



# LPDF

## LAND PROMOTERS & DEVELOPERS FEDERATION

### Members Newsletter 6 - April 2020

#### FACING UP TO THE CHALLENGE OF COVID-19



*Paul Brocklehurst,  
Chairman of the LPDF*

As each day passes it becomes ever more clear that Covid-19 is having a massive, and long-lasting, impact on British businesses and the wider community.

Amid mixed messages about those that qualify as key workers, many major housebuilders have taken the difficult decision to close down their sites for the safety and wellbeing of construction teams. Our entire sector is affected.

The LPDF is closely monitoring the developments of the pandemic and we are following Government advice, which is updated daily. Our priority is the health, safety and wellbeing of our own team, LPDF members, consultants and the general public.

When light appears at the end of this dark tunnel, and the virus is finally under control, it is the development and housebuilding industry that will lead Britain's economic recovery.

To do that, we will need strong government support and encouragement. We are asking the government to use the Planning White Paper to simplify and speed up the planning process. It should be streamlined so that more sites achieve consent and are ready to be developed as soon as this crisis comes to an end.

We will be working constructively and positively with the LPAs through the challenging months ahead to ensure that as many planning applications as possible are determined.

Action is already being taken by the government. An amendment was introduced into the Coronavirus Act 2020 to enable Councils to hold virtual Planning Committee Meetings. Draft Regulations have now been published which should be brought into force very shortly.

And, in a letter to local authorities' chief planning officers, the government has said plan-making and planning decision-taking should continue during the pandemic, albeit sometimes to extended deadlines.

Ministry of Housing, Communities and Local Government chief planner Steve Quartermain said that the government expects its proposed legislation to temporarily enable virtual council planning committee meetings "will allow planning committees to continue".

The housing sector has been through many recessions and tends to come out of each better prepared to fight the next challenge. Here at the LPDF, we are certain that the housebuilding industry will be critical to the economic recovery.

We believe we are in a strong position to bounce back:

- The housing market is mainly underpinned by interest rates. Fixed-term deals are at record lows and are likely to stay low.
- The last recession was caused by a credit crunch and lack of mortgage availability which slowed plot sales. Liquidity is not an issue this time and the structural shortage of housing will sustain demand.
- Homes England is heavily investing in the housing market and there is a system in place to accelerate the market.
- Help to Buy is a major benefit to the industry and there is likely to be more commitment to it from the Government.

There is some excellent advice and information available online to help us all navigate the crisis so that we come out of it fit and ready to successfully drive Britain's business recovery.

- The **Government's advice** to employers
- Advice from the **Planning Inspectorate**
- The IOD has launched a business **support hub**
- The government has launched a new website that provides UK businesses with detailed information on the range of schemes and support it is rolling out at [www.businesssupport.gov.uk/coronavirus-business-support/](http://www.businesssupport.gov.uk/coronavirus-business-support/)
- The CBI has also launched a Covid-19 **information hub**
- Business Secretary Alok Sharma's **advice to the construction sector**

We will be issuing alerts and our regular weekly update to help members navigate this unprecedented crisis.

Please feel free to contact myself at [paulb@lpdf.co.uk](mailto:paulb@lpdf.co.uk) or our policy director John Acres at [johna@lpdf.co.uk](mailto:johna@lpdf.co.uk) if you have any questions. We'll do our best to offer any guidance we can.

Take care and stay safe.

## NEWS IN BRIEF



### JACK AIREY APPOINTED AS NO 10 SPECIAL HOUSING AND PLANNING ADVISOR

The former head of housing at the 'think tank' *Policy Exchange* has been appointed as a special advisor to Prime Minister Boris Johnson.

Jack Airey recently co-wrote a controversial *Policy Exchange* report entitled '*Re-thinking the Planning System*' which proposed abandoning the current planning process, (established in 1947) and replacing it with a 'binary zonal system' without detailed land use allocations and a more market-led approach. Under the proposed arrangements, there would be no defined limits to housing or economic growth and Green Belt would be fundamentally reviewed.

Councillors would only be involved at the policy level in setting zones and rules – leaving officers to approve or reject planning applications according to routine administrative procedures. It remains to be seen whether, and to what extent, these ideas will find their way into the forthcoming Government Planning White Paper due out this spring.



### LPDF WELCOMES NEW JUNIOR HOUSING MINISTER

LPDF chairman Paul Brocklehurst has written to welcome Christopher Pincher MP, the new Junior Housing and Planning Minister, into the post. He is the 10th housing minister in the last 10 years and replaces Esther McVey, who returns to the back-benches. Christopher has represented Tamworth since 2010 but has no previous experience in the housing and property world. His former Government posts were as a Junior Foreign Office Minister, Junior Whip and as Principal Private Secretary to Philip Hammond. His early statements refer to the importance of housing delivery.

### LPDF VOICE GROWS STRONGER

We've had an influx of new members in 2020, strengthening our voice in the exciting sector in which we all work. It's great to see that more and more companies are recognising the many benefits of joining the LPDF.

We now have more than 60 members, including some of the biggest names in housebuilding, planning, law, property consultancy and other support services. For our full list of members visit:

[www.lpdf.co.uk/members-directory](http://www.lpdf.co.uk/members-directory)



### DCN2020 SPOTLIGHT ON LPDF

An LPDF delegation attended the District Councils Network 2020 annual conference where we discussed with many visitors how we could improve the housing supply to meet the Government's target of 300,000 new homes each year.

