



# HOUSING WHITE PAPER:

## Fixing our broken housing market

February 2017

### INTRODUCTION

On 7 February 2017, the Department for Communities and Local Government (“DCLG”) published its much trumpeted and long awaited Housing White Paper, together with a flurry of associated documents. The White Paper is called “Fixing our broken housing market” and it accepts the existence of a housing crisis in emphatic terms: our “broken” housing market is, the Prime Minister tells us in her Foreword, one of the greatest barriers to progress in Britain today. And the White Paper is clear that there is a “moral duty” for everyone involved in politics and the housing industry to tackle the problem.

The underlying issue is simple: for decades, there has been an undersupply of new homes (since the 1970s there have been on average 160,000 new homes each year in England, but there is a broad consensus that England needs in the order of 225,000 to 275,000 or more each year to keep pace with population growth and to start to tackle historic undersupply).<sup>1</sup> But tackling this undersupply has proved profoundly difficult, and although the White Paper aims for a comprehensive approach that “tackles failure at every point in the system”<sup>2</sup> there is much that needs to be done.

### Contents

1. INTRODUCTION
2. THE HOUSING WHITE PAPER AND ASSOCIATED DOCUMENTS
2. LOCAL PLANS
3. NEIGHBOURHOOD PLANS
4. OBJECTIVELY ASSESSED NEED FOR HOUSING
4. FIVE YEAR HOUSING LAND SUPPLY
5. THE HOUSING DELIVERY TEST
5. GREEN BELT AND BROWNFIELD ISSUES
7. COMPULSORY PURCHASE POWERS
8. THE WHITE PAPER – THE DEVELOPER’S PERSPECTIVE
9. CONTRIBUTORS

<sup>1</sup> Housing White Paper, page 9.

<sup>2</sup> Housing White Paper, Foreword from the Prime Minister.

The White Paper recognises the problems of affordability and finance which hinder development, the need to promote smaller sites and smaller developers, the role of the public sector and the contribution which planning makes. Our note focuses on the planning aspects and seek to provide some initial thoughts on the difference which the proposals will make. It is important to recognise what parts of the paper are White – as steps which the government will take – and which are Green – being ideas put out for consultation. On some matters such as planning steps to encourage permissions to be built out quickly and policy making processes there is a great deal of debate to be had. James Strachan QC, Philippa Jackson and Ned Helme provide briefings on different aspects, whilst Peter Village QC looks at the measures to speed up housebuilding from the developer's viewpoint.

We will be discussing these issues further in a seminar at 39 Essex Chambers on 29th March 2017.

## THE HOUSING WHITE PAPER AND ASSOCIATED DOCUMENTS

The Housing White Paper Collection, as it is referred to on the gov.uk website,<sup>3</sup> consists of the following materials, all published on 7 February 2017:

- a. The Housing White Paper itself, together with the Press Release and Oral Statement to Parliament that accompanied it;
- b. A consultation on the Housing White Paper, running to 2 May 2017;
- c. A consultation on "Planning and affordable housing for Build to Rent" running to 1 May 2017;
- d. The Government response to its consultation on "proposed changes to National Planning Policy" which ran from 7 December to 22 February 2016;
- e. The Government response to its technical consultation on "starter homes regulations" which ran from 23 March to 30 June 2016;
- f. The Government response to its technical consultation on "implementation of planning changes", its consultation on "upward extensions in London" and its consultation on "Rural Planning Review call for evidence", all of which ran from 18 February to 15 April 2016;
- g. The Government response to the Communities and Local Government Select Committee inquiry into

the 16 March 2016 Report of the Local Plans Expert Group; and

- h. The Community Infrastructure Levy review: report to Government.

Although not part of the Housing White Paper Collection, 7 February 2017 also saw the publication of the Government response to the DCLG Committee Report on the Consultation on National Planning Policy.<sup>4</sup>

The Housing White Paper itself is a substantial document, running to 106 pages, and separated into four Chapters: (1) planning for the right homes in the right places; (2) building homes faster; (3) diversifying the market; and (4) helping people now. It includes a substantial Annex providing further detail and consultation on the proposals in Chapters 1 and 2 (but not 3 and 4, other than a separate consultation on Build to Rent proposals in Chapter 3). Many of the changes proposed in the Housing White Paper will require amendments to the National Planning Policy Framework ("NPPF"), and the Government intends to publish a revised NPPF later this year, consolidating the outcomes of the Housing White Paper consultation and the various associated consultations.

