

Dated Tuesday, 17 November 2020

**RESPONSE TO THE MHCLG
CONSULTATION ON DRAFT REGULATIONS
PLANNING FOR THE FUTURE**

PLANNING FOR THE FUTURE

Irwin Mitchell are a UK based national law firm with a large specialist real estate team. This response is written by the Planning and Environment team who themselves are nationally ranked in both the Legal 500 and Chambers. The Planning and Environment team has a broad client base including national PLC housebuilders and SME housebuilders as well more specialist providers of housing and those who work in and around the planning system including land promoters and funders. The team includes lawyers who have worked in house in a local authority setting and is also instructed by LPA's out-sourcing work. This consultation response is done following discussion with some of those clients.

Question 1. *What three words do you associate most with the planning system in England?*

(1) under-resourced (2) under-appreciated (3) complex

Question 2. *Do you get involved with planning decisions in your local area?*

Yes

Question 2(a). *If no, why not?*

To qualify the above, whilst most of our involvement is professional, some members of the team do also get involved in local planning matters in a personal capacity as well.

Question 3. *Our proposals will make it much easier to access plans and contribute your views to planning decisions. How would you like to find out about plans and planning proposals in the future?*

[Social media / Online news / Newspaper / By post / Other – please specify]

All of the above. But the time really has come for the system to modernise and move away from hard copy site notices, letters and newspaper adverts being the legal minimum. Some of the relaxations brought in for COVID should be made permanent.

Question 4. *What are your top three priorities for planning in your local area?*

- Building homes for young people
- Increasing the affordability of housing
- More or better local infrastructure (which needs to include the High Street and the Local Economy – it's all linked)

Question 5. *Do you agree that Local Plans should be simplified in line with our proposals?*

Local plans should be simplified; however these proposals are not necessarily the correct way forward. For example:

Growth Areas: Moving to a position where an allocation in a growth area carries with it an allocation for planning permission is going to front load a large amount of feasibility work, currently funded by landowners and developers prior to the submission of a planning application, to the local plan stage. Presumably here it will have to be funded and carried out by local authorities during the local plan process, as otherwise it will appear as if landowners/ developers are buying their allocations. This is going to have a significant impact on both the time and the resource required to bring a local plan forward, which could cause difficulties for the ambitious statutory timetable proposed in this consultation.

Protect Areas: The move towards one, catch all, category for such a wide variety of policy and statutory designations is unhelpful. Each of the proposed designations to be included in protect areas,

require very different types of development control and involve very different planning considerations. There is a real risk that the nuances between the different designations will be lost or will need to be set out in more specific policies, which will not be any more accessible to local people than is currently the case.

The reversion to plans being revolved around local plan maps and keys is welcome.

Question 6. *Do you agree with our proposals for streamlining the development management content of Local Plans, and setting out general development management policies nationally?*

Bringing planning policy documentation in line with modern technology would be a big step forward and make it much easier for developers and other practitioners to access, understand and interact with local plans and development policy. This should include the use of clear and up to date interactive maps and plans. Consideration should be given to putting resources into modernising and placing information on a bespoke app which can be used by local authorities and the general public.

As set out more fully below, it would be better to avoid using supplementary guidance where possible and to include everything in a comprehensive local plan. Alternatively, if a search function could be developed which would return the results of all development policies, guides, codes etc. that apply to a particular site this would make this more workable.

Question 7(a). *Do you agree with our proposals to replace existing legal and policy tests for Local Plans with a consolidated test of “sustainable development”, which would include consideration of environmental impact?*

Yes, although there should be detailed guidance on precisely what “sustainable development” is intended to mean and this guidance should be widely consulted upon prior to adoption. If this is not clearly defined and widely consulted upon, there is a risk that the consolidated test could be subject to extensive litigation in order to establish its meaning.

Furthermore, there needs to be more detail as to what environmental impacts are being considered, how the Environment Bill and the targets which have been publicised would feed into this process and consideration.

So whilst it is a good idea in principle, more detail is required.

Question 7(b). *How could strategic, cross-boundary issues be best planned for in the absence of a formal Duty to Cooperate?*

The current system is inadequate in providing for strategic planning. A regional tier approach can play a vital role in bridging the gap between local authorities and central government and to reconcile important strategic issues such as land use, major public infrastructure, housing, transport, waste management and environmental protection. This regional tier allows a level of objectivity in some planning decisions in which local councils are too close to provide and central government is too distant to deliver effectively.

