LPDF

LAND PROMOTERS & DEVELOPERS FEDERATION

Members Newsletter Q5 - January 2020

MESSAGE TO BORIS – 2020 IS THE YEAR TO HOME IN ON HOUSING

Paul Brocklehurst, Chairman of the LPDF

Well, 2019 was an interesting year that's for sure.

A period of intense political turmoil and protests came to a head with a snap General Election, which handed the Conservative Government a handsome majority.

Whatever your political persuasion, a period of greater economic stability will be welcomed across our industry – assuming, of course, our imminent departure from the EU runs smoothly.

With the new Government will come a fresh momentum and a tranche of spending pledges and policies including, we hope, an increased focus on measures to help housebuilders deliver the new homes this country needs.

That's why we've issued a 10-point manifesto calling for urgent Government action to end the crisis by putting housing at the top of the political agenda.

We are calling on Prime Minister Boris Johnson's new government to implement a range of measures to help housebuilders achieve the target of 300,000 homes each year, starting in 2020.

Our manifesto calls for an urgent step-change to enable the delivery of suitable development land in order to build sufficient new homes of all types and tenures, including affordable housing.

The housing crisis inhibits our economy - high housing costs restrict the ability of consumers to spend, whilst a lack of supply inhibits labour market mobility. Conversely, increased new build activity has a significantly positive multiplier effect on the economy. Yet just as important is the human and social cost.

Research paper after research paper highlights the benefits to health and in particular mental health of good quality housing.

It seems clear that resolving the crisis must be at the top of the political agenda of the new Conservative government. Nationally, there needs to be a cultural change as to how we view new housing, and politicians at all levels of government, central and local, need to prioritise the needs and views of those that don't have a home above those that do.

So, here at the LPDF, we have published our manifesto to address the crisis and we are calling on the new government to put housing at the top of the political agenda.

This is what we need to help tackle the housing crisis:

1. A step change in the delivery of suitable development land to build sufficient new housing, of all types and tenures, including affordable housing to help address Britain's current housing crisis, support economic growth and to create attractive places.
2. An urgent programme to tackle climate change, both globally and locally, (based upon empirical evidence), but which acknowledges the need for development and change to meet peoples' housing needs in sustainable locations close to where the need arises.
3. A greater appreciation of the separate and vital roles of land promoters, developers, housebuilders and local authorities in co-operating together and contributing positively to the development process and tackling the housing crisis.
4. A strategic planning process at citywide and sub-regional levels where local authorities and development agencies are encouraged to work closely with the private sector to help facilitate growth and change.
5. A Local Plan and Neighbourhood Planning process which is charged with the responsibility to deliver sufficient sites to flexibly address the opportunities, demands, needs and challenges within local communities in a sustainable manner.
6. A progressive but realistic environmental agenda which conserves resources, promotes sustainable design and upholds high standards of quality and best practice in the development industry.
7. A firm Government commitment to reducing regional inequalities, with the aim of creating a more efficient distribution of employment, investment, housing and infrastructure to deliver change and improve places.
8. An ambitious programme of infrastructure provision across the whole country, backed by private and public funding to support the scale of new homes and jobs needed nationwide.
9. A fully funded local authority planning process and Planning Inspectorate with a brief to deliver change and with a 'can-do' philosophy designed to attract initiative, investment and prosperity and achieve results.
10. A simpler and fairer system of development infrastructure funding which incentivises developers, businesses and other wealth providers to invest in growth and change.

DATES FOR YOUR DIARY

February 12:

Rosewell in Action: join experts from Eversheds Sutherland and Kings Chambers who will outline the changes and give some practical insight into how best to approach the new process.

Registration: 8am, close at 10am.

Venue: Eversheds Sutherland,

Birmingham Office

RSVP at **info@lpdf.co.uk**

April 1: Booking is essential

Annual Lunch, to be held in central London . Details have been circulated and the booking form can be downloaded at:

www.lpdf.co.uk/events

(This is a paid for event)

May 11:

Parliamentary Reception in partnership with Planning Futures: (Formal invites to be circulated in due course. Places are included in membership fee)

For more information visit:

www.lpdf.co.uk/events

OUT AND ABOUT

February 6 – 7:

LPDF chairman Paul Brocklehurst will be a guest speaker at the District Councils' Network Annual Conference, being staged at Chesford Grange, Kenilworth. Paul will join a panel discussing 'Housing: if the market is broken, how can we fix it'.

The LPDF will also be exhibiting at the conference with a stand in the main members area.

LPDF CELEBRATES FURTHER GROWTH

More and more companies operating in this exciting sector are recognising the many benefits of joining the LPDF.

We have grown substantially since our annual conference last September.

We now have 19 full members and 35 affiliates – quite amazing considering we were only established two years ago.

They include 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

RAISE A GLASS TO ANOTHER YEAR OF GREAT EVENTS

One of the key benefits of LPDF membership is being able to network with like-minded people at the events we stage throughout the year.

