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Welcome to Landmark Chambers' 'Levelling-Up and Regeneration Bill – Session 3' webinar

Tuesday 7 June 2022

The recording may be accessed here.

Your speakers today are…

Landmark Chambers

David Forsdick QC (Chair)

Stephen Morgan

Topic:
Post-decision: amendments, appeals and enforcement

Matthew Dale-Harris

Topic:
Infrastructure levy: the new levy, infrastructure delivery strategies, and role for S106

Nicholas Grant

Topic:
Regeneration: Compulsory Purchase, compensation and development corporations

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Infrastructure levy: the new levy, infrastructure delivery strategies, and role for S106

Matthew Dale-Harris

Introduction

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- One of the survivors from the White Paper
- Most detail is to come in the regulations but Schedule 11 (which will insert a new Part 10A into the 2008 Act) is accompanied by a policy paper giving further information.
- https://www.gov.uk/government/publications/levelling-up-and-regeneration-further-information/levelling-up-and-regeneration-further-information

Headlines

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- CIL and s.106 will be generally replaced for provision of infrastructure funding by new Infrastructure Levy ("**IL**") to be charged as a fixed proportion of gross development value above a set threshold
- Rates will be set locally via charging schedules. LPAs will also be required to produce infrastructure delivery strategies
- Levy will be charged on the value of property when it is sold
- Goal is to secure at least as much affordable housing as developer contributions do now
- S.106 will be retained for "narrowly targeted" site specific infrastructure and delivery of the largest sites where infrastructure is to be provided in kind

The Bill: new levy

- Under s.204A, SoS will have power (with Treasury) to make regulations providing for the imposition in England of the Infrastructure Levy ("**IL**").

- Subsection (2) provides that SoS must aim to ensure that purpose of IL

  "*is to ensure that costs incurred in supporting the development of an area and in achieving any purpose specified under section 204N(5) can be funded (wholly or partly) by owners or developers of land in a way that does not make development of the area economically unviable*."

Key provisions

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- S.204B - Local planning authorities are to be the charging authorities and must charge IL in respect of development in its area.

- S.204D (Liability) – arises on commencement of development (or when a person assumes liability in accordance with the regulations). Per (6), the amount of any liability is to be calculated "*by reference to the charging schedule which has effect at the time when planning permission first permits the development as a result of which the levy becomes payable*".

- S.204E (interpretation of keys terms) defines terms like "development" but also requires the regulations to set out further definitions.

Section 204G (Amount)

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- S.204G – charging authorities must issue charging schedules setting rates or other criteria by which amount of IL chargeable is to be determined. Per (2), in setting rates or other criteria must have regard to

> "*the desirability of ensuring that—*
>
> > *(a) the level of affordable housing which is funded by developers and provided in the authority's area, and*
> >
> > *(b) the level of the funding provided by the developers,*
>
> *is maintained at a level which, over a specified period, is equal to or exceeds the level of such housing and funding provided over an earlier specified period of the same length*."

Section 204G continued

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- Per (4), in setting rates or other criteria, they must also have regard to (subject to specification in the regulations):
  - Economic viability
  - Actual or potential economic effects of matters affecting the value of land including the development plan, planning permission or provision of infrastructure
  - Previous provision
  - The charging authority's infrastructure delivery strategy.

- Detail of how the chargeable amount is to be calculated left to regulations; but provisions in subsections (7)-(8) are very broad.

Other provisions

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- ss. 204H-M provide for preparation, examination and adoption
- ss. 204N defines infrastructure to which the receiving authorities must apply IL
- ss. 204O-P provide for a duty to pass receipts to other authorities or persons.
- ss. 204R-V cover collection, enforcement and appeals
- ss. 204W-Y give power to SoS to issue guidance, direct exemptions or review.

Infrastructure delivery strategy

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- Another requirement on charging authorities. Regulations will set out detail of what is to be required but they must

  "*set out the strategic plans (however expressed) of the charging authority in relation to the application of IL*"

- They will require examination with the detail to be set out in the regulations and in guidance.

- Policy paper indicates that regulations are likely to "*enable local authorities to require the assistance of infrastructure providers and other bodies in devising these strategies, and their development plans.*"

Retained role for s.106

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- S.204Z1 provides that the regulations may make provision for interrelation with CIL and s.106 but no detail. Policy paper says regulations will:

  "*Require developers to deliver infrastructure integral to the operation and physical design of a site – such as an internal play area or flood risk mitigation. Planning conditions and narrowly targeted section 106 agreements will be used to make sure this type of infrastructure is delivered*."