Question 8(a). *Do you agree that a standard method for establishing housing requirements (that takes into account constraints) should be introduced?*

Not sure – whilst a standard method removes the ability for local authorities to dictate the housing need in their area, a standard method which incorporates appropriate indicators and takes into account the constraints of a local area will provide an accurate indication of its housing requirements. However, a local authority is best placed to make adjustments to consider the housing need across their district and a standard method removes this discretion.

Question 8(b). *Do you agree that affordability and the extent of existing urban areas are appropriate indicators of the quantity of development to be accommodated?*

No – these factors are not the sole indicators of the quantity of development required. Under the proposed methodology, rural areas with a lower affordability (where houses are more expensive in

comparison to the local average income) will see more homes planned. Increasing supply in an area does not automatically improve affordability and areas with typically expensive housing may not be sustainable areas to develop.

Question 9(a). *Do you agree that there should be automatic outline permission for areas for substantial development (Growth areas) with faster routes for detailed consent?*

[Yes / No / Not sure. Please provide supporting statement.]

Growth Areas: Moving to a position where an allocation in a growth area carries with it an allocation for planning permission is going to front load a large amount of feasibility work, currently funded by landowners and developers prior to the submission of a planning application, to the local plan stage. Presumably here it will have to be funded and carried out by local authorities during the local plan process, as otherwise it will appear as if landowners/ developers are buying their allocations. This is going to have a significant impact on both the time and the resource required to bring a local plan forward, which could cause difficulties for the ambitious statutory timetable proposed in this consultation.

Question 9(b). *Do you agree with our proposals above for the consent arrangements for Renewal and Protected areas?*

[Yes / No / Not sure. Please provide supporting statement.]

Protect Areas: The move towards one, catch all, category for such a wide variety of policy and statutory designations is unhelpful. Each of the proposed designations to be included in protect areas, require very different types of development control and involve very different planning considerations. There is a real risk that the nuances between the different designations will be lost or will need to be set out in more specific policies, which will not be any more accessible to local people than is currently the case.

Question 9(c). *Do you think there is a case for allowing new settlements to be brought forward under the Nationally Significant Infrastructure Projects regime?*

[Yes / No / Not sure. Please provide supporting statement.]

Question 10. *Do you agree with our proposals to make decision-making faster and more certain?*

Not sure. In theory it is exactly what we have been calling for, for years. The current system is too political. It has always been ironic that the most complex decisions are made by the least experienced but most politically motivated players in the system, who should have set their stall when they were involved in the Local Plan but then differ to those policies when the decision affects their chances of getting re-elected. The most experienced / qualified then make the simplest decisions or act as advisors only on the most complex.

Question 11. *Do you agree with our proposals for accessible, web-based Local Plans?*

[Yes / No / Not sure. Please provide supporting statement.]

Yes. Consistent standardisation and the use of modern technology in Local Plan preparation would make access to local planning policy easier. Currently, the form of local plans varies hugely between local authorities and this adds complexity to the system. Even where a local authority has an interactive local plan map, these are not always user-friendly nor comprehensive. However, it is important to ensure that these changes do not alienate or exclude certain members of society – for example although this may help to encourage engagement from younger people it could exclude older people or those without easy access to computers, smart phones etc. Local authority computer systems will also need to be able to run any new models effectively.

Question 12. *Do you agree with our proposals for a 30 month statutory timescale for the production of Local Plans?*

The 30 month statutory timescale is extremely ambitious. To meet it local authorities will need to be properly and effectively resourced. Too many LPA's barely have a policy team left – the focus on getting decisions made has led to that resource being shifted elsewhere. In more recent years the focus on getting Local Plans adopted quicker has led to a less detailed examination of them with light touch examinations and quicker redrafts needed. There will be real resourcing challenges arising from the new system, particularly if local plans are also going to grant planning permissions for growth areas as part of the local plan process (see above). If these challenges are not addressed up front, then the prospect of the 30 month timescale actually being met is minimal.

Question 13(a). *Do you agree that Neighbourhood Plans should be retained in the reformed planning system?*

[Yes / No / Not sure. Please provide supporting statement.]

No. A typical Neighbourhood Plan is not pro-growth – even those which allocate growth in some areas often have at their heart minimising the growth of their area. If the aim is to make it simpler and quicker for appropriate developments to get through the planning system adding another layer of local plan policy in the form of neighbourhood plans is likely to only hinder this.

Having planning policy created for even smaller areas e.g. individual streets is almost certainly not a good idea as this could lead to a multitude of different planning policy documents, with many different policies and approaches being applicable in just a small area. If the idea is to reform local plans to make them more consistent and simpler this idea is counter-intuitive,

A better approach, would be to ensure effective communication and consultation with local neighbourhoods during local plan preparation, to incorporate their views (where appropriate) into one, comprehensive local plan.

