



Department for
Communities and
Local Government

Housing and Planning Bill:

Nationally Significant Infrastructure Projects and Housing

Briefing note



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Housing and Planning Bill: Nationally Significant Infrastructure Projects and Housing

Briefing Note on Clause 107

1. This briefing note provides further information on clause 107 of the Housing and Planning Bill as introduced in the House of Commons on 13 October 2015. The clause fulfils the commitment made in the Government's Productivity Plan ("Fixing the Foundations: Creating a more prosperous nation")¹ to legislate to allow an element of housing to be consented when development consent is granted for a nationally significant infrastructure project under the Planning Act 2008 ("the 2008 Act").
2. The legislation being brought forward will enable housing which is related to the infrastructure to be consented as part of a Development Consent Order for a nationally significant infrastructure project. In order to provide flexibility, the Government is proposing that further details on the circumstances where housing will be acceptable and the amount and type of housing that would be allowable should be set out in guidance rather than primary legislation. This briefing note therefore includes a draft guidance note. A final version of this, revised as necessary, will be published if clause 107 receives Royal Assent.

Background

3. The 2008 Act provides the legislative basis for granting consent for nationally significant infrastructure projects in the 5 fields of energy, transport, water supply, waste water and waste. Specific types of nationally significant infrastructure projects in these fields are set out in the 2008 Act², along with thresholds or criteria which determine which projects require consent under the Act³. These project types can be added to or varied through an Order made by the Secretary of State. The Secretary of State can also direct⁴ that projects which do not fall within the thresholds set out in the 2008 Act but fall within the 5 fields are to be treated as projects that require development consent under the 2008 Act.
4. The Growth and Infrastructure Act 2013 extended the 2008 Act so that the Secretary of State can also direct that certain types of business and commercial projects require development consent through the 2008 Act. The definition of what constitutes a business and commercial project is set out in

¹ <https://www.gov.uk/government/publications/fixing-the-foundations-creating-a-more-prosperous-nation>

² Section 15 of the 2008 Act

³ These are set out in sections 15-30 of the 2008 Act

⁴ Section 35 of the 2008 Act

secondary legislation⁵. In issuing a Direction, the Secretary of State must be satisfied that a project falls within the prescribed descriptions of such projects and that it is nationally significant.

5. The process for obtaining consent for a nationally significant infrastructure project is front loaded and the developer consults extensively on a proposed project before submitting an application⁶. Amongst others, the developer must consult local authorities, the local community and statutory consultees before any application is made for consent. Once an application is submitted, the Secretary of State⁷ is required to reach a decision on whether to accept the application for examination.
6. After an application is accepted, it will be examined⁸ by a single inspector or a panel of inspectors from the Planning Inspectorate⁹ known as the Examining Authority. Following completion of the examination, the Examining Authority will provide a report and recommendation to the Secretary of State who then takes the decision on whether to grant consent for the project. Where consent is granted, this will be in the form of a Development Consent Order. This not only provides development consent for the nationally significant infrastructure project but can also incorporate other consents and include authorisation for the compulsory acquisition of land.

The current position on housing

7. Development consent must be obtained under the 2008 Act for development which is, or forms part of, a nationally significant infrastructure project¹⁰ or for any projects that the Secretary of State directs into the regime. Development consent may also be granted for associated development¹¹ This is development which is intrinsically linked to the infrastructure project or needed to support it, for example, the construction of a railway station on a new railway line.
8. The 2008 Act does not currently permit any housing to be consented because:
 - housing does not fall within any category of infrastructure for which development consent is required under the 2008 Act;

⁵ The Infrastructure Planning (Business or Commercial Project)s Regulations 2013

⁶ For Guidance on consultation and the pre-application process is available – see: <https://www.gov.uk/government/publications/guidance-on-the-pre-application-process-for-major-infrastructure-projects>

⁷ The Planning Inspectorate will undertake this role on behalf of the Secretary of State.

⁸ Guidance on the examinations process is available at: <https://www.gov.uk/government/publications/planning-act-2008-examination-of-applications-for-development-consent>

⁹ The Planning Inspectorate are an executive agency of DCLG responsible for acting on behalf of the Secretary of State in examining applications. They also have a separate role of providing advice to applicants on the requirements and processes under the 2008 Act.