It was great to see so many members at our Christmas drinks at The Alchemist in Birmingham. We welcomed 65 people – from 37 businesses – to the event where they enjoyed scintillating conversation, a range of wonderful cocktails and delicious snacks.

We've already got several events in the pipeline for 2020, including our first ever networking lunch and a Parliamentary Reception.

TAKING STOCK ON HOUSING!

What does a new Conservative Government mean for housing & planning policy?

John Acres,
Policy Director, LPDF

Please feel free to contact me directly at johna@lpdf.co.uk

Nothing has changed, and yet everything has changed. A fresh Conservative Government with a comfortable 80 seat majority, gives the freedom for a new administration to carry out its policies without looking over its shoulder. Whether Brexit is delivered within the tight timescale or not, there is now a generous 5 year time horizon to address the pressing housing problems facing the nation. But will it all be business as usual or will there be a shift in direction? John Acres looks into his crystal ball and concludes that taking a longer-term outlook, priorities may now change, possibly to the advantage of the land promoters and developers.

First though, the bad news. A greater emphasis on controlling international migration will have a critical impact on levels of net migration, which in turn drives population and hence household change, and hence housing needs – in fact it already is. Net migration from EU countries has fallen sharply, albeit partly offset by rises in migration from outside the EU. But net international migration, although still at 200,000 per year, appears to be on a downward trend. That will clearly temper long term housing requirements.

This pattern aligns with the growing localist, populist and latent 'nationalist' groundswell which has emerged in Britain and chimes with many people's desire to protect services, conserve resources and preserve the environment. It may also be used as a scapegoat to justify reducing growth ostensibly to tackle climate change – arguably the most pressing problem facing us in 2020.

But the good news is that Government, unlike its predecessors has taken a robust stance in addressing the housing shortage. The 2017 Housing White Paper acknowledged that the housing market was 'broken' and set a clear objective to meet 300,000 homes per year – or 1 million homes in the last Parliament – something they have repeated in their manifesto for the new Parliament. The key objective now is to deliver housing, which means building sufficient homes in the right places, of the right type and at the right time – and that means now.

But if delivery is to rise, it means holding the local authorities' feet to the fire'. Currently we see Councils producing unsound Local Plans, undershooting housing targets and avoiding Local Plan reviews. The Government's forthcoming Planning White Paper (heralded before the election) will uphold the plan-led system but try to address these shortcomings, by speeding up the Local Plan production programme and taking the tension out of the planning process. I would also expect to see further measures to improve staffing, reduce paperwork, streamline processes and measures to discourage appeals.

But the biggest challenge facing the Government will be to tackle the chronic lack of affordability amongst young people which has created a 'generational divide'. Margaret Thatcher won three General Elections by creating a 'property owning democracy' in the certain knowledge that home ownership would change peoples' long term attitudes and aspirations. The average age of first-time buyer which had been 26 years old in 1977, fell during the 1980's and 1990's, but has since risen to 34 years old in 2018 – a factor of house price inflation but also changing attitudes towards home ownership and social patterns such as later marriages.

During the 40 years since Thatcherism, patterns have completely changed. Some young people have lost the desire for property ownership and become more accustomed to spending for the moment. With historically low interest rates, saving has simply gone out of fashion. Furthermore, following the house price crash in 2008, youngsters have neither had the confidence nor the wherewithal to buy a home.

With almost 50% of young people progressing to University or further education - unlike their parents' generation - they are paying £9000 per annum in course fees plus the cost of student accommodation, leaving them up to £50,000 in debt on graduation. Without help, they cannot hope to get on the housing ladder.

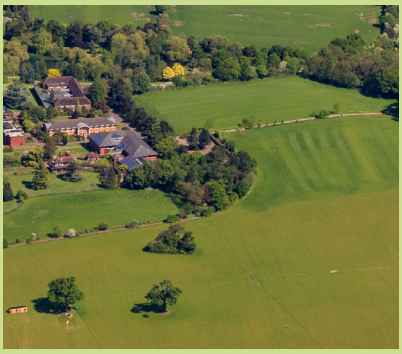
So we now have a more divided society – those who make the jump to home ownership (usually with parental assistance) and those who remain trapped in the rented sector or stay living with parents.

The new Government will want to get young people investing in home ownership again. It's not just good for morale, it's good for business too; greater security, more stability and increased spending and long-term returns to Government from Inheritance tax and Stamp Duty and greater political security make it good for Government too. Higher home ownership may also help re-balance the economy if it is easier to buy housing outside London.

The first step is likely to be the new 'Housing First' initiative announced in the Queen's Speech to give subsidies to 'local' first-time buyers to help them get on the housing ladder, albeit this may turn out to be in the form of long term loans possibly at the developers' expense.

Looking ahead, if the Labour Party recovers its pride and purpose, (which it may well do with a new leader), traditional working-class seats, such as Scunthorpe, Burnley and Workington, will doubtless return to Labour control. That means for the new Government to retain its majority in 5 years' time, Boris Johnson will need to revitalise the first-time buyer market for young people right across the country.