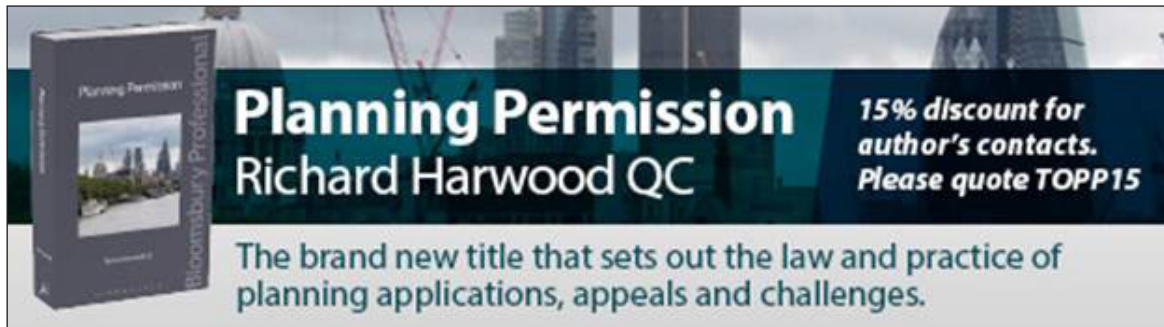
## LOCAL PLANS

The White Paper identifies the failure to have in place up-to-date local plans as one of three key factors behind the country's current housing crisis. This will come as no surprise to either Local Planning Authorities or Developers, and indeed the proposals contained in the White Paper largely reflect the recommendations of the Local Plans Expert Group, which was established in September 2015 to consider this issue.

The paper notes that over 40 per cent of local planning authorities do not have a plan that meets the projected growth in households in their area. In broad terms, the government therefore intends to: (i) simplify and streamline the Local Plan process to speed up plan making, including introducing a standardised approach to assessing housing requirements (discussed below) and; (ii) establish new powers of intervention to ensure that every authority has an up-to-date plan in place.

<sup>3</sup> <https://www.gov.uk/government/collections/housing-white-paper>

<sup>4</sup> <https://www.gov.uk/government/publications/government-response-to-the-clg-committee-report-on-the-consultation-on-national-planning-policy>



The Government has also indicated that it will remove the expectation that areas should be covered by a single local plan. Instead, it will set out the “strategic priorities” that each area should plan for, with flexibility over how to achieve these. At the same time, it intends to strengthen expectations about keeping plans up-to-date by requiring them to be reviewed regularly and updated at least every five years. The White Paper also reiterates the Government’s commitment to and support for the Neighbourhood Plan process.

While the need for regular reviews is laudable, it remains to be seen whether this new requirement will help to reduce the cost, time and bureaucracy associated with the Local Plan process. Nor is it currently clear that allowing Local Authorities to have more than one plan – presumably with multiple examinations and the prospect of multiple legal challenges – will help to streamline the Local Plan process.

The government’s threat of intervention is also nothing new: a similar statement was made in 2015 by the then Housing Minister, Brandon Lewis. The ability for the Government to compel dilatory local authorities to produce up-to-date plans makes sense, but whether these powers will be effective will presumably depend on the strength of the sanctions available to the Government in the event of non-compliance.

## NEIGHBOURHOOD PLANS

The Government shows no signs of curbing its enthusiasm for Neighbourhood Plans. The White Paper states that those plans in force that plan for a housing number have, on average planned for approximately 10% more homes than the number for that area set out by the relevant local planning authority. The White Paper refers to the separate legislative measures in the Neighbourhood

Planning Bill to encourage their preparation, by giving them “full weight” in the planning process as early as possible and measures for streamlining their production and amendment.

The White Paper expresses a Government concern that these plans are being “undermined” because they are vulnerable to speculative applications where the local planning authority does not have a five-year housing land supply. To make such plans more effective, the White Paper announces proposals to amend planning policy so that neighbourhood planning groups can obtain a “housing requirement figure” from their local planning authority. No guidance is given as to how that “housing requirement figure” will be set by local authorities; however, views are being sought in the consultation on the standardised methodology on OAN as to whether it could be used for calculating housing need in a neighbourhood plan area.

This may well be difficult to achieve. A frequent weakness in Neighbourhood Plans is the lack of clear correlation or realism as to how the housing requirements for the local authority will be met if the Neighbourhood Plan is too restrictive or is not itself based upon a proper understanding of the wider OAN.