¹⁰ Section 31 of the 2008 Act

¹¹ Section 115(2) of the 2008 Act. There is also guidance on associated development – see: <https://www.gov.uk/government/publications/planning-act-2008-associated-development-applications-for-major-infrastructure-projects>

- the regulations that prescribe the descriptions of business and commercial projects are precluded from including the construction of one or more dwellings; and
 - associated development as defined in the 2008 Act is development which “is not the construction or extension of one or more dwellings”.
9. The consequence of not being able to grant development consent for housing through a Development Consent Order is that the only accommodation that development consent can be obtained for is temporary accommodation (eg for construction workers). Such accommodation must normally be removed or demolished once construction of an infrastructure project is completed. Developers of nationally significant infrastructure projects who wish to include even the smallest element of permanent housing in their proposals are therefore forced to seek planning permission from the local planning authority through a separate application under the Town and Country Planning Act 1990. This has time and cost implications for developers.

What is being changed?

10. The Government wants developers to be able to obtain consent for a limited amount of housing as part of a Development Consent Order for a nationally significant infrastructure project under the 2008 Act. In particular, it wants to allow developers to seek development consent for housing in cases where:
- (i) there is a **functional need** for the housing in terms of the construction or operation of a project. For example where housing (rather than temporary accommodation) is needed for construction workers, or to support a 24 hour presence on the site for key workers);
 - (ii) the housing is not functionally linked to the infrastructure project but is in **geographical proximity** to the project, (For example, housing which is within the boundary of an infrastructure project such as a business and commercial project that includes housing, or housing that is adjacent to or in close proximity of a nationally significant project (eg a rail station on a railway line).
11. To achieve this, the Government proposes to amend section 115(1) of the 2008 Act so that “related housing development” can be granted development consent. Related housing development is defined in a new section 115(4B) as follows:
- “Related Housing development means development which –
- (a) consists of, or includes the construction of one or more dwellings,
 - (b) is on the same site as, or is next to or close to, any part of the development within subsection (1)(a) or is otherwise associated with that development (or any part of it), and
 - (c) is to be carried out wholly in England.”

12. The amendment therefore permits housing to be consented as part of a Development Consent Order where:
 - (i) the housing is in geographical proximity to a nationally significant infrastructure project (“development which...is on the same site as, or is next to or close to any part of the development”): and/or
 - (ii) the housing is required to meet a functional need (“development which...is otherwise associated with that development (or any part of it”).
13. The proposed amendment to section 115 of the 2008 Act will only apply to nationally significant infrastructure projects that are physically located:
 - (i) entirely within England, or
 - (ii) in waters adjacent to England up to the seaward limits of the territorial sea.

Any related housing development will also have to be located wholly within England. Although the 2008 Act does apply in Wales, **the power for the Secretary of State to grant development consent for housing will not apply to any project in Wales.**

14. The amendment being made to legislation will also **not allow projects that only comprise housing** to be granted development consent. Housing will only be capable of being consented if it is linked (either by a functional need or by geographical proximity) to an infrastructure project that itself requires development consent.
15. The amount of housing allowed will be limited and set in guidance rather than primary legislation. The amendment proposed to section 115 of the 2008 Act requires the Secretary of State to take account of any matters set out in guidance when taking decisions on applications for development consent that include housing.

Guidance

16. The Government is not proposing that detailed matters in relation to granting development consent for housing should be covered in the Housing and Planning Bill. To minimise regulation and provide maximum flexibility, more detailed issues relating to the inclusion of housing will be covered in guidance.
17. A maximum limit of 500 dwellings will be set in guidance. The guidance will make clear that it is very unlikely that the Secretary of State will grant consent for more than 500 dwellings in a single Development Consent Order and that in some locations, for example those where development is already restricted by policies in the National Planning Policy Framework, a lower amount of housing, or no housing at all, will be appropriate.

18. In addition, the guidance will also cover:

- the types of infrastructure that housing could be included with;
- the two circumstances in which housing that might be built (functional link or geographic proximity);
- the location of housing in relation to the infrastructure;
- the assessment of housing proposals; and
- how the housing element of any nationally significant infrastructure project will be treated at each stage of the nationally significant infrastructure planning process and the considerations that will need to be taken into account by developers.