Not all local communities are able to draw on their own resources, or they may lack the capacity to produce a neighbourhood plan which can contribute to social inequalities.

The only possible sensible time I can think of that an individual street should have something akin to a Neighbourhood Plan in its own right is for design/conservation – The Crescent in Bath may justify it but otherwise this level of macro planning does not fit with the proposals.

Question 13(b). *How can the neighbourhood planning process be developed to meet our objectives, such as in the use of digital tools and reflecting community preferences about design?*

As above, effective communication and consultation with local neighbourhoods during local plan preparation would be a more efficient approach.

Question 14. *Do you agree there should be a stronger emphasis on the build out of developments? And if so, what further measures would you support?*

Yes. If the system gave better certainty and simplicity the need to implement, bank and reapply (whilst pretty rare in itself) would be minimised. The Letwin Report found little evidence of land banking but where it did find banking enabling more developers to build across large sites was the most evidenced solution. Care should be taken not to flood the market too rapidly. Whilst a rebalancing of property is needed those already owning “second hand” homes should not be prevented from moving on because the market has been flooded to create negative equity.

Question 15. *What do you think about the design of new development that has happened recently in your area?*

[Not sure or indifferent / Beautiful and/or well-designed / Ugly and/or poorly-designed / There hasn't been any / Other – please specify]

Not sure or indifferent – see answer to 18.

Question 16. *Sustainability is at the heart of our proposals. What is your priority for sustainability in your area?*

[Less reliance on cars / More green and open spaces / Energy efficiency of new buildings / More trees / Other – please specify]

All of the above. Sustainable travel plans, being able to access urban green space, but able to use sustainable travel to more rural green space, creating better environments and better sense of communities not disparate housing around a retail core.

More blended living, with more co-space, inter-generational living and mixed use schemes that embrace environmental sustainability.

Question 17. *Do you agree with our proposals for improving the production and use of design guides and codes?*

[Yes / No / Not sure. Please provide supporting statement.]

Not sure.

The concept of having national design codes/ guides and then design codes at local plan level seems to be a simple and consistent way forward. But, in order to retain this simplicity and consistency, care needs to be taken as to how these codes/guides are created at local level. In a similar vein to the comments on neighbourhood planning above, it is likely to be better to seek to include the design aspects within the local plan preparation, ensuring effective community consultation at the time. Having separate documents created after local plan preparation and/or by smaller communities is likely to counteract having simpler and more consistent local plans. As a practitioner, it is frustrating to need to find and then sift through lots of different supplementary planning guidance documents.

Question 18. *Do you agree that we should establish a new body to support design coding and building better places, and that each authority should have a chief officer for design and place-making?*

[Yes / No / Not sure. Please provide supporting statement.]

Yes, in part. Having someone who is looking at place making should be crucial going forward. If we are to enhance and incorporate change into the planning system and the way we live for the better this would be a good idea – as set out in 16.

A standard design code however, we are less certain about as it feels as though we are trying to create an homogenous build concept for housing developments across the country. To some extent with centralised design teams in large volume housebuilders, this takes place and it therefore eradicates in part local design and characteristics. See 17 above.

Question 19. *Do you agree with our proposal to consider how design might be given greater emphasis in the strategic objectives for Homes England?*

[Yes / No / Not sure. Please provide supporting statement.]

Question 20. *Do you agree with our proposals for implementing a fast-track for beauty?*

[Yes / No / Not sure. Please provide supporting statement.]

No. whether something is beautiful is irrelevant if it is not sustainable or practical. We should be aiming for well designed, practical homes and buildings which will stand the test of time and can be used for a multitude of different uses by different generations over generations. The beauty of such buildings comes from their longevity of use, their approach to practicality and how they fit into the landscape around them – whether that is built or natural.

Whether the buildings are beautiful or not is not objective enough of a test. There should be no way that beauty should be fast tracked taking into consideration the above.

[Note: there is no Q21.]

Question 22. *When new development happens in your area, what is your priority for what comes with it?*

[More affordable housing / More or better infrastructure (such as transport, schools, health provision) / Design of new buildings / More shops and/or employment space / Green space / Don't know / Other – please specify]

Local priorities for infrastructure and developer obligations will vary significantly around the country. All communities require adequate transportation links, good schools and access to medical services, as well as retail and employment opportunities and access to green spaces. Prioritising just one of these needs, to the detriment of the others, has the potential to undermine the ability to deliver balanced developments that serve the needs of the communities that reside in them.

What seems to be missing in the question is the central question in planning for as long as I have practised – “balance”. If my local GP/hospital has capacity I don't want more health provision. If it is already at capacity I will be in fear that the new housing will disrupt my health care provision and will want to see this catered for before the new housing is permitted.