Land promoters and developers will be at the forefront of that challenge; promoting land, assembling sites, securing consents and delivering funding packages to give the housebuilders available sites of all shapes and sizes which can come forward quickly and efficiently and help to satisfy the chronic housing needs which all know exist.



RESEARCH FOCUSES ON LAND PROMOTERS

Henley Business School

The role of land promoters in the housing land market is the subject of a research project being conducted by the University of Reading.

Several LPDF members are taking part in the research, which is investigating the structure and business models of the land promoter sector, the benefits and costs of land promotion activities for key stakeholders in the land supply process and the relative importance of land promoters in the supply of housing land.

Whilst there is a growing belief that land promoters have become increasingly significant participants in the housing land market, there has been very little research on the nature and importance of this emergent sector.

The aim of this research is to begin to close this knowledge gap and to investigate the role of the land promotion sector in the supply of land for housing development.

It will investigate the structure and business models of the land promotion sector, the benefits and costs of land promotion activities for key stakeholders in the land supply process and the relative importance of land promoters in the supply of housing land.

It is being conducted by the following academic staff from the University of Reading: Professor Pat McAllister; Professor Pete Wyatt; Dr Edward Shepherd. The results will be published in a report which will be publicly available, as well as in a number of papers which will be published in academic journals.

www.henley.ac.uk

Henley Business School
UNIVERSITY OF READING

COUNTING THE COST OF MONITORING AMENDMENTS

David Mathias, Partner at Shoosmiths LLP

Recent CIL Amendment Regulations removed pooling restrictions and introduced Annual Infrastructure Statements as a successor to Regulation 123 Lists.

The changes set out in amendment Regulation 10 have the effect of finally putting a local planning authority's entitlement to claim costs associated with monitoring compliance with planning obligations on a statutory footing.

The amendments, inserted into the 2010 Regulations as Regulation 122(2A), provide that fees associated with monitoring and reporting on planning obligations given by developers and landowners are capable of being charged through section 106 agreements.

That is provided they 'fairly and reasonable related in scale and kind to the development' and do 'not exceed the authority's estimate of its cost of monitoring the development over the lifetime of the planning obligations which relate to that development'.

Monitoring fees have been around for some time (usually appearing at the front end of any agreement alongside a requirement to pay the local planning authority's legal fees) and their imposition was challenged back in 2015 in Oxfordshire ([2015] EWHC 186 Admin), where the High Court found that they were not 'necessary to make the development acceptable in planning terms' and were not therefore planning obligations meeting the requirements of the test in the version of Regulation 122 in force prior to September.

The decision in Oxfordshire has been subject to mixed judicial treatment and Regulation 122(2A) resolves any ambiguity.

Bringing the monitoring costs test in line with that relevant to imposition of planning obligations makes sense.

It does, however, limit what had been a healthy income stream for some local planning authorities. Prior to September, the position had been that monitoring costs were not to be considered when determining whether to grant planning consent.

Developers would accuse authorities of imposing monitoring costs arbitrarily, while authorities would argue that the job of ensuring developers were sticking to what they had agreed by way of planning obligation was a lengthy, time-consuming and frustrating process.

The amendments make it clear to both sides that monitoring costs must always be fair and reasonable. Will the amendments provide a new ground for legal challenge? Will local planning authorities need to publish schedules showing how monitoring costs are incurred? Just how this impacts upon the level of fee being imposed remains to be seen.

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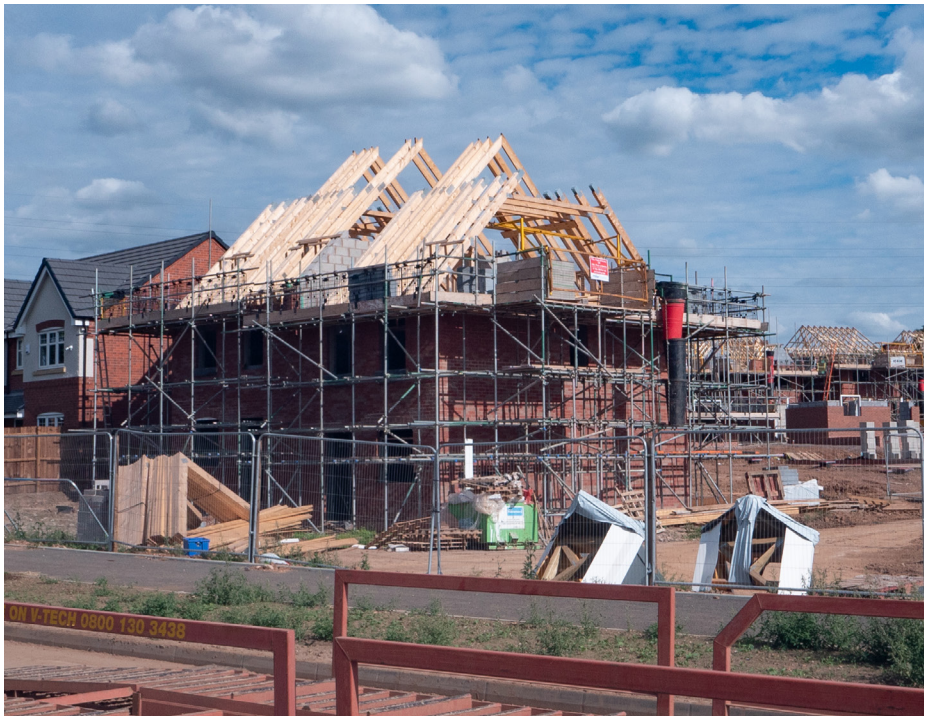

