

Introduction

The Housing White Paper was billed as a radical and ambitious set of proposals that would provide this Government's comprehensive solution to the chronic undersupply of housing in Britain. Given the current fiscal and political environment, it is probably not surprising that this is not what the Government has delivered. Instead, Sajid Javid has unveiled a package of proposals, statements of intent, consultations and re-announcements, which are likely to be of varying use (one or two could be described as positively unhelpful).

This briefing is intended to cut through the rhetoric and provide a concise guide to the more relevant, and interesting, proposals put forward in the White Paper. For ease of use, it follows the structure of the White Paper itself and adopts the same chapter headings.

It is also intended to assist those who are intending to respond to the White Paper Consultation on the main proposals put forward by the government (which starts on page 70). The consultation is currently open and closes on 2 May 2017.

Chapter 1: Planning for the right homes in the right places

This particular part of the White Paper is focussed on plan making and site assembly/ land identification issues. The over-arching theme is that the Government (which in effect means the Secretary of State for Communities and Local Government) is taking a great deal of interest in local authorities and their activities. The proposals can be divided pretty evenly into "carrots" and "sticks" with promises to make plans easier to produce and improve national guidance, backed up with threats of Government intervention if the plans are not adopted effectively.

Specific proposals in this chapter include:

Plan Making

- Allowing greater flexibility for Local Planning Authorities as to precisely how the key strategic planning policies for their area are presented. This has the effect of rolling back the clock to the days of "core strategies" (now "key strategic policies") supported by more detailed planning policy documents – which are now to be deemed "optional". What is new is a proposal to mandate the high-level content (or priorities) of these "key strategic policies" at a national level (through the NPPF). The proposals also specifically allow, and in some ways encourage, joint plan-making between local authorities, and plan-making by combined authorities or elected mayors. This could be interpreted as a move towards the re-introduction of regional planning, which was abolished by the Coalition Government in 2011.
- Further emphasis on the need for local authorities to work together can be found in a proposal to amend the NPPF to require neighbouring authorities to prepare and file a "statement of common ground" when preparing local plans. These are intended to set out how the authorities will work together on cross border issues, such as meeting housing need. There is no indication that these statements will be binding, however, which does somewhat beg the question as to the purpose.
- The Government has confirmed its intention to intervene in the plan making process for those local authorities which do not produce local plans quickly enough – and have set out the proposed grounds for intervention in the accompanying consultation. They are also promising new planning regulations placing a duty on local authorities to review their local plans every five years to ensure they remain fit for purpose.
- It is also proposed that the test for finding a local plan sound is relaxed – so that local authorities only have to establish that the local plan provides "an appropriate strategy" for the area as opposed to "the most appropriate strategy". The amount of supporting evidence required is also going to be reduced in the interests of "proportionality".
- The Government is also intending to introduce a standardised approach assessing a local authority's housing need, although a preferred methodology has not, as yet been selected and will be subject to further consultation. Local authorities who do not adopt the standardised approach will have to justify themselves to a planning inspector at inquiries and may have it "imposed" upon them as a baseline for "Five Year Housing Land Supply" calculations.

National Policy Proposals

In addition the following specific amendments are proposed to the NPPF:

- Including specific requirements for local authorities to include clear policies for “specialist housing” in their local plans – including homes suitable for the elderly and disabled people. There is also to be an increased emphasis on supporting sites which provide affordable housing.
- Requiring local authorities to have clear strategies in their plans to “maximise the use of suitable land” to clarify how much development can be accommodated. This will include amendments to promote increasing housing density on development sites, which are also to be included in the NPPF.
- Strengthening the duty on local authorities to plan to meet all of their identified housing need, unless the NPPF provides strong reasons for not doing so or the adverse impacts would significantly *and demonstrably* outweigh the benefits of doing so (my emphasis).
- Increasing the weight to be given to the value of using brownfield land for residential development in the planning balance; and perhaps most significantly:
- Strengthening the wording of the “Presumption of Sustainable Development” at the heart of the NPPF to reflect the new emphasis on maximising housing delivery. The exact wording of the new presumption is set out on page 79 of the White Paper and is worth reading.
- The Government states that they are not making any change to green belt policy and development on the green belt will very much remain an option of last resort. However, a potentially significant amendment is proposed in relation to brownfield land within the green belt, which could be used to deliver starter homes (see Chapter 4) provided that doing so will not cause “substantial harm” to the openness of the green belt.
- Similarly, the Government has re-emphasised its commitment to neighbourhood planning, with promises to provide more funds to assist local groups with producing neighbourhood plans and a proposal that they will be provided with local housing need figures by the local authority.
- Policy support is promised in the NPPF for smaller “windfall” sites, and for infill developments within settlement boundaries. In fact, there is a proposal that at least 10% of allocated sites in local plans should be on sites of half a hectare or less.
- Somewhat confusingly, policy amendments are proposed to simultaneously promote the development of entire new garden towns and villages and to encourage the subdivision of large development sites. This could be seen as a requirement to go bigger and go smaller at the same time. Given that one of the biggest legal headaches on large sites is subdividing the infrastructure and s.106 obligations that sit alongside the planning consent, this proposal may require a fundamental re-think on how s.106 agreements are to be structured for these developments.

Site Assembly Issues and Associated Changes to Local Authority Powers

There is a lot in the White Paper about addressing common issues and road blocks to site assembly, although you do need to read between the lines to get to the meat of what is being proposed.

- The Government is proposing to repeal a slightly obscure piece of legislation (Reg 9 of the Town and Country Planning General Regulations 1992) which effectively prevents local authorities from selling land with the benefit of a planning consent which they granted to themselves. Under current rules, the planning consent dies as soon as anyone other than the planning authority tries to benefit from it. This proposed change will not, however, resolve the issue of how the infrastructure requirements for these types of development are to be met. Local authorities cannot covenant with themselves, which means that it will be very difficult to create planning obligations to fund infrastructure that bind and run with the land being sold subject to the proposed new power.
- A consultation is being promised on allowing local authorities to dispose of land for less than “best value” and on additional powers that may be needed to enable them to take a more active role in land assembly – such as the power to over-ride or purchase “ransom strips”.
- The Government commits to completing the compulsory registration of all land in England and Wales by 2030, although how this is going to be mandated is not explained, and legislation is promised to enact “the Law Commission’s proposals for the reform of restrictive covenants and other interests”. This single throwaway line indicates that significant reform of a wide range of legal land interests – including easements, covenants and profits a prendre – is likely to be on its way during the course of this parliament.

- Measures to encourage estate regeneration by local authorities are also promised but are not specified. Local Development Orders and area-wide design codes are also to be promoted, but again with no detail as to how this is to take place.

Chapter 2: Building homes faster

This next cluster of proposals is intended, quite simply, to speed up the process of obtaining planning consent and actually getting on site. Again the “carrot and stick” approach to policy making remains prevalent, although the parts of the market in line for reward and punishment vary somewhat. Some of the proposals in this chapter repeat promises or initiatives announced earlier in the paper or in earlier legislation. In the interests of brevity, I have ignored these.

Specific proposals in this chapter include:

- Amending the NPPF to allow a local authority’s five year housing land supply position to be assessed on an annual basis and then fixed for the next twelve months. The rationale for this appears to be two-fold; firstly, it should cut down on arguments about housing land supply at appeal, and secondly, it could be seen as a “quid pro quo” for adopting the standardised assessment methodology proposed in Chapter 1.
- Requiring neighbourhood plans to meet their share of local housing needs in full; although the current protections set out in “that” Written Ministerial Statement from Gavin Barwell (which allow two years under-delivery) will remain in some form, the intention is that they will be scaled back if there is persistent under-delivery of housing in the local authority area.
- In a bid to deal with the chronic under-resourcing of local authority planning departments, planning application fees are to be increased significantly. The fees will be nationally set, but local authorities may be able to access larger increases (of up to 40%) if they commit to spending the additional funds on their planning departments and are delivering enough houses to meet their objectively assessed needs.
- A consultation is also promised on introducing fees for planning appeals, although the intention appears to be that the fees would be refundable if the appeal was successful.
- There are promises of initiatives to boost provision of utilities to sites, improve broadband connectivity and generally reduce delays in getting sites serviced, but there is very little detail available on these.
- Similarly further consultations are proposed for the reform of CIL, which has been found to be “not as fast, simple, certain or transparent as originally intended”. The CIL Review Report proposes root and branch reform of the levy, and whilst the White Paper does not go this far (it will be a big, complicated and hideously fiddly job for whoever is tasked with it), it is at least encouraging to see the Government acknowledge that CIL in its current form is not fit for purpose.
- A streamlined approach to obtaining licences for protected species is to be rolled out, following a successful pilot of the system by Woking Borough Council, which is likely to be welcomed by developers; and
- A review of construction training methods, intended to address the skills gap in the industry, is promised later this year.

Moving on to the more “stick-like” proposals:

- The Government is proposing to amend the NPPF to enable local authorities to consider how realistic the development of a particular site actually is – particularly if previous planning consents for the site have not been implemented.
- There is a suggestion that the applicant’s track record of delivering housing should become a relevant planning consideration for committees – at least in relation to larger house-builders.
- The government is also consulting on empowering local authorities to reduce the timescales within which a planning permission must be implemented to two years (down from three). It is proposed that this should only be allowed where a shorter timescale would not hinder the viability or deliverability of a scheme, but given the length of time that it can take to deal with reserved matters, pre-commencement conditions and potential legal challenges; this is likely to be a highly controversial proposal.
- A simplified procedure for Completion Notices (which can be served by local authorities to compel the completion of a development) is being considered, with a proposal that planning permission could be removed from parts of stalled sites. This is likely to cause issues for funders of development projects, who are unlikely to want to lend on developments if the planning consent is capable of being removed part way through the build.

- A further consultation on CPO powers is promised, with a view to making it easier for local authorities to use.
- In a “punishment” mechanism aimed at local authorities, a new “housing delivery test” is proposed, which will identify local authorities that are under-delivering and include specific actions to be taken to increase housing levels. The “punishments” for under-delivery are incremental and increase with severity over time (see table below)

November 2017	November 2018	November 2019	November 2020
Delivery below 95% of annual housing need to result in production of action plan to improve build out rates.	Delivery below 25% of annual housing need – relevant local plan policies automatically to be deemed out of date and NPPF presumption of sustainable development to apply.	Delivery below 45% of annual housing need – relevant local plan policies automatically to be deemed out of date and NPPF presumption of sustainable development to apply.	Delivery below 65% of annual housing need – relevant local plan policies automatically to be deemed out of date and NPPF presumption of sustainable development to apply.
Delivery below 85% of annual housing need to result in requirement to plan for 20% buffer on five year housing land supply			

Chapter 3: Diversifying the market

This is probably the thinnest section of the paper, as it is primarily made up of statements of intent and existing policy announcements. It does, however, clearly set out a direction of travel aimed at encouraging small development companies and institutional investors into the market.

Proposals in this chapter include:

- The launch of a new “Accelerated Construction Programme” which will see the government partnering with small to medium sized development firms to bring forward housing schemes on public sector land.
- An increased focus on, and support for, “custom build” homes, an initiative which will please anyone hoping that Channel 4 will commission a new series of “Grand Designs”.
- The launch of a new (and separate) consultation on a package of measures aimed at encouraging and promoting Build to Rent developments – including amendments to the NPPF and to affordable housing definitions.
- Increasing the length of tenancies to at least three years, where appropriate.
- Changing financial and regulatory arrangements for housing authorities to make it easier for them to borrow against future income and to move the social housing regulator back out into an independent body (the previous regulator, the Tenant Services Authority having being absorbed into the Homes and Communities Agency in 2012).
- Changing the name of the Homes and Communities Agency to “Homes England”.
- Encouraging and supporting local authorities to develop their own affordable housing schemes and to adopt “innovative” styles of development, such as modular construction.

