

18 July 2022

Dear Sir,

I followed with interest the Committee's evidence session on 20 June. The Committee may be interested in the further legal advice that Rights Community Action have received that I attach as an annex. We are happy for this advice to be published if this of assistance to the Committee.

Yours sincerely,
Naomi Luhde-Thompson
Director, Rights: Community: Action

Supplementary briefing note on the provisions in the Levelling Up and Regeneration Bill concerning public participation in the planning system

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Summary

1. We are instructed by Rights: Community: Action to provide a supplementary briefing note on the provisions in the Levelling Up and Regeneration Bill ("the Bill") that affect public participation in the planning system.¹ We are asked to review the oral evidence provided to the Levelling Up, Housing and Communities Committee ("the Committee") on 20 June 2022, and consider whether this causes us to change our view that the Bill "*radically centralises planning decision-making and substantially erodes public participation in the planning system.*"² In particular, we have been made aware that Mr Christopher Young QC, a knowledgeable and highly respected planning law practitioner, gave oral evidence to the Committee and disagrees with our analysis. We understand that in his view, the Bill only puts on a statutory footing that which is already occurring in the planning system.
2. In summary, the oral evidence provided to the Committee does not cause us to change or revise our previously stated views in any way. As Mr Young QC fairly pointed out in his oral evidence, it is not uncommon for barristers to reasonably disagree on points of law. For the reasons given below, we maintain our previously stated position that this is a radical Bill that centralises decision making and substantially erodes public participation in the planning system.
3. We do not repeat the points in our previous briefing note that were not disputed in the oral evidence session, such as the lack of a consultation requirement for National Development Management Policies (which contrast with the intensive consultation requirements for Local Plan policies³), or the potential for clause 97 development to

impose controversial development outside of the normal planning process.⁴ We will, however, elaborate on the current status of national planning policy in the planning system, as this appears to be a point of legal dispute. The answer to that dispute will necessarily determine how radical the proposed changes are.

¹ Available here: <https://bills.parliament.uk/bills/3155>.

² Para 1(e) of our briefing note.

³ Para 3 of our briefing note.

⁴ Paras 10-12 of our briefing note.

The current status of national planning policy

4. We disagree with the view expressed to the Committee that national policy currently has effective primacy over the local plan. We disagree for four reasons:

- a) Firstly, that is not the position set out in the NPPF itself:
 - i. Paragraph 1 of the NPPF itself states that “*Planning law requires that applications for planning permission be determined in accordance with the development plan*,” whereas the NPPF is only “*a material consideration in planning decisions*.”
 - ii. Paragraph 12 of the NPPF provides that “*The presumption in favour of sustainable development [in the NPPF] does not change the statutory status of the development plan as the starting point for decision-making. Where a planning application conflicts with an up-to-date development plan... permission should not usually be granted*.”
 - iii. Paragraph 15 of the NPPF provides that “*The planning system should be genuinely plan led*.”
- b) Secondly, that is not the position described in case law. In *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 W.L.R. 1865, a case referred to by Mr Young QC in oral evidence, the Supreme Court considered this issue directly. Lord Carnwath discussed the fact that the Secretary of State has an implied power under the Planning Acts to make national planning policy [20] and that Planning Inspectors exercise their judgment within the framework of that policy [21]. However, Lord Carnwath then went on to say:

“It is important, however, in assessing the effect of the Framework, not to overstate the scope of this policy-making role. The Framework itself makes clear that as respects the determination of planning applications (by contrast with plan-making in which it has statutory recognition), it is no more than "guidance" and as such a "material consideration" for the purposes of section 70(2) of the 1990 Act... It cannot, and does not purport to, displace the primacy given by the statute and policy to the statutory development plan. It must be exercised consistently with, and not so as to displace or distort, the statutory scheme.”
- c) Thirdly, as we stated in our briefing note, and as Lord Carnwath stated in *Hopkins Homes*, this is simply not the position under existing planning legislation. Section

38(6) of the Planning and Compulsory Purchase Act 2004 is clear that the development plan, not national policy, has primacy.⁵

- d) Fourthly, it is possible under the existing system to bring forward a Local Plan which departs from the NPPF. Consistency with the NPPF is one of the tests of soundness, as was pointed out to the Committee. However, as long as a local planning authority can justify a departure from the NPPF, it remains open to them to do so (or otherwise tailor the NPPF to their own local circumstances). For example, in *DB Schenker Rail (UK) v Leeds City Council* [2013] EWHC 2865 (Admin) it was noted at [14] that “*The requirement to have regard to national planning policy in section 19(2) of the 2004 Act and the policy requirement in [the NPPF] does not mean that an Inspector has to adhere slavishly to national planning policy.*” Under the Bill, however, this element of discretion will clearly be lost.
5. For these reasons, although national planning policy is undoubtedly a weighty consideration in most (if not all) planning decisions, and although Mr Young QC was in our view quite right to comment that the NPPF is “*omnipresent through the whole [planning] process,*” it is clear to us that the NPPF currently does not – and cannot – trump the policies in an up-to-date local development plan. In other words, the national policies in the NPPF have an unequivocally lesser status in law than the local policies in the local plan.

Conclusion

6. It follows from our position that the proposals in the Bill for National Development Management Policies would undoubtedly impose a radical, centralising change upon the current system. We are not persuaded by the view that the Bill only places on a statutory footing that which is already happening today. The NPPF, case law and planning legislation all state in various ways that we currently have a local plan-led system, not a national policy-led system. We firmly agree.

PAUL BROWN Q.C.

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⁵ Para 3(c) of our briefing note.