

27 OCTOBER 2020

## **PR 12-20 | TRANSPARENCY AND COMPETITION: DATA AND LAND CONTROL**

I am writing in response to the MHCLG Transparency and Competition: data and land control consultation.

The National Association of Local Councils (NALC) is the nationally recognised membership and support organisation representing the interests of around 10,000 parish and town councils and many parish meetings in England, 70% of which are situated in rural areas. Local (parish and town) councils are the backbone of our democracy and closest to local people, providing our neighbourhoods, villages, towns and small cities with a democratic voice and structure for taking action, contributing in excess of £2 billion of community investment to supporting and improving local communities and delivering neighbourhood level services.

### **Executive Summary**

- The requirement in the National Planning Policy Framework (NPPF) for a five year land supply for housing needs to be amended and clarified in a way which prevents developers riding roughshod over Local Plans, contrary to the wishes of local communities, endorsed planning policies and emerging and 'made' Neighbourhood Plans.
- We are aware that planning authorities are concerned that both Robert Jenrick, MP (now), and Eric Pickles back in about 2011, believed that the national shortage of homes is / was due to an alleged obstructiveness or tardiness in the planning system. However, in reality, we believe that plenty of land already has been given planning permission, and some further sites have begun to be developed (but very slowly), and more still have been allocated for development in statutory Local Development Plans. Arguably, more homes would be built, and more rapidly, if there were to be greater transparency in the world of property transactions, land-banking and investments.
- In principle we do welcome the Ministry's shift to try to make land ownership and contracts more generally transparent and understood. And to that end we would want and expect local councils with contractual controls in land and opt-ins to buy land / involved in a conditional contract – to be protected as well as to be transparent.

- We believe the government's proposals for this additional data and information to be collected and held by HMLR, and to be freely available by searching the register, are long overdue and are welcome. We fully support proposed primary and / or secondary legislation to bring this about at the earliest opportunity.

## Consultation questions

NALC will be responding to the consultation questions as follows:

### 1. The Public Interest

#### **Do you think there is a public interest in collating and publishing additional data on contractual controls over land?**

Yes. Occasions arise when local councils would find it beneficial to know more about land ownership in their parish and what contractual controls apply, especially when responding to Local Plan consultations and commenting on certain planning applications. (In any event, as this Transparency and Competition paper acknowledges in paragraph 42 on page 12, there is a recognised public interest in open access to information on land ownership). Of course, the Planning White Paper is proposing to remove from local councils their currently held statutory right to be consulted on planning applications and to restrict the involvement they could have in Local Plan making to a brief, up-front, consultation process. These suggested changes are unacceptable to local councils whose democratic voice would be severely curtailed by the proposed new system.

Regarding the below quote from the end of the consultation document:

***“To realise the benefits of greater transparency set out above, the government proposes to place some additional data on the land register and to publish—free of charge—a contractual control interests dataset”,***

we nonetheless suggest that the charges register on a title could usefully be enhanced by including more specific detail about third party rights, covenants etc. (which it appears is often missing altogether) though we do not suppose we will ever progress towards having a ‘joined up’ approach to planning control accommodating both public policy and private interests in land, which currently ‘sit’ in two completely distinct camps, with LPAs effectively ‘blind’ to private interests.

But having more transparency on the register might lead to a better understanding of what is and what is not possible in planning terms and help

avoid the situation where a Local Planning Authority might act in 'good faith', and in accordance with public policy, and issue a grant of permission only for the decision effectively to be overturned and the development concerned rightly frustrated by a court through the enforcement of a restrictive covenant or some other charge. Surely the benefits would include saving unnecessary time and expense incurred both by public bodies and private individuals.

## **2. Rights of pre-emption and options**

**(a) Do you think that the definition of rights of pre-emption and land options in the Finance Act 2003, s. 4616 is a suitable basis for defining rights of pre-emption and options that will be subject to additional data requirements? Please give reasons.**

a) Yes on balance – providing this is GDPR compliant. It is important that people can learn what packages of land have a Right of Pre-emption or a land option attached. Furthermore, if stamp duty land tax is payable on the eventual purchase it should also be payable on entering a pre-emption right and land option agreement.