Controversially, the Government had already sought to bring in what it regarded as additional policy protection for Neighbourhood Plans against being treated as out-of-date where there is a lack of five year housing supply in the local authority’s area. By Written Ministerial Statement of 12 December 2016, the Government stated that relevant policies for the supply of housing in a neighbourhood plan should not be deemed to be ‘out-of-date’ for 2 years after the statement, or where the neighbourhood plan was no more than 2 years

old if the plan allocates site for housing and the local planning authority can demonstrate “a three-year supply of deliverable housing sites”. The introduction of this policy without consultation is the subject of an outstanding legal challenge. The White Paper proposes amending this policy (subject to consultation) so that the protection applies where (a) neighbourhoods can demonstrate that their site allocations and/or housing policies will meet their share of local housing need; and (b) the local planning authority should be able to demonstrate through the housing delivery test that, from 2020, delivery has been over 65% (25% in 2018; 45% in 2019) for the wider authority area (to ensure that delivery rates across the area as a whole are at a satisfactory level).

As to (a), this gives rise to the difficulty already mentioned of being able to establish a local “housing requirement figure”. As to (b), it is evident that delivery for these purposes will be measured against that local housing requirement figure using the “housing delivery test” that the White Paper seeks to introduce.

## **OBJECTIVELY ASSESSED NEED FOR HOUSING**

The White Paper refers to some local authorities being able “to duck potentially difficult decisions” on delivering housing requirements for their area by coming up with their own methodology for calculating their objectively assessed need (OAN). The importance of an “honest” assessment of such need is identified.

This part of the White Paper refers to a recurring difficulty. An accurate calculation of OAN is of fundamental importance if one is to plan properly for required housing growth; equally, it is a key ingredient for assessing five years of housing land supply and so when a local plan is out of date. Local authorities are well aware that the higher the OAN, the greater the pressure there will be to find housing for their area and the harder it may be to show the existence of a five year supply. For some local authorities, this has led to the promotion of unrealistically low figures.

The White Paper suggests that arguments over OAN and its calculation have been a factor in making plan-making slow, expensive and bureaucratic. It identifies that a lack of a standard methodology in the existing system

creates particular complexity and lack of transparency. Whilst the NPPF contains criteria, it is silent on how the assessment itself is to be done. This has led to many disputes over methodology, be it over factors like the ‘Liverpool’ or ‘Sedgefield’ approach, or how one decides whether a local authority is a 5% or 20% buffer authority. History has demonstrated that some local plans have been found unsound at examination due to unrealistic OANs.

The Government believes that the lack of a standard methodology makes the process opaque for local people, as well as meaning that the number of homes needed is not fully recognised. The White Paper therefore anticipates the introduction of a more standardised approach from April 2018. But it does not set out what the standardised approach is proposed to be. Instead it says that consultation is to be published “at the earliest opportunity” this year with the outcome resulting in changes to the NPPF. Any standardised approach will therefore very much depend upon such outcome.

Moreover, the standardised approach will not be mandatory. The Government is proposing incentives for its adoption and will require local authorities that decide not to use to explain this and justify any different methodology to the Planning Inspectorate. The Government proposes to set out what might constitute reasonable justification from deviating from the standard methodology (presumably in the NPPF as well). The Government anticipates that if a local authority does not have an up-to-date local or strategic plan by April 2018, the new methodology for calculating OAN will apply as the baseline for assessing five year housing land supply and housing delivery in a Council’s area the local authority can justify an exception (such as ambitious new plans for its area).

## **FIVE YEAR HOUSING LAND SUPPLY**

The White Paper does not signal any change to the policy importance of being able to demonstrate a five year housing land supply and treating policies for the supply of housing as out of date where no such supply exists. The White Paper describes this policy as having been an effective, but blunt tool which has led to an increase in planning by appeal. To reduce this effect, the Government is proposing to amend the NPPF to give local authorities the opportunity to have their housing



land supply agreed on an “annual basis” and fixed for a one year period (ie relevant plan policies will be assumed to be up to date for the ensuing year). It seems that this option will be available if local authorities include a 10% buffer within the requirement. It is unclear if this is intended to be a further buffer over the 5% or 20% figure relating to past performance.

