy of the reasons is just another stick with which to beat the Council.

19. The consultation on these proposals is now closed, and the Government website states that Government is now "analysing your responses."

THE GROWTH AND INFRASTRUCTURE ACT

20. The Growth and Infrastructure Act, which was enacted on 25th April 2013, contains several of the Government's new initiatives for enabling development. Some of these seem to me to have the potential for speeding up the process. One example is the option to make planning applications directly to the Secretary of State where he has designated a Council as not proceeding quickly enough with the determination of planning applications. I think the principle of all that is difficult to quarrel with, but how the Planning Inspectorate will cope with the responsibility of processing a planning application from start to finish, I shudder to think. It already has considerable difficulty in coping with its existing workload, and is not always the most flexible organisation! Further, the disadvantage of using this procedure from a developer's point of view is that if the Secretary of State decides the application (in other words, if the Inspectorate does so) there is no appeal.

21. Another major change in the Act is the new proposed section 106BA of the 1990 Act (introduced by section 7 of the Growth and Infrastructure Act) which would allow application for discharge of an affordable housing requirement before the five years that have to expire for applications in respect of other section 106 obligations, with an appeal to the Secretary of State. This seems sensible to me, as a means of tackling the present deadlock that exists for a considerable number of development sites with onerous affordable housing obligations imposed during the boom years.

22. You'll no doubt know about the Secretary of State's new panel of "expert planning mediators" whose job is to be to conduct mediations between councils and developers to break the deadlock on infrastructure obligations, in particular affordable housing obligations. How much that mediation opportunity will be used, it is difficult to say. As a piece of anecdotal information, I was appointed to the panel at the beginning of November, and there has been very little call on the Panel's services so far. Last week I received for the first time notification of a mediation for which the services of a Panel member are required.

23. I will mention one other proposal in the new Act, which is the ability of owners of land to deposit a statement in the prescribed form, to stop the time running "during which persons have indulged as of right in lawful sports and pastimes on the land to which the statement relates". This provision, at section 15 of the Act, is intended to make it easier for landowners to obtain certainty

that they have stopped the time running for acquisition of town or village green rights.

REVIEW OF PLANNING APPEAL PROCEDURES

24. I now want to turn to the review of planning appeal procedures in relation to which consultation was issued in November 2012. Again, let me mention some of the proposals. Appellants will be required to submit their "full appeal statement" as part of their grounds of appeal on submission of the appeal, and "Only in respect of inquiries will the submission of more detail, in the form of proofs of evidence, be acceptable." (para 25). I can see the point of requiring in effect the Statement of Case at the time the appeal is submitted. But the intention that proofs of evidence will be acceptable only at inquiries might make the *hearing* a less useful tool for appeals. If the Inspectorate continues to force appellants to hearings, their ability to expand their case will be substantially reduced. That seems to me to be a potential curb on delivery of meritorious development, but good for the lawyers as it may lead to there being more inquiries.

25. It is also proposed that when submitting an appeal, an appellant should submit a first draft Statement of Common Ground, as well as submitting a more detailed time estimate, specifying the number of witnesses and the length of time they are likely to need to give their evidence (see paragraph 38). Again, although that would be burdensome, it is, it seems to me, hard to object to.

26. It is proposed to shorten the time between the start of an appeal and the appeal event. I would be interested to hear what you say about that proposal. The lead times for appeal hearings and inquiries have come down so much in the last couple of years that I wonder if appellants and local authorities generally would welcome a further speeding up of the appeal process.

27. However, on the other hand there is a sign of welcome flexibility to some extent in these proposals, in that (see paragraph 63) it is proposed to extend the cases to which bespoke timetables will be applied, namely to offer a bespoke timetable to inquiries forecast to last three days or more. That seems to me to be eminently sensible.

28. The consultation on these proposals closed in December 2012. The Government is still mulling our responses, so it would seem that the process of speeding up the planning process is not always as speedy as one might wish!