**(b) Is the exemption for options and rights of pre-emption for the purchase or lease of residential property for use as a domestic residence sufficient to cover:**  
• options relating to the provision of occupational housing and • shared ownership schemes? Please give reasons.

Yes on balance – we have not heard not from other sources.

**(c) Are there any types of rights of pre-emption or options that do not fall under the scope of the definition in the Finance Act 2003, s. 46? Please give reasons.**

Not that we have heard from the local council sector. It is sensible that exempted options would lose their exempt status if dependent on planning permission conditions.

## **3. Estate contracts**

**3. Are the tests set out above sufficient to avoid inadvertently capturing transactions not related to the development of land? If not, please give examples.**

Yes, on balance – it is probably thorough enough – based on the completion date and conditionality test. The document on Transparency and Competition does mention land banking by both developers and land owners as a factor, though it goes on to say this should be addressed by making ownership of land more

transparent. Our view is that land banking is one of the major reasons for lack of home building, be this by developer or land ownership, and we concede both are occurring. The issue of whether to permit more transparency in land registry and who holds which land is considered to be a good move, but without the above mentioned issues of land-banking (by developers or land owners) being first addressed by the Ministry, the proposed policy will fail in its intentions.

Instinctively the greater the transparency, the better, as long as the data collected is complete, accurate and up to date. The likelihood of data being complete, accurate and up to date in all circumstances is vanishingly low.

#### **4. Other contractual controls**

**(a) Are there any contractual arrangements by which control can be exercised over the purchase or sale of land, which should be included within this regime and which are not rights of pre-emption, options or estate contracts? Please give examples.**

No. Nothing additional. We believe MHCLG have captured most contractual arrangements allowing third parties to exercise control over the purchase or sale of land. We would however ask the Ministry to have regard to the views of many local councils that most land is under the option to develop – to only the big developers.

**(b) If so, do you consider them (i) an interest in land (interests that are capable of being protected by way of a notice on the land register); or (ii) not an interest in land? Please give reasons.**

N/A (see [a]).

#### **5: Data requirements**

**(a) Are there any data fields that (i) should; or (ii) should not be subject to additional data requirements? Please give reasons.**

Not that we are aware of. All data should be limited to official use. There may not be a willingness from people to provide their personal data.

**(b) Are there any data fields that (i) should; or (ii) should not be placed on the land register? Please give reasons.**

Not that we are aware of. All data should be limited to official use. There may not be a willingness from people to provide their personal data. The Land Registry seems to be the repository of land data and so it should all be available there.

Currently the lack of complete data seems to be reducing the integrity of the land register.

**(c) Are there any data fields that (i) should; or (ii) should not be included in a contractual control interest dataset? Please give reasons.**

Not that we are aware of. All data should be limited to official use. There may not be an interest from people to provide their personal data. It is difficult to see how you can obtain and publish data on land that is, for example, being left in a will that, as yet, no-one has seen.

**(d) Are there other data fields that should be collected? Please give reasons.**

Not that we are aware of. All data should be limited to official use.

**(e) Do any of the data fields give rise to privacy risks? Please give reasons.**

Not that we are aware of. Providing all data is limited to official use and GDPR compliant.

## **6. Contractual conditions**

**(a) Are there any data fields that (i) should; or (ii) should not be subject to additional data requirements? Please give reasons.**

No – not that we are aware of. We think the proposals strike the right balance. We have not been informed that certain fields should or should not be included – by the local council sector. It is right to retain the current levels of prejudicial data exclusion unless needed under the new regime. There will certainly be some areas where conditions will be required and more detail will mean more transparency.

**(b) Are there any data fields that (i) should; or (ii) should not be placed on the land register? Please give reasons.**

No – not that we are aware of. See (a).

**(c) Are there any data fields that (i) should; or (ii) should not be included in a contractual control interest dataset? Please give reasons.**

No – not that we are aware of. See (a and b).

