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CLLS Planning & Environmental Law Committee response to Department for Communities and Local Government's Technical consultation on planning

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. The views of its Planning & Environmental Law Committee (the "Committee") in respect of select provisions in the Housing and Planning Bill (the "Bill") are set out below.

Part 1, Chapter 1 - Starter Homes

The Committee note the Government's commitment to increasing opportunities for home ownership for first-time buyers under 40 by the provision of discounted market homes.
The Bill, once enacted, will require planning authorities (including the Secretary of State) in England to carry out their relevant planning functions with a view to promoting the supply of starter homes in England, having regard to any guidance the Secretary of State gives. Relevant planning functions include the granting of planning permission (but not permission in principle) and plan making.

Further, regulations may require English planning authorities to grant permission for certain residential developments only if a requirement (to be specified in the regulations) as to starter homes is met. The Bill suggests that regulations could allow permission to be granted only if a developer enters into a planning (s106) obligation to provide starter homes or pay a contribution to the authority towards starter homes.

- Clarification is required, by amendment to the National Planning Policy Framework ("NPPF") or other guidance, to explain whether authorities are expected to assess and address the need for starter homes as part of the objective assessment of housing need or whether "promoting the supply" of starter homes is intended to raise additional burdens on authorities.

- Starter homes are discounted market homes and therefore another form of essentially subsidised/affordable housing. It may be that sites will come forward comprising solely starter homes, particularly if no CIL is payable and other s106 requirements are limited.
- On other sites, starter homes are likely to be subsidised by the developer/landowner. The cost of that subsidy will need to be considered alongside other forms of affordable housing, community infrastructure levy and other s106 requirements and negotiated on a site by site basis. There is a risk that a blanket requirement to introduce starter homes on certain types of sites could render developments unviable.

- There will be uncertainty for both authorities and developers as the extent of the new duty until the Government's requirements become clear. In particular, in imposing new duties and guidance affecting the plan making function, there is a risk that new plans or work on

emerging plans becomes out of date and the development plan led system becomes undermined. To avoid delay in the negotiation of planning applications with authorities, further detail would be welcome as soon as possible.

Part 1, Chapter 2 - Self-build Homes

The Bill intends to impose a duty on authorities to give suitable development permission (planning permission or permission in principle) in respect of enough serviced plots of land to meet the demand for self-build and custom housebuilding in the authority's area for defined base periods of 12 months. The demand is to be evidenced by the addition of entries to the register kept under the Self-build and Custom Housebuilding Act 2015.

- The definition of "suitable development permission" is unclear. A permission is "suitable" if it is permission for development that "could include self-build or custom housebuilding". That is a broad definition and it is not clear whether it excludes full planning permissions.

- Development permission for a plot of land may not be taken into account in relation to more than one base period. We question how this is anticipated to work. It would be sensible to allow planning permissions or permission in principle granted (whether on express application or through allocation) for multiple plots to apply across a number of base periods due to the length of time it can take to allocate sites or bring forward permissions.

- There may be limited opportunities for authorities to allocate sites or grant permissions on their own land. If so, authorities will inevitably look to developers to include an element of self-build and custom build within larger sites to fulfil their duty. Again, that involves a subsidy by the developer which will need to be taken into account in viability discussions. Further, it is unclear how the duty will sit alongside the authority's wider obligations under the NPPF to objectively assess and meet housing need.

Part 6, Clauses 92-95 - Neighbourhood Planning

The Bill, once enacted, will give the Secretary of State the power by regulations to force through the designation of a neighbourhood area, where there is a valid application and the local planning authority ("LPA") has failed to determine the application within a specified time limit.

It will give the Secretary of State a power to decide whether to hold referendums in relation to neighbourhood development orders and plans, and exercise other key neighbourhood planning functions.

- There are obvious tensions between the Localism agenda and the intervention by the Secretary of State in the development of neighbourhood plans and development orders.

- The Committee consider that neighbourhood plans and orders are best dealt with at the local level with Government resources better spent on bringing forward local plans as a priority.

Part 6, Clauses 96-100 - Local Plans

The Bill will give the Secretary of State (or the Mayor of London in relation to a London Borough) the power to intervene if a LPA is failing or omitting to do what is necessary to put its Local Plan in place.