19. Annex A of this briefing document includes a draft of the guidance. This is based on an assumption that clause 107 of the Housing and Planning Bill as introduced will achieve Royal Assent.

Draft Guidance: Nationally Significant Infrastructure Projects and Housing

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Introduction

1. This draft guidance has been produced by the Government to cover changes to the Planning Act 2008 (“the 2008 Act”) proposed by clause 107 of the Housing and Planning Bill. These changes, if the bill receives royal assent, will allow development consent to be obtained for housing which is related to a nationally significant infrastructure project under the 2008 Act. **This guidance has been drafted on the basis that the provisions in the Housing and Planning Bill as introduced in the House of Commons will receive royal assent.**
2. The 2008 Act provides the consenting regime for granting planning and other consents for nationally significant infrastructure projects. These are large scale developments, both onshore and offshore, such as new harbours, roads, railways, power stations and electricity transmission lines. The 2008 Act sets out the thresholds above which certain types of infrastructure development are considered to be nationally significant and in relation to which developers must seek development consent under the Act. The Secretary of State may also issue a direction¹, the effect of which is to bring a project into the remit of the consenting regime provided for in the 2008 Act.
3. Obtaining development consent under the 2008 Act involves a front loaded process where the developer consults on a proposed project before submitting an application. The application will then be examined by a single inspector or a panel of inspectors from the Planning Inspectorate, known as the Examining Authority. On completion of the examination, the Examining Authority will provide a report and recommendation to the Secretary of State who will decide whether consent should be given.
4. Where the Secretary of State proposes to grant consent for a project, this will be through a Development Consent Order which is normally made as a statutory instrument – a form of secondary legislation. The Development Consent Order not only provides planning consent for the project but may also incorporate other consents and include authorisation for the compulsory acquisition of land. The Order will specify details of the development consented and its location (including plans) and any requirements (conditions) that must be met in implementing the consent.
5. The changes to the 2008 Act made by the Housing and Planning Act 2016 allow the Secretary of State to grant development consent for housing which is related to a nationally significant infrastructure project. This guidance note sets out matters relating to:
 - the types and location of infrastructure projects where housing may be included in an application for development consent;
 - the circumstances where housing might be consented;

¹ Directions may be issued under section 35 of the 2008 Act for projects in the fields of energy, transport, water supply, waste water and waste and business and commercial projects of a prescribed type where the Secretary of State is of the view that these are nationally significant.

- the maximum amount of housing that may be consented;
- the location of housing that may be consented;
- some of the factors that may be taken into account in deciding applications for development consent that include an element of housing.

The guidance also includes a step-by-step guide to the planning process for handling nationally significant infrastructure projects under the 2008 Act and the considerations that developers as well as local authorities and other consultees will need to take into account at each stage of that process.

Who is this guidance aimed at?

6. The main audience of this guidance is expected to be developers of nationally significant infrastructure projects who are considering using the provisions in the Housing and Planning Act to include an element of housing as part of their application for development consent for a nationally significant infrastructure project. It may also be of interest to local authorities, statutory consultees, and organisations or individuals who have an interest in such projects.

Status of this guidance

7. Nothing in this guidance should be taken as indicating that any requirement of planning law or any other law may be overridden. The guidance does not replace the statutory provisions of the 2008 Act or any regulations made under that Act and does not add to their scope. Only the courts can give an authoritative interpretation of legislation.
8. Section 115(7) of the 2008 Act requires the Secretary of State to take into account any matters set out in this guidance when deciding an application for an order granting development consent that includes related housing development.

Changes introduced by the Housing and Planning Act

9. Section [] of the Housing and Planning Act 2016 brought in provisions that allow development consent to be granted for housing which is related to a nationally significant infrastructure project. It amends section 115 of the 2008 Act by adding “related housing development” to the types of development for which development consent can be granted.
10. Related housing development is defined in the new section 115 (4B):

“Related Housing development means development which –
 (a) consists of, or includes the construction of one or more dwellings,

- (b) is on the same site as, or is next to or close to any part of the development within subsection (1)(a) or is otherwise associated with that development (or any part of it),
- (c) is to be carried out wholly in England, and
- (d) meets the condition in subsection (4C)”

New subsection 4C allows related housing development in cases where the development for which development consent is required (ie the infrastructure project itself) is located wholly in England, or in waters adjacent to England up to the seaward limits of the territorial sea.