In a fascinating Q&A session, our chairman Paul Brocklehurst answered questions including: How many of the 300,000 need to be social/affordable homes, and how do we build enough of this type of housing? How can we get the high volume house builders to embrace low carbon construction?

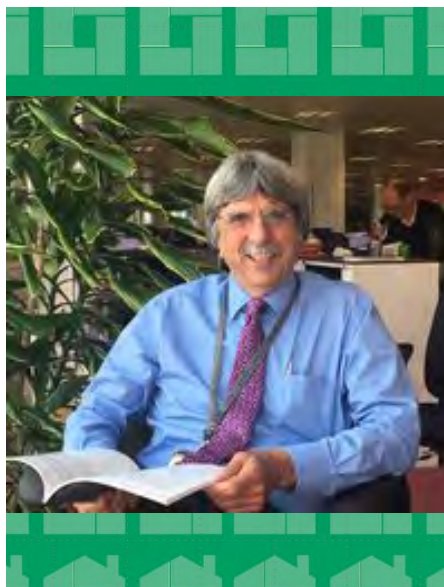
Many of the district council officers and councillors that attended showed a great deal of interest in the LPDF and our members.



## LPDF ROUND TABLE MEETING WITH CHIEF PLANNER

Following the successful January meeting with retiring Chief Planner Steve Quartermain CBE, no less than 15 LPDF members were involved in an open round-table meeting in February with him and two of his closest civil servants to discuss a wide range of housing and planning issues.

The discussion proved to be extremely valuable both in highlighting matters which continue to concern the development industry and in building future relationships with Government. A request has been circulated to LPDF members seeking information on their application cases which have been refused against officers' advice and also cases where inspectors have dismissed appeals in similar circumstances. A summary of the discussion is available from the LPDF policy director at [johna@lpdf.co.uk](mailto:johna@lpdf.co.uk).



## HOUSING PROVISION: REVIEWING THE STANDARD METHODOLOGY

Civil servants have indicated that they propose to review the standard methodology for calculating housing provision for individual local authorities in advance of publishing the new household projections later this year. This occurs against a background where the new market-driven system is displaying clear teething problems whereby some local authorities, especially in London and the South East, struggle to meet higher numbers and in some cases resist Local Plan reviews, whilst other authorities in the Midlands and North welcome lower housing numbers, despite strong demands.

In a separate move, leading planning consultants, developers and barristers have convened a meeting to discuss an alternative approach to assessing Housing Requirements in a standardised way, which could influence the Government's thinking. The LPDF will be represented at this meeting.



## EVENT PUTS SPOTLIGHT ON ROSEWELL

It was great to see so many members at our Rosewell in Action event in Birmingham, hosted by Eversheds Sutherland and King's Chambers.

Stuart Andrews, of Eversheds Sutherland, and Giles Cannock QC, of King's Chambers, gave interesting presentations focusing on the impact of Rosewell on planning inquiries, and how best to approach the new process, from first-hand experience.

A lively question and answer session followed, with members sharing their experience of the new guidance recently implemented by the Government.



## ANNUAL LUNCH PUT ON HOLD

By now we had hoped to have staged our inaugural annual lunch and thought we'd be talking about what a fantastic success it was after selling out almost 300 tickets.

Sadly, as we are all too aware, events involving large groups have been postponed right across the country in response to the COVID-19 pandemic, and ours was no exception.

Although we are disappointed, the crucial thing is that we all take care of our health and that of our loved ones. Please look after yourselves and think of those who are perhaps more vulnerable to this virus.

We are in the process of negotiating with the venue regarding a new date for the first LPDF Annual Industry Lunch & Networking Event. Thank you for your understanding and patience, and we will in touch with more details in due course.

## MEETING WITH MAGAZINE EDITORS

Two key meetings were held with the editors of both Planning and The Planner magazines, with a view to ensuring that the LPDF raises its voice within the trade and professional press. Scope was explored for producing articles and accepting speaking engagements at housing and planning conferences to project the message about the role, purpose, value and success of land promotion and development.



## 2070 COMMISSION LAUNCHED IN MANCHESTER

The LPDF was represented at the launch of the final report of the 2070 Commission on 3rd March. The report comes up with a 10 point delivery plan which includes greater devolution of powers to the cities and regions, a levelling up of the north-south divide, the creation of new centres and excellence and the 're-thinking of the housing crisis'. The Commission is chaired by former Head of the Civil Service, Sir Bob Kerslake.

## GETTING OVER THE VIRUS



**John Acres,**  
**Policy Director, LPDF**

*Please feel free to  
contact me directly at  
[johna@lpdf.co.uk](mailto:johna@lpdf.co.uk)*

There is no doubt that the whole world has fundamentally changed over the last few weeks and it will probably never be quite the same again. Like a horror movie, we have discovered that an unseen virus can bring our lives and our economy to a virtual standstill. We are all much more vulnerable than we thought.

What's more, a Government elected on a platform of free enterprise and a spirit of free markets, has had to negotiate a 180 degree turn and introduce a draconian regime with an effective curfew, throttling back on economic activity and imposing an interventionist strategy to support our economy and our workforce in the interests of the survival of our people.

What is clearly evident now is that the basics in life – food, health and shelter – have become the key essentials of paramount importance, bringing housing into sharp focus. We are currently suffering, without doubt, the biggest humanitarian and economic crisis since the Second World War.