## **7. Legal Entity Identifiers**

**Should legal entities that are beneficiaries of contractual arrangements be asked to provide a Legal Entity Identifier? Please give reasons**

Yes, on balance. Providing this is GDPR compliant we have no issue with this. It will create more transparency in land dealings. We have heard that in a development involving a bigger national builder and a small local builder, the big builder usually gives the smaller local builder a small piece of land it does not like – either tucked away or harder to sell, or simply gives the smaller builder the social housing element. LEIs aim to increase transparency in financial transactions relating, in this case, to land – so, yes, LEIs should continue to be used and so enable transparency.

## **8. Data currency**

**(a) Should beneficiaries be required to provide updated information on: • variation • termination, or • assignment or novation? Please give reasons.**

Yes, on balance. That is sensible as if there is no updated information provided on variation, termination, assignment or novation how else will MHCLG and others know that beneficiary status has changed unless this data is provided? Variation, termination and novation are changes in ownership or contractual constraints of land – if they change this must be recorded.

**(b) Are there other ways in which data currency could be maintained?**

Not that we have been informed of. The quality of data is said to rely on accuracy, completeness, reliability, relevance and timeliness. Therefore updated information from beneficiaries should be required.

## **9. Accounting treatment**

**If your organisation is required to produce annual accounts, when are: (i) rights of pre-emption; (ii) options; and (iii) estate contracts recognised on the balance sheet? Please give reasons and state the accounting standard used.**

Local councils with an annual budgeted income of less than £25,000 per annum have to abide by the Smaller Authorities' Transparency Code 2015 and publish certain data on their websites. Those between £25,001 and £200,000 have limited assurance engagement with some undertaking a full audit where references to land would be considered. Those with budgets of over £200,001 are subject to external audit and land and assets would likely be considered as part of an external audit of those councils annually, and included on an asset register. Such assets may also be covered by relevant sections of the Local Government Transparency Code, which also covers local councils with an annual turnover of £200,001+.



## **10. Existing contractual control interests**

**(a) Should the requirement to supply additional data be limited to: (i) new contractual control interests only; or (ii) all extant interests? Please give reasons.**

New only as we need to recognise where we are now and given COVID 19 it would be a huge logistical task for local councils with contractual control in land and opt-in to buy land / involved in a conditional contract - to supply additional data for all extant interests. It makes sense to limit these contractual control interests to those which are varied, assigned or novated.

Yes for new contract control interests; for extant ones, data should only be obtained as a last resort if it is materially relevant. If the intent is to have complete data about a piece of land relevant and up-to-date information must be available.

**(b) How long should beneficiaries of an extant contractual control interest that is varied, assigned or novated be given to provide additional data before losing protection: (i) three months; or six months?**

There needs to be a balance between speed and quality outcome. Instinctively 3 months seems too little. On balance we suggest six months as this would provide more time.

## **11. Current beneficiaries**

**What are the best ways of informing current beneficiaries of the need to provide additional data? Please give reasons.**

Contact them directly. If they have email, then digitally with 'Request a Read Receipt'. If they do not, then by registered post. NALC has no view on the wider sectors. For local councils if HMLR sent relevant promotional text to NALC it could also cascade this data to local councils via the network of 43 county associations of local councils.

## **12. A digital process?**

**Should the provision of additional data prior to the application process for an agreed notice be exclusively digital (with assisted digital support if required)? Please give reasons.**

No. Most of England's local councils are smaller councils with budgets of under £25,000 per annum and not all have websites. Whilst a medium term shift to provision of additional data being exclusively digital may eventually work - if small rural councils are not equipped enough with adequate broadband, websites and

other infrastructure provision – an immediate requirement will not work. This is because rural local council beneficiaries will likely not have sufficient internet provision or simply the IT hardware required to all provide such data purely digitally – so hard copies should also be allowed for now. Even in the future – additional support will be needed for local council land beneficiaries. But MHCLG need to recognise that some local councils do not even yet have websites, and may not for some time. So where local councils are involved in applications HMLR need to ensure there is sufficient investment in its digital support to local council land beneficiaries.