11. The effect of this is to allow housing to be granted development consent in two specific circumstances:
 - (i) where there is a **functional need** for the housing in terms of the construction or operation of a project. For example where housing (rather than temporary accommodation) is needed for construction workers, or to support a 24 hour presence on the site for key workers);
 - (ii) where the housing is not functionally linked to the infrastructure project but is in **geographical proximity** to the project, (for example, housing which is within the boundary of an infrastructure project such as a business and commercial project that includes housing, or housing that is adjacent to or in close proximity of a nationally significant project (eg a rail station on a railway line).
12. The changes introduced by the Housing and Planning Act 2016 will not allow projects that only comprise housing to be granted development consent. Housing will only be capable of being consented if it is linked (either by a functional need or by geographical proximity) to an infrastructure project that itself requires development consent.

Infrastructure categories and housing

13. The changes made by the Housing and Planning Act 2016 allow consent to be granted for related housing development for any infrastructure project where development consent is being applied for and the project is wholly in England. Development consent cannot be granted for housing in Wales.
14. The Government does not propose to place limits on the categories of infrastructure project that may include housing. This will mean any of the categories of nationally significant infrastructure projects specified in the 2008 Act², and any projects that are directed into the regime³ may include an element of housing in an application for development consent. Some infrastructure project types will naturally be more suited for inclusion of housing than others but the Government believes that decisions on whether to include

² See section 14 of the 2008 Act

³ Under section 35 of the 2008 Act

housing in an application should be left to the judgement of developers, taking into account this guidance note.

Amount of housing

15. The Government wants to ensure that the flexibility being provided to allow an element of housing to be consented through a Development Consent Order under the 2008 Act does not undermine the local planning process and the wider responsibilities for local authorities to plan for housing need in their area. It is therefore setting a maximum amount of housing that can be consented through a Development Consent Order.

Housing provided on the basis of geographical proximity

16. Where housing is being provided on the basis of geographic proximity to an infrastructure project, the maximum amount of permanent housing that could be granted consent through a Development Consent Order is 500 dwellings. Given the importance of ensuring that the local planning process is not undermined, it is very unlikely that the Secretary of State will consent more than 500 permanent dwellings for a single nationally significant infrastructure project.

Housing provided on the basis of functional need

17. Where housing is being provided on the basis of a functional need, the maximum amount of permanent housing that could be granted consent through a Development Consent Order is also 500 dwellings.
18. There may be some situations where a developer chooses to provide housing for construction workers (as opposed to temporary accommodation) which is of a standard that will allow this housing to be retained as, or converted to, permanent dwellings once construction of an infrastructure project is complete. In such cases, more than 500 dwellings may be consented for the construction phase of the project as long as these are subsequently converted so that the number of permanent dwellings after any conversion is 500 or less. The requirement for conversion should be included within the Development Consent Order.

Temporary Accommodation

19. The ability for a Development Consent Order to include consent for temporary accommodation (eg for construction workers) remains unchanged by the amendments made by the Housing and Planning Act. Such temporary accommodation will be classed as associated development rather than related housing development and will normally be expected to be removed or demolished once construction of an infrastructure project is completed.

Restrictions on amount of housing in certain locations

20. Irrespective of whether housing is being provided on the basis of geographic proximity or functional need, in locations where specific policies in the National Planning Policy Framework⁴ indicate that development should be restricted, a lower number of dwellings, or no housing at all, is likely to be appropriate. These policies include those for:
- sites protected under the Birds and Habitats Directives and/or designated as Sites of Special Scientific Interest;
 - land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority);
 - designated heritage assets; and
 - locations at risk of flooding or coastal erosion.
21. In assessing any proposals for housing in these locations, the Examining Authority (during the examination of the application for development consent) and the Secretary of State (when reaching a decision on the application) will assess the housing element, including the appropriateness of the amount of housing being sought, against the relevant policies set out in the National Planning Policy Framework.