Yet, at some stage, the country will emerge from the current pandemic and business will eventually recover, so it is perhaps worthwhile anticipating how things may change and how the industry might adapt to what is currently an extremely uncertain future.

Looking at the **short-term** position, the Government has effectively halted the housing market by advising people against pursuing house sales for the time being. Similarly, building and construction (although not prohibited) has slowly ground to a halt, with most of the major housebuilders conceding that they cannot function adequately whilst observing the social distancing measures.

But land promotion and development is fortunate in being a home-grown industry which does not rely on critical imports or exports, but thrives on *inputs* and *experts* instead. The business is driven by people - most of whom can continue

working remotely but productively from their offices. There is no doubt that progress will slow during the pandemic crisis as more people fall ill or self-isolate, but the promotion of sites can continue – and surely must.

The retiring Chief Planner, Steve Quartermain, made clear in his final newsletter this week that planners should *'be practical, be pragmatic and plan for the future'*. On 'decision-making' he stresses that; *'It is important that authorities continue to provide the best service possible in these stretching times and prioritise decision-making to ensure the planning system continues to function, especially where this will support the local economy. We ask you to take an innovative approach, using all options available to you to continue your service.'* Within that spirit, the new emergency powers within the Coronavirus Act 2020 enable local authorities to conduct planning committees remotely so that business can continue and new draft regulations have now been published. It remains to be seen how this works.

A similarly positive approach is applied to plan making, where he says; *'We encourage all local planning authorities to continue, as much as possible, to work proactively with their community and other stakeholders to progress plans, even if some adjustments to timetables are necessary.'* So, planning authorities and developers will need to work together to extend planning consents, apply conditions instead of imposing refusals and co-operate to positively overcome the current hiatus.

The **medium-term** position is perhaps more uncertain. The dramatic fiscal measures, which have been introduced by the Chancellor to bolster the economy, will help keep most people in jobs during the downturn, but there is little doubt that Britain will undergo a period of shrinkage and recession over the coming year. The Exchequer will also face a long-term borrowing commitment, whilst individuals and firms will slowly recover and re-build their assets, which will need to be paid for. Furthermore, investors are bound to be more cautious and lenders more risk averse as we enter a period of greater uncertainty. Changes in policy, such as the Planning White Paper, will certainly be delayed and probably reviewed against the 'new normal' and priorities will undoubtedly change.

But the **longer-term** picture is perhaps more

positive. We have all discovered new ways of working, whereby meetings can be held remotely and time can be saved without personal contact. Working practices will change so that things will be done more efficiently without the need to travel and that will have a positive effect on the environment and help combat climate change. It already has.

The underlying strength of the development industry will undoubtedly shine through as new sites are brought to the market. People will always need homes and, with a period of months cooped up at home, the birth-rate is bound to perk up and in turn will influence longer term household projections. In future, new homes may need to be bigger and better designed to incorporate more workspace.

People may once again prioritise their financial security and invest in bricks and mortar – in a way not seen since the boom in owner occupation during the Thatcherite years. The Government's 'First Homes' initiative may also help to change the attitudes, aspirations and opportunities of young people – giving them a new longer-term perspective.

We will see a new spirit of positivity, whereby firms will be encouraged to thrive as they bring us back out of recession. There will be strong support for a more flexible planning system, which boosts development and economic growth, and planners and politicians may begin to question the value of previously long-held policy constraints – such as green belt - which deserve to be subject to proper review. We cannot afford to simply carry on the way we were.

Finally, the pandemic, desperately damaging though it will be, will force the nation into a new start with new blood and with new technology – as part of a fourth industrial revolution. We now have a political leadership, a press and a people, which has been forced to think and behave very differently.

Some might see the Coronavirus as a metaphor for the health of the economy – indeed the two are closely inter-twined. Currently the nation is suffering acute pain and powerlessness as the pandemic spreads and more and more people succumb to the disease, but the development industry and, above all, housebuilding will be at the forefront of the recovery when it comes – as it surely will. We will always need homes and it is our job to provide them.



## CHANCELLOR HERALDS BIG CAPITAL SPENDING BOOST

Against the background of the growing Coronavirus epidemic, the new Chancellor Rishi Sunak delivered an ambitious £600bn capital spending programme for the current Parliament in his first budget statement, triggering a substantial increase in Government borrowing.

How much of this will survive the current crisis is anyone's guess but, in brief, here's what he announced.

Coming hot on the heels of the OBR's decision to reduce the interest rate by 0.5% to 0.25% earlier in the day, the Chancellor committed the Government to tripling infrastructure spending and 'changing the mindset of Government' by reviewing the 'Green Book' which assesses value for money in capital spending as part of the 'levelling up agenda'.

There was a generous programme of spending on roads and railways announced, with over £27 billion on new roads between 2020 and 2025, with 'unprecedented investment' in urban transport, with £4.2 billion for five-year, integrated transport settlements for 8 city regions on top of

the £1 billion allocated to shovel-ready transport schemes. In addition, flood defence spending is being doubled to £5.2bn and a £1bn Building Safety Fund for removing cladding from tall buildings was also announced.

The Budget included an extra £12bn for the affordable housing programme and further allocations announced from the Housing Infrastructure Fund totalling £1.1 billion for nine different areas, including Manchester, South Sunderland and South Lancaster. In addition, there was a pledge that the government will, as part of July's comprehensive spending review, "launch a new long-term Single Housing Infrastructure Fund".

