NEIGHBOURHOOD PLANNING BILL

DELEGATED POWERS MEMORANDUM BY THE DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT

Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Neighbourhood Planning Bill ("the Bill") introduced in the House of Commons on 7 September 2016 and updated for the Bill's introduction to the House of Lords on 14 December. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

2. In summary the Bill will:

   a. further strengthen neighbourhood planning;

   b. streamline local plan-making and allow action to be taken where insufficient progress is being made to put plans in place;

   c. ensure that planning conditions are imposed only when necessary, and that pre-commencement conditions are only imposed with the written consent of the applicant;

   d. require some permitted development rights which are subject to a prior approval or notification procedure to appear on the planning register; and

   e. make the process for compulsory acquisition clearer, faster and fairer by reforming the context in which compensation is negotiated, together with other technical improvements.

Delegated Powers created by the Neighbourhood Planning Bill

Part 1

Neighbourhood Planning

Clause 3(10) and Schedule 1, new Schedule A2 to the Planning and Compulsory Purchase Act 2004: Powers for Secretary of State to make Regulations in relation to the modification of neighbourhood development plans

Powers conferred on: *Secretary of State*

Powers exercised by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Negative procedure*

Context and Purpose

3. The process for making a neighbourhood development order is set out in Schedule 4B to the Town and Country Planning Act 1990 ('the 1990 Act'), which was inserted by the Localism Act 2011. This process is applied to neighbourhood development plans by section 38A(3) of the Planning and Compulsory Purchase 2004 Act ('the 2004 Act'), also inserted by the Localism Act 2011.

4. Neighbourhood development plans are planning documents prepared by parish councils or designated neighbourhood forums, known as 'qualifying bodies' under the regime. Once independently examined and approved in a local referendum, these plans have the same legal status as development plan documents adopted by local planning authorities or approved by the Secretary of State under Part 2 of the 2004 Act.

5. The process for making a neighbourhood development plan involves the following key stages:

   a. a relevant body (a parish council or prospective neighbourhood forum) will apply to a local planning authority to designate an area as a neighbourhood area;

   b. once a neighbourhood area has been designated, the qualifying body (the parish council or designated forum) will submit a proposal for a neighbourhood plan or order to the local planning authority;

   c. the local planning authority will then arrange for the proposal to be independently examined, if satisfied that the qualifying body has followed certain procedural steps;

   d. an independent examiner will then decide if the plan or order proposal meets basic conditions (or would do so with recommended modifications). In doing so the examiner will consider written representations and hold a hearing where necessary;

   e. if the examiner recommends that the proposal can proceed to referendum and the local planning authority agrees, a referendum must be held (and an additional business referendum in business areas); and

   f. if the proposal is approved in each applicable referendum, the local planning authority must make the plan or order and has very limited discretion not to do so

6. Schedule 4B to the 1990 Act contains powers to prescribe more detailed procedural requirements for making neighbourhood development orders. Schedule 4B is applied to neighbourhood development plans by section 38A(3) of the 2004 Act. The Neighbourhood Planning (General) Regulations 2012[1] ("the Neighbourhood Planning Regulations") are made under these powers. Separate Regulations make detailed provision for the holding of neighbourhood planning referendums.

[1] S.I 2012/637, amended by S.I 2015/20 and S.I. 2016/873.

7. Once a neighbourhood development plan has been made, a local planning authority can only modify it for the purpose of correcting errors. The Secretary of State also has the power to revoke a plan in certain circumstances. A qualifying body can only make revisions to a plan by initiating the process for making a new plan. It is therefore considered that a more proportionate and efficient process which enables a qualifying body to apply to modify a plan is required.

8. Clause 3(10) and Schedule 1 to the Bill insert a new Schedule A2 to the 2004 Act which sets out the process which must be followed for modifications to a neighbourhood development plan which are material but are not so significant or substantial that they change the nature of the plan. This closely replicates the existing procedures and delegated powers in Schedule 4B to the 1990 Act (process for making a new development plan), with minor distinctions to make the procedure proportionate to modifications that do not change the nature of the plan. It is necessary to create a new Schedule to the 2004 Act, rather than amending Schedule 4B to the 1990 Act, because the modification procedure applies only to neighbourhood development plans and not to neighbourhood development orders. This is because most neighbourhood development orders grant planning permission for a fixed period of time and allowing revisions to be made could encourage delays to development.

9. The 2004 Act concerns plan-making, whereas the 1990 Act is largely concerned with development management, including development orders. Nevertheless, the powers in new Schedule A2 to the 2004 Act closely replicate the powers in Schedule 4B to the 1990 Act and it is intended that they will be exercised in the same instrument (the Neighbourhood Planning Regulations), which sets out the detailed procedure for making neighbourhood development orders and neighbourhood development plans in one instrument.

10. The main difference between the procedure for making a neighbourhood development order or plan and the procedure in the new Schedule A2 for making material modifications to a neighbourhood development plan is that, if the local planning authority and the independent examiner agree that the modification procedure is appropriate, there will be no local referendum before the modification can be made. There will still be an examination in all cases, though there is a greater expectation in the case of plan modifications that this will be undertaken through written representations, with oral hearings held only in exceptional circumstances. The local planning authority will be required to make the modified plan should the examiner recommend that they do so, subject to compatibility with EU obligations and human rights. This exception is necessary to ensure that a local planning authority is not bound to accept something which does not comply with EU law or legal requirements arising from the European Convention on Human Rights.

Justification for delegation

11. While still a relatively new part of the planning system, qualifying bodies and local planning authorities are becoming increasingly familiar with the current process for making a neighbourhood development order or plan. It will therefore benefit all users of the system to replicate the procedure as far as possible for the modification of a plan rather than creating a new and unfamiliar procedure. The new Schedule A2 to the 2004 Act therefore contains powers equivalent to those that already exist for making a plan, to prescribe the detailed aspects of the modification process in secondary legislation and the Government intends to co-ordinate any future amendments to the two procedures in the same instrument (the Neighbourhood Planning Regulations).