Affordable housing and Starter Homes

22. In cases where there is no functional need and housing is granted consent on the basis of geographic proximity to an infrastructure project, the Secretary of State expects any housing consented to include a percentage of affordable housing in accordance with any policies set out in a local plan. Any housing consented should also include an element of Starter Homes. Affordable housing and Starter Homes should be secured through a section 106 agreement between the developer and the local authority.

Location of housing

23. Where housing is being provided on the basis of geographic proximity to the infrastructure for which development consent is sought, developers will need to demonstrate that it is on the same site as, or is next to or close to any part of that infrastructure. In this context, “close to” should be considered to be up to 1 mile away from any part of the infrastructure for which consent is being sought. It should be clear from the application documents being provided that the housing being provided meets this parameter (see paragraphs 33-35 below).

⁴ <https://www.gov.uk/government/publications/national-planning-policy-framework--2>

24. If housing is being provided on the basis of a functional need, then the expectation is that the housing will normally need to be located close to the infrastructure project concerned. However, where it is proposed to provide a large amount of housing to meet a functional need (eg for construction workers) it may be more appropriate for this to be in a location that is not in the immediate vicinity of the infrastructure project. It may, for example, be more sustainable in overall terms for the housing to be provided in a local town, with better access to other local services and facilities, as long as it is within reasonable commuting distance of the infrastructure being constructed.
25. Developers will be expected to include a justification for the location of any housing in their application for development consent (see paragraphs 34 -36 below).

Assessment of housing proposals

26. The housing element of any application for development consent will be subject to the examination process provided for by the 2008 Act and associated secondary legislation⁵. Although there will be a single examination, the housing element of any application is likely to need examination as a discrete entity. This is to ensure that any housing proposed is acceptable in planning terms.
27. It will be for the Examining Authority to decide the basis for the examination of the housing elements of any application. But as a minimum, it is likely that they will want to consider the justification for any housing where it is being provided to meet a functional need; the amount of housing being proposed (irrespective of whether it is being proposed on the basis of functional need or is being provided on the basis of geographic proximity); and its location.
28. In examining and reporting on the housing proposal, the examining authority will need to assess the housing against policies set out in the National Planning Policy Framework and matters set out in supporting planning guidance. The Framework is also likely to be an important and relevant consideration for the Secretary of State when reaching a decision on whether to grant consent for any housing element of an infrastructure project.
29. The policies in any development plan may also be relevant in terms of the assessment of housing proposals by the Examining Authority. Policies in the development plan are also likely to be an important and relevant consideration for the Secretary of State when deciding whether to grant development consent for the housing element of the scheme.
30. The 2008 Act provides local authorities with the opportunity to submit a local impact report which sets out the likely impact of the development covered by an application for development consent. Local impact reports are valuable

⁵ The Infrastructure Planning (Examination Procedure) Rules 2010

documents that ensure the examining body are aware of the local impacts of development for which consent is sought and so will assist in the overall examination of an application. The Secretary of State is also required to have regard to any local impact report when deciding whether to grant development consent. Local authorities are strongly encouraged to submit a local impact report and to ensure that it covers any specific impacts arising from the housing. It is also open to the Examining Authority to request any information from a local authority that they may consider necessary (for example, in relation to the impacts on local housing markets and supply).

Application process under the Planning Act 2008

Directions for business and commercial and other projects

31. Where the Secretary of State considers a request for a project⁶ to be directed into the nationally significant infrastructure planning regime, the request will be considered in terms of the provisions set out in section 35 of the 2008 Act. In particular, the Secretary of State will consider whether the proposed infrastructure in itself is of national significance. Consideration of any housing element to a project will not form part of this assessment of national significance and will not be a factor in deciding whether a direction should be issued.

Pre-application and consultation

32. The extensive pre-application consultation that is a key feature of the nationally significant infrastructure planning regime applies equally to any project where it is proposed to include an element of housing in an application for development consent. Full engagement with local authorities and local communities on any proposed infrastructure projects that will involve housing is essential. That engagement must include clear information about the amount and type of housing proposed and where it will be located. Existing guidance on the Planning Act 2008 pre-application process⁷ will also be equally relevant to proposed infrastructure projects that include an element of housing.
33. Developers should also discuss any proposals for infrastructure projects with an element of housing with the Planning Inspectorate at an early stage in the pre-application process.

