BRIEFING NOTE
SPRING 2018 PLANNING REFORMS

On Monday 5 March, the Government announced its much-anticipated fundamental review of national planning policy.

Many of the proposed changes build upon the Housing White Paper (February 2017), the Planning for the Right Homes in the Right Places consultation (September 2017) and the Budget 2017. Maximising the use of land, strengthening Green Belt protection and the conversion of planning permissions into homes are said to be "at the heart" of the reforms. The Housing Secretary, Sajid Javid, said:

> *"An entire generation is being locked out of a broken housing market as prices and rents race ahead of supply. Reforming the planning system is the crucial next step to building the homes the country needs.*
>
> *This government is determined to fix the broken housing market and restore the dream of home ownership for a new generation. There is no silver bullet to this problem but we're rewriting the rules on planning so we can take action on all fronts.*
>
> *In moving to a more integrated society, the focus for everyone, whether a developer or a neighbourhood group, must be to come together to build the homes our communities deserve."*

In this Briefing Note, we i) highlight some key proposed changes to the National Planning Policy Framework ("NPPF"); ii) consider the publication of draft Planning Practice Guidance for Viability; iii) examine the separate consultation on reforms to developer contributions towards affordable housing and infrastructure; and conclude with iv) a chapter by chapter summary of the key proposed changes to the NPPF.

Consultation on the revised draft NPPF runs until 10 May 2018, with the Government having stated its desire to produce a final version *"before the summer"*.

Under the heading *"Going Further"*, the Government

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notes that – in order to deliver 300,000 new homes a year - more needs to be done. As such, the Government is considering further planning reforms that could support this ambition, including:

(i) The potential use of permitted development rights to find "more solutions to making the most of the spaces we have in delivering the homes we need in the right places", including a new permitted development right for upwards extensions for new homes where existing buildings are lower than the prevailing roofline.

(ii) In locations where there is a need to find extra land to deliver the homes needed locally, "exploring wider measures to support farm diversification and housing in the rural economy".

Beyond housing, there are other notable challenges ahead. In particular, an important test will be how successful the NPPF is in fulfilling the Government's 25-Year Environment Plan, published in January this year, particularly as over the life of that Plan there will be no assurance that UK environmental laws and policies will remain aligned with those of the EU. In this regard, Stephen Tromans QC considers that *"although the draft text of the revised NPPF contains some helpful statements, such as on the protection to be accorded to irreplaceable assets such as ancient woodland; planning for the enhancement of natural capital; and identification of opportunities to improve air quality or mitigate impacts on it"*, in the real world of planning, *"the devil lies in the detail, and it is questionable whether the wording of policies is robust enough to deliver what is promised by the rhetoric on net environmental gain and improving air quality"*. Given that the draft is quite weak on the issue of climate change and the Government's duties under the Climate Change Act 2008, *"maybe that is no longer a "sexy" enough issue for politicians?"*

15 KEY PROPOSED CHANGES TO THE NPPF

Jonathan Darby

According to its Introduction, in developing the draft NPPF the Government has incorporated i) proposals from previous consultations, taking into account the views raised in response to them; ii) changes to planning policy implemented through Written Ministerial Statements since publication of the NPPF in 2012; iii) the effect of case law on the interpretation of planning policy since 2012; and iv) improvements to the text to increase coherence and reduce duplication.

In summarising the main proposals, it is said that, although the draft NPPF makes a number of structural changes, in particular dividing the document into clear chapters, *"there is much continuity – the presumption in favour of sustainable development remains at the heart of the Framework, and more text has remained the same than changed"*.

15 of the key proposals are as follows.

1. An expectation for objectively assessed needs to be accommodated unless there are strong reasons not to, including any unmet needs from neighbouring areas.

2. A defined list of policies which provide a specific reason for restricting development as set out at footnote 7, including Ancient Woodland and aged or veteran trees.

3. Changes to the decision-making part of the presumption in favour of sustainable development that are intended to provide greater clarity, so that it refers to circumstances where *"there are no relevant development plan policies, or the policies most important to determining the application are out of date"*; and to *"refusing"* rather than *"restricting"* development.