12. This is consistent with the planning regime more widely where many procedural requirements are set by delegated legislation. For example, under the 1990 Act, this includes but is not limited to the procedural requirements for making planning applications, the requirements for making written representations, and the procedure for making and holding planning appeals. Under the Planning Act 2008, which regulates nationally significant infrastructure project applications, the procedures for making applications, consulting interested parties, examining applications and modifying development consent orders are also set out in Regulations. These delegations allow for the requirements to be updated so that procedures operate optimally.

13. Further details of each delegated power within the new Schedule A2 to the 2004 Act are set out below.

Schedule 1: paragraphs 1(4) and (5) of new Schedule A2 to the 2004 Act

14. Paragraph 1(4) provides the Secretary of State with the power to prescribe in Regulations the form of a proposal to modify a neighbourhood development plan and the documents and information that must accompany it.

15. Paragraph 1(5) allows the Secretary of State to prescribe in Regulations the persons who must be sent a copy of the proposal to modify the neighbourhood development plan, and the information that they must be sent.

16. These powers are required to ensure that the examiner has all the relevant documentation, such as any representations or supporting documents submitted by the qualifying body. They replicate the existing powers which relate to proposals to make new neighbourhood orders and plans under paragraphs 1(3) and (4) of Schedule 4B to the 1990 Act, as applied to neighbourhood development plans by section 38A(3) of the 2004 Act. These powers have been exercised in the Neighbourhood Planning Regulations. The intention is to amend those Regulations to make equivalent provision for the modification of a neighbourhood development plan.

Schedule 1: paragraphs 1(6) and (7) of new Schedule A2 to the 2004 Act

17. Paragraph 1(6) provides the Secretary of State with the power to publish a document which sets standards for the preparation of a proposal to modify a neighbourhood development plan.

18. Paragraph 1(7) then goes on to provide that the documents and information accompanying the proposal (including the draft of the proposed modified neighbourhood development plan) must comply with those standards.

19. This replicates the powers that exists in relation to neighbourhood development orders in paragraph 1(5) and (6) of Schedule 4B to the 1990 Act, as applied to neighbourhood development plans by section 38A(3) of the 2004 Act. Although no documents have ever been published by the Secretary of State under this power to date, it is necessary to allow for standards to be set to provide for clear and consistent formatting of documentation to allow key issues to be identified quickly – or they could set the number of copies of documents which should be submitted, either on paper or electronically. Alternatively,

standards could be set about the layout of draft neighbourhood development plans, as proposed to be modified. It is necessary to replicate this power for the modification procedure as, should the power under Schedule 4B be exercised in the future, it would enable the standard of proposals for modification to remain consistent with those for new orders or plans.

Schedule 1: paragraph 4 of new Schedule A2 to the 2004 Act

20. Paragraph 4 provides the Secretary of State with the power to make Regulations which make provision for the requirements that must be complied with before proposals for the modification of a neighbourhood development plan may be submitted to a local planning authority or fall to be considered by a local planning authority.

21. These powers replicate the provisions in paragraph 4 of Schedule 4B to the 1990 Act, as applied to neighbourhood development plans by section 38A(3) of the 2004 Act, to ensure that qualifying bodies consult with and involve the public and other interested parties at an early stage of their proposals. The Neighbourhood Planning Regulations set out the detailed requirements, including the bodies that must be consulted if the qualifying body considers that the body's interests may be affected by the proposals for a neighbourhood development order or plan (including Natural England and the Highways Agency). Those Regulations also address matters such as who should be sent the draft proposals and other relevant documents and information and how this information should be publicised.

Schedule 1: paragraph 11(1)(c) and 11(2)(e) of new Schedule A2 to the 2004 Act

22. Paragraphs 11(1)(c) and 11(2)(e) allow for the Secretary of State to make provision in Regulations to add to the matters and basic conditions that an examiner of a draft proposal to modify a neighbourhood development plan must consider when deciding whether to recommend that a local planning authority should make the draft modifications to the plan (or to recommend further modifications).

23. This replicates existing powers under paragraphs 8(1)(e) and 8(2)(g) of Schedule 4B to the 1990 Act respectively. These powers exist to ensure for example that an examiner is required to consider any supporting material that might be provided in connection with proposals, or to consider representations that might be made post-application but before the examination, because of any Regulations made by the Secretary of State in relation to the notice and publicity requirements for an examination under paragraph 11 of Schedule 4B and the new paragraph 15 of the new Schedule A2 (discussed below). These powers may also be used to set out further matters that an examiner may need do take account of. For example, the powers under paragraph 8(2)(g) of Schedule 4B have been exercised to ensure full account is taken of important habitats[2].

Schedule 1: paragraph 12(2) (b) and 12(3)(c) of new Schedule A2 to the 2004 Act

24. Paragraph 12(2)(b) allows the Secretary of State to make Regulations which prescribe the circumstances where an examiner may cause a hearing to be held for the purpose of

[2] See Schedule 2 to the Neighbourhood Planning Regulations.

receiving oral representations about a particular issue in relation to the modification proposal.

25. Paragraph 12(3)(c) allows for provision to be made in relation to the persons who may make oral representations at such a hearing. This replicates the powers in paragraphs 9(2)(b) and 9(3)(d) of Schedule 4B to the 1990 Act, as applied to neighbourhood development plans by section 38A(3) of the 2004 Act.

Schedule 1: paragraph 13(7) of new Schedule A2 to the 2004 Act

26. Paragraph 13(7) allows the Secretary of State to make Regulations which prescribe the way that the local planning authority must publish the report made by the examiner which sets out the examiner's recommendation to a local planning authority on whether to make the draft plan with or without modification.

27. This replicates paragraph 10(8) of Schedule 4B to the 1990 Act, as applied to neighbourhood development plans by section 38A(3) of the 2004 Act which has been exercised by Regulation 18 of the Neighbourhood Planning Regulations to require local planning authorities to publish the report electronically on their website. The Government intends to apply the same provision to reports on the examination of a proposal to modify a plan.