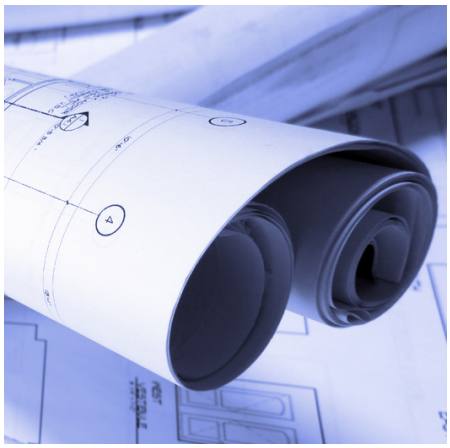

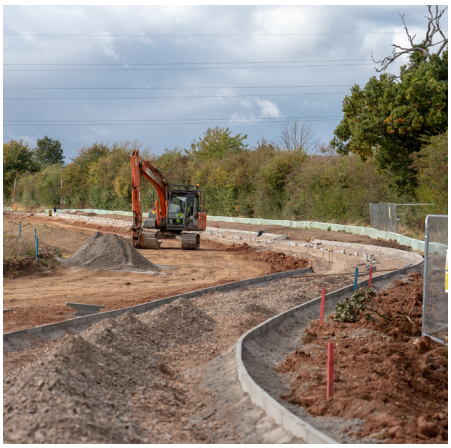

MEANS OF ACCESS TO DEVELOPMENT SITES – ARE YOU ON THE RIGHT ROAD?

Ruth Stockley, Specialist Highways and Planning Barrister, Kings Chambers

At the start of a new decade, reflections on the last 10 years of highways and development reveal that the issue arising most frequently in practice has, undoubtedly, been that of the effective provision of a vehicular access to a development site.

It therefore feels timely to set out some aide-memoir pointers worthy of consideration whenever difficulties over the means of access arise.

Firstly, early consideration of the means of access is crucial for land promoters and developers. Otherwise, at best, significant delays could ensue; at worst, development could be incapable of delivery.

Secondly, where the development site, or other land in the applicant's ownership or control, does not have direct access to the public vehicular highway in a suitable location, in order to avoid a ransom situation, identify whether any private rights of way exist over the proposed means of access for the benefit of the site. Private rights of way may exist by virtue of express grant, implied grant, or have been acquired by prescription after 20 years user as of right. The three fundamental questions to consider are:

1. Is the site entitled to the benefit of the right of way?
2. Is the right of way sufficient for the proposed use of the new access? An express grant in a form such as use "at all times and for all purposes with and without vehicles" could well suffice as it is unqualified. In contrast, for implied and prescriptive rights of way, the extent of the grant is determined by reference to the circumstances at the time it was made or presumed to have been made
3. Does the right of way allow for required works of repair and/or improvement to be undertaken? There is an entitlement to improve a way to the extent necessary to accommodate the grant. However, its widening could not be carried out pursuant to the right beyond the width of the grant, and the alignment of the way could not be altered.

Thirdly, consider whether there are any public rights of way over land which would enable access. If the route is recorded as a byway open to all traffic on the County Council's Definitive Map kept under section 53 of the Wildlife and Countryside Act 1981, that would generally suffice to serve a development. The Definitive Map is conclusive that a public right of way exists to the extent shown on the Map as of the relevant date by virtue of section 56. However, it is not conclusive as to what is not recorded.

Therefore, a route may be a public right of way despite its lack of inclusion. Nonetheless, it is necessary to be aware of the implications of the oft overlooked sections 66 and 67 of the Natural Environment and Rural Communities Act 2006, which preclude vehicular highways being established through long user as from May 2006 in England and November 2006 in Wales.

Fourthly, if works are required to a public right of way, or indeed to any vehicular highway, such as surfacing, widening, or other improvements, a right or power to carry out those works must be identified. Such works would generally be undertaken pursuant to a section 278 agreement with the highway authority. However, it is important to recollect that such an agreement can only be made in relation to a highway, which is maintainable at the public expense.

Fifthly, it is necessary to identify any public rights of way, such as footpaths or bridleways, which may require stopping up or diverting to enable access. A grant of planning permission does not authorise the obstruction of a highway, such as could well arise where the access crosses a footpath, which must then be extinguished or diverted by a separate statutory process unless the footpath was created subject to a vehicular crossing.