### **13. Certification**

**Should beneficiaries of contractual control interests with a duty to produce annual accounts be required to certify that all relevant interests have been noted? Please give reasons.**

Yes. This would where relevant assist transparency – but HMLR and MHCLG will need to issue clear guidance. NALC would be happy to promote such relevant guidance to local councils. It is very easy to say you have contacted a list of people – and equally easy for that not to be the truth. There should be a means to prove it and so have complete transparency.

### **14. Restrictions**

**(a) Should beneficiaries of contractual control interests be required to obtain an agreed notice before they could apply for a restriction? Please give reasons.**

Yes where possible. We support the Law Commission proposals in principle. It would not be right that beneficiaries could be allowed to forego the protection of a notice and seek to protect their interests by way of a restriction. MHCLG should await the decision as to whether the Secretary of State will be allowed new powers to make rules to decide whether certain types of contractual control cannot be covered by a protection, or not.

**(b) Should the protections of restrictions placed on an un-noted contractual control interest be (i) limited; or (ii) removed? Please give reasons.**

Limited as removals may cause un-envisaged problems.

**c) If the government accepts the Law Commission's recommendation on restrictions, should contractual control interest fall into the category of interest that cannot be capable of protection by way of a restriction? Please give reasons.**



Yes. The government should prioritise protection of beneficiaries through an agreed notice. This is more transparent.

## **15. Alternative options**

**(a) Should a mandatory system be introduced whereby the beneficiary of a contractual control interest would, where it is possible to do so, be required to note their interest with HMLR? Please give reasons.**

Yes. This would probably assist with transparency. Also given that the responsibility of HMLR is to (in England and Wales) provide a reliable record of property ownership and interests; provide owners with a land title, guaranteed by the government; and to provide a title plan which indicates general boundaries – HMLR is the right body to notify. However, care with ‘where possible’ as this means there is an “out”, and people will use it if they can.

**(b) If so, how should the system be enforced? Please give reasons.**

MHCLG would need to take guidance from HMLR in answer to this question. HMLR cannot provide legal advice on precise boundary positions and responsibilities. However in principle if HMLR were to retain a register of beneficiaries of contractual control interests (where it had been possible for beneficiaries to note their interests with HMLR) – this may prove workable and would certainly be transparent.

Enforcement is costly and often does not have enough power behind it to compel people to comply. Again we see a flaw in this system where complete data may be unachievable as it relies on the good will and compliance of all. That said, one would assume sanctions would have to exist in the event of non-compliance.

## **16. Current practice**

**(a) If you are a beneficiary of a right of pre-emption, option or estate contract, please indicate how you protect your interest.**

N/A - NALC is not a beneficiary. Local councils may be in certain instances but would have to respond to this question individually. However it does seem logical in principle for the Ministry to want to work with the grain of the existing notice system and limit additional data requirements to data that should be readily available to beneficiaries.

**(b) What factors influence your choice? Please give reasons.**

N/A - (see [a]). Local councils who are beneficiaries would have to communicate their own factors direct to MHCLG as NALC has received little direct evidence in

answer to this question. However it does seem sensible that the Ministry gathers as much evidence as possible in general first as to how beneficiaries currently protect their interests – before it makes any final decisions regarding introducing a mandatory system of interest registration.

## **17. Data collation and provision**

### **(a) Are there any data fields in Annex A that contracting parties would not have readily to hand? Please list them.**

Not that NALC has been informed of. Some local councils may communicate this data back to MHCLG direct, though, if they are land beneficiaries. Many local councils also (especially smaller ones with annual budgets of less than £25,000) do not have web-sites, so several are currently not fully digitally capable. Therefore the Ministry should act with care before introducing requirements for local council beneficiaries to provide additional data digitally at the same time as applying for an agreed notice.

### **(b) What is your estimate of the time needed to provide the additional data?**

We have not been informed of such a figure by local councils. But 6 months would seem reasonable logistically.

### **(c) Does your entity hold a Legal Entity Identifier?**

N/A - NALC is not a land beneficiary. Whilst we do not think there will be huge numbers of local council land beneficiaries in England – we do not have data as to how many of them hold a Legal Entity Identifier.