Schedule 1: paragraph 14(7) of new Schedule A2 to the 2004 Act

28. Paragraph 14(7) allows the Secretary of State to make Regulations which prescribe the date by which the local planning authority must make the modified plan.

29. This mirrors provisions in section 38A(4)(b) of the 2004 Act, as amended by section 140(3) of the Housing and Planning Act 2016 under which a local planning authority must make a neighbourhood development plan as soon as reasonably practicable after a majority vote in a referendum, and in any event by such date as may be prescribed. This power has been exercised by Regulation 18A of the Neighbourhood Planning Regulations which requires that a plan is made within 8 weeks of a referendum being held. The Government intends to apply the same 8 week period to decisions on proposals to modify a plan to ensure that such decisions are taken in an equally timely manner. The prescribed date could be amended in future should experience indicate that a different time period would be more appropriate.

Schedule 1: paragraph 15 of new Schedule A2 to the 2004 Act

30. Paragraph 15(1) of the new Schedule A2 to the 2004 Act will allow the Secretary of State to make Regulations which set out provision in connection with examinations under paragraph 9 of that Schedule.

31. This replicates the powers set out in paragraph 11(1) of Schedule 4B to the 1990 Act, as applied to neighbourhood development plans by section 38A(3) of the 2004 Act. These allow provision to be made in Regulations relating to the notice and publicity in connection with an examination, the information to be made available to the public and the making of representations.

Justification for procedure selected

32. As set out above, the Government intends to exercise the delegated powers in the new Schedule A2 by way of an amendment to the existing Neighbourhood Planning Regulations which are made under the negative resolution procedure. It would not be appropriate for a higher level of parliamentary scrutiny to be applied to the procedures which only modify a neighbourhood development plan when the procedure for making a completely new neighbourhood development plan is subject only to the negative procedure.

33. Applying the negative procedure to the Regulations made under these powers will enable updates to be made more efficiently without unnecessarily using Parliamentary time for procedural matters, for example, adding or replacing a new body or group to the list of consultation bodies.

34. Finally, applying the negative procedure to this power will enable all amendments to the existing Neighbourhood Planning Regulations to be made in the same instrument, whether they relate to the making of a new neighbourhood development order or plan or the modification of an existing plan. This means the legislation is easier to use, and thus reduces the time and cost to local planning authorities, qualifying bodies and other users of the regime.

The Government consulted on the content of these Regulations when the Bill was introduced to the House of Commons[3] and has published a response to the consultation[4] showing how it intends to exercise the delegated powers in the new Schedule A2 to the 2004 Act.

Local Development Documents

Clause 7, new sections 28A to 28C of the 2004 Act: Power to direct preparation of joint development plan documents

Powers conferred on: *Secretary of State*

Powers exercised by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Negative procedure*

Context and Purpose

35. Local planning authorities in England are required to keep the matters which may be expected to affect the development of their area or the planning of its development under review[5]. An authority must set out their policies relating to the development and use of land in their area in 'local development documents'.

[3] The consultation document can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/551132/Neighbourhood_Planning_regulations_consultation.pdf

[4] The consultation response can be found at https://www.gov.uk/government/consultations/implementation-of-neighbourhood-planning-provisions-in-the-neighbourhood-planning-bill

[5] See section 17(6) of the 2016 Act.

36. Part 2 of the 2004 Act sets out the process for the preparation, examination and adoption of these local development documents. The Town and Country Planning (Local Planning) (England) Regulations 2012[6] ('the Local Plan Regulations') prescribe which planning documents must be prepared as local development documents and which of those must be prepared as 'development plan documents'. Development plan documents are subject to examination by a person appointed by the Secretary of State. The Local Plan Regulations define development plan documents as 'local plans' but the term 'Local Plan' is more commonly used to describe the suite of key documents that set out the strategic priorities for the development of a local planning authority area.

37. Local Plans are part of the development plan for an area, which is the starting point for the determination of a planning application[7] (along with neighbourhood plans and any spatial development strategy published by the Mayor of London, or a combined authority where it has this function, and any 'saved policies' from pre-2004 planning documents or the former Regional Strategies). Applications must be decided in accordance with the development plan, unless material considerations indicate otherwise. National planning policy and other local development documents that are not development plan documents are examples of material considerations.

38. Section 28 of the 2004 Act provides that neighbouring local planning authorities may choose to prepare one or more local development documents jointly. This is used by authorities where it would be beneficial to plan for a wider area, for example for essential infrastructure or housing need. Section 28 allows for two or more local planning authorities to voluntarily agree to prepare joint local development documents but anticipates that one or more authorities may wish to withdraw from the agreement. In that case, any examination of the joint document must be suspended but any one or more of the authorities that were a party to the agreement can request, within a period prescribed by the Secretary of State, that the examination is resumed in relation to a "corresponding document". This ensures so far as possible that work undertaken voluntarily by a number of local planning authorities to prepare a joint planning document is not wasted where one or more of those authorities withdraws from the arrangement.

39. Clause 7 of the Bill inserts a new section 28A to the 2004 Act which enables the Secretary of State to direct two or more local planning authorities to prepare a joint development plan document where it would facilitate the more effective planning of the development and use of land in the area of one or more of those authorities[8].

40. Clause 7 also inserts new section 28B which applies the requirements of Part 2 of the 2004 Act to such documents and new section 28C which provides for the modification or withdrawal of a direction made under new section 28A of the 2004 Act.

41. The new section 28C makes equivalent provision to that made by section 28 of the 2004 Act. Where a local planning authority withdraws from the joint agreement with another

[6] S.I. 2012/767.

[7] See section 70(2) of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004.

[8] The power to give directions itself is not a power to make delegated legislation.

authority, the Secretary of State can withdraw a direction requiring two or more local planning authorities to prepare a joint document. It provides that within a period prescribed by the Secretary of State, one or more of those authorities can request the resumption of the examination in relation to a "corresponding document" or "corresponding joint development plan document", as defined in regulations. The existing section 28 is also amended to make clear that the Secretary of State may define what is a "corresponding local development document" as well as a "corresponding document".