The Secretary of State has a power to require the LPA to submit local plan documents to him for independent examination and has the power to direct the examiner, halt the examination, and direct the examiner to hear from a specified person or to consider any specified matters.
The Secretary of State can intervene by preparing or revising the local plan documents or giving directions to the LPA in relation to the preparation or revision of the documents. The Secretary of State must hold an independent examination or direct the authority to submit the

document for independent examination and may “approve” the document or direct the authority to consider adopting or rejecting the document.

• There is an obvious tension with the Localism agenda here, and concerns have been raised as to whether the level of intervention envisaged in the examination of local plan documents will jeopardise the independence of the examination process.

• However, the Government's clear drive to ensure that local plans are brought forward is welcomed and the certainty that this will bring across the sector.

• There should be a stepped procedure so that LPA is notified that they are failing and given an opportunity agree a timetable to work towards a finalised plan, prior to intervention from the Secretary of State.

• Clarity is required as to how the Secretary of State will be able to bring forward local plans in failing authorities where, for example, there are issues with the evidence base coming forward. Further detail should be provided as to the practical steps the Secretary of State will take to bring forward a local plan. Will a team be sent in to work with failing local authorities and how will this be resourced?

• Clarity is also required as to what is meant by the new clause 27(5)(a) by which the Secretary of State can "approve" the local plan. If the Secretary of State cannot go as far as to adopt the local plan or deem its adoption this will undermine the process.

Part 6, Clause 102 – Permission in principle for development of land

New Section 59A of the Town and Country Planning Act 1990 establishes the permission in principle (“PiP”) concept, which together with a technical details consent will grant full planning permission for development of land in England.

The Committee are generally supportive of the introduction of a new mechanism for the grant of planning permission. However:

• Given that a development order made under section 59A(1)(A) can only grant PiP in respect of land which is specifically allocated for the purposes of section 59A, a positive step is required in most cases by LPAs to evoke the powers. In a climate where Government expects LPAs to have local plans in place by 2017, a clear direction from central Government on the use of LPA resource is needed. While it is possible that the private sector will assist LPAs to bring forward site allocations for PiP, ultimately the process needs to be owned by each LPA, who is unlikely to have the resources to do so. Government should either provide additional funding to LPAs to support land being allocated for PiP, or clarify whether the delivery of housing through the local plan process or permission in principle should be prioritised.

• Government has widely announced its intention that the route to PiP following an application under section 59A(1)(b) will only be available where the application relates minor housing development of fewer than 10 units. If this is the case, the Committee query the need for the Bill (in paragraphs 2 and 20 of Schedule 6) to extend the powers of the Mayor of London and the Secretary of State to direct that they are to determine the application for PiP. Clarification from the Government on this would be welcomed.

• The Bill does not consider how duties under the Environmental Impact Assessment Regulations will be satisfied in respect of PiP. Development likely to have significant environmental effects will need to be environmentally assessed before consent can be given. Multi-stage consent procedures involving a ‘principal’ decision and an ‘implementing’ decision which cannot extend beyond the parameters of the principal decision require EIA at the stage the principal decision is made- in this case the allocation of land for PiP. Where effects are not identifiable until the implementing decision is granted, EIA may also have to be carried out as part of the grant of the implementing decision. Does the Government propose to legislate that development which is likely to give rise to significant environmental effects is excluded from the scope of PiP (as is the case with the General Permitted Development Order)? Or

would a LPA have to undertake EIA when allocating land for PiP? In some circumstances a developer would still have to undertake further EIA (when seeking approval of technical details) if any aspects of the project have not yet been assessed or require fresh assessment.

Part 6, Clause 103- Local planning authority to keep register of particular kinds of land

New Section 14A of the Planning and Compulsory Purchase Act 2004 would permit the Secretary of State to make regulations requiring a LPA to prepare, maintain and publish a register of particular land at least partly within its area. This new power is closely linked to the PiP regime, as land listed in such registers could be allocated for PiP.

We agree with the principle of LPAs maintaining registers of land earmarked for development. It would allow developers to identify opportunities for development by accessing publicly available registers. However, we advocate for greater safeguards as to the creation of these registers:

- Given that the registers are capable of creating PiP, preparation of the registers and decisions to enter land onto the registers should be transparent and inclusive. The Government has proposed in Section 14A(4)(a) that the regulations to be made by the Secretary of State may require LPAs to carry out consultation in relation to the entries on the register; the Committee advocate that the requirement to consult is made mandatory.

