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Secretary of State for Communities, Housing and Local Government
3rd Floor, South East Fry Building
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Dear Secretary of State

Changes to the Current Planning System

Consultation Response

The City of London Law Society ("CLLS") represents approximately 17,000 City solicitors 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 role of the CLLS Planning & Environmental Law Committee (CLLS PELC) is to keep under review, and to promote improvements in, planning law, practice and procedure.

The Government issued its consultation paper '*Changes to the Current Planning System*' ("the Paper") in August and seeks views on the following proposed changes to the planning system:

- changes to the standard method for assessing local housing need
- securing of First Homes through developer contributions
- temporarily lifting the small sites threshold
- extending the current Permission in Principle to major development

Our responses to the questions raised in the Paper are set out below (please note that matters of pure policy fall outside the remit of the CLLS PELC and we provide no comment on questions that fall outside our scope as neutral legal stakeholder).

The standard method for assessing housing numbers in strategic plans

Q1: Do you agree that planning practice guidance should be amended to specify that the appropriate baseline for the standard method is whichever is the higher of the level of 0.5% of housing stock in each local authority area OR the latest household projections averaged over a 10-year period?

CLLS PELC supports measures that would improve the accuracy of assessing housing requirements. Introducing more up to date data into the method as opposed to solely relying on historic forecasts is welcomed. However, we note concerns raised within the industry that continued reliance on historic forecasts might be prejudicial if there has been a significant change in an area's needs and conversely existing housing stock might not reflect current demand. We share these concerns and would advise that any change to the standard method is rolled out for a temporary period to allow for review as to whether the proposed changes work and that the figures being produced are meeting local, regional and national requirements. There is a danger that some areas may end up with disproportionately high numbers, particularly London, so jeopardising the overall 300,000 plus homes a year ambition.

Q2: In the stock element of the baseline, do you agree that 0.5% of existing stock for the standard method is appropriate? If not, please explain why.

No comment – outside our scope.

Q3: Do you agree that using the workplace-based median house price to median earnings ratio from the most recent year for which data is available to adjust the standard method's baseline is appropriate? If not, please explain why.

No comment – outside our scope.

Q4: Do you agree that incorporating an adjustment for the change of affordability over 10 years is a positive way to look at whether affordability has improved? If not, please explain why.

No comment – outside our scope.

Q5: Do you agree that affordability is given an appropriate weighting within the standard method? If not, please explain why.

No comment– outside our scope.

Q6: Authorities which are already at the second stage of the strategic plan consultation process (Regulation 19), which should be given 6 months to submit their plan to the Planning Inspectorate for examination?

No comment– outside our scope.

Q7: Authorities close to publishing their second stage consultation (Regulation 19), which should be given 3 months from the publication date of the revised guidance to publish their Regulation 19 plan, and a further 6 months to submit their plan to the Planning Inspectorate? If not, please explain why. Are there particular circumstances which need to be catered for?

No comment– outside our scope.

Delivering First Homes

Q8: The Government is proposing policy compliant planning applications will deliver a minimum of 25% of onsite affordable housing as First Homes, and a minimum of 25% of offsite contributions towards First Homes where appropriate. Which do you think is the most appropriate option for the remaining 75% of affordable housing secured through developer contributions? Please provide reasons and / or evidence for your views (if possible):

- i) Prioritising the replacement of affordable home ownership tenures, and delivering rental tenures in the ratio set out in the local plan policy.**
- ii) Negotiation between a local authority and developer.**

iii) Other (please specify)

We consider that (i) is the most appropriate course of action. The local plan should guide and determine what tenures the remaining affordable housing should be in accordance with the local housing needs assessments and that the First Homes provided replaces the home ownership requirements. This approach will provide developers and authorities with certainty and will not leave matters open to potentially open-ended negotiations in contrast to (ii).

Q9: Should the existing exemptions from the requirement for affordable home ownership products (e.g. for build to rent) also apply to apply to this First Homes requirement?

We consider that the exemptions in paragraph 64(i) to (iii) of the NPPF should also apply to First Homes.