Sixthly, if the proposed access is in unknown ownership, or the owner refuses to enter into an agreement, a section 38 agreement cannot generally be relied upon to dedicate it as a highway as only the freeholder has the capacity to dedicate.

Seventhly, in such circumstances, consider the use of section 228 of the Highways Act 1980 which, in appropriate cases, can be an effective means of ensuring dedication and adoption, particularly where ownership is unknown. Provided street works have been executed, such as pursuant to a private right of way, the street works authority is entitled to declare the street to be a highway maintainable at the public expense by notice, subject to any objections being made by the landowner.

Eighthly, compulsory purchase by the local authority of the means of access is an available last resort. Nonetheless, if he comes forward, the landowner may be entitled to compensation reflecting the ransom value of the land.

Given the crucial significance of the provision of an effective vehicular access to every development site, it would be a bet worth placing that the matter will remain the front-runner of highway and development issues arising over the next decade.

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LOCALLY-LED NEW TOWN DEVELOPMENT CORPORATIONS

Francis Truss – partner, National Strategic Land, Carter Jonas

Designation Requirements

Locally-led New Town Development Corporations were first identified in the 2017 Neighbourhood Plan Act. Following the Government response to consultation (May 2019) it issued guidance (June 2019), including on the designation requirement (for Secretary of State satisfaction) that Locally led New Town Development Corporations are 'expedient in the national interest' and examined against:

- Deliverability: A Development Corporation may be in a better position - than, say a collection of fragmented landowners – to meet the viability challenge posed by upfront infrastructure costs through access to long term, 'patient' capital and other direct Local Authority investment. It will need to consider any state aid implications and ascertain why such 'innovative' funding sources couldn't be achieved by existing 'credible' developers.
- Best route to delivery and the need for public sector intervention: If landowners are contractually aligned (even if holdings are fragmented) and a 'credible' developer is in place then this will likely be hard to prove
- Community participation and consultation
- Governance.
- Placemaking/ Community Engagement/ Stewardship.
- Strategic Environmental Assessment.

Set Up

Locally-led New Town Development Corporations (through amendments to the New Towns Act 1981) create a new, parallel route for the creation of Development Corporations which doesn't rely on Central Government selecting specific areas for the establishment of such bodies. These Development Corporations can have responsibility for master planning and project development, bringing on board private investment, partnering with developers and overseeing the completion of a new settlements. Applications to the Secretary of State must request that an order is made to:

- Designate an area to be a New Town.
- Appoint the Local Authority (or Authorities) as the oversight authority.
- Establish the New Town Development Corporation.

Setting up and resourcing such a Development Corporation through – say – its initial five years (including site masterplanning and obtaining planning permission) could incur costs of circa £5-10 million.

Rationale and Comparison to the Status Quo

Locally-led New Town Development Corporations reflect public policy frustration with the pace of the development of new settlements, a perceived potential for 'back loading' infrastructure provision and a lack of local control/ accountability. The extent to which they are better placed to address these concerns (given that Local Authorities already hold most of the appropriate powers) is open to debate, albeit the specific focus on New Towns may increase Local Authorities' appetite and focus.

Unlike Urban Development Corporations, Locally-led New Town Development Corporations are not autonomous within a defined area but are – through the oversight authority – ultimately controlled by relevant Local Authorities. This could have advantages in terms of accountability and local 'buy in' but clearly brings political risk into play (e.g. changes in Local Authority control) and limits the operational freedom of the organisation.

The significant area of benefit should be the access to funding. The guidance says that Government investment will work on a 'case-by-case' basis, with each one receiving different settlements based on the strength of their proposal. Whilst Local Authorities can bid for various elements of Government funding, this creates a structured route and no caps or restrictions have been put in place as of yet. This structured approach should create a more attractive proposition for private sector investment partners (based on investment in servicing infrastructure and land).

From an investor/landowner/developer standpoint, the scale of infrastructure costs to deliver serviced plots on new settlements (figures of £30,000-60,000 per house are not unusual) is very significant. Having a public body with the ability to invest could be attractive to investors/ landowners/ developers depending on the specific structure and partnership arrangements which are negotiated.

Compulsory Purchase Order powers and the confirmation of Local Development Orders still sits with Government and the tests for acceptability do not differ from existing legislation. However, having a designated Development Corporation (with robust governance procedures and a delivery plan) in place should reinforce the credibility of Local Authorities to bring development forward. A continual area of debate in public policy is the acquisition price of strategic land (prior to consent).

There is nothing explicit in the guidance that changes or adds to the existing parameters within which this price is determined.

www.carterjonas.co.uk

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2020 – A YEAR TO LEARN FROM HISTORY, NOT REPEAT IT

David Bainbridge, Director of Planning at Savills

As the famous quote goes: "Those who fail to learn from history are doomed to repeat it."

This is especially relevant when taking-stock at the beginning of a new decade and looking ahead at what the coming year might hold for us.