4. Additional certainty for neighbourhood plans in certain circumstances, including where there is substantial under-delivery of housing: see Paragraph 14 (based on the Written Ministerial Statement of 12 December 2016).

5. The new requirement for authorities to review plan policies every five years following the date of adoption, with updates, if necessary, to reflect changing circumstances.

6. When preparing plans, authorities will need to prepare and maintain a statement of common ground, as evidence (where appropriate) of the statutory duty to cooperate in order to meet the test of soundness.

7. A new approach to viability:
   a. Through which plans are expected to be clear about the contributions expected in association with development.
   b. Where a proposed development accords with all relevant policies in the plan there is no need for a viability assessment to accompany the planning application.
   c. All viability assessments to reflect the Government's recommended approach as set out in draft revised national planning guidance.

8. A new standard method for the calculation of local housing need: see Paragraph 61 and the draft revised national planning guidance.

9. Continued encouragement of the greater use of small sites, to help diversify opportunities for builders and increase the number of schemes that can be built-out quickly: see Paragraphs 69-70.

10. The policy consequences of the new Housing Delivery Test: see Paragraphs 74(c), 75 and 77 and Footnote 29, which proposes that from 2020, the presumption in favour of sustainable development will apply where delivery is below 75% of the authority's housing requirement.

11. Amendments to the 'sequential approach' to planning applications, so that out of centre sites should be considered only if suitable town centre or edge of centre sites are unavailable or not expected to become available within a reasonable period: see Paragraph 87.

12. Continued encourage of the more intensive use of land and existing buildings where appropriate, including:
    a. Giving substantial weight to the value of using suitable brownfield land within settlements for homes: see Paragraph 118c;
    b. Reallocating land where there is no reasonable prospect of an application coming forward for the allocated use: see Paragraph 120;
    c. Avoiding building homes at low densities in areas of high demand, and pursuing higher-density housing in accessible locations, while reflecting the character and infrastructure capacity of each area: see Paragraph 123; and
    d. Expecting minimum density standards in certain circumstances: see Paragraph 123.

13. Continued strong protection for the Green Belt and clarification of the circumstances in which release may occur: see Chapter 13.

14. Current policy allows buildings in the Green Belt in association with uses such as outdoor sport and cemeteries, but does not allow material changes in the use of land for such purposes, even if there would be no harm to openness. To allow a more consistent approach, material changes of use that preserve openness are no longer inappropriate development in the Green Belt: see Paragraph 145e.

15. Strengthened protection for ancient woodland and other irreplaceable habitats: see Paragraph 173c.

A NEW APPROACH TO VIABILITY

Rose Grogan

One of the key political issues that the draft NPPF seeks to address is the perception – and often the reality – that developers promise affordable housing at planning permission stage only to negotiate it out once permission has been granted on the grounds of viability. It has not helped that historically, viability assessments are confidential, rarely, if ever, disclosed to the public and that there is no standard approach to viability assessment.

The current NPPF deals with viability by in paragraphs 173-177. In striking the balance between facilitating development and obtaining much needed affordable housing and infrastructure contributions, the NPPF and accompanying guidance has built into it the principle that development should be able to provide competitive

returns for the land owner.

The "viability loophole" as it has been described by some commentators is a knotty practical and political problem. The policy was intended to increase supply by of housing by boosting a sluggish market. While some areas may have benefitted overall in terms of housing delivery, it came at the cost of affordable housing provision. Research by Shelter in 2017 estimated that as a result of re-negotiation of affordable housing quotas on the grounds of viability, 9 cities had lost out on 2,500 affordable homes in one year.[1] The CPRE has recently reported on the same problem arising in rural areas. On the other side of the argument, there is a need to allow for planning obligations and contributions to be adjusted to take into account changed economic circumstances, otherwise much needed housing schemes will not be built.

The new proposals have their basis in the government's Planning for the Right Homes in the Right Places consultation. The government's response to the consultation revealed divided views about whether and how the current approach to viability should be reformed, although there was significant support for greater transparency.

The result is as follows:

At the plan-making stage, there is a clear shift in emphasis in the draft guidance. The government has sought to push viability back into the under the jurisdiction of plan-makers. Reading between the lines, the goal is that issues of viability should be the exception, not the norm.