Applications

34. An application for development consent for an infrastructure project that includes an element of housing will need to meet the requirements set out in

⁶ Under section 35(2) of the 2008 Act, a direction can be given if a project or proposed project is in the field of "...energy, transport, water, waste water, or waste" or is a "business and commercial project (or a proposed project) of a prescribed prescription".

⁷ <https://www.gov.uk/government/publications/guidance-on-the-pre-application-process-for-major-infrastructure-projects>

existing regulations⁸. Information on the housing element of a project in an application should provide the same level of detail as if an application for full (not outline) planning permission were being sought.

35. In addition to the requirements set out in the regulations, developers will need to provide a simple one page summary of the housing element of their application. This should include the amount of housing for which development consent is sought and the basis for it (functional need or geographic proximity). In the case of housing being provided to meet a functional need, a short justification for that need should also be included within the summary.
36. Where housing is being provided on the basis of geographic proximity, the developer should provide an assessment of the impact of the housing proposed in terms of local plan provision and local housing supply.

Acceptance stage

37. The legal basis for consideration of whether an application for development consent should be accepted for examination will be no different where an application includes an element of housing. Under the 2008 Act⁹, the Secretary of State will only be able to accept an application where the application is considered to be of a satisfactory standard and where the applicant has complied with the requirements in respect of pre-application procedures. In considering whether pre-application procedures have been met, the Secretary of State will have regard to the consultation report submitted with the application, any adequacy of consultation representation received from a local authority, and the extent to which the applicant has had regard to guidance on pre-application procedures. In all cases where an element of housing has been included in an application, the Secretary of State will want to ensure that the housing element has been properly consulted on before any application is accepted for examination.
38. The Secretary of State is highly unlikely to accept an application for examination which is seeking consent for more than 500 permanent dwellings.

Examination of applications

39. The examination of any application will be an examination of the whole application for development consent. However it is likely that the housing element of a scheme will need to be examined as a discrete entity in order to assess the acceptability of the housing proposed in planning terms. It will be for the Examining Authority to decide the issues that arise in respect of the housing element that need examination and how the examination of those issues should be undertaken.

Report and recommendations by the examining authority

⁸ The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009

⁹ See section 55(3) of the 2008 Act

40. There will be no change to the way in which the Examining Authority report and make recommendations to the Secretary of State. Currently, the Examining Authority may recommend to the Secretary of State that part of the development (or associated development) for which development consent is sought should not be granted development consent. It will be equally open to the Examining Authority to recommend that related housing development should not be granted consent.

Decisions by the Secretary of State

41. There will also be no changes to the process for taking decisions by the Secretary of State. Decisions on applications for development consent for infrastructure projects that include an element of housing will be taken by the Secretary of State with decision making responsibility for the infrastructure concerned.
42. The requirement¹⁰ for the Secretary of State to decide an application in accordance with any relevant national policy statement remains (except to the extent that certain other considerations set out in the 2008 Act may apply). It will, however, be open to the Secretary of State to grant consent for the infrastructure, but refuse consent for some or all of the housing, if he considers that the adverse impact of the housing outweighs the benefits of the development as a whole.

Changes to Development Consent Orders post consent

43. The 2008 Act and regulations¹¹ make provision for changes to be made to Development Consent Orders once a consent has been granted by the Secretary of State. However, any application for a change that seeks development consent for housing may fall into the category of being a change for which a fresh application for development consent will be required¹². This is particularly likely to be the case if it is proposed to seek consent for a significant amount of housing when little or no housing was included in the original consent.

Enforcement

44. Existing mechanisms in the 2008 Act¹³ will to apply to projects where the Development Consent Order for an infrastructure project includes consent for housing. Such provisions would be available if, for example, a developer constructed related housing development but did not build the infrastructure it was related to.

¹⁰ Section 104(3) of the 2008 Act

¹¹ See, in particular, Schedule 6 of the 2008 Act and the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 (as amended).

¹² See the amendment made to Schedule 6 of the 2008 Act by section 28(3) of the Infrastructure Act 2015.

¹³ See part 8 of the 2008 Act and the power to seek a revocation of a Development Consent Order under Schedule 6 of the 2008 Act