In specific regard to build to rent, given that such schemes are intended to be 100% rented and to remain under unified ownership and professional management (in accordance with the glossary at Appendix 2 of the NPPF), it would be inappropriate and may potentially negatively detract from the concept of build to rent schemes to introduce a home ownership element.

Furthermore, home ownership tenures such as First Homes would likely not be appropriate for specialist accommodation for the elderly or students where rental products would generally be more appropriate. First Homes would also be incompatible with self-builds.

On the face of the proposals, we do not however, consider that there is any legal or other reason why First Homes cannot per se be incorporated into exclusive affordable housing schemes, entry-level exception sites or rural exception sites. Paragraph 64 of the NPPF does build in flexibility to remove the need for a minimum number of home ownership tenures in cases where this would exceed the level of affordable housing required in the area, or significantly prejudice the ability to meet the identified affordable housing needs of specific groups.

Q10: Are any existing exemptions not required? If not, please set out which exemptions and why.

No comment – outside our scope.

Q11: Are any other exemptions needed? If so, please provide reasons and /or evidence for your views.

The flexibility in paragraph 64 of the NPPF, i.e. to dis-apply the minimum number of affordable ownership homes where they will significantly prejudice the ability to meet the identified affordable housing needs of specific groups, is potentially a high bar. We suggest that consideration should be given to exempt other 100% affordable rented schemes which are meeting a local housing need. In some areas of the country, such affordable rental tenures may be preferable over home ownership tenures but it may be difficult to show that requiring a minimum number of home ownership tenures would significantly prejudice the housing needs of specific groups.

Q12: Do you agree with the proposed approach to transitional arrangements set out above?

Yes.

Q13: Do you agree with the proposed approach to different levels of discount?

We consider the approach sensible. However, the NPPF and NPPG should clearly state what percentage discount (equivalent or otherwise) is also required on resales to ensure that the First Homes remain affordable in perpetuity.

For example, the definition of 'discounted market sale housing' simply states that "Provisions should be in place to ensure housing remains at a discount for future eligible households" (emphasis added). It is open to interpretation what 'a discount' should be, whether it should be the same as the original discount or some other amount. To ensure that First Homes continue to benefit local people and are affordable in perpetuity, a clear minimum discount should be provided.

Q14: Do you agree with the approach of allowing a small proportion of market housing on First Homes exception sites, in order to ensure site viability?

Yes

Q15: Do you agree with the removal of the site size threshold set out in the National Planning Policy Framework?

Yes

Q16: Do you agree that the First Homes exception sites policy should not apply in designated rural areas?

No comment – outside our scope.

Supporting small and medium-sized developers

Q17: Do you agree with the proposed approach to raise the small sites threshold for a time-limited period? (see question 18 for comments on level of threshold)

Yes – although the CLLS PELC notes there is concern in some quarters that raising the threshold for any period may impact on supply levels of affordable housing. A time-limited provision is a sensible approach but we would suggest that any legislation introduced has clear drafting on timing. In the past sunset clauses have caused uncertainty in relation to applications submitted but not yet determined by the relevant cut-off date. We refer in particular to the time limited provisions of S106BA-BC TCPA 1990 (as amended).

There is also concern as to 'buy-in' by local authorities. As acknowledged within the Paper, 8% of local authorities with up to date plans seek affordable housing contributions for developments under the 10 unit threshold. It is likely that this percentage of "opt-outs" will increase if the threshold is raised.

Furthermore, it will no doubt take a while for local plans to be adjusted to comply with NPPF changes (namely para 63) and so for the interim period the 'tilted balance' approach may be triggered within the decision-making process. Paragraph 11(d) of the NPPF has already been the cause of much litigation and has cropped up as a key theme at appeal. There is real risk that the short-term measure being proposed will simply lead to an increase in appeals.

Q18: What is the appropriate level of small sites threshold? i) Up to 40 homes ii) Up to 50 homes iii) Other (please specify)

No comment – outside our scope.

Q19: Do you agree with the proposed approach to the site size threshold?

No comment – outside our scope.

Q20: Do you agree with linking the time-limited period to economic recovery and raising the threshold for an initial period of 18 months?

Yes – see Q17

Q21: Do you agree with the proposed approach to minimising threshold effects?

No comment – outside our scope.