The White Paper is light on how this new policy will be delivered in practice. It identifies that annual assessments will need to be prepared in consultation with developers as well as other interests who will have an impact on the delivery of sites (such as infrastructure providers). It anticipates that guidance will set out more detail on how the 5 year land supply must be calculated, including making appropriate allowance for the fact that smaller sites tend to be built out more quickly than larger ones. It also anticipates the need to publish the assessment in draft, following by consideration and agreement by the Planning Inspectorate. But beyond that the proposed mechanisms are unclear and views are sought on what will inevitably be controversial, namely whether PINS should merely be reviewing the draft to see if it is “robust” or whether PINS should be making its own assessment itself.

For those that do not follow this process, the current approach in the NPPF will remain applicable.

### THE HOUSING DELIVERY TEST

As part of the drive to stimulate building homes faster, the White Paper promotes an intention to hold local authorities to account through a new “housing delivery test”.

The test is intended to show where the number of homes being built is below the relevant target. The first assessment period will be for the financial years April 2014 - March 2017. Statistics on net additional dwellings will be used to derive a rolling three year annual average. Where under-delivery is identified, the Government proposes a tiered approach to addressing the situation that will be set out in national policy and guidance. The White Paper envisages that from November 2017, if delivery of housing falls below 95% of the authority's annual housing requirement, the local authority will need to publish an action plan. If delivery is below 85%, authorities will be expected to plan for a 20% buffer



in their five year land supply. From November 2018, if delivery of housing falls below 25% of the housing requirement, the presumption in favour of sustainable development in the National Planning Policy Framework will apply automatically. From November 2019, if delivery falls below 45% the presumption would apply. From November 2020, if delivery falls below 65% the presumption would apply.

The intention is therefore again one of introducing some standardised approach to the consequences of failing to deliver housing at agreed percentages. But the details of the policy and its implementation will be critical and it remains to be seen whether threshold percentages applied in this way are effective in boosting housing delivery in practice.

### GREEN BELT AND BROWNFIELD ISSUES

In the run-up to the publication of the Housing White Paper, there was much speculation that it would signal a major weakening of Green Belt protection and/or support major releases from the Green Belt. That has turned out not to be the case, and in his Oral Statement

to Parliament, Sajid Javid was keen to confirm that the Housing White Paper does not remove any of the Green Belt's protections. This has caused some consternation in the developer community, but has contributed to the Housing White Paper being broadly welcomed by the Campaign to Protect Rural England.<sup>5</sup> The logic appears to be that only around 13% of land is covered by Green Belt,<sup>6</sup> and only about 11% of total land has been built upon,<sup>7</sup> so that fixing the housing market does not require the Government to renege on its manifesto promise to protect the Green Belt.<sup>8</sup> The realism of that approach remains to be seen.

Yet changes to NPPF Green Belt policy are proposed. The current NPPF states at paragraph 83 that Green Belt boundaries should only be altered in "exceptional circumstances" through the preparation or review of the Local Plan, but the NPPF does not specify what might constitute such circumstances. In a desire to "be more transparent about what this means in practice and so that local communities can hold their councils to account" the Government proposes<sup>9</sup> to amend the NPPF to make clear:

- a. that authorities should amend Green Belt boundaries only when they can demonstrate that they have examined fully all other reasonable options for meeting their identified development requirements;
- b. that where land is removed from the Green Belt, local policies should require the impact to be offset by compensatory improvements to the environmental quality or accessibility of remaining Green Belt land;
- c. that when carrying out a Green Belt review, local planning authorities should look first at using any Green Belt land which has been previously developed and/or which surrounds transport hubs;
- d. that appropriate facilities for existing cemeteries are not to be regarded as 'inappropriate development' in the Green Belt;
- e. that development brought forward under a Neighbourhood Development Order should also

not be regarded as inappropriate in the Green Belt, provided it preserves openness and does not conflict with the purposes of the Green Belt; and

- f. that where a local or strategic plan has demonstrated the need for Green Belt boundaries to be amended, the detailed boundary may be determined through a neighbourhood plan (or plans) for the area in question.

The Housing White Paper also indicates the Government's intention to explore whether higher contributions can be collected from development as a consequence of land being released from the Green Belt.<sup>10</sup>

As can be seen, therefore, the Government is proposing significant changes to Green Belt policy. It is not clear whether this will lead to it becoming more or less strict. But the requirement on authorities to examine fully all other reasonable options before amending Green Belt boundaries may prove burdensome, and render such amendments less likely. It is also not clear whether or how the scale of compensatory improvements to offset releases will be set so as to take account of the quality of the Green Belt released (by no means all of the Green Belt is of high quality or serves any of the paragraph 80 Green Belt purposes). And the proposal for higher contributions may prove controversial in the context of the CIL tests. Despite the Government's broad intention to retain Green Belt policy, the consultation is therefore likely to provoke considerable response.