  "Detail the retained role for section 106 agreements to support delivery of the largest sites. In these instances, infrastructure will be able to be provided in-kind and negotiated, but with the guarantee that the value of what is agreed will be no less than will be paid through the Levy."

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Levelling-Up & Regeneration Bill: Post-decision – amendments, enforcement and appeals

Stephen Morgan

SCOPE

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CHANGES RELATING TO POST-DECISION MATTERS:

(1) **Amendments:** Cl. 98 Minor variations in planning permission

(2) **Enforcement**: Cls. 99-107 Increased powers

(3) **Appeals** : Cls. 104-105 Restrictions on, and progressing of, enforcement appeals

SOURCES:

In addition to the Bill itself, the Explanatory Notes (ExN) merit consideration in relation to these new provisions.

1. MINOR VARIATIONS TO PLANNING PERMISSIONS

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- ExN[571] "…*the existing framework for varying planning permissions is often seen as confusing, burdensome, and overly restrictive by applicants and local planning authorities. Recent case law has compounded these issues*."

- **Current position**: s.73 applications (to develop land without compliance with conditions) and section 96A (non-material changes to planning permissions)
- **What about material changes outside of section 73**?

  E.g. changes to description of development approved is outside scope of s.73 *(Finney v Welsh Ministers* [2019] EWCA Civ 1868)
- **What about 'drop-in" applications?**

  Potential problems following *Hillside Parks Ltd. v Snowdonia National Park Authority* [2020] EWCA Civ 1440

Minor variations in planning permissions (2)

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- **Cl.98** (Minor variations in planning permission) would introduce a new **s.73B** - *Applications for permission substantially the same as existing permission*
- Based on an **existing permission** other than one which has been granted under s.73, s.73A or s.73B.
- That existing permission must have been granted **on application**.
- Application proposes **the conditions** if any to which it should be subject BUT Cannot change date for development to be started or for reserved matters applications to be made (Cl. 98(6)).
- Applies also to a **permission in principle** (Cl.98(13))

Minor variations to planning permissions (3)

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- **CRITICAL**: Planning permission may be granted in accordance with this new section only if the local planning authority is satisfied that:

  its effect (by reference to both the development it authorises and any conditions to which it is subject) will not be substantially different from that of the existing permission (ignoring any minor amendment made under s.96A). (s.73B(5)-(10))

- **DETERMINATION**: is based on limiting considerations to those respects in which the permission being applied for would differ in effect from the existing permission identified and from any permission under s. 73 (s.73B(7))

- **CONSEQUENCES**: no right of appeal; new planning permission; can't avoid the mandatory BNG condition (under para 13 of Shcd 7A of the TCPA 1990)

2. ENFORCEMENT

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- Enforcing the carrying out the **development authorised**:

  Cl.99 Development Commencement Notices

  Cl.100 Completion notices

- Enforcing against **unauthorised development**

  - Time limits for taking enforcement action
  - Duration of temporary stop notices
  - Enforcement warning notices
  - Power to provide relief from enforcement of planning conditions
  - Increase in some penalties

Enforcement (2) – Authorised Development Development Commencement Notices

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- Inserts new s.93G into the TCPA 1990 (England) which imposes a duty on the person intending to carry out development (permitted pursuant to an application under s.58(1)(b) or 73 of the TCPA, 1990 and of a prescribed description) to **serve a Commencement Notice (CN) before development is begun**.
- **The CN must contain the information to be prescribed** – but see Example 1 (on p.97 of the ExN) for residential scheme – delivery rate; phasing; expected completion date.
- The information required is to be included in the **Planning Register** (s.69 of the TCPA 1990, as to be amended by s.93G).
- There is power for the LPA **to serve a notice** requiring the required information to be provided and if not provided within 21 days (without a reasonable excuse) a level 3 summary offence (£1000) will have been committed, (S.93G(3)-(9)).