Those who have spent any time planning for development, and in particular housing development, will know only too well that there are those who seem not to have learnt. Planning policy, planning guidance and development issues, which are de rigueur, have a habit of being repeated.

Politicians turning against potential development sites in the run-in to elections, confusion over the difference between green field and green belt land and the lazy accusation of land-banking, to explain the gap between number of dwellings consented and built in any given year, are just some examples of the cycle of planning.

In taking up the challenge set by the Editor to make some predictions I immediately searched for famous quotes and realised that this was one challenge I might come to regret. Quotes such as "those who have knowledge, don't predict" and "prediction is very difficult, especially if it is about the future", point to the scale of the challenge.

Still, armed without prescience, I shall have a go with my own five predictions on planning for development in the coming year.

1. The Environment

Will remain headline news with resurrection of the draft Environment Bill in Parliament. This will enshrine in law environmental principles and legally-binding targets, including for air quality and net-gain in biodiversity.

A greater level of planning for green and blue infrastructure will be required on development sites or else compensatory provision off-site. One for landowners to consider as a market for such land will continue to grow.

Recent consultation has pointed to the Government's intention to introduce uplifts to standards of Part L of the Building Regulations and changes to Part F. There might be a transition period but enhanced insulation and reduced energy-use are all part of the drive towards plans for the 'Future Homes Standard'.

2. Infrastructure

The Queen's Speech during the State Opening of Parliament in December and subsequent political announcements made much of the need to develop the Nation's infrastructure; especially given the uncertainty over the economic impact of exiting the EU.

A National Infrastructure Strategy is to be published, possibly alongside the first Budget, setting-out further details of the Government's plan to invest £100 billion in the UK's infrastructure.

I predict that HS2 will continue-on, albeit with more delay and eye-watering budget predictions; the Oxford-Cambridge Expressway road will 'evolve' depending on the political mood, although we may see reference to 'express' being used less and less; and I hope investment in infrastructure for electric vehicles will take-off.

3. Planning White Paper

This has been widely mentioned but the content of it and implications for planning for development are uncertain. To have real clout the Government should be encouraged to make the post of Chief Planning Officer a statutory position in Local Government and to ring-fence a long-term budget for adequate funding of posts related to planning being not just planning officers but legal advisers and relevant consultees.

It is inevitable that the prospect of new legislation will bring about additional planning guidance, probably updates to the National Planning Policy Framework and the Planning Practice Guidance.

4. Plan-making

The days of planning policy teams being mocked about deadlines being stretched-out and phones rarely ringing have long gone. Few planners would relish the challenge of preparing a Local Plan, guiding it through the various stages of policy development and defending it at examination in public.

Despite this, the number of plans in England at examination remains high but the number of plans adopted post publication of the NPPF remains quite static at about 45%. The update to the Local Planning Regulations in 2017 means that a plan review must be completed every five years, starting from the date of adoption of the local plan.

More plans will be examined in the coming year; the number of NPPF-compliant plans may rise to over 50% and who knows maybe, just maybe, the two oldest plans in England, being York and St Albans, might just be replaced by newly adopted plans.

5. Decision-making

In the year to June 2019, planning permissions were granted in England on land that could deliver some 377,000 dwellings but there is a gap of around 124,000 dwellings between consents granted and homes delivered.

This is evidence much-cited by groups looking to shift the balance away from green field land and seeking greater regulation in the market for development land.

The upward trend in consented dwellings is likely to increase and the gap to delivery may narrow slightly but this will be insufficient to address the critics' accusations. 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. Our understanding of how to trigger the 'tilted balance' within the NPPF and the weighing-up of the planning balance will be different in a year's time. Appeal decisions and court judgments will see to that.

What will this mean for planning for development in the first year of the new decade? The supply of new homes will remain insufficient but increasingly there will be more emphasis on place-making and standards of building design. There will be new primary and secondary legislation, just as cases testing the existing regime continue on. There will be much to learn and discuss to keep up to date in the planning for development, especially new housing. And hopefully, just maybe, decision-makers will learn from history and not just repeat it.

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DONT BANK ON OVERAGE

Mark Davies, partner, commercial property, Howes Percival.

- Overage is never guaranteed
- Keep it simple
- Include worked examples

What is overage?

Overage is a mechanism that gives a seller of land an opportunity to share in the uplift in value of land following a grant and implementation of planning permission. This simple concept hides potentially complex calculations and generates many potential traps for sellers and buyers alike. Unsurprisingly, overage agreements are a fertile source of litigation.

No crystal balls

Overage is contingent on the occurrence of a future event which may not happen, or which may turn out differently to either party's expectations.

The parties must try to cover all possible eventualities but these will increase in proportion to the complexity of the overage terms and the length of the overage period, ultimately becoming impossible to predict.

The more complex the overage arrangements, and the longer the overage period, the greater the likelihood that things will go wrong. Simplicity is key.

Triggers

How many bites of the cherry?

You need to decide whether the occurrence of the first overage trigger event will end the overage scheme, or whether it will run for the whole of the overage period.