The tone of the guidance has also changed. Gone are the references to "proportionality" and "competitive returns" for landowners. The definition of viability in the existing guidance – a site is viable if the value generated by its development exceeds the costs of developing it and also provides sufficient incentive for the land to come forward and the development to be undertaken – has been taken out. The focus has shifted to minimum returns and the message that developers will not be able to get out of their obligations lightly. The guidance also makes clear that overpaying for land cannot be used to justify a failure to comply with policy.

Further key changes come at the decision-making stage:

(1) The general theme is that viability assessments should not be necessary.

(2) Where a scheme complies with relevant policies in the local plan, no viability assessment should be required to accompany the application (see paragraph 58 of the draft NPPF). This effectively means that compliant schemes will be presumed to be viable, in the hope that this will speed up decision-making.

(3) The government has left it to local planning authorities to identify the circumstances in which viability assessments will be required in their local plans. It will also be up to local planning authorities to decide whether to identify how review mechanisms will be used when circumstances change and what those review mechanisms will look like. However, the examples given in the draft guidance suggest that the expectation is that viability assessments should only be required where the development proposed is out of the ordinary or where there has been a significant change in circumstances.

(4) Where viability assessments are needed, the government has proposed new guidance which sets out a standardised approach.

(5) Viability assessments should be made publicly available.

The reforms certainly sound like dramatic changes – and have been hailed as such by the government. However, the government cannot, as yet, force developers to build out schemes that will not be profitable. There is also a significant amount of detail to be worked out at a local level. These proposed reforms are by no means the end of viability assessments or renegotiation of planning obligations. While standardisation and transparency are to be welcomed, it will be interesting to see whether these reforms, if implemented, lead to any significant changes on the ground.

1 http://blog.shelter.org.uk/2017/11/the-high-cost-of-viability-assessments-2500-affordable-homes-lost-injust-one-year/

DEVELOPER CONTRIBUTIONS: REFORMS

Stephanie David

There is no doubt that the system of developer contributions is complex, fragmented and uncertain – symptomatic, in part, of the partial uptake of CIL and the shrouded nature of s 106 negotiations. As Sajid Javid, the Housing Secretary, put it before the House of Commons, *"it is vital that developers know what contributions they are expected to make towards affordable housing and essential infrastructure, and that local authorities can hold them to account."*

Hence, the objectives of the consultation on developer contributions are to reduce complexity, increase certainty, improve transparency and increase market responsiveness. Yet, how does the Government *propose* those objectives are translated into *actual* policies?

1) The **evidence of local infrastructure need in the plan-making process will be the same as that used for setting a CIL charging schedule** (except in circumstances of significant market changes, where the evidence may be supplemented for setting CIL).

2) The **current statutory consultation requirements** for amending or introducing CIL will be **replaced with a published statement** to be considered by an Examiner.

3) The **pooling restriction on s 106 obligations will be removed** in three circumstances: (a) where the LA is charging CIL; (b) where it would not be feasible for the LA to adopt CIL in addition to section 106 contributions; and (c) where significant development is planned on several large strategic sites.

4) The **operation of CIL will be improved** by: (a) relaxing the Commencement Notice requirement for exempted development; and (b) balancing CIL liabilities between different phases of the same development where permission is secured before the introduction of CIL.

5) **CIL liabilities** will be calculated on the basis of the **existing use of the land** (**or** the majority use, if over 80%, on sites with differential rates).

6) **CIL will be indexed to the House Prices Index** for residential development; and to either the Consumer Price Index or a combined proportion of HPI and CPI for nonresidential development.

7) **Regulation 123 lists** will be replaced with an **annual Infrastructure Funding Statement** to set priorities.

8) And finally, combined authorities and joint committees with strategic planning authority will be able to charge a **Strategic Infrastructure Tariff**, analogous to the London Mayoral CIL used to fund Crossrail.

By introducing further nuance, and therefore complexity, to the system of developer contributions, there seems to be a significant risk that the purported objectives, whilst laudable in theory, might in practice be thwarted. And the introduction of yet another levy, the Strategic Infrastructure Tariff, could well be the cherry on top of the developer contribution minefield.