There was also an announcement of a "£10.9 billion increase in housing investment to support the commitment to build at least 1 million new homes by the end of the Parliament, and an average of 300,000 homes a year by the mid-2020s". Significantly the Chancellor indicated there would be an announcement from the Communities Secretary on planning tomorrow. The 'Red Book' which accompanies the Budget, states that:

*'Land availability, as constrained by the planning*

*system, is the most significant barrier to building more houses. The Secretary of State for Housing, Communities and Local Government will shortly set out comprehensive reforms to bring the planning system into the 21st century, followed by a Planning White Paper in the spring. These reforms will aim to create a simpler planning system and improve the capacity, capability and performance of Local Planning Authorities (LPAs) to accelerate the development process. Where LPAs fail to meet their local housing need, there will be firm consequences, including a stricter approach taken to the release of land for development and greater government intervention. The government will also explore long-term reforms to the planning system, rethinking planning from first principles, to ensure the system is providing more certainty to the public, LPAs and developers'.* (para 1.154 of the Red Book)



## PLANNING FOR THE FUTURE UNVEILED

Housing, Communities & Local Government Secretary Robert Jenrick has announced a series of significant planning and housing reforms in his policy paper, **Planning for the Future**. His paper was a strong commitment to positive planning, the delivery of more housing, and to home ownership. It included:

### Promote more, well-planned development where homes are needed:

- Renewed emphasis on brownfield land, including investing £400m to use brownfield land productively.
- Launching a national brownfield map (a brownfield register already exists) and a call for proposals for building above stations.
- A review of the formula for calculating Local Housing Need, which is already in progress.
- New rules to encourage building upwards and increasing density.
- Supporting community and self-build housing.
- Backing the Oxford-Cambridge Arc and plans to explore the case for a new town at Cambridge.

### Make land sufficiently available to deliver homes in the right places:

- Ensure land, sites and homes come forward on time and incentivise authorities to deliver more homes.
- Setting a deadline for all local authorities to have an up-to-date local plan by December 2023, and intervention where LAs fail to meet the deadline.
- Continue with plans to raise the Housing Delivery

test threshold to 75% in November 2020.

- Reforming the New Homes Bonus (NHB) to reward delivery.

### Deliver on our commitment to infrastructure first:

- Investing another £1.1 billion in local infrastructure HIF funding to unlock almost 70,000 new homes.
- A new £10 billion Single Housing Infrastructure Fund.

### Speeding up the planning system:

- A Planning White Paper is to be released in the spring - A new English planning system, fit for the future.
- Reform planning fees to create a world-class planning service linked to performance.
- Automatic rebates where planning applications are successful at appeal.
- Ensure land for housing is built out, and make it clearer who owns land.
- Expand the use of zoning tools to support development.
- Increase effectiveness, take-up and role of CPOs, to facilitate land assembly and infrastructure delivery.

### Helping first time buyers on to the housing ladder:

- Cut the cost of new homes through the new First Homes scheme. Current consultation to offer 30%+ discount in perpetuity on certain new build housing.
- Explore encouraging a market for long-term fixed rate mortgages.
- A new national Shared Ownership model.

### Creating beautiful, sustainable places:

- Revise the NPPF to embed the principles of good design and placemaking.
- Give local authorities the ability to produce Local Design Codes.
- Review our policy for building in areas at flood risk.
- From 2025, the Future Homes Standard will require up to 80% lower carbon emissions for all new homes.
- Establish a Net Zero development in Toton in the East Midlands.
- Transform Homes England into a more muscular agency that is better able to drive up delivery.

### Ensuring affordable, safe and secure housing for all:

- £12bn investment in affordable homes over five years.
- Publishing the Social Housing White Paper.
- £1 billion to support remediation for building safety.
- Protecting new homeowners through the New Homes Ombudsman, which is already being rolled out in consultation with the HBF.
- Ensuring renters are treated fairly through the Renters' Reform Bill.
- Pledging over £640 million to end rough sleeping.





## SUPREME COURT RULES ON MEANING OF “OPENNESS” FOR GREEN BELT DEVELOPMENT



**Jay Mehta,**  
Director at Howes  
Percival

Development on unallocated sites within the Green Belt can be challenging. An obvious statement perhaps, primarily due to the protection afforded under the National Planning Policy Framework (2019) (“NPPF”). Most would support a relaxation of the restrictions, as advocated by the head of the National Infrastructure Commission.

The NPPF regards all new buildings in the Green Belt as “*inappropriate*”, which should not be approved except in very special circumstances (“VSC”). (Note: the Courts continue to emphasise that VSC is a matter of planning judgment for the decision maker (a common concept which I will return to), that does not necessarily need to be unique).

NPPF145 and 146 contain a number of exceptions to “*inappropriate*” development. This includes “*mineral extraction*”, provided that it preserves Green Belt openness and does not conflict with its purposes.

The Supreme Court recently grappled with this exception in *Samuel Smith Old Brewery (Tadcaster and others) v North Yorkshire CC* [2020] UKSC 3. The Court considered the “short point” as to whether the County Council correctly understood the meaning of “*openness*” when deciding to grant planning permission for a 6 hectare quarry extension within the North Yorkshire Green Belt.