42. Regulations made under this power will clarify the difference between a "corresponding document", a "corresponding joint local development document" and a "corresponding joint development plan document". These are closely related concepts – essentially these terms describe the documents that remain when one or more local planning authorities who were party to an agreement or subject to a direction to prepare a joint plan cease to be involved in the preparation of the original document.

43. The powers in new section 28C mirror the existing delegated powers in subsections (9) and (11) of section 28. Regulation 32 of the Local Plan Regulations is made under these existing powers. That regulation both prescribes the period (three months) within which a local planning authority may request resumption of an examination into a "corresponding document" and defines what is meant by that term. Essentially, a corresponding document is a document which has substantially the same effect as the original joint document but does not include any of the area of the authority or authorities that chose to withdraw from the agreement.

Justification for delegation

44. Using secondary legislation for these matters is consistent with how the existing procedures for joint development documents, which are prepared voluntarily, are prescribed. It is also consistent with the wider planning regime where similar non-controversial procedural requirements are delegated to ensure the Government can respond to the experience of local planning authorities and other stakeholders involved in the process of preparing planning documents and procedures can be updated as necessary to ensure they operate optimally[9].

45. The Government already has the ability to both set and to amend the relevant time period under section 28 in the 2004 Act and the way corresponding documents are defined. This flexibility is necessary to enable essential but uncontroversial changes to be made to procedures efficiently. For example, minor revisions were made to the Local Plan Regulations in 2016 to make consequential provision as a consequence of sections 143 to 147 of, and Schedule 11 to, the Housing and Planning Act 2016[10].

Justification for procedure selected

46. The Local Plan Regulations are made under the negative resolution procedure, and the Government intends to exercise these powers by way of an amendment to regulation 32 of these Regulations. This will mean that the existing time period of 3 months, and the

[9] See paragraph 12 of this memorandum.
[10] See the Town and Country Planning (Local Planning) (England) (Amendment) Regulations 2016. SI 2016/871.

existing definition of corresponding document will apply equally to both joint local development documents that are produced voluntarily by two or more local planning authorities, and joint development plan documents that are prepared on the direction of the Secretary of State. It will also mean that all of the procedural requirements for local development documents will exist within a single instrument which will benefit users of the regime.

47. The Government therefore considers that this remains the most appropriate level of Parliamentary scrutiny for any amendments made to them. The Regulations are entirely procedural; the substantive obligations to plan for the development and use of land in a local planning authority's area are set out in primary legislation (Part 2 of the 2004 Act). It would be a disproportionate use of Parliamentary time to require debates each time that these procedural regulations are updated.

Clause 9, new section 36(3)-(5) of the 2004 Act: Power to publish data standards for local development schemes and documents

Powers conferred on: *Secretary of State*

Powers exercised by: *Published document*

Parliamentary Procedure: *None*

Context and Purpose

48. Clause 9 of the Bill inserts new section 36(3) to the 2004 Act which provides that the Secretary of State may from time to time publish "data standards" for local planning authorities to comply with when preparing local development schemes and local development documents. These provisions will allow the Secretary of State to set technical specifications for these schemes and documents, or data contained in these schemes or documents.

49. Clause 9 also inserts new section 15(8AA)(b) to the 2004 Act which provides that where a local planning authority has a local development scheme that does not comply with the new standards, the Secretary of State or the Mayor of London may direct that the scheme is revised so that it complies with the standards.

50. The power to set data standards will encourage greater use of digital technology and improve the accessibility of the local development schemes and documents by those submitting planning applications and the public at large.

Justification for delegation

51. The setting of data standards is not suitable for legislation as the standards will comprise highly technical specifications for how information (data) in a scheme or document is to be published in a file format structured so that software applications can easily identify, recognise and extract specific data to permit its re-use (for example to publish it or adapt it in some way). The standards themselves are likely to be presented in a number of formats that will not necessarily be compatible with the requirements for the publication

of secondary legislation. The standards may need to change to respond to feedback from local planning authorities and users of the planning system.

52. The purpose of setting data standards is to encourage the creation of new innovative products. Therefore, the government will need to review the published standards from time to time in order to keep up with technological developments. Setting these standards by way of publication by the Secretary of State is the most appropriate way to disseminate this information.

Justification for the Procedure

53. There is an existing power at section 17(7)(b) of the 2004 Act for the Secretary of State to be able to prescribe in regulations the form and content of local development documents. The Secretary of State therefore already has power to prescribe the substantive content of these documents, subject to Parliamentary scrutiny (regulations under section 17(7)(b) are subject to the negative resolution procedure). New section 36(3) of the 2004 Act provides that these data standards relate only to the *form* in which data that comprises local planning documents is prepared and published. On that basis, the Government considers that it is appropriate that these data standards may be published without Parliamentary scrutiny.

Before the power to publish data standards will be exercised, the Government will be running a 'digital planning pilot programme' to better understand how planning data can be used most effectively and will consult before specifying standards to understand what works best for authorities. The Government has published a policy paper which provides further detail on the pilot programme[11].

Clause 10: Power to make provision requiring a local planning authority to review local development documents at such times as may be prescribed.

Power conferred on: *Secretary of State*

Power exercised by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Negative procedure*

Context and Purpose

54. Clause 6 of the Bill will require every local planning authority to identify the strategic priorities for the development and use of land in the authority's area and have policies in their development plan documents (the documents that comprise the Local Plan) to address these priorities.

[11] See document titled 'further information on how the Government intends to exercise the Bill's delegated powers' at https://www.gov.uk/government/publications/neighbourhood-planning-bill-overarching-documents

55. As set out above, there is already a statutory duty on local planning authorities to keep their local development documents under review[12]. However, to be most effective, local development documents (the documents which comprise the Local Plan and any supplementary planning documents) need to be reviewed and, if necessary, revised so that they reflect changes in legislation and policy. Clause 10 therefore amends section 17 of the 2004 Act to enable the Secretary of State to make provision in Regulations requiring local planning authorities to review their local development documents at prescribed intervals. Following each review an authority must decide whether to revise the documents and, if they decide not to, must publish their reasons for doing so.