## **18. Data currency**

### **What additional work (over and above the time and cost of preparing annual accounts) would your organisation need to undertake to identify contractual control interests that needed to be updated?**

This would cause some additional work for local councils, 6000 of whom in England likely employ one full time equivalent clerk (officer) or less. Such work would involve (for them) liaising with their internal auditor, possibly engaging a solicitor and also paying additional fees to such a solicitor to identify contractual control interests that needed to be updated. Estimates are hard to provide as we have not heard from many local council land beneficiaries in response to this consultation. **However, indicatively, one local council respondent suggested one working week (37.5 hours).**

## 19. Certification

**What additional work (over and above the time and cost of preparing annual accounts) would your organisation need to undertake to certify in your organisation's annual accounts that all relevant contractual control interests had been noted on the land register where the land is registered?**

Whilst this question does not apply directly to NALC as it is not a beneficiary, it would apply to any local council which was a land beneficiary as local councils are required to provide annual audited accounts. As in 18 – this could take significant additional time for smaller local councils to effect – as a proportion of a part-time staff member's working week. It would be slightly less of a burden for middle sized local councils and less of a problem for larger local councils. Estimates are hard to provide as we have not heard from many local council land beneficiaries in response to this consultation. **However, indicatively, one local council respondent suggested <7 days for self-certification, and 1-2 working weeks for a notary.**

## 20. Economic impact

**What impact, if any, do you think that these proposals will have on the English land market (residential and commercial)? Please describe the effects and provide evidence.**

We do not have a significant corpus of evidence to provide. However we support the principle of transparency so long as it is not burdensome to local council land beneficiaries. These proposals on balance should make the English land market more transparent and efficient if applied fairly, proportionately and not being a burden to local council land beneficiaries. The residential land market usually affects residents in parished areas more than local councils themselves. However some local councils (larger ones usually) may have commercial land interests – which are likely to have been badly affected by COVID 19. These are factors the Ministry needs to have regard to.

Such proposals may have a positive effect, but they equally may have a negative effect where data collection and update becomes too onerous. Any 'guesstimate' would be made even more impossible due to the economic impact of COVID 19.

## 21. Costs

**What impact, if any, do you think that these proposals will have on the costs incurred by participants in the English land market (residential and commercial)? Please describe the effects and provide evidence.**

MHCLG and HMLR need to consider new burdens of both time and money on local council land beneficiaries involved in the English land market. 6000 of England's 10,000 local councils are small and have annual budgets of less than £25,000. These proposals where local councils are small (and land beneficiaries) will likely have a bigger impact than on larger or medium sized local council land beneficiaries. We would fully hope that the Ministry and HMLR minimised costs for local councils who had interests in either residential or commercial land in England - and that financial burdens were not placed on these councils.

Estimates are hard to provide as we have not heard from many local council land beneficiaries in response to this consultation. **However, indicatively, one local council respondent suggested that the net transactional effect could be for lawyers / conveyancers / agents to increase their fees by >10%.**

## **22. Identifying and understanding contractual control interests**

### **(a) Can you estimate the amount of (i) time and (ii) money that you have spent on identifying land affected by a contractual control interest?**

N/A - NALC does not own land. The likelihood is that smaller local councils which are land beneficiaries (possible in rural areas) - will incur disproportionate amounts of time and money relative to their officer capacity and annual budgets - trying to identify land affected by a contractual control interest. Estimates are hard to provide as we have not heard from many local council land beneficiaries in response to this consultation. **However, indicatively, one local council respondent suggested >£3000 including legal fees per unit.**

Langham Parish Council tell us that in preparation of the Neighbourhood Plan just identifying who thought they owned what parcels of land was a tortuous task. Finding out who actually did own it was almost impossible.

### **(b) What is the source of your information?**

Local councils who are land beneficiaries may inform NALC of the time and money estimates involved for them and NALC will provide this data to MHCLG and HMLR if received. Currently NALC has not received much of such data as very few local council land beneficiaries have provided us with it in answer to this consultation question.