Enforcement (3) – Authorised Development Completion notices

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- **Currently**: Existing provisions under ss.94-96 of the TCPA 1990.
- A CN can be served after the deadline for commencement of development has passed; and
- Currently requires confirmation by the SoS.
- **Proposed:** Cl. 100(2) introduces new ss. 93H, 93I & 93J into the TCPA 1990 removing the requirement for that confirmation
- The new provisions apply **retrospectively to permissions** granted before the measures come into effect.
- However, any CNs served before the new measures come into effect remain **subject to the current procedures**.

Enforcement (4) – Authorised Development Completion notices

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- New s.93H (and Schedule 10 consequential amendments) gives a power to LPAs in England to serve a CN for development which has commenced as required by ss.91 or 92 but in their opinion **will not be completed in a reasonable period** (s.93H(1)).
- That period must be at **least 12 months after service of CN** (s.93H(2)&(3)).
- The effect of a CN is that the planning permission to which it relates becomes **invalid** at the CN deadline whether as originally specified or substituted on appeal. S.93I introduces a process of appeals against the service of a CN.
- Development carried out under the planning permission **prior to the CN is not affected** (s.93J(3))
- However, the notice is of **no effect** pending the final determination of an appeal or withdrawal of the appeal (s.93J(2)).

ENFORCEMENT (5) – UNAUTHORISED DEVELOPMENT
Time Limits for enforcement action

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- **Currently** - 4 year time limit for unauthorised operational development (building, engineering, mining or other) (s.171B(1)) and for change of use of any building to use as a single dwelling house (s.171B(2)).
- Other breaches are subject to 10 year time limit for taking enforcement action (s.171B(3)).

- **Proposed** – In England (but not Wales) these 4 year time limits are to be amended to 10 years in common with other breaches.

Enforcement (6) – Unauthorised Development
Duration of temporary stop notices

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- **Currently** - s.171E of the TCPA 1990 empowers LPAs to pause development for 28 days if a planning breach is suspected whilst the facts are established to decide further action to take.

- **Proposed** – Cl.102 extns this period to up to 56 days in England

- **Listed Buildings** – Cl.93 amends the LBA to enable the issuing of a temporary stop notice for such unauthorised works for up to 56 days. There are also changes in respect of the compensation provisions for LB temporary stop notices and related matted matters (Cls.94-95).

Enforcement (7) – Unauthorised Development
Enforcement warning notices

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- **Proposed –** a new power by inserting a new s.172ZA into the TCPA 1990 and with other consequential amendments (Cl.103).
- It would apply where the LPA in England becomes aware of unauthorised development **that has a reasonable prospect of being acceptable**.
- The LPA will be enable serve an Enforcement Notice Warning asking the person concerned (the owner of the land and any other person having interest in the land that would be materially affected by the taking of any further enforcement action) **to submit a retrospective planning permission**.
- If such an application is not received within the specified period the LPA **can take further enforcement action**.

Enforcement (8) – Unauthorised Development
Relief from enforcement of planning conditions

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- **Proposed** – Cl. 107 would insert a new s.196E into the TCPA 1990 which would grant a new power to the SoS to provide by regulations that a LPA in England may not take, or is subject to specific restrictions in how it may take, enforcement measures for non-compliance with specified planning conditions or limitations for a specified period of time.
- **Context (**see ExN[620]-[622]) – since March 2020 LPAs have been encouraged to be flexible in terms of enforcement action in terms of construction working hours and delivery ours in response to the pandemic (s.16 of the Business and Planning Act 2020 and Written Ministerial Statements).
- **Example** (ExN p.106) – shortage of HGV drivers leading to need for deliveries outside of usual hours

ENFORCEMENT (9) – Increase in some penalties

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- Cl.106 would amend s.187A (**enforcement of planning conditions**) and s.216 (**maintenance of land)** to increase the maximum level of fines for breaches in relation to these in England (the current fine levels are maintained in Wales).

- As a consequence, there would be an **unlimited fine** (level 5 on the standard scale) for failure to comply with a **breach of condition notice**.

- The maximum fine for **non-compliance with a s.215 notice** would also be unlimited and the maximum daily fine in England to the greater of either one tenth of a **level 4 fine (currently £2,500) or £5,000**.