Within the question of balance all “laws of unintended consequence” should be considered. E.g. there is an increasing prevalence for NHS contributions to be requested, not for capital improvements, as may be expected, (more people = need for more surgery spaces) but a simple lack of the NHS funding system to keep track with people moving about the country. Each local surgery/hospital is funded in accordance with its patient rota on a particular day in the year. If their rota increases throughout the year there is no balancing payment throughout the year to account for that increase, they just need to swallow it but the following year's NHS funding will be increased. Developers are therefore being asked to pay for the first partial years of NHS care for the houses they build as well as providing additional surgery rooms etc, which could naturally be considered the infrastructure impact of their development.

The better question to ask may be “When new development happens, how is it and its future occupants integrated into the community?” particularly if we are to build homes not just houses.

The focus of the white paper is on housing, with very little covered on employment land. The effects of COVID-19 and Brexit is likely to leave a lost lasting dent and impact on employment in the UK and the government (and our local plans) must engage now whilst the planning reform is at an embryonic stage. Consideration should be given to a top-down target for employment sites.

Question 22(a). *Should the Government replace the Community Infrastructure Levy and Section 106 planning obligations with a new consolidated Infrastructure Levy, which is charged as a fixed proportion of development value above a set threshold?*

[Yes / No / Not sure. Please provide supporting statement.]

No. Introducing a new form of development tax is extremely complex. The Community Infrastructure Levy, which was introduced in 2010, was amended nine times from the date of its adoption to the end of 2019 – and still has issues and glitches that could do with some refinement. A new development land tax is likely to have a similarly lengthy adjustment period before it can become workable, which will be highly disruptive both for local planning authorities and the development industry.

Setting the overall disruption aside, there are elements of the proposed consolidated infrastructure levy which are likely to be difficult to implement and otherwise potentially problematic:

- Establishing an appropriate rate or rates of development value which will work for all development types within an area without having an undue effect on development viability;

- Ensuring that the chosen rates recognise the differences in viability within development types. For example, built to rent developments, specialist housing for the elderly, student housing and co-living are all types of residential development; but they have very different operating models and viability profiles that market housing for sale.
- Establishing an appropriate minimum threshold or thresholds that will take account of the wide range of viability concerns across all development types within an area or areas;
- There is a risk that substantially widening the types of infrastructure or initiatives that can be funded through the levy to include 'lowering council tax' or 'other policy priorities' as well as affordable housing will significantly reduce the level of funds available for actual infrastructure improvements.
- This proposal would also effectively break the link between new developments coming forward and the delivery of new infrastructure – as the funds could be diverted to other political priorities for the council. This is unlikely to overcome concerns of objectors or local residents, who are often opposed to new developments because of fears that their local infrastructure network will be unable to support it.

Question 22(b). *Should the Infrastructure Levy rates be set nationally at a single rate, set nationally at an area-specific rate, or set locally?*

[Nationally at a single rate / Nationally at an area-specific rate / Locally]

The rates should be set locally, or at least regionally, as local councils are best placed to understand their local property markets.

Question 22(c). *Should the Infrastructure Levy aim to capture the same amount of value overall, or more value, to support greater investment in infrastructure, affordable housing and local communities?*

[Same amount overall / More value / Less value / Not sure. Please provide supporting statement.]

There is a difficult balancing exercise to strike here. Higher rates will have a greater impact on the viability of the developments being brought forward – particularly in areas with low land values – which could result in lower levels of development overall. Low rates are less likely to impact on overall levels of development and will support greater amounts of development, but may raise less in higher value land areas. The level needs to be set at a rate which does not prevent the vast majority of development from coming forward, otherwise the levy would undermine the government's ambition to build 300,000 homes a year. High levels of value capture that which result in less overall development would simply be counter-productive.

Question 22(d). *Should we allow local authorities to borrow against the Infrastructure Levy, to support infrastructure delivery in their area?*

[Yes / No / Not sure. Please provide supporting statement.]

Not sure – this is a question that local authorities would be better placed to respond to.

Question 23. *Do you agree that the scope of the reformed Infrastructure Levy should capture changes of use through permitted development rights?*

[Yes / No / Not sure. Please provide supporting statement.]

The Community Infrastructure Levy already applies to changes of use through permitted development rights. Permitted development schemes are not automatically exempt; it is just that these schemes are more likely to qualify for floor space deductions on the basis that some or all of the building being converted has been in lawful use for the relevant period. Whether or not a greater level of

contributions can actually be obtained from permitted development schemes will depend on whether the government proposes to retain these discounts.