Much sympathy may be had for the Respondent; a quarry operator already subject to some 7 years of litigation before the Supreme Court hearing. Its original planning permission for the extension was quashed due to environmental impact assessment failings (often a popular – but mostly avoidable – ground of challenge).

Fast forward some 7 years, the Supreme Court considered whether Lindblom LJ’s decision to quash the latest planning permission should stand, as he found the officer’s report “*defective, at least, in failing to make clear to the members that...visual impact was a potentially relevant and potentially significant factor in their approach to the effect of the development on the ‘openness of the Green Belt’...*” [49].

In a relatively short decision, the Supreme Court upheld the permission. The following approach of Sales LJ in *Turner* [2016] EWCA Civ 466 was not disputed:

*“The concept of ‘openness of the Green Belt’ is not narrowly limited to the volumetric approach suggested by [counsel]. The word ‘openness’ is open-textured and a number of factors are capable of being relevant... Prominent among these will be factors relevant to how built up the Green Belt is now and how built up it would be if redevelopment occurs... and factors relevant to the visual impact on the aspect of openness which the Green Belt presents.”* [25]

Acknowledging that *Turner* did not specify how visual effects may or may not be taken into account, the Supreme Court helpfully held:

*“[Openness] is a matter not of legal principle but of planning judgement for the planning authority or the inspector”* [25] ... “...There was no error of law on the face of the report. Paragraph 90 [now NPPF146] does not expressly refer to visual impact as a necessary part of the analysis, nor in my view is it made so by implication. As explained in my discussion of the authorities, the matters

*relevant to openness in any particular case are a matter of planning judgement, not law.”* [39]

The outcome is not surprising – quite simply visual impacts may be relevant to be openness as a matter of planning judgment. I therefore sympathise with Lord Carnwath’s initial reaction that it was “*surprising in retrospect that the relationship between openness and visual impact has sparked such legal controversy.*”

The Supreme Court also reinforced the distinction between application of planning policies (a matter for the decision maker subject to rationality, etc.) and their interpretation (a matter usually reserved for the Court). The question of “openness” and relevance of “*visual impact*” falls within the former category.

*Samuel Smith* is another example of why the planning process should not be overly legalised, whilst objectors to planning permissions continue to increasingly scrutinise officer’s reports to find legal error to support a legal challenge. Despite the Court’s efforts in reminding claimants that officer’s reports should not be interrogated as if they were pieces of legislation or contracts, this is inevitable in the context of judicial review.

The salient lesson for applicants and local authorities is to ensure robust decision making. This is, in my experience, easily achievable with forethought. Quite often a few additional sentences in an officer’s report, or caution when determining applications under EIA or Habitats Regulations, can make all the difference between a successful quashing, or not.

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## DEVELOPMENT LAND: TENANCIES, TERMINATION AND TACTICS



*Emma Preece and James Green, Associates at Charles Russell Speechlys LLP*

The political and economic pressures around housing continue, with supply consistently falling short of demand. In its 2019 manifesto, the Conservative Party re-affirmed its commitment to promoting housebuilding, maintaining a target of 300,000 homes a year by the mid-2020s and pledging to simplify the planning process to get more homes built.

As a result, more and more landowners are considering the residential development prospects for their land. It is easy to see why; land with a planning consent for residential development may be worth as much as 50 times as land without. There is particular potential for the development of agricultural, greenfield land which tends to be favoured by developers as it usually has lower set-up costs than an equivalent brownfield site.

It is important for landowners who are assessing the development potential of their land to consider the impact any existing agricultural tenancies might have on the process. There are a number of potential concerns relating to such tenancies, from security of tenure to the potential for any existing tenant to frustrate the planning process.

There are broadly speaking two types of agricultural tenancy – agricultural holdings under the Agricultural Holdings Act 1986 and Farm Business Tenancies under the Agricultural Tenancies Act 1995 – and each act presents a different route for seeking possession on the basis of development.

### **Terminating agricultural holdings under the Agricultural Holdings Act 1986 for development**

The First-tier Tribunal (a special property tribunal) has recently decided that the notice requirements of the Agricultural Holdings Act 1986 only present one avenue for recovering possession of land on the grounds of development – that is, service of a Case B Notice once planning permission has been obtained. This can be a lengthy process, particularly if the tenant disputes the notice. Furthermore, as notice can only be served once planning permission has been obtained, commencement of the development can be delayed.

Frequently, landowners will only wish to develop part of the holding occupied by a tenant, which presents a further complication with recovering possession. For a tenancy under the 1986 Act where only part of the land is required for development, a landowner may find itself unable

to terminate the tenancy lawfully. This would arise if the tenancy does not allow for termination of part, and the (limited) statutory exemptions contained in the 1986 Act do not apply. In such a scenario, a landowner should consider severing the reversion by selling or gifting part of the freehold to another person – although there remains some doubt as to whether such an arrangement would be effective – or alternatively, attempting to agree a surrender with the tenant.

### **Terminating tenancies under the Agricultural Tenancies Act 1995 for development**

By contrast, Farm Business Tenancies under the 1995 Act present a much more landlord-friendly approach to termination. The landlord does not have to demonstrate that the land is required for a particular purpose or rely upon a breach by the tenant, it can simply serve a Notice to Quit, and regain possession of the holding on the expiry of that notice.