3. ENFORCEMENT NOTICE APPEALS- Restrictions on appeals under ground (a)

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- **Currently** – s.174(2A) & (2B) removes the ability of a person to lodge an appeal on ground (a) in England in certain circumstances (Cl.104).
- **Proposed –** to extend the circumstances where a ground (a) appeal is prohibited to cover the situation where a related application has been submitted (even before the time for determination has expired).
- Applies to a *'related application for planning permission*' which is one that **covers the same development** as is the subject of the enforcement notice.
- Applies where the enforcement notice is served **within 2 years** of the date the related application ceased to be under consideration (as explained in new s.174((2AB) & 2AC –see also the Table in ExN[613] at p.102).

ENFORCEMENT NOTICE APPEALS (2) – Undue delay in appeals

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- **Proposed by Cl.105** – a new power (new ss.(6) in s.176 and amended s.195 of the TCPA 1990) to the SoS to dismiss an appeal in relation to an enforcement notice or an application for a lawful development certificate in England, should it appear to them that the appellant is causing undue delay to the appeals process. (already exists for s.78 appeals – s.79(6A) of the TCPA 1990).

- In such circumstances, the SoS may **issue a notice** explaining that the appeal may be dismissed if the appellant does not take the steps specified in the notice to expedite the appeal **within the specified time**.

And finally…

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Cl. 110

Additional powers in relation to planning obligations

In section 106A of TCPA 1990 (modification and discharge of planning obligations), after subsection (9) insert—

"(9A) Regulations may make provision for, or in connection with—

(a) requirements which must be met in order for a planning obligation in respect of land in England to be modified or discharged; and

(b) circumstances in which a planning obligation in respect of land in England may not be modified or discharged."

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Regeneration: Compulsory Purchase, compensation and development corporations

Nicholas Grant

Outline

- Development corporations
- Compulsory purchase

Development Corporations: Current position

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- Four types:
  - Urban development corporations: Local Government, Planning and Land Act 1980 (“LGPLA 1980”)
  - Mayoral development corporations: Localism Act 2011
  - New Towns Act 1981 (“NTA 1981”) development corporations
  - New Towns Act 1981 development corporations with oversight authorities

Development corporations: consultation

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- Govt consultation in 2018 on
  - Facilitating private sector involvement and investment
  - Whether existing models “sufficiently broad in scope to support modern mixed-use development”
  - Whether all forms of DC should be able to become planning authority
  - Whether all forms of DC should have access to revenues from CIL, Strategic Infrastructure Tariff, and s. 106 revenues.

Development Corporations: the Bill (Pt 6)

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- Cl. 131 and 132 insert similar provisions into LGPLA 1980 and NTA 1981: “Locally Led UDC” and “DC for Locally Led New Towns”

- Local authorities make proposal to SoS that LLUDA/LLNT should be set up, and authority to act as “oversight authority” for the DC
  - Must come from LAs of the area
  - ”area” can consist of separate, non-contiguous areas
  - Consultation

- SoS can permit by order if “satisfied it would be expedient in the local interest”

Development Corporations: the Bill (Pt 6)

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- Oversight authorities (LGPLA 1980)
  - May be established by SoS by regulations
  - Regs may specify how OA to oversee regeneration.
  - SI to be approved by each House

- Much of that already in S. 1A New Towns Act 1981

Development corporations: the Bill (Pt 6)

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- Planning Powers (cl. 134-136)
  - UDCs granted access to planning powers equivalent to those currently available to Mayoral DC
  - New Town DCs given access to planning powers equivalent to those currently available to Mayoral DC
  - Mayoral DCs to become mineral and waste authority for plan making purposes for all or part of MDCs area

- Membership and borrowing powers (cl. 138-139)
  - Removes current cap of 11 members
  - Removes current borrowing caps

CPO Powers: the Bill (Pt 7)

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- Cl 140: in s. 226 TCPA 1990 insert

  "(1B) In the applications of subsections (1) and (1A) in England, "improvement" includes regeneration"

- Cl 141: Online publicity for notices

- Cl 142: An end to automatic inquiries

- Cl 143: Condition confirmations

CPO Powers: the Bill (Pt 7)

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- Cl 144: corresponding provisions for CPO by Ministers
- Cl 145: Consequential amendments to date of operation
- Cl 146: Power to extent time limits for implementation
- Cl 147: Agreement to vary vesting date
- Cl 148: Data standards

Compensation: the bill (Part 7)

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- S. 6D LCA 1961 (meaning of “scheme” for the “no scheme principle”) – minor definitional amendments.

- S. 6E (relevant transport projects)

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Thank you for listening

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