56. The Government has consulted on how this power will be exercised in relation to statements of community involvement[13] (these are local development documents which set out the authority's policies on the involvement of interested parties in the exercise of the authority's functions in relation to the preparation of other development documents). The consultation proposed that regulations should prescribe that these documents are reviewed at least every five years and the Government response to that consultation sets out that this was widely supported[14]. The Government intends to apply the same five year period across the board for reviewing all local development documents.

Justification for delegation

57. As already expressed in this memorandum,[15] it is appropriate for the procedures for plan preparation to be in delegated legislation so that they can be readily updated, to evolve and become more efficient. This is in keeping with the wider planning regime.

58. Adhering to precedent in delegating these measures and doing so using the same instrument will provide for consistency, and ease for users of the legislation, reducing the time and cost to local planning authorities, qualifying bodies and others of familiarising themselves with new requirements. Also, prescribing different intervals for different local development documents is not a matter which would be appropriate for primary legislation.

Justification for procedure selected

59. The Government intends to exercise this power by updating the existing Local Plan Regulations which are subject to the negative resolution procedure. These existing procedural requirements for local development documents are subject to the negative procedure to allow non-controversial requirements to be easily updated. For example the time period of 5 years may need to be reduced or increased where the practical experience of local authorities in complying with the requirements deems this to be

[12] See paragraph 37 of this memorandum

[13] Section 18 of the 2004 Act requires local planning authorities to produce a statement of community involvement.

[14] See the Government's response to consultation on implementing the neighbourhood planning provisions of the Neighbourhood Planning Bill at https://www.gov.uk/government/consultations/implementation-of-neighbourhood-planning-provisions-in-the-neighbourhood-planning-bill

[15] See paragraphs 12 and 44 of this memorandum

necessary. This would not be a matter which would be appropriate for extensive parliamentary scrutiny.

Planning Conditions

Clause 12(1) (New section 100ZA of the 1990 Act): Restrictions on power to impose planning conditions

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative procedure

Context and Purpose

60. Clause 12(1) inserts new section 100ZA into the 1990 Act. Subsection (1) of this new section enables the Secretary of State to make regulations which prescribe the circumstances where conditions may or may not be imposed, and to set out the descriptions of such conditions. Further, subsection (6) allows the Secretary of State to prescribe the circumstances where subsection (5) (pre-commencement conditions may not be imposed on a grant of planning permission without the agreement of the applicant) does not apply.

61. Planning conditions are used by local planning authorities to make a proposed development which would otherwise be unacceptable in planning terms, acceptable, such that it may be granted planning permission.

62. Paragraph 206 of the National Planning Policy Framework[16] states that conditions should only be imposed where they are necessary, relevant to planning and the development to be permitted, enforceable, precise and reasonable in all other respects ("the national policy tests").

63. Such conditions can relate to how the development is constructed (for example the detailed appearance, landscaping and materials used), or they can relate to the operation of the development once completed (for example by controlling hours of operation, or activities that can be carried out, such as specifying the goods that can be sold from a retail development). Alternatively, conditions may be imposed to defer consideration of certain matters until after the grant of planning permission. The Government's planning practice guidance[17] ("the Guidance") has clarified that where justified, the ability to impose conditions requiring submission and approval of further details extends to aspects of the development that are not fully described in the planning application, for example, the provision of car parking spaces.

[16] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6077/2116950.pdf
[17] http://planningguidance.communities.gov.uk/blog/guidance/use-of-planning-conditions/

64. There is evidence that that some local planning authorities are imposing unnecessary and inappropriate planning conditions which do not meet the tests in national policy, resulting in delays to the delivery of new development.

65. The Government intends to strengthen the requirement for planning conditions to be imposed by a local authority in a way which meets the national policy tests. In particular, the Government wishes to ensure that pre-commencement conditions, which require action before any development can take place, are not imposed unnecessarily, for example relating to matters that are capable of being discharged later in the development process. This can impose unnecessary costs on development and delay the completion of new development.

Justification for delegation

66. Clause 12(1) (by inserting the new section 100ZA(5) into the 1990 Act) provides that no pre-commencement conditions may be imposed without the written agreement of the applicant.

67. The provisions also include a power for the Secretary of State to further limit the imposition of conditions. New section 100ZA(1) will allow the Secretary of State to make regulations which prescribe the circumstances in which conditions may or may not be imposed and set out the descriptions of such conditions. New section 100ZA(2) has the effect that the Secretary of State can only make such regulations if he is satisfied that such provision is appropriate for the purpose of ensuring that conditions meet the existing national policy tests.

68. Examples of the types of conditions that this power is likely to be used to expressly prohibit are illustrated in the Department's planning practice Guidance[18].The examples in the Guidance of conditions that should be avoided include: those which may unreasonably impact on the deliverability of a development, those which place unjustifiable and disproportionate financial burdens on an applicant, or those which duplicate requirements to comply with other statutory regimes.

69. While the Guidance provides this steer, the Government is seeking to give the list of conditions that should be avoided statutory force, to ensure that such conditions are not imposed and that development can proceed without any undue delay caused by the imposition of unnecessary planning conditions. This description of circumstances and conditions has been left to secondary legislation so that the power is capable of being used in the future to prohibit the use of unnecessary and particularly onerous conditions which impede completion of development. Such delegation will also allow the Government flexibility in updating the list, in response to evidence provided by stakeholders without imposing unduly on Parliamentary time but whilst still engaging those affected through a public consultation, which is required under 100ZA(3). For example, there might be a consistent theme in house-builders' annual reports detailing conditions which appear to be unnecessarily holding up delivery. The Government may then consider those conditions against the policy tests and if the view is that such

[18] http://planningguidance.communities.gov.uk/blog/guidance/use-of-planning-conditions/what-approach-should-be-taken-to-imposing-conditions/

conditions breach the six policy tests, consult on amending the regulations to prohibit such conditions.

70. The Government acknowledges that the power to prescribe the circumstances where conditions may or may not be imposed and to set out the descriptions of such conditions is wide. However, the Government considers a delegation appropriate in these circumstances.