29. In another recent consultation, Government proposed to clarify the practice about the performance of statutory consultees at appeals, and the award of costs. Having considered the results of the consultation exercise, Government has now inserted new text in the costs circular, to make clear that inspectors may if asked add statutory consultees as parties to the inquiry, which will draw them into liability for an award of costs if they behave unreasonably. Having myself run planning appeals where the performance of statutory consultees has been less than perfect, I think anything which concentrates their minds on the

need to give cogent advice and then back it up on appeal if necessary will be beneficial to the appeal system generally.

EXTENDING NSIP PROCEDURE

30. I now consider the recent proposals to extend the Nationally Significant Infrastructure Planning regime to business and commercial projects. The proposal is "to help speed up planning decisions for the most complex projects" (para 11); to extend the scope of the Planning Act 2008 so that a wider range of development can be brought within the nationally significant infrastructure planning regime. As I understand the proposals, it is not intended to *force* developers of the relevant business and commercial development into the new regime. It is intended to give them the option. It is not intended that this option should apply to housing or retail, on the basis that provision of housing and retail are seen to be largely the business of local authorities to plan on the basis of local needs, rather than to be planned on a national basis.

31. The consultation lasted from November 2012 to January 2013, and Government still has not published its response. I would be interested to know what you think about the proposals. I am not convinced that the experience so far of the NSIP process is that it is enabling development to happen more quickly. Furthermore, I am not convinced that the process will allow adequate scrutiny of proposals, in that cross-examination is only to be allowed where "necessary", with the clear implication that it will not normally be allowed.

32. However, subject to those caveats, anything that adds to the options for those responsible for development projects is a potential benefit.

33. One further matter. On 26th April 2013 Government produced its "Guidance for the examination of applications for development consent for nationally significant infrastructure projects." One of the important points in it is to make clear (paragraphs 105-107) Government's view that applications for a development consent order can be amended, just like planning applications, provided there has been proper consultation and any EIA requirements are complied with. This is important, as the IPC took a different stance in some early development consent applications, in effect stating that no changes could be made. Clearly, if that were so, the development consent procedure would become absurdly cumbersome. This issue could be important in London, eg for the development consent order process for the new Thames Sewer.

34. Lastly, I note that in dealing with procedure at examinations the new Guidance says that where cross examination is allowed the Examining Authority will intervene to stop it becoming "aggressively adversarial"! That is a phrase which I am sure will echo down the years.

COMMUNITY INFRASTRUCTURE LEVY

35. What if planning permission is likely to forthcoming, but the issue is infrastructure contributions? Community Infrastructure Levy has begun to

bite, and as of March 2013, 10 charging schedules had been adopted with 15 at examination and 53 due to come forward in 2013.

36. Experience of how well CIL is working varies. It is, I think, by no means clear that CIL is the answer to all of the problems of the section 106 system. As an example of the difficulties it is likely to cause, some have complained of the rigidity of applying a rate across a district for all types of development. For example, I know of one district which was concerned at the effect of the levy on small retailers, so it exempted all retail development, including large supermarkets, from CIL. In other districts, developers have complained that the burden of CIL on residential development is making schemes unviable.

37. In April 2013 Government produced a consultation paper on further reforms to the CIL process. Time for responses runs out next Tuesday. Among the proposals is that the levy will be able to be paid in phases where there is a development planned to come forward in phases, by enabling the developer to treat the scheme as a series of separate chargeable developments.

JUDICIAL REVIEW

38. Next, what happens when you have, after all the vicissitudes of the planning process, acquired your planning permission. Someone applies for JR! I want to turn to the Government's proposals for reforming judicial review. It is clearly Government's view that at the moment judicial review is a clog on economic

development generally. Let me mention the two main changes, as announced by Government in April, and to be brought in shortly.

39. Many of the Government's proposals for reform of judicial review have been produced with immigration in mind, because most of the applications for judicial review are about immigration. But specific thought has been given to planning. In particular, it is proposed that instead of the present three-month limit for bringing judicial review cases, the limit should be six weeks, to bring it into line with the present time limits from bringing appeals against Secretary of State decisions. When the proposals first emerged I expressed the preliminary view that this time limit reduction is likely to be welcomed by developers, largely because they will get more certainty about the immunity of their planning permissions to judicial review challenge at an earlier stage. Reading the Government's Response to the Consultation, produced in April, I was surprised that this message did not loom larger in the summary of the consultation responses.