KEY PROPOSED CHANGES TO THE NPPF A CHAPTER BY CHAPTER SUMMARY

Chapter 2 Achieving sustainable development

Paragraph 11 contains the presumption in favour of sustainable development, which has been reordered to reflect the way that plan and decision-making are approached in practice.

For plan-making, the draft states that this means:

"a) plans should positively seek opportunities to meet the development needs of their area, and be sufficiently flexible to adapt to rapid change;

b) strategic plans should, as a minimum, provide for objectively assessed needs for housing and other development, as well as any needs that cannot be met within neighbouring areas, unless:

i. the application of policies in this Framework that protect areas or assets of particular importance provides a strong reason for restricting the overall scale, type or distribution of development in the plan area; or

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

For decision-taking, the draft states that this means:

"c) approving development proposals that accord with an up-to-date development plan without delay; or

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, granting permission unless:

i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed;

or

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

Key changes:

1. Local plans should provide for objectively assessed needs for development, including unmet need from neighbouring areas, unless particular policies provide "a strong reason for restricting the overall scale" of development.

2. Examples of policies which provide a specific reason for restricting development are proposed to form a defined list, which is set out at footnote 7 and includes Ancient Woodland and aged or veteran trees. The draft states that this approach does not preclude other policies being used to limit development where the presumption applies, if the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits.

3. The decision-making part of the presumption has also been changed to provide greater clarity, so that it refers to circumstances where "there are no relevant development plan policies, or the policies most important to determining the application are out of date"; and to "refusing" rather than "restricting" development.

Chapter 3: Plan-making

Key changes to plan-making policy proposed by the Housing White Paper reflected in chapter 3 are as follows:

1. A new plan-making framework which defines strategic priorities and allows authorities to plan for these in the most appropriate way.

2. Amendments to the tests for a 'sound' plan, to make clear that it should set out 'an' appropriate strategy rather than 'the most appropriate strategy' (to avoid the need for disproportionate work to demonstrate that a strategy is optimal).

3. Enabling spatial development strategies to allocate sites if there is unanimous agreement.

4. The new requirement for authorities to review plan policies every five years following the date of adoption, with updates, if necessary, to reflect changing circumstances.

5. Tightening the evidence which is expected in respect of both local and strategic policies to support a 'sound' plan, to allow for a more proportionate approach.

6. Introducing the expectation that plans should use digital tools to assist consultation and presentation of policies.

Key changes proposed by the Planning for the Right Homes in the Right Places consultation reflected in the chapter:

1. Setting out that to meet the test of soundness authorities (including Mayors and combined authorities with plan-making powers), when preparing plans, will need to prepare and maintain a statement of common ground, as evidence (where appropriate) of the statutory duty to cooperate.

2. Changing the 'effective' and 'positively prepared' soundness test so that these more clearly encourage agreements and joint working.

3. A new approach to viability, through which plans are expected to be clear about the contributions

expected in association with development. This will help ensure that requirements on developments set through plan policies are deliverable, more transparent and provide more certainty about what will be expected at the decisionmaking stage.

Chapter 4: Decision-taking

Key changes:

1. Paragraph 58 takes forward the reforms to viability assessment proposed in the Planning for the right homes in the right places consultation. The policy makes clear that where a proposed development accords with all relevant policies in the plan there is no need for a viability assessment to accompany the planning application. The policy also expects all viability assessments to reflect the Government's recommended approach which is set out in draft revised national planning guidance.

2. New paragraphs 48 to 51 set out the weight that may be given to policies in emerging plans (previously in Annex 1), and puts into policy the approach to 'prematurity' previously contained in national planning guidance.

Chapter 5: Delivering a wide choice of high quality homes

Key changes:

1. Paragraph 61 introduces a new standard method for the calculation of local housing need. The details of the standard method are set out in draft revised national planning guidance published alongside the draft NPPF.

2. Paragraphs 74(c), 75 and 77 set out the policy consequences of the new Housing Delivery Test. Footnote 29 proposes that from 2020, the presumption in favour of sustainable development will apply where delivery is below 75% of the authority's housing requirement.

3. Paragraph 76 takes forward the housing White Paper proposal that the 5 year land supply position should be capable of being agreed for a one year period. The policy proposes that this should be demonstrated either through a recently adopted plan, or through a subsequent annual position statement. The minimum 10% buffer required in order for local authorities to take advantage of this policy is set out in paragraph 74(b).