71. The power to make regulations in section 100ZA(1) is constrained, as explained in paragraph 69 above, by subsection (2) such that any regulations may make provision only to the extent that the Secretary of State is satisfied that the provision is appropriate for the purposes of ensuring that any condition imposed meets the national policy tests. National policy already provides that local authorities should only impose planning conditions where the proposed conditions meet the national policy tests, and as explained Guidance sets out a number of specific circumstances where conditions should not be used. Therefore, exercises of this power will put on a statutory footing the best practice of only imposing necessary conditions such as to allow development to be completed promptly.

72. Further, the power is subject to a consultation requirement each time it is exercised (see subsection (3)) to ensure that any list of conditions made under the power accurately reflects the views of all of those involved in the planning process. We are of the view that this will allow for an appropriate level of review and will sufficiently protect the interests of those interested or affected by the proposed measures.

73. Limits on the conditions that may be imposed by local authorities already exist in secondary legislation. Regulation 123(2A) of the Community Infrastructure Levy Regulations 2010 provides that a condition requiring a highway agreement for the funding or provision of relevant infrastructure or a condition that prevents or restricts the carrying out of development until such an agreement is entered into cannot be imposed in certain circumstances.

Justification for procedure selected

74. Regulations made under these delegated powers will be subject to the negative procedure. The Government considers that this level of scrutiny is appropriate as the powers are not such that Parliament should not need to debate each exercise.

75. Firstly, the Government must consult prior to the exercise of the power, and therefore any exercise of the power will receive considered input from interested groups. Secondly, the detail of the planning application procedure is currently subject to the negative resolution procedure under the 1990 Act, and these provisions are intended to add to existing powers. For example, article 35 (written notice of decision or determination relating to a planning application)of the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("DMPO")[19] regulates matters around the imposition of conditions by requiring full reasons for each condition imposed and in the case of each pre-commencement condition, an explanation of why it

[19] S.I 2015/595.

is a pre-commencement condition (see section 74 of the 1990 Act). Thirdly, frequent modification of the description of the conditions and of the circumstances in which conditions may or may not be imposed is likely to be necessary in order to keep pace with changes in planning and more generally in the housing market and, therefore, to ensure the regulations remain effective at dealing with conditions that unnecessarily impact on development. The negative procedure would allow for such amendments to the regulations to be carried out without imposing unduly on Parliamentary time.

76. Finally, the effect of the provisions allowing the Secretary of State to prescribe the circumstances where the requirement to agree the terms of a pre-commencement condition (see subsection (5)) would be dis-applied is such as to narrow the ambit of the duty on the local planning authority to seek the agreement of the applicant. Therefore, the negative procedure is considered appropriate.

The Government has consulted on how the process of prohibiting the use of pre-commencement conditions without the agreement of the applicant will operate, and on the potential for a wider application of the power to prohibit certain conditions in targeted circumstances when the Bill is introduced[20]. The Government has published a policy paper and indicative draft Regulations which provide further details on how these powers will be exercised[21].

Register of Planning Applications

Part 1

Clause 13, new section 69A of the 1990 Act: Power to prescribe which information relating to prior approvals is to be kept on a register for planning applications.

Power conferred on: Secretary of State

Power exercised by: Development Order

Parliamentary Procedure: Negative procedure

Context and Purpose

77. Section 58 of the 1990 Act provides that planning permission may be granted on application to a local planning authority, or by development order. The Secretary of State has exercised the power to grant planning permission by development order through the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO")[22]. The planning permissions granted by the GPDO are known as permitted development rights. As permitted development rights are a national grant of planning permission, this means that certain building works and changes of use (usually where the

[20] The consultation and consultation response can be found at https://www.gov.uk/government/consultations/improving-the-use-of-planning-conditions

[21] See document titled 'further information on how the Government intends to exercise the Bill's delegated powers' at https://www.gov.uk/government/publications/neighbourhood-planning-bill overarching-documents

[22] SI 2015/596.

impacts of development are not significant) can be carried out without having to make a planning application.

78. Under section 60 of the 1990 Act, permitted development rights may be granted subject to conditions or limitations, such as a requirement to seek the prior approval of the local planning authority in relation to specified impacts ("prior approval application") or to notify the local planning authority that development has been carried out, for example for carrying out an extension to an existing agricultural building or for a temporary change of use from a shop to restaurant. Permitted development rights covering more significant development, for example the change of use of a building from retail to a dwellinghouse, will generally be subject to the prior approval of the local authority.

79. Section 69 of the 1990 Act requires a local planning authority to keep a register containing prescribed information relating to applications for planning permission. The specific information which must be included in the planning register is prescribed in Article 40 of the DMPO. This requirement does not currently include information relating to applications for prior approval or notifications made under the GPDO.

80. As a result, information about prior approval applications or notifications made in connection with permitted development rights is currently not consistently recorded by local planning authorities and is unavailable to central Government.

81. Regulations made under new section 69A of the 1990 Act inserted by clause 13 will allow prescribed information about prior approval applications or notifications relating to specific permitted development rights to be captured in the planning register. This will in turn allow the Government to closely monitor the impact of particular permitted development rights, and also ensure that a consistent approach is taken with information held on the planning register in respect of planning applications.

Justification for delegation

82. Delegating details of matters to be included in the Planning Register is consistent with section 69 of the 1990 Act which provides for such details to be set out in the DMPO. It is appropriate for such detailed procedural matters to appear within the DMPO, rather than on the face of the 1990 Act, to enable the information which is required to be submitted with a planning application, prior approval application or notification to be updated in line with developments in planning policy or legislation. Inclusion of this measure within the DMPO enables the Government to ensure that all such information can be quickly captured in the planning register. Further, it enables the Government to require specific information to be captured at times when that information may be particularly important (for example, as at present, information about housing numbers).

