



Bringing forward housing under the Planning Act 2008 and the magic number is...

By Sheridan Treger and Paul Grace

The Housing and Planning Bill laid before Parliament on 13 October 2015 proposes allowing relatively modest elements of “related housing development” to be brought forward under the Planning Act 2008 consenting process. The housing would have to be part of applications for existing categories of nationally significant infrastructure projects. Much of the detail, including actual numbers of houses, is to be left to planning guidance. This article considers the draft guidance issued by DCLG on 28 October 2015,

“Related housing development” for DCOs under the Housing and Planning Bill

On 13 October 2015, we blogged¹ about how the Housing and Planning Bill, laid before Parliament that day, does not propose making housing a nationally significant infrastructure project (NSIP) in its own right, alongside transport, energy and waste infrastructure.

However, the Bill certainly proposes allowing housing’s foot firmly in the door. At that stage the position was that an undisclosed number of dwellings may be included in development consent order (DCO) applications where there is a **functional link** with the main infrastructure project **or at least a close geographical link**.

One driver may well be that the Government is currently seeking funding for proposed nuclear power stations. The large temporary worker villages these schemes will need during construction need to be torn down without separate planning permission if they are to remain.

The Bill, however, also opens up opportunities for housebuilders to find innovative ways of including housing in infrastructure schemes they might not have previously considered obviously compatible, as well as converting temporary worker accommodation for the wider market. There is also potentially scope for promoters of certain categories of business and commercial schemes, which can opt into DCOs, and more conventionally include housing, to inject additional viability where this could make all the difference.

Draft guidance

Key issues, like the circumstances in which housing would be acceptable and the amount and type of housing allowable, were not set out in the Bill. Instead, they were specifically left for “Guidance”. A draft of that Guidance was issued yesterday by the Department for Communities and Local Government.

A speculative observer might say...

The draft Guidance states that it, rather than primary legislation, is covering these subjects “in order to allow flexibility”.

¹ <http://www.blplaw.com/expert-legal-insights/articles/foot-housing-ladder-nsips/>

A speculative observer might say that, of course, the minimum thresholds for nationally significant transport, energy and waste infrastructure *are* enshrined in primary legislation, and the same could have been done for “related housing development”.

Critically, whereas the Planning Act 2008 sets minimum thresholds for nationally significant infrastructure, the approach for housing is to set **a maximum threshold**, albeit with some wiggle room for increases to be made. No doubt housing is too much of a political hot potato to simply enshrine minimum thresholds in statute and take the matter out of local authority control. The Government will presumably test the water and by not fixing a threshold in the Bill, it leaves the door open for increasing the thresholds in the future through the relatively swift process of revised Guidance.

The minimum thresholds for business and commercial schemes which can opt into DCOs are also, of course, set in Guidance rather than statute, and again this may have been to preserve flexibility on extending categories in the future.

How does housing fit into DCOs?

DCOs cannot be granted for projects which just include housing. The Guidance makes it very clear that housing is not an NSIP in its own right.

There must either be a **“functional need”** for the housing in terms of the construction or operation of an NSIP or the housing may be **“in geographical proximity”** to an NSIP.

An example of functional need given is where permanent housing is required for key workers who must be on site 24 hours – something of interest to infrastructure providers. In any event, the housing must be “close to” the NSIP, though there is an understanding that large amounts of construction worker housing might most sustainably be placed within a reasonable commute of the NSIP rather than in its vicinity.

The examples given of “geographical proximity” are for housing within the boundary of business and commercial projects or housing adjacent to a railway line. Here, “close to” the NSIP is tighter, meaning within a mile of any part of the NSIP.

The magic number

The proposed magic number, a “maximum amount” of how many dwellings will be allowed into any application, is 500:

- The Secretary of State is said to be “very unlikely” to consent more than 500 dwellings for housing included as being “in geographical proximity” to an NSIP.
- For “functional need” housing, more than 500 dwellings may be consented for use during an NSIP’s construction phase but no more than 500 can be converted into permanent housing thereafter for the wider public.