The decision broadly to preserve the Green Belt inevitably means that housing land must be looked for elsewhere. The Housing White Paper proposes a range of measures to maximise the use of suitable land. These include proposals: to free up public sector land;<sup>11</sup> to increase the support for windfall sites;<sup>12</sup> to support a new wave of garden towns and villages (including legislating to allow locally accountable New Town Development Corporations);<sup>13</sup> and to encourage higher housing

5 [http://www.cpre.org.uk/media-centre/sound-bites/item/4511-housing-white-paper-cpre-reaction?gclid=CJvT\\_IzsgtlCFYe\\_7Qodzn0JpA](http://www.cpre.org.uk/media-centre/sound-bites/item/4511-housing-white-paper-cpre-reaction?gclid=CJvT_IzsgtlCFYe_7Qodzn0JpA)

6 Housing White Paper Introduction page 9

7 Housing White Paper paragraph 1.37

8 Housing White Paper paragraph 1.38

9 Housing White Paper paragraphs 1.37-1.40 and A.59-A.64

10 Housing White Paper paragraph 1.39

11 Housing White Paper paragraphs 1.26-1.28

12 Housing White Paper paragraph 1.30

13 Housing White Paper paragraphs 1.35-1.36



density (including reviewing the Nationally Described Space Standard).<sup>14</sup>

Perhaps foremost among the measures to maximise suitable land use is an increased emphasis on the use of brownfield land, and the Government is proposing to amend the NPPF to indicate that “great weight” should be attached to the value of using suitable brownfield land within settlements for homes.<sup>15</sup> They are also proposing to change the NPPF specifically to allow more brownfield land to be released for developments with a higher proportion of starter homes<sup>16</sup> (including in the Green Belt, but only where it contributes to the delivery of starter homes and there is no “substantial harm” to the openness of the Green Belt).<sup>17</sup> And they confirm that the £1.2 billion Starter Home Land Fund will be invested to support the preparation of brownfield sites to support these developments.<sup>18</sup>

All in all, there is a considerable range of measures seeking to address the fundamental difficulty of finding sufficient suitable and available land for housing, but

many of the measures are not new, and without a greater input from Green Belt sites it is questionable whether the measures will succeed.

## COMPULSORY PURCHASE POWERS

In chapter 2 the White Paper tackles the difficult question of how to speed up the building process itself, including by encouraging developers to start building on sites which have already been through the planning process.

Central to the government’s proposals is the use of compulsory purchase powers by local planning authorities to “support the build out of stalled sites”. It is also envisaged that the Homes and Communities Agency (HCA) will take a more proactive role, by working with local authorities to use their compulsory purchase powers for these purposes.

The White Paper indicates that the Government will prepare further guidance on this issue and at this stage there is limited information about how – or if – the Government will pursue this threat.

<sup>14</sup> Housing White Paper paragraphs 1.51-1.55

<sup>15</sup> Housing White Paper paragraph 1.25

<sup>16</sup> It is worth noting that the proposal for a mandatory requirement for 20% starter homes on all developments over a certain size has been dropped, but there is proposed to be a policy expectation that housing sites will deliver a minimum of 10% affordable home ownership units (see paragraphs 4.16-4.17 of the Housing White Paper).

<sup>17</sup> Housing White Paper paragraph 4.18

<sup>18</sup> Housing White Paper paragraph 4.20



The threat of strengthened CPO powers certainly makes the government seem serious about expediting the house building process, but it is far from clear that measures which increase the risk of holding land will ultimately result in more houses being built. Developers may be particularly alarmed by the government's intention to examine whether the level of compensation payable following the use of such powers could be 'unambiguously' established through the auction process. Given the serious interference with property rights involved in using CPO powers and the inherent unpredictability of the auction process, the answer to this question seems likely to be in the negative. The complexity and cost associated with compensation claims may therefore prove a significant obstacle to the government's proposals to use enhanced CPO powers to speed up development.

## THE WHITE PAPER – THE DEVELOPER'S PERSPECTIVE

What all those involved in the development industry crave, be they local planning authorities, land-owners, developers, house builders or investors, is certainty. For uncertainty deters investment and decision-making and can ultimately seriously harm housing delivery. It would be a terrible irony if this was the effect of this White Paper, and that is one of the matters that the 39 Essex White Paper seminar will wish to discuss.