83. Further to this, having a mechanism for amending these details by secondary legislation will eliminate the risk of overprescribing what should be contained in the planning register. For example, there are a wide range of permitted development rights which may be subject to prior approval or notification requirements and it will be necessary to ensure that there is a mechanism for updating the requirements as experience and observation deems necessary. For example, the Government initially intends to limit the requirement to applications for prior approval for development which will create

additional dwelling houses, because this will allow central and local government and communities to better track housing delivery.

Justification for procedure selected

84. Existing powers to prescribe information which must be captured in the planning register in relation to planning applications are subject to the negative resolution procedure and have been exercised in the DMPO. The Government intends to amend the DMPO to reflect these new requirements in relation to specified classes of development and it is therefore considered appropriate for this narrower and uncontroversial requirement to be subject to the same level of parliamentary scrutiny. This will also have the added benefit of allowing for all information requirements to be set out in the same instrument which will provide consistency and efficiency for users of the regime. Furthermore, local authorities will already be recording details of these applications and updating the planning register will not present them with a significant burden which merits further parliamentary debate.

The Government will has published indicative draft secondary legislation, and a policy paper demonstrating how the power in Clause 13 will be exercised[23].

Compulsory Purchase Orders

Part 2, Chapter 1

Clause 21(4): Requirement for the Treasury to make Regulations which specify the rate of interest to be paid on advance payments of compensation which are paid late, and make further provision in connection with the payment of such interest.

Power conferred on: Treasury

Power exercised by: Regulations made be statutory instrument

Procedure: Negative procedure

Purpose and context

85. Clause 19(2) provides that a person having an interest in or right to occupy land is entitled to receive compensation for any loss or injury sustained as a result of the acquiring authority's temporary possession of land.

86. Clause 20(3) provides that a claimant can make a request for an advance payment of that compensation. Clause 21(1) provides that if an acquiring authority is required to make an advance payment of compensation but pays some or all of it late, the authority must pay interest on the amount which is paid late. This will ensure there is an effective sanction against acquiring authorities who fail to make the payment on time.

[23]See document titled 'further information on how the Government intends to exercise the Bill's delegated powers' at https://www.gov.uk/government/publications/neighbourhood-planning-bill-overarching-documents

87. Clause 21(4) provides that the Treasury must by Regulations specify the rate of interest to be paid on advance payments of compensation which are paid late. Clause 21(5) provides that the Regulations may contain further provision in connection with the payment of interest. For example, to allow for the need to update the reference days (currently the Government intends these to be the last day of March, June, September and December), or changing the definition of the base rate that the actual rate of interest is attached to. Regulations made under this power could also provide for a ceiling: in times of high interest rates, 8% above base might be considered to be excessive, so if the base rate was, for example, 12%, it may be appropriate to put a ceiling in place of 20% to protect acquiring authorities.

Justification for delegation

88. It will be important to set a rate of interest that acts as an effective deterrent to late payment, but is not disproportionate and unfairly damaging to the delivery of development in the public interest. The Government intends to therefore set the rate of interest by reference to the base rate (the consultation paper proposed a rate of 8% above the base rate for late payment of advance payments of compensation for land taken by compulsion). It is likely that the rate will be published every quarter to reflect any changes in the base rate and where there is a significant change it will be necessary to update the Regulations. Secondary legislation is therefore the most appropriate way to allow for this. It will also be necessary to review the relationship between the base rate and the payable rate and amend this where necessary. Primary legislation would not allow this objective to be met.

89. Furthermore, there is precedent for this power at section 52B Land Compensation Act 1973, which is inserted by section 196(3) of the Housing and Planning Act 2016. This provides for a penal rate of interest if advance payments of compensation for land taken are late.

Justification for procedure selected

90. This scope of this power is very narrow, allowing only for Regulations to set a level of interest which is of benefit to land owners and which will track base rate in principle and be adjusted only from time to time. It is therefore considered that the negative resolution procedure provides the most appropriate form of Parliamentary scrutiny.

Clause 24(1): Power for the Secretary of State or Welsh ministers to make Regulations about taking possession of land temporarily

Power conferred on: *Secretary of State or Welsh Ministers*

Power exercised by: *Regulations made by statutory instrument*

Parliamentary Procedure: *Affirmative procedure*

Context and Purpose

91. The current compulsory purchase statutory regime only allows for compulsory purchase orders to authorise the permanent acquisition of land or the acquisition of permanent new rights over land. Clause 14(2) creates a new power for acquiring authorities to take temporary possession of land in connection with the carrying out of any development for which the acquiring authority could be authorised to acquire the land compulsorily.

92. Clauses 14 to 26 describe the key constraints and protections around the establishment and use of the temporary possession power and ensure fair and proper notification for affected landowners and occupiers, and provide for the payment of compensation. The Government will further limit and define the temporary possession power in Regulations made under clause 24(1). The purpose of the Regulations is to introduce technical provisions necessary for the implementation of the temporary possession power and to place further limits on the power to take temporary possession to protect the interests of persons affected). The limits will be different according to the different circumstances in which the temporary possession power may be exercised.

93. For example, clause 24(2) provides that the power under clause 24(1) may limit the circumstances in which an acquiring authority may take temporary possession of land such as for special kinds of land[24]and require an acquiring authority to provide specified information relating to the temporary possession period to specified persons[25] . Clause 24(2) also enables provision to be made in the Regulations for a person who has a right to occupy land to be deemed to occupy the land for specified purposes during the temporary possession period[26].

94. The Government also intends to use the Regulations to make provision in relation to the sale by a person with an interest in land where that land is or may be subject to temporary possession (for example, in the event of an order for sale in matrimonial proceedings) and to require an acquiring authority to take steps in relation to the reinstatement of land subject to temporary possession at the end of the temporary possession period. It is also likely to be necessary to make provision in the Regulations limiting the way in which an acquiring authority could use land. For example, in areas of noise sensitivity the use could be limited to storage of materials.