Chapter 4: Helping people now

The final chapter of the White Paper contains the Government’s “quick wins” i.e. those policies intended to have an effect in the short to medium term. Again, a number of these initiatives are not new – Lifetime ISAs, Help to Buy Equity Loans, the Community Housing Fund and extending the Right to Buy to housing association tenants all feature in this section of the White Paper and will not be explored in detail.

The newer and more interesting elements of the chapter are:

- A significant rolling back of the Starter Homes initiative set out in the Housing and Planning Act 2016. Under these new proposals starter homes will only be available to households with a joint income of less than £80,000 (or £90,000 in London) who require a mortgage to complete the purchase. There will be a 15 year repayment window before the property can be re-sold at full market rates, within which the discount for purchasers will have to be repaid.

- The 20% Starter Homes requirement for local authorities has been dropped entirely. Instead a new proposal in the NPPF will ensure a minimum of 10% of units on all housing sites comprise some sort of affordable housing – regardless of tenure.
- The NPPF will also be amended to make it easier to release underused former employment land for the delivery of starter homes and *significantly* the potential use of brownfield land within the green belt.
- Measures are promised to crack down on rogue landlords and abuses of long leasehold properties; these are not specified but are likely to focus on arrangements to purchase freehold and the use of service charges.
- A green paper is promised at some point in the future that will address issues around short term sheltered housing and a “conversation” with stakeholders to develop new proposals and support for specialist housing for the elderly is set out in detail, although with little indication as to when the conversation will take place and what support will be introduced. I suspect that this is most likely to result in a further working group or a new consultation paper on retirement housing in the not too distant future.

Conclusion

The White Paper that has been released is not the White Paper we were promised. Whilst some of the proposals have merit and can be welcomed, others appear to be based on a fundamental misunderstanding of the realities of development.

Much of the delay in moving a site forward is caused by the need to clear away reserved matters applications, pre-commencement conditions or private property rights, rather than being down to land-banking. Very few developers actively hold back sites with implementable planning consents and reducing the time available to resolve all of these issues and get on site is unlikely to be helpful.

Similarly, all of the policy “carrots” and threats of enforcement are not going to speed up the adoption of local plans, or the delivery of planning consents, unless there is significant inward investment by local authorities into their planning departments, and a wide-spread change of heart at a political level about the desirability of residential developments in their local constituencies. Increasing planning fees and threatening to intervene in decision making if targets are not met is unlikely to create the systemic change in approach required to make this work. The inherent conflict between localism and the need to create more homes remains at the heart of the planning system. In fact both neighbourhood plans and obligations on local authorities to meet their housing needs appear to be strengthened in equal measure.

The intention behind the White Paper appears noble. We will have to wait and see how effective it is in practice.


Nicola Gooch
Planning Associate
Irwin Mitchell LLP

8 February 2017

This material is for guidance and is not a substitute for legal advice. Irwin Mitchell LLP is a limited liability partnership registered in England & Wales, with number OC343897 and is authorised and regulated by the Solicitors Regulation Authority. The word ‘partner’, used in relation to the LLP, refers to a member of the LLP or any employee of, or consultant to, the LLP (or any affiliated firm) who is a lawyer with equivalent standing and qualifications. A list of the members of the LLP and of those non-members who are designated as partners, is displayed at the LLP’s registered office: Riverside East, 2 Millsands, Sheffield, S3 8DT.

 0370 1500 100

 www.irwinmitchell.com

 @irwinmitchell

For a list of our offices visit our website

Irwin Mitchell LLP is a limited liability partnership registered in England & Wales, with number OC343897, and is authorised and regulated by the Solicitors Regulation Authority. All Scottish cases will be handled by a separate Scottish legal practice, Irwin Mitchell Scotland LLP, which is regulated by the Law Society of Scotland.