Chapter 6: Building a strong, competitive economy

Key changes:

1. The rural economy section in the existing NPPF has been brought within this chapter, with new policy at paragraph 85 on the potential need for planning policies and decisions to accommodate sites for local business and community needs outside existing settlements, in ways which minimise the impact of such sites and exploits opportunities to make such locations more sustainable.

Chapter 7: Ensuring the vitality of town centres

Key changes:

1. Paragraph 87 amends the 'sequential approach' to planning applications, so that out of centre sites should be considered only if suitable town centre or edge of centre sites are unavailable or not expected to become available within a reasonable period.

2. Paragraph 90 removes the expectation that office developments outside town centres are subject to an impact assessment, where the development is over a certain floorspace threshold.

Chapter 8: Promoting healthy and safe communities

Key changes:

1. Paragraph 94 reflects the housing White Paper proposal that policies and decisions should consider the social and economic benefits of estate regeneration, and that authorities should use their planning powers to help deliver estate regeneration to a high standard.

Chapter 9: Promoting sustainable transport

Key changes:

1. Policy on assessing the transport impact of proposals (now at paragraphs 108-110) has been amended to refer to highway safety as well as capacity and congestion in order to make it clear that we expect that designs should prioritise pedestrian and cycle movements, followed by access to high quality public transport (so far as possible) as well as to reflect the importance of creating well-designed places.

Chapter 10: Supporting high quality communications

Key changes:

1. Paragraph 112 indicates that plan policies should set out expectations in relation to the delivery of high quality digital infrastructure, which provides access to services from a range of providers.

Chapter 11: Making effective use of land

Key changes:

1. This chapter combines existing policy with a number of proposals from the housing White Paper, including:
   a. Expecting plans to have a clear strategy for using land (paragraph 117);
   b. Making more intensive use of existing land and buildings (paragraph 118d-e);
   c. Avoiding building homes at low densities in areas of high demand, and pursuing higher-density housing in accessible locations, while reflecting the character and infrastructure capacity of each area (paragraph 123); and
   d. Taking a flexible approach to policies or guidance that could inhibit making effective use of a site – although the proposed policy now refers specifically to daylight and sunlight issues, as these are considered to be the most relevant consideration in this context (paragraph 123c).

2. Councils will be given more freedom to make the most of brownfield land in order to build homes that maximise density. Building upon previous and forthcoming announcements in relation to flexibility for upwards extensions on existing properties, the changes in this area encourage the reuse of redundant land for homes (paragraph 118).

3. This chapter also reflects a number of additional proposals to make more land available for housing as set out in Budget 2017, including:
   a. Making more effective use of empty space above shops – with the proposed policy widening this to refer to other situations where under-utilised land and buildings could be used more effectively (paragraph 118d);
   b. Reallocating land where there is no reasonable prospect of an application coming forward for the allocated use – with the proposed policy also setting out how alternative uses should be considered ahead of a plan review taking place (paragraph 120);
   c. Making it easier to convert retail and employment land to housing where this would be a more effective use (paragraph 121); and
   d. Expecting minimum density standards to be used in certain instances (paragraph 123).

4. Paragraph 123c also proposes that local planning authorities should refuse applications which they consider fail to make effective use of land, in areas where there is an existing or anticipated shortage of land for meeting identified housing needs.

Chapter 12: Achieving well-designed places

Key changes:

1. Paragraphs 124-125 reflect the White Paper proposals that plans should, at the most appropriate level, set out a clear design vision and expectations, supported by visual tools such as design guides and codes.

2. Additional emphasis has been placed on the importance of pre-application discussions in securing good design (paragraph 127).

3. The text also implements the White Paper proposal that design should not be used as a reason to object to development where the scheme complies with local policies (paragraph 129).

Chapter 13: Protecting the Green Belt

Key changes:

1. Paragraphs 136-137 implement the housing White Paper proposals that certain criteria should be satisfied before 'exceptional circumstances' are used to change Green Belt boundaries, and that where Green Belt is released first consideration should be given to land which has been previously-developed or which is wellserved by public transport.