- LPAs should be given discretion to exclude certain sites from the register where local circumstances dictate; local knowledge and planning judgement should not be capable of being overridden by central Government requiring certain land to be entered on registers which is subsequently conferred PiP status. Section 14A(4)(c) allows the Secretary of State to provide for such discretion in regulations; the Committee's view is that there should be a requirement in the primary legislation for regulations to confer such discretion .

Part 6, Clause 107 – Development consent for projects that involve housing

Amendments to Section 115 of the Planning Act 2008 (the "2008 Act") would permit housing which is either "associated" with a nationally significant infrastructure project ("NSIP") or "on the same site as, or next to or close to" an NSIP to be included in an application for development consent under the 2008 Act.

The Committee welcomes the introduction of a new power which permits an element of housing which is functionally linked to an NSIP to form part of the NSIP regime, and be consented as part of the development consent order for the NSIP. It recognises that this will reduce time and cost for developers who would otherwise have to seek separate planning permission.

However, the Committee considers that the current approach to delivering this new power leads to uncertainty. It also overcomplicates the existing legislation. Introducing as associated development a category of housing which has no functional link to an NSIP is inconsistent with the Government's view that housing should not form a separate category of infrastructure for which development consent is required under the 2008 Act.

Government should review again whether it should legislate for the inclusion of housing as a category of nationally significant infrastructure. If it maintains that housing is not capable of being regarded as infrastructure of national significance in its own right, we consider that the existing provisions in and guidance pursuant to Section 115 of the 2008 Act in respect of associated development should be relied on for housing development. Rather than proceeding with the changes set out in Clause 107, we would recommend:

- Deleting existing Section 115(2)(b) of the 2008 Act; and

- Amending the 'Guidance on Associated Development' to remove references to associated development not including housing. Annex A should be amended to include examples of the type of housing development which may qualify as associated development,

focused on the functional relationship between housing and the NSIP, rather than simply requiring there to be a geographic link. An example of housing which with a functional link to an NSIP includes replacement housing where existing housing is demolished as part of the NSIP.

Part 7 – Compulsory Purchase etc

The changes to CPO powers, timetable and process within the Bill are long overdue and generally welcomed by the industry. The use of CPO powers, even as a last resort, has effects on many different groups, from the resourcing of Acquiring Authorities, to developers' timetable and funding, to individuals and businesses subjected to compulsory purchase. Provisions such as those for new survey powers and proposals for clear timetables are matters which the Compulsory Purchase Association ("CPA") have been campaigning for to help ensure that the CPO process can be as smooth and efficient as feasible, but there are some doubts as to whether the finer details are acceptable. Some may also consider that the "changes" made under the Bill are merely cosmetic as the changes reflect the process currently followed by practitioners ignoring the outdated or unfavourable rules with no consequence.

Clause 136 of the Bill provides for an extension of the time limit for compulsory purchase orders if a challenge is made to the validity of the order. Acquiring Authorities currently have three years to exercise their compulsory purchase powers once the order becomes operative. Clause 136 imposes legislative changes which provide for that time period to be extended until the shorter of:

a) the time it takes to deal with the challenge; or
b) one year.

The principle of an extension makes sense, considering most Acquiring Authorities will wait until a final decision is reached on the challenge before exercising their powers. However, if this principle of an extension is acceptable, then we argue the extension should run for the entire time it takes to deal with the challenge, even if this is more than one year.
The timetable process set out in Clause 118 is to be commended, although the actual timetable will need to be fully scrutinised once it is published by the Secretary of State, with three months considered to be an appropriate timeframe. We also question whether the Secretary of State should also be subjected to a specific timetable and the monitoring and reporting of performance, given that many CPOs are delayed whilst a decision is awaited by the Secretary of State. Periodic revisions to the timetable should be allowed, provided sufficient reasons are given for any changes to that timetable.
The power for courts to quash the decision to confirm a CPO rather than having to quash the entire CPO itself will be welcomed by both Acquiring Authorities and developers. Rather than having to start the CPO process all over again, this process could save months or even years of repeated work and delay.

Date 25th November 2015

THE CITY OF LONDON LAW SOCIETY
PLANNING & ENVIRONMENTAL LAW COMMITTEE

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