Permission to land?

Jamie McKie examines the latest tools in the planner's toolbox, permission in principle and the Brownfield Register, and asks whether they will have the impact that the government hopes and expects

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'PiP is a new, "alternative", route to obtaining planning permission. The broad intention behind it is to separate "in principle" matters such as use and location from technical details, which are left to be agreed later.'

A cynic might ask whether we really need another route to obtaining planning permission. After all, several already exist and the evidence suggests that they are being granted in increasing numbers (Department for Communities and Local Government data, see www.legalease.co.uk/planning-applications). Is the sole intention behind the introduction of permission in principle (PiP) to expedite the delivery of more housing? Comments during the reading of the Housing and Planning Bill that it would be (Brandon Lewis MP, 3 December 2015):

> ... a new element in the planning system that gives local authorities an extra tool to deliver the housing that the country needs...

suggest so.

Alternatively, are there loftier aspirations for PiP to become the preferred route of applicants? This will depend very much on early successes, which will build confidence in both applicants and local planning authorities (LPAs) alike. It also depends on whether its current limited scope is expanded to allow its use beyond 'housing-led' development and at a greater scale.

Although we are at the start of the journey with PiPs, the reception to date among developers has been lukewarm.

Ultimately, its success, particularly in facilitating greater housing delivery, will depend upon the effectiveness of the numerous other recent planning reforms, most notably its siblings in the Housing and Planning Act 2016 (HPA 2016). Many still await secondary legislation and/or the chance to bed in.

Added to this, with the Autumn Budget on the horizon at the time of writing, there are likely to be further developments affecting the planning system, notably in relation to developer contributions and the Community Infrastructure Levy (CIL).

Finally, with the housing white paper and its many consultation proposals, some of which may see the light of day in expected revisions to the National Planning Policy Framework towards the end of 2017, it is clear that PiP is part of a bigger picture. Indeed, the National Planning Practice Guidance (NPPG) envisages that it will 'work alongside, not replace, existing routes for obtaining planning permission' ('Brownfield Registers and Permission in Principle: frequently asked questions', 21 April 2017).

What is permission in principle?

In short, PiP is a new, 'alternative', route to obtaining planning permission. The broad intention behind it is to separate 'in principle' matters such as use and location from technical details, which are left to be agreed later. Theoretically,

this will provide greater certainty earlier on in the planning process (particularly when compared to a site allocation). This, in turn, is expected to make it easier for developers and lenders to commit resources to a project, knowing that the planning risk is mitigated to some extent having secured a friendly nod that the principle of the proposed development is acceptable. That then 'just' leaves the technical details to be submitted and, hopefully, approved subsequently.

This expectation was echoed by Brandon Lewis MP during the Bill's passage through Parliament when he commented that:

> ... planning permission in principle will give applicants greater certainty that the suitability of land for development is agreed so they have the confidence to invest in the technical detail without fear that the fundamental principle of development will be reopened. The technical detail stage will provide the opportunity to assess the detailed design of the scheme to ensure that any impacts are appropriately mitigated and that the contributions to essential infrastructure, for example, are secured. If the technical details are not acceptable, the local authority can refuse the application.

Legislative background

PiP was first introduced through s150 of the HPA 2016 which has, in turn, amended the Town and Country Planning Act 1990 (TCPA 1990 – now s59A(1)). Subsequent secondary legislation has now yielded the Housing and Planning Act 2016 (Permission in Principle, etc) (Miscellaneous Amendments) (England) Regulations 2017 (in force from 27 March 2017) and the Town and Country Planning (Permission in Principle) Order 2017 (in force from 15 April 2017). At present, the picture is not yet complete, with further secondary legislation awaited to bring into effect remaining provisions envisaged under the PiP regime.

At a glance – routes to PiP

- Through allocation by the LPA in a 'qualifying document'.
- Through application by a developer to the LPA.

Routes to PiP

Under s59A(1) of the TCPA 1990, there are two ways in which to obtain PiP:

- through allocation by the LPA in a 'qualifying document': this can be a register (the Brownfield Register (BR) being the current example with the possibility that more may follow, such as small sites) maintained under s14A Planning and Compulsory Purchase Act 2004, a development plan document or a neighbourhood development plan; or
- through an application to the LPA which is likely to be limited to minor applications of ten units or less.

The PiP will focus on high-level matters only, fixing the location, land use and amount of development which can take place on the site. The remainder will fall to be addressed at the technical details stage.

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Technical details consent

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Determination

The LPA only has discretion when considering an application – it can grant or refuse it. Decisions are to be taken in the usual way – determined in accordance with the development plan unless material considerations indicate otherwise. Applications for technical details consent must be determined in accordance with the terms of the PiP granted. This is a logical requirement given that the PiP fixes the broad parameters of the development with the principle established, and is not open for reconsideration. The technical details consent addresses the particulars required to give effect to it.

PiP and BR: the story so far

Since April 2017, LPAs have been able to grant PiP for housing and 'compatible' non-residential developments on suitable sites entered in part 2 of their BR. Further secondary legislation is currently required to allow PiP to be used for allocated sites in local plans and through individual applications to the LPA for minor development. Regulations now specify the BR eligibility criteria and the deadline for the BR to be in place is 31 December 2017.

The statutory timeframes for determination of technical details consent are deliberately shorter than for other routes and intended to incentivise its use for speedy delivery. They are five weeks for minor development and ten weeks for major development. Planning conditions can be attached subject to meeting statutory requirements, as can s106 agreements/planning obligations on the same basis. CIL will also be payable provided that a charging schedule is in place.