Generally, the seller will expect any planning permission granted during a specified overage period to trigger payment. If there is only one trigger, the developer may be tempted to apply for a permission that results in a minimal overage payment.

Planning permission

Be clear about what types of planning permission will trigger an overage payment.

In Loxleigh Investments Ltd v Dartford Borough Council [2019], the overage trigger was a 'detailed planning permission', a term not defined in planning legislation. The developer argued that it did not include approval of reserved matters.

The court ruled that the term extended to approvals and permissions granted pursuant to outline planning permissions but an express definition in the overage agreement could have avoided litigation.

Implementation of permission

There have been a couple of cases where a developer obtained planning permission but could not implement it for technical reasons, and yet still had to pay overage. In one case, the development could not be built because of varying ground levels and in another, the development would have contravened building regulations.

Any planning permission which triggers overage must be capable of implementation and for this reason, developers generally prefer a trigger that occurs later in the development process, such as the date of disposal of the developed property.

Disposal

The parties should agree -

- Types of disposal that will trigger overage. Long leases as well as freehold sales are typically included but the seller may also seek to include the disposal of shares in a property-rich SPV.
- Types of disposal that can be disregarded because they do not increase value, e.g. disposals to utility companies, public bodies and registered providers of social housing; financial charges and short-term leases.
- How to deal with disposals at an undervalue.

Overage payment

The more complicated the formula, the greater the chance of a dispute about its application.

In Chartbrook Limited v Persimmon Homes Limited [2009], litigation went all the way to the House of Lords over the positioning of some brackets in a mathematical equation, which resulted in a difference of £3.7 million in the amounts claimed by the parties.

Always test the formula for peace of mind. If the results are unexpected, revisit the formula.

General obligations

In Gaia Ventures Ltd v Abbeygate Helical (Leisure Plaza) Ltd [2019], a developer agreed to pay overage on obtaining an acceptable planning permission and to use reasonable endeavours to satisfy a land assembly condition 'as soon as reasonably practicable'.

The court found that the developer had deliberately slowed matters down to allow time to run out under the overage agreement, breaching its obligations. A duty to use reasonable endeavours generally allows the duty holder to take some account of its own commercial considerations. From a developer's perspective, not having to pay overage is undeniably a commercial consideration, but one that undermines the whole purpose of an overage agreement.

Developers should be wary of taking on additional general obligations and be mindful that the courts are prepared to imply terms to fulfil the underlying objective of an overage agreement.

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AMENDING AND INTERPRETING PLANNING PERMISSIONS - AFTER FINNEY AND LAMBETH

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Developers frequently rely upon the powers given to authorities by sections 73 and 96A of the Town and Country Planning Act 1990 to allow changes to planning permissions. Two cases heard in 2019 shed light on the circumstances in which section 73 can be used and its legal outcome.

Finney – limits to the section 73 power

In November, the Court of Appeal reversed the decision of the High Court in Finney v Welsh Ministers & Others. The High Court had upheld a decision of an inspector relying on section 73 to vary a condition by amending an approved drawing and permitting a windfarm that would have a tip height exceeding that specified in the description of development.

The test commonly referred to in considering what conditions can be imposed on section 73 permissions derives from the 2000 case of R v Coventry City Council Ex p. Arrowcroft Group Plc i.e. whether the conditions could have been lawfully imposed on the original permission, in that they were not a fundamental alteration to the original proposal.

Opinions and decisions have since differed over whether there is lawful scope for a (non-fundamental) amendment under section 73 to vary conditions in a way that would be inconsistent with the description of development. The current situation, following the Court of Appeal decision, is that there is not - section 73 allows only the variation of conditions and conditions cannot be imposed which are inconsistent with the operative part of the development i.e. the description of development.

Flexibility post-Finney

This decision has taken away some flexibility exercised by some authorities and leaves applicants in a curious position, whereby their ability to rely on section 73 may depend on the precise description of development, rather than what is shown on the approved plans.

Applicants may have alternative options. As noted by the Court in Finney, an application can made under section 96A to change the description of development and the conditions, as section 96A expressly allows changes to any part of a permission. Section 96A can only be used, however, where a change is not material. Government guidance makes it clear that what is immaterial depends on context.

Alternatively, applicants may discuss with officers an application under section 96A to amend the description of development, followed by a section 73 application to vary the conditions. If neither route is acceptable, a fresh application may be necessary and a "drop-in" application for a smaller part of a scheme can sometimes provide a way forward.

Careful attention should be given to the description of the development when applying for development and negotiating a draft planning permission, wherever possible leaving the substantive detail to the conditions.

Lambeth – interpreting multiple permissions

The outcome of a section 73 application is accepted to be a fresh permission, which developers can implement or ignore. However, there are differing views on how a section 73 permission should be interpreted and the regard to be had to the original permission.