Q22: Do you agree with the Government's proposed approach to setting thresholds in rural areas?

No comment – outside our scope.

Q23: Are there any other ways in which the Government can support SME builders to deliver new homes during the economic recovery period?

Further exemptions to para 145 NPPF in respect of development of brownfield land within the Green Belt would assist. Considerable delays and costs are still being experienced by SMEs in arguing over whether the exemptions apply to proposed development.

Extension of the Permission in Principle consent regime

Q24: Do you agree that the new Permission in Principle should remove the restriction on major development?

We consider that there will be limited benefit in removing this restriction, we doubt authorities will be prepared to grant permission in principle on applications relating to more complex sites and in turn, developers could be misled. The nature of the current application process will simply limit the type of sites for which this route will be appropriate, bearing in mind the perceived benefits. The concept is that "in principle" issues such as use and scale are addressed at the first stage (at which no conditions can be imposed), with technical details to follow.

A fundamental issue is that the more complex the site, the more detail that is required to establish whether a proposed use / scale of development is acceptable – undermining the benefit of this route. It may be that the Council is unable to establish whether a particular scale of development is appropriate without analysis of technical details and assessment of appropriate mitigation in respect of potential harm caused (secured by condition or s106 obligation). It can become difficult to divorce the "principle" from the "detail".

In addition, the land value (underpinning any associated transaction facilitating development) often cannot be ascertained until the detailed stage, at which point the mitigation becomes understood. This is particularly the case if affordable housing or other requirements need to be negotiated at the technical details stage. The PIP route is more likely to be of benefit where affordable housing is not sought.

Q25: Should the new Permission in Principle for major development set any limit on the amount of commercial development (providing housing still occupies the majority of the floorspace of the overall scheme)? Please provide any comments in support of your views.

The flexibility could be beneficial. Again, the information needed to establish in principle that a particular combination and scale of uses is acceptable for a site could vary considerably.

Q26: Do you agree with our proposal that information requirements for Permission in Principle by application for major development should broadly remain unchanged? If you disagree, what changes would you suggest and why?

As above, the current process is likely to limit the complexity of sites / developments that can benefit from this route, where the information that can be submitted, and the parameters fixed at in principle approval stage, are so limited.

Q27: Should there be an additional height parameter for Permission in Principle? Please provide comments in support of your views.

We agree that a maximum height threshold parameter may assist in giving certainty to the Council and neighbouring owners as to the impact of the development (which affects whether the principle is acceptable) and therefore could be beneficial. This should be height above existing ground level for clarity and potentially could vary across the site.

Whilst this introduces a further consideration, it could increase the number of sites that could benefit. The application could be extended to include an explanatory statement.

Q28: Do you agree that publicity arrangements for Permission in Principle by application should be extended for large developments? If so, should local planning authorities be:

- i) required to publish a notice in a local newspaper?**
- ii) subject to a general requirement to publicise the application or**
- iii) both?**
- iv) disagree If you disagree, please state your reasons.**

A general requirement would give the authorities flexibility.

Q29: Do you agree with our proposal for a banded fee structure based on a flat fee per hectare, with a maximum fee cap? Q30: What level of flat fee do you consider appropriate, and why?

No comment, save that we consider that authorities should be properly funded to undertake the work that is necessary to assess an application.

Q31: Do you agree that any brownfield site that is granted Permission in Principle through the application process should be included in Part 2 of the Brownfield Land Register? If you disagree, please state why.

No comment – outside our scope.

Q32: What guidance would help support applicants and local planning authorities to make decisions about Permission in Principle? Where possible, please set out any areas of guidance you consider are currently lacking and would assist stakeholders.

No comment – outside our scope.

Q33: What costs and benefits do you envisage the proposed scheme would cause? Where you have identified drawbacks, how might these be overcome?

Please see above.

Q34: To what extent do you consider landowners and developers are likely to use the proposed measure? Please provide evidence where possible.

Please see above.

Q35: In light of the proposals set out in this consultation, are there any direct or indirect impacts in terms of eliminating unlawful discrimination, advancing equality of opportunity and fostering good relations on people who share characteristics protected under the Public Sector Equality Duty?

None

Your sincerely

Stephen Webb
Chair
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