Duration

Once granted, PiP will last for:

- five years in the case of PiP by a development order (or such other period – longer or shorter – as the LPA may direct) (s57A(7) TCPA 1990); or
- three years if granted by the LPA under application (or such other period – longer or shorter – as the LPA may direct) (s57A(8) TCPA 1990).

If technical details consent is refused, the PiP remains intact with further opportunities to obtain technical details consent being available until such time as it expires.

The Brownfield Register – a game of two parts

One method of obtaining PiP, which has gained considerable attention, is allocation following entry onto the BR. This is largely because the entry of a site onto part 2 of this register automatically results in the grant of PiP. This underscores the government's 'brownfield first' message as reflected in the housing white paper, namely that promoting greater housing delivery on brownfield land is an easier answer to dealing with constrained land supply, and avoids having to tackle the thorny question of redefining the green belt.

The statutory requirement to maintain a BR was first introduced through s151 of the HPA 2016. The Town and Country Planning (Brownfield Land Register) Regulations 2017 have added meat to the bones in terms of what is required.

It is intended to provide a public record of land which the LPA considers to be suitable for residential development, with an expectation that it will be regularly reviewed and updated, at least once a year. As such, it fits neatly in line with an LPA's assessment of its housing land supply.

The usefulness of the BR from a developer and landowner perspective very much depends upon which part of the BR their site finds itself on. Part 1 is the broad brush – a comprehensive list of all brownfield sites that are suitable for housing, regardless of their planning status. Part 2 is where the real value lies – entry onto this part carries with it the automatic grant of PiP.

The BR is reserved for those sites classified as 'previously developed land' (PDL) under Annex 2 of the NPPF (www.legalease.co.uk/nppf-glossary). That is not always straightforward.

If the long-awaited updates to the NPPF arrive before the deadline for the BR to be in place (31 December 2017), they will bring this definition up to speed with the court's recent, widened, interpretation in the *R (Dartford Borough Council) v Secretary of State for Communities and Local Government* [2016] case. In the meantime, it will be interesting to see how authorities compiling their BRs deal with any calls for gardens in non-built-up areas to be included.

Merely being considered PDL is insufficient in itself to unlock the door to the BR. There are additional requirements to be met as follows:

- size – 0.25 hectares or larger or capable of supporting at least five dwellings, although smaller sites can also be chosen;
- suitability – the site has planning permission or PiP for residential development, or has been allocated in a development plan document, or the LPA considers that it is appropriate for residential development taking into account adverse impacts and relevant representations received;
- achievability – the LPA believes the site will come

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The applicant's development menu

Choose from:

- detailed planning permission;
- hybrid planning permission;
- outline planning permission;
- planning permission in principle;
- housing as part of a development consent order; or
- site allocations.

forward within 15 years based on publicly available information and relevant representations received; and

- availability – all owners of the site and/or developers with control have expressed an intention to sell or develop it within 21 days prior to the entry date on the BR based upon information publicly available and relevant representations received.

If the above requirements are met and the land is PDL, the LPA must enter it in part 1 of the BR.

Sites that are entered on part 2 of the BR will automatically be granted PiP. However, the extent to which the LPA freely exercises its discretion to allow movement from part 1 to part 2 of the BR is likely to be an important determining factor of the success – or otherwise – of the BR in unlocking brownfield land for housing development. Publicity, notification and consultation requirements do also apply which will add to the pressures of resource-strapped LPAs still awaiting their long-promised cash injection from the government.

LPAs have until 31 December 2017 to put in place the BR. As such, those 73 LPAs which were part of the early pilot project have a head start on the rest and, much like the deadline for getting up-to-date local plans in place, it remains to be seen what will be the nature of any sanctions for non-compliance.

Limitations mean missed opportunities?

As discussed at the outset, the extent to which PiP will make a more significant contribution to planning, beyond solely housing delivery, will be determined by the extent to which it is permitted to free itself from the shackles of restrictions that currently limit its usefulness. If there are higher aspirations to make this a genuine alternative to other routes for obtaining planning permission, the following limitations will need to be revisited over time:

'Housing-led'

PiP is currently only available for housing-led development. Guidance on what that means is provided in the NPPG (para 004 reference ID 58-004-20170728), which states that residential development is:

> ... development in which the residential use occupies the majority of the floorspace. Non-residential development should be compatible with the proposed residential development. Appropriate non-residential uses may include, for example, a small proportion of retail, office space or community uses.

A greater ability to use PiP for mixed-use developments would undoubtedly increase its take-up, as would allowing it to be used for solely commercial schemes. There is no logical reason why such an extension should not be permitted. It would seem that the unstoppable move towards housing development being categorised as a free-standing subset of planning continues.

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Excluded development

Importantly, specific classes of development are excluded from the remit of PiP, most notably environmental impact assessment (EIA)-related development – that which would fall within Sch 1 EIA development and that which is Sch 2 EIA development and has been screened as EIA development. While the reasons for this are clear – developments which have EIA implications are unlikely to be capable of 'in principle' decisions separated from technical details – it nevertheless reduces the ability for PiP to contribute to housing delivery at scale and in a truly meaningful way.

Conclusion

Time will tell whether PiP becomes the preferred route of choice for applicants and whether it is able to make a meaningful contribution to housing delivery, particularly on brownfield land. In its present incarnation, it is difficult to escape the feeling that it represents a missed opportunity. ■

Key reading

- House of Commons Library, Briefing Paper Number 06418, 12 July 2017.
- NPPG: 'Permission in Principle', 28 July 2017.
- NPPG: 'Brownfield registers and permission in principle: frequently asked questions', 21 April 2017.

R (Dartford Borough Council) v Secretary of State for Communities and Local Government
[2016] EWHC 635 (Admin)