July's Supreme Court judgement in London Borough of Lambeth v Secretary of State for Housing, Communities and Local Government & Others considered a section 73 permission where Lambeth had failed to expressly restate in the list of conditions a condition restricting what could be sold from an A1 unit. The section 73 permission had however stated that permission was granted for a variation of the relevant condition and the original and proposed wording was set out in full.

The Supreme Court adopted an "ordinary reading" of the decision notice and held that the wording had the force of a condition, despite not being listed as one. It also noted that other conditions not expressly discharged by a section 73 permission could continue to have effect. Where a condition is intended to be removed entirely, it is preferable to record that in the description of development on the face of the section 73 permission to avoid any doubt.

Implied conditions

Discussion in Lambeth also touched on controversial commentary in the 2016 case of Trump International Golf Club Scotland Ltd v Scottish Ministers that it might be possible to imply terms into conditions. The Supreme Court observed in passing in Lambeth that it would be difficult to envisage circumstances in which it would be appropriate to imply whole new conditions into a permission. If the courts follow that viewpoint when a case comes before them, there remains scope for an implied term into an existing condition, for example that an approved plan must be complied with (where such words are missing from the original permission).

The cases highlight the care that must be taken when negotiating the content of a permission, including the operative part and conditions, both on an original application and following a section 73 or 96A application to create certainty and preserve flexibility.

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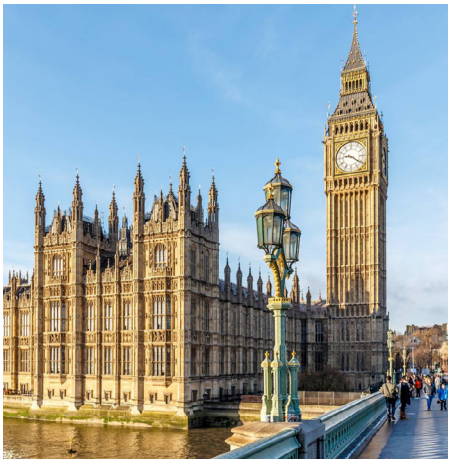
LOBBYING AND POLITICAL UPDATE

A new year, a new Parliament. The parliamentary arithmetic seems to have spelled the end (for the time being) of tense, bad tempered, late night debates ending in Government defeats.

The European Withdrawal Bill has now been voted through by both the House of Commons and the House of Lords meaning we will officially leave the EU on January 31st 2020. In a sign of the changed times, the Bill's initial passing through the Commons received barely half a page of coverage in any of the nationals.

Attention turns now to negotiating the UK and EU's future trading relationship. This is all to be done by the Government's self-imposed deadline of the 31st December 2020. This will prove extremely difficult if not impossible, although the Prime Minister might aim to separate the deal into small sector-by-sector agreements to give him more flexibility with the deadline.



The Government will be hoping its domestic agenda diverts attention away from Brexit to enable it to retain the support of voters from the North and Midlands. If there is one thing we know from Boris' time in City Hall, it is that he does like the idea of big infrastructure projects. From airports in the Thames to garden bridges. And whilst very few such ideas ever come to fruition, there is no doubt he will have more ideas and announcements around infrastructure in the North in the months to come.

So, expect issues of transport and NHS funding to feature prominently. The Treasury's buzzword is 'level-up', so do not expect ambitious projects in the South to be signed off any time soon – all eyes are firmly on the North.

The Conservatives have also pledged to build 300,000 homes-a-year by the mid-2020s, as is essentially compulsory when it comes to manifesto promises, whilst vowing to protect the green belt. A politically difficult square to circle. Commitments have also been made to simplify the planning system, but to also change the rules to require infrastructure delivery before houses are built. This could have a significant impact on future developments if brought into practice.

Rumours of an extensive reorganisation of Whitehall are also circling, with Government purportedly considering setting-up a new department for infrastructure to help fulfil manifesto promises. A Cabinet reshuffle is also expected in February, with names such as Rishi Sunak tipped for promotion.

Having claimed to have "won the argument" whilst simultaneously presiding over Labour's worst defeat since the 1930s, Jeremy Corbyn remains as Leader. The new Leader will be revealed on the 4th April and the current favourite is the centrist Sir Kier Starmer QC, followed by the continuity Corbyn candidate Rebecca Long-Bailey. The result will undoubtedly determine if Labour can rise from the ashes of defeat or instead allow the Conservatives another decade or more in power.

Labour's immediate fortunes might however fare better in the London Mayoral and Assembly Elections scheduled for the 7th May where Mayor Sadiq Khan should be comfortably returned for a second term. Several other mayoral votes across the country will also be taking place, the one to watch being the West Midlands Combined Authority, which could see Mayor Andy Street displaced should Liam Byrne MP win the nomination as Labour candidate - result due 6th February. There are then also 118 councils which will be holding elections, nine of which will be all-out.

LPDF members should also be alive to further local government reorganisation. There is now a significant body of support behind further unitarization. Eyes on Essex, Somerset, Cheshire and the East Midlands in particular.

All those hoping for a quiet 2020 in politics might be a little disappointed...

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