### **Surrender – first port of call or last chance saloon?**

In light of the complications associated with termination under the 1986 Act, it is not unusual for landowners to explore a surrender with a tenant as their first approach. This is particularly likely if the landowner has a good relationship with their tenant, or if the landowner has identified that it is unable to terminate the tenancy lawfully. Equally, a surrender may provide a solution for landowners with a difficult tenant, and especially those tenants who are considered likely to challenge any notice served. It is also possible to agree a surrender once a notice to quit has been served.

Landowners should handle surrender negotiations carefully. A tenant who gets wind of the landowner's plans for development may seek to hold the landlord to ransom, demanding a sizeable premium for surrendering its tenancy and protected status. Landlords are advised to seek strategic advice prior to engaging with tenants in order to protect their negotiating position and ensure any agreement reached is documented, to reduce the risk of any later challenge by the tenant. For example, any surrender agreement will ideally include an obligation on the tenant not to object to or otherwise attempt to frustrate the planning application for the development.

### **Development agreement considerations**

Landowners looking to enter into an option agreement or a promotion agreement with a developer or land promoter will need to disclose any agricultural tenancy affecting the land. The developer or promoter will want to ensure that once planning permission is obtained, vacant possession of the site can be obtained either to allow the developer to implement the planning permission or for the consented site to be disposed of to a developer.

If the parties agree that the land is to be handed back to the landlord at some point in the future, landowners may also wish to consider an agreement for surrender which will be completed as and when planning permission is granted. If

the tenant is agreeable to such an approach, it enables the landowner to keep the rental income from the tenancy for as long as possible, pending the grant of planning permission.

A further alternative is to agree a surrender of an existing 1986 Act tenancy and to grant the tenant a new Farm Business Tenancy with an early break right for the landlord. However, this will require the tenant's agreement and can cause uncertainty for an agricultural tenant's business, particularly around crop cycles.

### **Timing**

Landowners should be particularly careful if they enter into a sale contract with a developer that is conditional on the developer obtaining planning permission. An organised developer who is dealing with a site which has already been allocated in the local plan, may well obtain outline planning consent sooner than the statutory notice periods for terminating an agricultural tenancy, which could leave a landowner in breach of the requirement under the conditional contract to deliver vacant possession.

An option or promotion agreement will also impose restrictions on the landowner dealing with the land, usually to avoid any tenancy being granted with security of tenure or with a notice period exceeding an agreed timeframe (typically between six and 12 months). It is therefore important that landowners take proper advice on the granting of any new tenancy or any renewal to ensure they do not fall foul of these requirements.

### **How Charles Russell Speechlys can help**

At Charles Russell Speechlys, we have a number of specialist teams who can assist with the management of agricultural tenancies and the issues affecting land development:

- We have a dedicated Strategic Land team within our Real Estate group which routinely advises landowners on option agreements, promotion agreements, conditional contracts and all other types of land development
- Our Real Estate Disputes group is regularly instructed to deal with termination of both 1986 Act tenancies and 1995 Act tenancies, and in relation to proceedings before the First-tier Tribunal
- Our Rural Business & Landed Estates group is a market leader in agricultural law and the management of rural businesses

Please contact James Green or Emma Preece if you have any queries in relation to the development of agricultural land or require advice in relation to an agricultural tenancy.

[www.charlesrussellspeechlys.com](http://www.charlesrussellspeechlys.com)



## WESTFERRY PRINTWORKS SITE DECISION – A CHANGE IN GOVERNMENT DIRECTION?



*Paul Wootton,  
Partner at Howes  
Percival*

On 14th January 2020, the still newly appointed Secretary of State for Housing, Communities and Local Government issued his decision on an appeal relating to the Westferry Printworks site (reference APP/E5900/W/19/3225474) ("the Decision"). Practitioners get very excited about Secretary of State housing decisions. Do they indicate a new direction of travel on the application of policy or guidance or the weight which will be attached to material considerations and is there anything we can take from the decision which will be helpful in securing planning permission on other sites?

The appeal was submitted on the ground of non-determination for a residential led mixed-use development including 1,524 units and was recovered by the Secretary of State. The speed from submission of application (July 2018) to recovery (April 2019), to inquiry (August 2019) and determination (January 2020) demonstrates this was a decision processed very quickly.

Tower Hamlets Council has reacted with fury, primarily it appears because the decision was made just three days before the Council's CIL charging schedule took effect, costing the Council an estimated £50 million in CIL monies. Mayor John Biggs called the Decision "a scandal and outrageous" and legal proceedings have now been launched.

The Decision follows the now formulaic approach of setting out the statutory framework in which the decision has been made and applying the presumption in favour of the development plan and then weighing material considerations in the planning balance. An article of this size

will do no justice to the complexity of this case (the inspector's report alone is over 160 pages long) but the conclusions on the key planning issues were:

- An earlier planning permission ("the Fallback") had been implemented and was a "realistic fallback" if the appeal proposals were dismissed. There would be significant additional benefits that the appeal scheme would deliver in comparison.
- In terms of the effect of scale, height and massing of the development and impact on character/appearance, the Secretary of State was clear that there would be policy conflicts and harm but concluded the harm should attract moderate weight.
- In terms of heritage impacts, the Secretary of State applied the statutory requirements to have special regard to the desirability of preserving listed buildings (including their settings) affected by the proposals. He concluded that the harm was "less than substantial", that considerable importance and weight should be given to the harm but that in accordance with paragraph 196 of the NPPF, that harm should be weighed against the public benefits.
- Harm in connection with the recreational use of Millwall Outer Dock should carry limited weight because the impact was not materially different to the Fallback.
- In connection with housing need, mix and affordable housing (for which there was an acute need):
  - the 21% affordable housing offered (although comprising a policy compliant tenure mix) did not represent the maximum reasonable amount of affordable housing as required by the London Plan. However, in the absence of an alternative scheme, it was unclear what the maximum reasonable amount could be although it might be up to 35% which would be policy compliant;