Does this White Paper offer certainty? Well it depends. As in the nature of all consultation documents, it offers a direction of travel. It is in fact much more of a Green paper than a White Paper – and its ultimate destination will not be known until the autumn. Until then one can expect endless hours of argument as to the weight to be given to this provision or that. The weight that may be given to any of the White Paper's contents will depend on the extent to which any provision is the subject of consultation, or whether it represents a settled position. But the White Paper is itself a material planning consideration in the determination of planning applications.

As to its contents, there are aspects of which might give rise to unintended consequences and which will not be welcome, at least by land-owners, investors, developers and house-builders. Chief amongst these is the provision proposing reducing the time to make an application for



approval of reserved matters from 3 to 2 years. This provision has been proposed in order to combat what has been suggested is a practice of land-banking by housebuilders. Whether land-banking is an example in the planning context of fake news, it has recently been cogently unpacked and debunked by Nathaniel Litchfield and Partners in their paper: *Stock and Flow: Planning Permissions and Housing Output*. So is the introduction of such a potentially damaging provision worth it, even if does provide some headlines for Mr Javid?

For land-owners to be encouraged to sell their land, they need time to market it effectively, and on large sites any house-builder needs time to work up their reserved matters approval, and then implement it. Undertaking all this within a period of 2 years appears, especially on strategic sites, is somewhat unrealistic. This could have the consequence of dissuading land owners from agreeing to an early release of their land; or only agreeing to releasing a much smaller area, which (if a site is identified in a local plan for residential development) would not be likely to jeopardise its long term prospects. Coupled with the threats regarding CPO (themselves somewhat odd and confused) property investors make take flight.

These are all issues which will be considered in greater detail in the 39 Essex Chambers White Paper Seminar on 29th March.



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Peter specialises in all aspects of planning and environmental law, and associated public law and commercial law disputes. "He remains a go-to presence at the bar" particularly in significant residential and retail cases. He is particularly noted for his environmental law litigation, successfully acting for Luton Borough Council 5000 new homes and additional retail and other provision in the Green Belt. This has been mentioned as one of the top planning cases of past years. He also led the successful team in the CALA litigation with respect to the purported revocation of Regional Strategies which culminated in the grant of planning permission for 2000 houses in North Winchester in 2012. Peter is regarded as a leading silk in Planning and Environmental law by The Legal 500 and in Planning by Chambers & Partners. Recent quotes include "A force of nature – the man to go to if you have a very difficult case" Chambers UK 2016 and "Very forceful and effective." Legal 500 2016. To view full CV click [here](#).



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James has an extensive practice in the field of planning, environment and compulsory purchase. He appears regularly in the courts and at public inquiries on most aspects of planning and environmental control. He regularly acts for leading developers in respect of major mixed use schemes, as well as for local and central government including most recently in the promotion of HS2. He has expertise in environmental law including cases with a European dimension. He is regarded as a leading silk in Planning and Environmental law by Chambers & Partners and in Planning by the UK Legal 500. James was named Environment and Planning 'Silk of the Year' at the Chambers and Partners Bar Awards in 2016. To view full CV click [here](#).

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Ned has an extensive planning and environmental law practice encompassing appeals, enforcement, development plan examinations, High Court applications and appeals, and prosecutions. He has acted in cases involving large scale housing, industrial developments and infrastructure projects (including wind farms, other renewable energy facilities and a Strategic Rail Freight Interchange). Within environmental law, he has particular expertise in Environmental Impact Assessment, Strategic Environmental Assessment, Sustainability Appraisal, Habitats Regulations Assessment, green belt issues, heritage issues, and nuisance. In environmental law, he is ranked as a leading junior in The Legal 500. In planning law, he is ranked in Chambers & Partners. He is a General Editor of the Sweet & Maxwell Environmental Law Bulletin. To view full CV [click here](#).



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Philippa undertakes a wide range of planning and environmental work, including planning and enforcement appeals, public examinations into development plan documents and challenges in the High Court. She acts for developers, local authorities, individuals and interest groups, and she has been listed for the past three years as one of the top planning juniors under 35 by Planning Magazine (2013, 2014 and 2015). Examples of recent cases include an appeal relating to an enabling development scheme for the restoration of a nationally important collection of historic buildings and a judicial review challenge to a local authority's decision to designate a sports stadium as a conservation area. To view full CV [click here](#).

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