### **(c) Can you estimate the amount of (i) time and (ii) money that you have spent on seeking professional advice on exactly how a contractual control interest affects a piece of land?**

N/A - NALC is not a land beneficiary but will inform MHCLG and HMLR if it is provided with information from local council land beneficiaries in answer to this consultation question. Again – such time and money would likely exceed the officer and financial capacity of England’s 6000 smaller local councils who happen to be land beneficiaries as they have an annual budget on average of less than £25,000 and typically employ one part time member of staff. Estimates are hard to provide as we have not heard from many local council land beneficiaries in response to this consultation. **However, indicatively, one local council respondent suggested <£500.**

### **23. Market impact**

**(a) If you are a small or medium enterprise (SME) builder or developer, do contractual controls hinder your ability to assess the viability of a local market? Please give reasons.**

Local councils are not SMEs by and large, and not developers. However we would suggest that local councils do not have much faith in the current planning system in general and it is likely that many or most local councils simply do not understand contractual control interests (latterly because most of them will not be land beneficiaries). The net effect is likely that contractual control interests make the planning system even less understood to local councils and their communities.

**(b) If you are an SME builder or developer, does a lack of freely accessible and understandable data act as a barrier to you entering the market? Please give reasons.**

Again local councils are not SMEs in general, or developers. However it is highly likely that the current lack of freely accessible data acts as a barrier to both buyers and suppliers in the English market currently (including local councils seeking to buy land).

### **24. Trust in the planning system**

**(a) Do you think that a lack of accessible and understandable data on contractual controls makes it more difficult for local communities to understand the likely pattern of development? Please give reasons.**

Yes, and more widely. Accessible and understandable data on contractual controls would make strategic planning for affected local councils easier to achieve. Communities preparing neighbourhood plans (including their land supply elements) need a ‘breathing space’ in which to plan, so we are asking for national planning policy and guidance to explicitly recognise this. There needs to

be a national housing land supply policy which does not have such a totally negating effect on so many neighbourhood plans.

The ability for a community to shape its area through neighbourhood planning is an important part of the social role of planning, also in regards to land management. Having more background information about the future plans for land in their own community would undoubtedly be illuminating and welcome to people. However, what they would not welcome is discovering that neither they nor their elected representatives have much genuine opportunity to influence planning outcomes. The new methodology outlined in the Planning White Paper requires that, within an extremely limited time period, a local authority has to find sufficient land to accommodate levels of housing which have been pre-determined for them and which they have no control over. Then, having allotted land for development, the local authority and its residents would have no real further opportunity to influence the planning process. It is this removal of democratic processes which would severely dent trust in the planning system.

**(b) If so, to what extent does it undermine trust and confidence in the planning system: (i) not much; (ii) somewhat; (iii) a great deal? Please give reasons.**

A great deal. As in our response to question 23 planning is easily the most important issue to most of England's 10,000 local councils – in their areas. However NALC constantly receives negative intelligence from its member councils regarding the lack of understanding of, or respect for, the current planning system in council areas. Local councils all want to understand and have a say in the pattern of development in their areas. The lack of currently transparent land data will not make it any easier for local councils to have a good knowledge of neighbourhood development.

It is therefore key that MHCLG should expressly set out the relationship that will exist between neighbourhood plans and the new types of spatial plans (especially regarding land supply). On this basis NALC formally endorses the recommendations in the report 'Re-imagining neighbourhood governance: the future of neighbourhood planning in England' by Matthew Wargent and Gavin Parker.

The government's proposals for this additional data and information to be collected and held by HMLR, and to be freely available by searching the land register, are long overdue and are welcome.

## **25. Public Sector Equality Duty**

**What impact, if any, do you think that these proposals will have on people who share protected characteristics? Please describe the effects and provide evidence.**



We have no view.

Should you require any further information on this response please do not hesitate to contact Chris Borg, policy manager, on 07714 771049 or via email at [chris.borg@nalc.gov.uk](mailto:chris.borg@nalc.gov.uk) .

Yours sincerely,

Cllr Sue Baxter, Chairman of NALC. © NALC 2020