95. Regulations under this power can either be made by Welsh Ministers, in Wales, or the Secretary of State, in relation to England or Wales. This is because Welsh Ministers have executive competence in relation to compulsory purchase functions. The National Assembly for Wales (Transfer of Functions) Order 1999[27] transfers to the National Assembly all functions of a Minister of the Crown under identified enactments including the Acquisition of Land Act 1981 which establishes the procedure for making and authorising compulsory purchase orders. Furthermore, paragraph 30 of Schedule 11 of the Government of Wales Bill 2006 transferred all functions which were initially transferred under the 1999 Order to Welsh Ministers. This gives the Welsh Assembly power to make or confirm compulsory purchase orders made by Welsh authorities and transfers the regulation-making functions under the Acquisition of Land Act to the

[24] Defined in Part 3 of, and Schedule 3 to, the Acquisition of Land Act 1981
[25] E.g. information to be included in the notice of intended entry for temporary possession in clause 16
[26] E.g. for protected tenancies a tenant being treated as being in occupation of the premises to preserve their right to apply for the grant of a new tenancy under Part 2 of the Landlord and Tenant Act 1954
[27] S.I 1999/672.

Assembly so far as the function is exercisable in relation to orders made or confirmed by the Assembly. Welsh Ministers (the executive of the Assembly) therefore have powers in relation to compulsory purchase functions and have made regulations such as the Compulsory Purchase of Land (Prescribed Forms) (National Assembly for Wales) Regulations 2004[28] which prescribe the way in which a CPO must be drafted.

96. The new temporary possession provisions will affect the way in which compulsory purchase orders are drafted and authorised because the order (or other instrument) must contain certain information about the temporary possession power (such as its purpose). It is therefore necessary to ensure that Welsh Ministers also have the power under the Bill when enacted to make or amend compulsory purchase regulations in cases where they are the acquiring or confirming authority. For example, Welsh Ministers will need the power to make new or amended regulations to prescribe the form of a compulsory purchase order so that the Schedule in the compulsory purchase order (which lists affected plots of land to be compulsorily acquired) also contains specific information about the temporary possession power which is to be exercised (for example its duration).

97. Regulations made under clause 24(1) could in theory be treated as a hybrid instrument for the purpose of standing order 216 of the House of Lords as they could provide for different provision to be made for particular areas of land, and acquiring authorities. These Regulations will apply the power of temporary possession in a different way to special kinds of land[29]. For example, in relation to land forming part of a common or open space, the regulations will ensure that temporary possession will only be available in limited circumstances where it would not cause serious detriment to owners or users of the land. An example of different provision being made for different interests would be in circumstances where occupiers of the land being temporarily required have a protected tenancy.[30] The Regulations will make provision to ensure that they will still be treated as being in occupation for the purposes of any rights to a new tenancy.

98. If these Regulations were treated as hybrid, this would result in an extended Parliamentary procedure allowing for individuals to petition and for those petitions to be considered by the select committee formed specifically to consider the instrument. Given that any impact on a particular interest will only be for the purposes of limiting the temporary possession power to give a higher protection for private interests in land that are already affected by the Bill, the hybrid procedure is not necessary to protect those interests.

99. Due to these limits on the power to make Regulations, and the fact that the Regulations will be subject to the affirmative procedure, and the scrutiny which that entails, the Government considers that applying the hybrid procedure to such instruments is unnecessary. Clause 39(6) therefore provides that the hybrid procedure should not apply to Regulations made under Clause 24(1).

[28] S.I 2004/2732.
[29] See paragraph 94 of this memorandum.
[30] Under Part 2 of the Landlord and Tenant Act 1954.

Justification for delegation

100. Regulations will limit the temporary possession power in different ways for different circumstances, as explained above. There will be different types of land, different areas, and different acquiring authorities which might be involved. The Government anticipates that it will be necessary over time to make different provision in respect of different acquiring authorities and for different types of land. This is because the temporary possession power is a new power, and the Government will want to respond to evidence gathered about how it is used to see what further limits need to be prescribed. Both the need to further extend or limit the temporary possession power over time, and the level of detail involved in these limitations make Regulations the most suitable legislative vehicle for these provisions.

Justification for the procedure selected

101. Due to the nature of the power to take temporary possession (which is an interference with property rights) and the public interest in compulsory powers over land, it is considered that the affirmative procedure will ensure the appropriate level of parliamentary scrutiny.

The Government has published a policy paper setting out further details on how this power will be exercised[31].

Final Provisions

Part 3

Clause 38: General power to make consequential provision in consequence of any of the provisions of the Act

Power Conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative procedure if amending primary legislation, otherwise negative procedure

102. Clause 38 confers a power on the Secretary of State to make such consequential provision as is considered appropriate for the purposes of the Bill. There are a number of consequential changes being made by the Bill, particularly those flowing from the addition of a new procedure for modifying neighbourhood plans, restricting the imposition of planning conditions, and amendments to compulsory purchase legislation. It is possible that not all such consequential changes have been identified in the Bill. As such it is considered prudent for the Bill to contain a power to deal with these in secondary legislation.

[31] See document titled 'further information on how the Government intends to exercise the Bill's delegated powers' at https://www.gov.uk/government/publications/neighbourhood-planning-bill-overarching-documents

103. The power in clause 38 allows for the Secretary of State to amend both legislation made by the UK parliament, and the National Assembly for Wales. This is necessary to allow for minor updates to be made to any references in Welsh planning legislation which become necessary as a consequence of the Compulsory Purchase provisions of the Bill.

104. There are various precedents for such provisions, including section 92 of the Immigration Act 2016 and section 213 of the Housing and Planning Act 2016. The scope of this power is narrowed by the requirement that the provision must be consequential on a provision of the Bill. This restricts the use of the power to only achieving the policy endorsed by Parliament when it approved the Bill.

105. Where this power is used to amend primary legislation, the affirmative procedure will apply. All other amendments will be subject to the negative procedure. It is therefore considered that this provides the appropriate level of Parliamentary scrutiny.

Clause 41: Commencement

Power Conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: None

106. This clause contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement Regulations, and to make transitional, transitory or saving provision in connection with the bringing into force provisions of the Bill.

107. As usual with commencement powers, Regulations made under this clause are not subject to any Parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by Regulations enables the provisions to be brought into force at a convenient time.

Department for Communities and Local Government
14 December 2016