How is housing examined and considered within the DCO process?

The Secretary of State will still assess housing included in DCO applications against the key national planning policy document for the Town and Country Planning Act 1990, the National Planning Policy Framework. That may well mean that, as in any Town and Country Planning application, it might only be possible for fewer dwellings, or none at all, to be consented in areas like the green belt, at risk of flooding or which impact on heritage assets.

Affordable housing policies from the relevant local plan will still apply. More widely, other policies in the local plan are likely to be important and relevant considerations for the Secretary of State in deciding the housing element of the application, the test for what to take into the planning balance where no tailor-made national policy statement under the Planning Act 2008 is in force. The Secretary of State must also have regard to local planning authorities’ “local impact reports”, where their views on the impacts of the proposed housing will be set out.

Housing will be examined as a discrete element of the NSIP application. This means it is likely to have its own hearings, and indeed (potentially) a different set of interest parties concerned with it as are concerned with the NSIP in which the housing is included.

It is open to the Secretary of State to sever all or some of a housing element from the NSIP when making his decision, and make a DCO for the NSIP but without the proposed dwellings.

Promoters who might consider varying a DCO already made to include housing are told it is “particularly likely” that they will be required to make an entirely fresh application instead. This is likely not to be an attractive proposition for just 500 houses.

The Guidance notes its statutory force – the Secretary of State has to take it into account when deciding DCOs which include housing. But it gives the housing element no policy advantage from its association with the NSIP.

Is this what “generation rent” has been waiting for?

No. With relatively small numbers of DCO applications for NSIPs in the process at any time, even 500 homes in each means this would still be no panacea for “generation rent”.

And some promoters may question the advantages of inclusion rather than seeking a separate Town and Country planning permission. In consenting terms, the housing element of a DCO application is in some ways little more than a fellow traveller to the main NSIP:

- It does not benefit from the same strong policy support of the Planning Act’s national policy statements (NPSs). These are the key to the certainty offered by the DCO process and its virtual 100% approval rate for applications. However, the NPSs all relate to utility infrastructure. The usual Town and Country Planning local and national policy matrix for housing still applies – and the approval rate at planning appeals for housing determined by the Secretary of State is certainly nowhere near 100%.
- The Guidance is rightly clear that it will not be permitted for consideration of housing during examinations to be overshadowed by the potentially bigger issues surrounding often enormous NSIPs, and indeed the housing can simply be severed.

But is there still an opportunity here?

Very possibly. Innovation is clearly being encouraged for promoters to try and make a case that any NSIP proposal can include up to 500 homes.

It allows infrastructure providers going through the time and cost of a major NSIP application to allow the Secretary of State to enable a legacy of some homes, including some affordable housing, out of temporary worker accommodation (perhaps in the same way as athlete accommodation during the Olympics was converted). This must be an interesting opportunity for housebuilders to consider. It also might make it more likely that business and commercial DCO applications will come forward as the omission of any element of housing in mixed use propositions did affect their viability.

The point of the proposal must be seen from the correct end of the telescope: the focus is not to facilitate major housing development, but rather to encourage moderate housing development where it can sensibly form part of a DCO package of complementary uses. In other words the proposal corrects what was otherwise a missed opportunity. This is not a housing policy, it is an infrastructure policy that seizes an opportunity to create some additional homes.

The last or the first stop for housing on the DCO train?

Should the relevant provision in the Housing and Planning Bill come into force, and the draft Guidance be published formally, proof of this proposed change’s utility will only be demonstrated by new DCO applications actually including housing, and that housing being consented.

If it goes well, and does make a difference, one never knows - the Guidance might one day be changed to include urban extensions and garden cities. However, such a step would, of course, be an acceptance by the Government of the limitations of Localism.



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