- the late stage viability review was of some limited benefit;
- the balance and mix was not policy compliant including in connection with family housing;
- however, the absolute increase in affordable units from 140 to 282 against the Fallback was a benefit and should attract "significant" weight in the planning balance even though there was a five year housing land supply.
- Moderate weight was attached to the social and economic benefits of additional employment and training during construction compared to the fallback.
- Public open space, play space and semi-private space was policy compliant but the Fallback offered greater benefits.
- The inspector attached moderate weight to planning obligations where the contribution was greater than the Fallback.

The Secretary of State concluded that the material considerations supported the grant of planning permission despite the conflicts with the development plan. Key to the decision was the substantial weight attached to the absolute increase in housing (and affordable housing) of the scheme compared to the Fallback which were considered to outweigh the harm, including to heritage assets.

The notion that an increase in the amount of housing compared to a realistic fallback is in itself sufficient to support the grant of planning permission is surprising. The Decision illustrates the importance of fallbacks but also that it is possible to grant planning permission within the current statutory framework even when a scheme is not policy compliant and significant harm is identified.

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## NOT SO APPEALING....



**David Bainbridge**  
MRTPI, Director of  
Planning at Savills

These are unusual times, with working practices and the old-norm having to change to adjust.

Whilst all of our priority should be to stay healthy and happy, there is an element of change bringing uncertainty which brings with it worry.

Some might say the town and country planning system experiences near constant change.

Associated with the UK Budget in March, the Housing Secretary Robert Jenrick MP launched Planning for the Future, which is intended to bring Britain's planning system into the 21st century in an attempt to get the country building more homes.

In the opening part of Planning for the Future is the following:

*"To achieve this mission, the Government will bring forward a series of major publications and legislate to deliver lasting change. This will start with an ambitious Planning White Paper in the spring to modernise our planning system, ensuring it supports the delivery of homes that local people need and creates more beautiful and greener communities."*

It is probable that spring will be stretched-out for this publication or else there will be a change in the season as the Government has more pressing matters to attend to.

However, it is positive to see the intent to speed-up the planning system and somehow with it the pace and scale of delivery of new homes in England.

Planning for housing does not always deliver planning permission at the local level of a local planning authority for many reasons. Local people, including councillors, rightly have a say in the planning for development but all too often this takes place in the heat of a planning application which can turn into a planning appeal. Where the site in question is undeveloped land not identified for development then feelings can run-deep.

Planning for housing on unallocated land is part of the planning system and where circumstances suit then the Government's own policy can be seen to encourage this, as enshrined in the presumption in favour of sustainable development in the NPPF. A form of which has been in place since the original publication in 2012. Also known as the titled-balance, the presumption should result in the granting of planning permission subject to assessment against NPPF policy and weighing-up of adverse impacts and benefits.

Of concern is the recently documented trend for planning appeals for housing to be dismissed even where the titled balance is engaged.

It was reported in March that Gladman claimed that fewer than one in five of the 67 major housing appeals, where the titled balance was applied in the first nine months of 2019, were successful. This prompted headlines that many applicants for major housing developments will think twice about whether to appeal. Of course those opposing development might claim that the development was not judged to be sustainable in the first place and hence the refusal of permission.

As mentioned in my article in the January edition of this members' newsletter, the downward trend in consents for dwellings on appeal is likely to continue as the uncertainty over main matters, even at a planning appeal inquiry led by a leading counsel, will continue.

The almost perverse trend of a presumption in favour of sustainable development, resulting in fewer planning permissions for housing development on appeal, it surely not what the Government intended. Whether this is a momentary blip on the journey and a trend that will be halted and reversed remains to be seen.

An experienced planning director friend of mine used to say that a planning appeal is a sign of failure because of the additional time, cost and risk that it brings. I would agree that even the most positive of applicants would struggle to see failure to secure planning permission at the local level as a success. But appeals are necessary as part of a site's overall planning strategy, bringing with it a stick and also a carrot.

The timing of the High Court judgment in March and commentary on the trend in appeal decisions comes at an unfortunate time for a number of reasons.

The Planning Inspectorate has made good progress with 16 of the 22 recommendations under the Rosewell Review and all others under way.

The announcement by PINS that all planning appeal inquiries will follow the new inquiries process was well received. Providing of course that PINS does not seek to 'downgrade' more appeals from an inquiry to a hearing.

Since the start of issuing inquiry appeal decisions in March 2019 under the Rosewell approach, 72 decisions have been decided. 100% of inquiry appeal cases that started as an inquiry, and were decided by a planning inspector, were completed in 26 weeks or less.

Delays to planning appeals are inevitable given the current restrictions on movement of people. This will also affect development plan examinations, planning committee meetings and any public gathering. It is encouraging to see that at the time of writing this, planning barristers are in discussion with PINS and the Housing Ministry about means to use technology to allow such events to continue. The Judiciary of England and Wales has prepared a protocol regarding remote hearings.