40. Nevertheless the Government has decided to proceed with this change, despite very substantial opposition.

41. I can see why Government has brought this in. It has become increasingly concerned about regeneration projects held up for years by local opposition, even when they are supported by the local authority. I have recently been involved in one such, in Hackney. A previous planning permission was quashed in 2009 because the Council had not followed the requirements of the

Race Relations Act now contained in the Equalities Act. The time since then has been spent in submitting a new application, obtaining permission (2012), and a second set of judicial review proceedings. Those proceedings commenced in mid 2012. Permission was refused on the papers last winter, and in April 2013 we fought off an oral renewal of the permission application before the High Court. The local residents have now gone to the Court of Appeal. Meanwhile, the site lies derelict. I am not seeking here to make a merits point about that particular case, merely to emphasise that the process of challenge takes a long time.

42. How much difference the new rule will make, I am not sure. Yes, from the point of view of a developer, or the local authority which has granted permission, there is more certainty at an earlier stage, as the time limit is reduced from three months to six weeks. However, the advantages of that may be reduced by the fact that because of the reduction in time limit, the Government is to dis-apply the rules about Pre-Action Protocols. So Defendants will receive less warning about an imminent challenge than they do now.

43. Furthermore, the courts will continue to have the power to extend the time limit to bring an action for judicial review on exceptional grounds. So even at the expiry of the new six week limit, the developer or local authority will not know for sure that it is immune from challenge. Contrast, here, the six week statutory challenges; in those cases the court has no jurisdiction to extend the time limit.

44. One final point on the new six week time limit. It will not apply to all planning cases. It will apply to challenges to all decisions relating to the grant or refusal of planning permission, and will include such related decisions as a decision by the Secretary of State not to call in a planning application, and challenges to decisions taken by the Secretary of State or local authorities about the EIA requirements. It will not apply to other planning matters, such as challenges to National Policy Statements or Local Plans.

45. The second change I wish to mention is removal of the rights to an oral renewal where the judge has considered and refused an application for permission to apply for judicial review on the papers, and he or she has said that the application is totally without merit. The new regime will cut down the opportunities Claimants have for asking the court for permission to seek judicial review. At the moment they have four opportunities. The application is considered by a judge of the High Court on the papers, and then there is the right to oral renewal before the High Court. If permission is refused by the High Court, there is the right to renew the application to the Court of Appeal. In the Court of Appeal the matter is considered on paper by a single judge of that Court, and there may be an oral hearing if he/she decides permission should not be granted.

46. The change will cut down oral renewal hearings. If the High Court judge certifies that the claim is wholly without merit, the former right to renew the application orally before the High Court will disappear. There is only a right to

apply to the Court of Appeal, and that right is to a consideration on the papers only.

47. Clearly, removal of the right to a hearing in such cases might assist delivery of development in cases where a planning permission is being challenged.

48. Personally, I think the proposal is justified. However, I sit as a Deputy High Court Judge and if you are considering paper applications in the High Court, you consider 12 applications per day. You give them very little time, because you have very little time to give them. The natural reaction is to refuse permission, knowing that if a Claimant is really serious, he or she can renew their application orally before the High Court. Oral renewals of permission applications often reveal aspects of a case that paper applications don't. However, I am sceptical that this will make much practical difference. If this change is brought in, I think judges will be very careful before certifying that a case is "totally without merit."

49. Finally, I mention one further change that is to be introduced. A fee is to be introduced for oral renewals of an application for permission to apply for judicial review. The amount will be same as the fee for a full hearing, currently £215.

PERMITTED DEVELOPMENT RIGHTS

50. Now for the people who can circumvent all the above, and do without a new planning permission at all. On 24th January 2013 the Government announced that it is to change permitted development rights, to allow change of use from B1(a) offices to C3 residential (as well as changes within class A). The changes are to come into effect next Thursday, 30th May, via the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013. The office to residential permission will last for the next three years.

51. The idea, of course, is to secure more housing development, which most people would say is much needed.

52. But there are some catches.

53. To begin with, Local Planning Authorities have been able to apply to apply for exemption on two exceptional grounds;

    (a) loss of a nationally significant area of economic activity;
    (b) substantial adverse economic consequences at the local authority level which are not offset by the positive benefits the new rights would bring.