Question 24(a). *Do you agree that we should aim to secure at least the same amount of affordable housing under the Infrastructure Levy, and as much on-site affordable provision, as at present?*

[Yes / No / Not sure. Please provide supporting statement.]

Whilst it is vitally important to maintain the levels and delivery of affordable housing, I am not sure that this will be possible under the revised Infrastructure Levy as proposed. The provision of affordable housing is a significant financial cost for developers and is often one of (if not the) largest financial obligations on a development. If the revised infrastructure levy is also to cover affordable housing, then that is highly likely to take up the vast majority of funding raised through the levy, leaving less in the pot than CIL currently raises for the remaining infrastructure needs of an area. Alternatively, if councils are to be permitted to flex the level of affordable housing provided in accordance with local infrastructure priorities, then you may well find that the overall proportion of on-site affordable housing drops under the revised levy.

Question 24(b). *Should affordable housing be secured as in-kind payment towards the Infrastructure Levy, or as a 'right to purchase' at discounted rates for local authorities?*

[Yes / No / Not sure. Please provide supporting statement.]

It is difficult to distinguish between the two mechanisms without far more detail on how they would actually work in practice. On the information provided, however, I would prefer an in-kind payment method, as this would be simpler to administer and more predictable than a 'right to purchase' mechanism – not least as it would avoid the need for a rebate in respect of properties purchased by the local authorities.

Question 24(c). *If an in-kind delivery approach is taken, should we mitigate against local authority overpayment risk?*

[Yes / No / Not sure. Please provide supporting statement.]

The overpayment risk is just as much a risk for the developer as it is the Councils, as such, it should be shared equally between the parties. This could be done by way of a limited or capped rebate of say, 50% of the overpayment.

Question 24(d). *If an in-kind delivery approach is taken, are there additional steps that would need to be taken to support affordable housing quality?*

[Yes / No / Not sure. Please provide supporting statement.]

Question 25. *Should local authorities have fewer restrictions over how they spend the Infrastructure Levy?*

[Yes / No / Not sure. Please provide supporting statement.]

No. As stated above, there is a risk that substantially widening the types of infrastructure or initiatives that can be funded through the levy to include 'lowering council tax' or 'other policy priorities' as well as affordable housing will significantly reduce the level of funds available for actual infrastructure improvements.

This proposal would also effectively break the link between new developments coming forward and the delivery of new infrastructure – as the funds could be diverted to other political priorities for the council. This is unlikely to overcome concerns of objectors or local residents, who are often opposed to new developments because of fears that their local infrastructure network will be unable to support it.

Question 25(a). *If yes, should an affordable housing 'ring-fence' be developed?*

[Yes / No / Not sure. Please provide supporting statement.]

If, despite the comments above, the Government does decide to implement the proposal then ring fences need to be in place for core infrastructure needs, such as education and highways, as well as affordable housing. Without this, there is a risk that the affordable housing provision will cannibalise the funding for all other infrastructure projects in the area.

Question 25A. *Neither Proposal 23 nor 24 have any related questions? Our comments on these areas are as follows: -*

Proposal 23

Greater regulation of pre-app charging is welcomed. The discrepancy nationwide are wide and unjustifiable.

There is a theme throughout the paper of passing costs on to the land owner and developer. It may be possible that land values will simply readjust to account for this but it is a common error to assume that each and every developer engaging with the system has a bottomless pot of profit being made. The impact of finance on the real estate system also needs to be understood, a lot of developer profit is made by those financing the development who will invest their money elsewhere if the returns cannot be made in the same way,

Proposal 24

Whilst this idea is commendable it needs to be seen in practice. Most enforcement is not a duty of the LPA but a discretionary remedy. In the local government cuts of 2011/2012 brought about by the coalition government to rebalance the books many LPA's paired back to doing what they had to do not what they ought to do and reduced their planning enforcement teams down to a skeleton and staffed what was left of it with ex policemen or trainees. Even within the planning world it is the less respected function of the RTPI with officers gaining RTPI qualifications to become proper planning officers making decisions but very rarely going the other way to become investigators/prosecutors.

LPA's have gotten better and / or more creative at using POCA to fully punish offenders and remove from them the profits of their crime but greater scrutiny needs to be given as to how these enhanced enforcement powers will be funded. Other areas of local government law have more teeth to their "cautions" – if an offence is admitted for non-payment of Council Tax a caution can be given and NFA taken subject to payment of the Council's costs and unpaid Council Tax.

Question 26. *Do you have any views on the potential impact of the proposals raised in this consultation on people with protected characteristics as defined in section 149 of the Equality Act 2010?*

**29 October 2020
Irwin Mitchell LLP**