It was the intention of senior members of the LPDF board and policy committee to meet the operations director at the Planning Inspectorate on 9th April to discuss the particular concerns of the land promoters and developers about the performance of the PINS service and the noticeably declining success rates of appeals.

How we plan for housing development continues to change and recent events has already resulted in some innovative thinking as to how to adapt. But the recent negative trend in planning appeal decisions for major housing development makes this a not so appealing prospect for many which will in time affect the Government's mission to increase the pace and scale of house building.

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## IN THE EYE OF THE POLITICAL STORM

We're only a few months into 2020 and politics couldn't have taken a more drastic turn. Brexit seems like recent history and promises of 'levelling up' Britain and 'unleashing' the potential of the UK economy have been eclipsed by the Covid-19 outbreak, now labelled as a global pandemic by the World Health Organisation. Europe currently lies at the epicentre of the virus and Boris Johnson's Government is in the eye of the storm as the UK's public health approach to the outbreak has been notably different to other countries until last week.

Fresh into the job, Chancellor Rishi Sunak is leading the charge in attempting to mitigate the worst economic consequences of the outbreak, impressing many so far with his conduct. Sunak has now announced a £350bn package of loans and grants to help Britain cope with isolation measures just less than a week after pledging £12bn to soften the impact of the pandemic.



What is becoming evidently clear is that the party known for fiscal responsibility is going to have to tear up the economic rule book to protect individuals and businesses. 'Whatever it takes' has become the Government's new mantra.

Whilst Labour have been pushing for even more economic support measures, they have been broadly supportive of the Government's science-led approach. The leadership election continues with Sir Kier Starmer all but certain to win on the 4th April. The extent of his victory will determine how much he can afford to break away with Corbynism when choosing the new Shadow Cabinet, but expect to see names like Rachel Reeves, Yvette Cooper and Lisa Nandy promoted to the front bench to hold the Government to account through this pandemic.

Away from the virus, the Budget also signalled a pivot away from the Conservative's last decade in power with increased spending and borrowing. In terms of housing, £12 billion was committed to build more affordable homes and Public Works Loan Board interest rates set to be cut by 1%, making £1bn available for councils to build. In addition to this, there will be a new £400m fund for regions to build on brownfield sites and a total of £1.1bn of new allocations through the Housing Infrastructure Fund have been confirmed, to open up 70,000 homes in areas of high demand across the country.

Housing Secretary Robert Jenrick also unveiled proposals to update the planning system and speed up the decision-making process ahead of the forthcoming white paper due in spring. Councils will be encouraged to ensure redevelopment of high streets is housing-led by building upwards and above and around

stations. To encourage councils to make the most of land, a register of brownfield sites will be established in April, and developers will be able to demolish vacant commercial, industrial and residential buildings and replace them with homes without getting delayed by the planning process. Furthermore, all local authorities will be required to have up-to-date local plans by December 2023 or face Government intervention.

Adding to the chaos, the Government announced that all local and mayoral elections due to take place in May are to be postponed by one year, with all campaigning now suspended. Eight mayoral elections and 118 councils were due to hold elections, nine of which would have been all out. Councils will now remain the same in terms of their political composition but will have to adapt quite dramatically if holding virtual council meetings and working remotely. Some disruption to the planning process and decision paralysis because of uncertainty is to be expected as local authorities will have to prioritise helping vulnerable residents during this crisis. However, post the immediate priorities, sights will very quickly turn to local economic recovery and the relationships between LDPF members and local authorities will be critical in that recovery.

The roaring twenties certainly hasn't got off to the start we all imagined.

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## BBC WEIGHS IN WITH HOUSING BRIEFING



*Jamie Roberts (Principal Planner) and Leonie Soate (Assistant Planner) at Tetlow King Planning*

In mid-February, the BBC published its **Housing Briefing**, a weighty document containing an array of facts, figures and case studies which spell out the scale and effects of the housing crisis, as well as potential solutions. The Briefing forms part of a series, looking in detail at key societal issues in the news. The BBC states that the Housing Briefing was prepared in order to address public demand for "more transparency

and better explanation of the facts behind the headlines" and to tackle misinformation in the public debate. The document is aimed at the wider public and the Briefing was promoted heavily on the BBC including on television, radio, online, and even on the Bitesize revision service.

The Housing Briefing does not undertake its own research, nor does it draw its own conclusions. Instead, it draws together an extensive range of data and studies published by sources including the Office for National Statistics; the Ministry for Housing, Communities and Local Government; Shelter; and other key pieces of research such as the Barker Review. The Housing Briefing however adds helpful detail in the form of case studies which explore the experiences of real people and households affected by the housing crisis. The Briefing is prepared at the national level and sets out the overall 'picture' in respect of housing matters. Sections 1 to 4 cover the broad context and issues; sections 5 to 7 consider the role of the public and private sectors in housing provision; and sections 8 to 10 cover policy mechanisms

to address housing issues.

Overall, the Housing Briefing is a wide-ranging and well-researched overview of current issues in housing. It is a useful reference for professionals and members of the public alike, providing a helpful overview of current data as well as evidence of the real-life impact of the housing crisis upon real households. It is also a good starting point for further, more detailed research.

Tetlow King Planning champion the delivery of affordable housing developments and regularly provide supporting affordable housing evidence for planning applications and at public inquiries on behalf of strategic land promoters and housebuilders.

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