54. Next, this covers change of use only, so that if the residential developer wanted to re-clad the office building, planning permission would be necessary.

55. Further, the right to change the use is subject to a "prior approval procedure" in relation to transport and highway impacts and contamination and flooding risks.

56. Government said that exemptions would be granted only in exceptional circumstances. I understand that 30 of the 33 London Boroughs and seven of the eight largest cities outside London sought an exemption to this rule on grounds of exceptional economic circumstances. However, only 17 local authorities gained exemption for either some or all of their area. The London Boroughs in part of whose area the Central Activities Zone or Tech City falls were all granted exemption for those areas, as were Kensington and Chelsea (for all of its area), Tower Hamlets (for areas in the Isle of Dogs) and Newham (for the Royal Docks Enterprise Zones).

57. I awaited with fascination the outcome for Westminster, in particular Mayfair. I spent much of my time in the late 1980s appearing for the Council to try to force the change of use of Mayfair houses back to residential, on the expiry of their post war office permissions. It will be a rich irony if Westminster now seeks to defend its Mayfair offices against the depredations of the *residential* developers!

58. If a Council has not been granted exemption in its area, to what extent could it frustrate the change of use by refusing planning permission for external alterations? I think Councils would need to be very careful. The Secretary of State on appeal would wish to be sure that any refusal of consent was on the ground of valid design/townscape reasons, and not just a ruse to defeat the change of use.

AND FINALLY……THE TRIUMPH OF THE NPPF?

59. It is now over one year from the publication of the NPPF. We know (Annex 1) that the anniversary was meant to be significant. That is because for a year after the publication date, decision takers could give full weight to relevant policies adopted since 2004, even if there was a "limited" degree of conflict with the Framework, and after that, the weight to be given to such policies is to depend on their consistency with the Framework. What does that mean? Paragraph 14 of the Framework tells us that where the development plan is out of date, planning permission should be granted unless adverse impacts would demonstrably outweigh the benefits, when assessed against the policies in the Framework.

60. So much for what the Framework says. Will the anniversary make any practical difference? Any prediction by me or anyone else is almost bound to be wrong.

61. There are very few Local Plans that can be described as being "up to date" in the sense of being produced in the light of the NPPF. Further, in the speech I mentioned at the start of this talk Nick Boles seems to suggest that if Councils do not produce realistic housing policies in their development plans, the presumption in favour of sustainable development will take over and permission will be granted for new development. But how is the Secretary of State to assess how "credible" local housing policies are? And is it really to be supposed that Inspectors will grant permission for housing on green field land more freely than before, in the absence of targets against which to measure the housing figures in development plan policies?

62. Having said that, I think there are some areas where the anniversary may make a practical difference. Let me give one example, although (unless someone tells me London is built on coal and not clay as I had always thought) it will make no difference in London.

63. National policy on opencast coal mining was formerly governed by MPG 3. That document contained policies which *according to some Local Authorities* (though not my clients UK Coal) provided that local residents' views on applications should normally have priority, even on appeal. Development Plan policies were framed based on MPG 3. The NPPF revoked MPG 3, and its own policy in opencast coal does not contain the paragraphs which were said to give preference to local views.

64. After the anniversary, I think it will be easier for my clients to argue that local policies providing for preference for residents' views should be ignored.

65. I have no doubt there are other examples, and perhaps some of them will be slightly more relevant to London!

CONCLUSION

66. It can't be denied that Government is interested in planning, and has been doing what it can to reshape the system so as to speed up delivery of development.

67. I think some of what Government has done or has proposed will indeed achieve its objective. I think the simplification of policy in NPPF is much to be welcomed. Some of the other changes, like reducing the time limits for applying for Judicial Review of planning permission, will make a difference to delivery.

68. I can't help thinking, though, that in its understandable desire to promote localism, the Government may reduce, rather than increase, the amount of new housing development nationwide. Regional targets at least forced authorities to make provision for substantial amounts of housing. I am not convinced that Nick Boles' financial carrots will have as much effect.

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