2. This chapter also reflects a number of proposals from the housing White Paper, including to:
   a. Make clear that neighbourhood plans may amend detailed Green Belt boundaries, once the need for a Green Belt change has been demonstrated (paragraph 135);

b. Expect policies to set out how the impact of removing land from the Green Belt can be offset (paragraph 137); and
c. Provide that facilities for existing cemeteries, and development brought forward under a Neighbourhood Development Order, should not be regarded as 'inappropriate development' (paragraphs 144b and 145f).

3. Paragraph 144g reflects the proposal in the December 2015 consultation to allow brownfield land in the Green Belt to be used for affordable housing, where there is no substantial harm to openness. The proposal broadens the previous proposal to allow brownfield land in the Green Belt to be used for Starter Homes so that, subject to Green Belt protections, all residential developments that contribute to meeting an identified local affordable housing need can use brownfield land, allowing local planning authorities to use this land more flexibly in response to local circumstances.

4. Current policy allows buildings in the Green Belt in association with uses such as outdoor sport and cemeteries, but does not allow material changes in the use of land for such purposes, even if there would be no harm to openness. To allow a more consistent approach, paragraph 145e provides that material changes of use that preserve openness are not inappropriate development in the Green Belt.

Chapter 14: Meeting the challenge of climate change, flooding and coastal change

Key changes:

1. This chapter carries forward a number of Housing White Paper proposals – to:
   a. Refer to the risk of overheating from rising temperatures and makes clear that planning policies should support measures to ensure the future resilience of communities and infrastructure to climate change (paragraph 148);
   b. Incorporate the Written Ministerial Statement of 18 June 2015 on wind energy development (paragraph 153b and its accompanying footnote);
   c. Clarify that plans should have regard to the cumulative impacts of flood risk, rather than just to or from individual development sites (paragraph 155); and
   d. Clarify policy on the exception test that may need to be applied when considering development in locations at risk of flooding (paragraphs 158-162).

2. A new paragraph (163) has been added to incorporate the Written Ministerial Statement of 18 December 2014 on sustainable drainage systems (SuDS) in major developments.

Chapter 15: Conserving and enhancing the natural environment

Key changes:

1. Paragraph 180 implements the housing White Paper proposal, and the announcement made on 18 January 2018, to clarify that the 'agent of change' (or applicant) should be responsible for mitigating the impact on their scheme of potential nuisance arising from existing development.

2. Paragraph 173c of the revised Framework strengthens protection for ancient woodland and other irreplaceable habitats, by making clear that development resulting in their loss or deterioration should be wholly exceptional, and maintains a high level of protection for individual aged or veteran trees found outside these areas.

Chapter 16: Conserving and enhancing the historic environment

Key changes:

1. Paragraph 189 has been revised to clarify that when considering the impact of a proposed development on a designated heritage asset, decision-makers should give great weight to the asset's conservation irrespective of whether the potential harm to its significance amounts to 'less than substantial harm' or 'substantial harm or total loss' of significance.

Chapter 17: Facilitating the sustainable use of minerals

Key changes:

1. Additional text on on-shore oil and gas development is included at paragraph 204, which builds on the Written Ministerial Statement of 16 September 2015 to provide clear policy on the issues to be taken into account in planning for and making decisions on this form of development.

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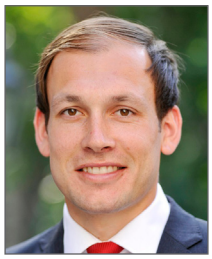
Rose specialises in planning, construction and public law. She acts in a wide range of planning matters, and is instructed regularly for developers and planning authorities. She is an experienced inquiry advocate and in 2014 acted for the local parish councils in the Redhill Aerodrome inquiry which led to the Court of Appeal decision on the meaning of "any other harm" in the Green Belt test. Significant cases include *R (on the application of Save Britain's Heritage and the Victorian Society) v Sheffield City Council* [2013] EWCA Civ 1108 and *Wind Prospect Developments Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 4041. In 2014 she was named as "highly recommended" in Legal Week's Stars at the Bar profile of the most promising junior barristers under 10 years call and is currently ranked 6th in planning magazine's top juniors under 35. To view full CV click here.



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