Levelling Up and Regeneration Bill

Supplementary Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Levelling Up and Regeneration Bill ("the Bill"). It supplements that memorandum that was submitted and published on 20 December 2022 when the Bill was introduced to the House of Lords and addresses powers contained in the government amendments tabled at Committee stage on 23 February 2023. If any further amendments are tabled to the Bill, any powers taken will also be supported by a further supplementary memorandum.

B. SUMMARY OF THE BILL

The DPRRC is referred to the memorandum published on 20 December 2022 for the summary of the Bill. The amendments being tabled at committee stage do not add any further Parts or Schedules to the Bill.

C. DELEGATED POWERS

The amendments due to be tabled at Committee stage on 23 February introduce a further, limited, number of substantive clauses to the Bill creating new, or amending existing, delegated powers. These are:

a. powers to make provision for statutory consultees to charge fees;
b. powers concerning the allocation of self and custom build properties;
c. a power to make regulations concerning certain Street Vote development;
d. expanding the scope of an existing power of enforcement of build out.

None of these powers are Henry VIII powers and they have all been drafted as narrowly as possible without undermining the policy intent behind the clause. Where appropriate, the department is committed to carrying out consultation prior to exercise of the powers. Further details are provided in the relevant sections below, but in all cases the power and associated procedure is considered necessary and appropriate.

D. ANALYSIS OF DELEGATED POWERS BY CLAUSE

Street Votes: Clause for the Secretary of State to make Regulations to modify the application of the Town and Country Planning (Environment Impact Assessment) Regulations 2017 (SI 2017/517)

Powers conferred on: *Local Planning Authorities*
Powers exercised by: *Regulations made by statutory instrument*
Parliamentary Procedure: *Negative procedure*

Context and Purpose

1. The Bill is being amended to insert a new Clause after Clause 100 to provide a power to modify the application of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations") in relation to the grant of planning permission by a SVDO. At Clause 99, in proposed new section 61QH(1)(b) of the Town and Country Planning Act 1990, the Bill makes provision to exclude from the scope of permission which can be granted by a Street Vote Development Orders (SVDOs) development of a type listed in Schedule 1 of the EIA Regulations. SVDOs include in scope development of a description listed in Schedule 2 of the EIA Regulations which, in turn, requires provision to be made to modify the process to be followed under the EIA Regulations so that its process is compatible with SVDOs.

2. Broadly, there are two aspects of the process which must fit together:

    a. applying the processes contained in EIA legislation to an SVDO for the purposes of determining whether development proposed by an SVDO requires an EIA. This involves:
        i. determining whether development proposed by an SVDO is "Schedule 2" development and, if so;
        ii. whether that Schedule 2 development should be 'screened in' as "EIA development" which requires assessment; and
    b. modifying the process for carrying out EIA, if one is required. This would require relevant consultation processes to be followed and relevant environmental information to be produced before a decision is taken to make an SVDO.

Justification for delegation

3. As the administrative, procedural and technical detail of the SVDO process will be introduced via regulations the modification to the EIA process for SVDOs would also be appropriate to be implemented by regulations. SVDOs will be a new route to gaining planning permission that will operate differently to existing routes. The procedural requirements of EIA regulations as they currently stand will not work to full effect and until the detail of the SVDO regime is known it is impossible to prescribe in the Bill how the EIA regulations will be amended without the risk of limiting those amendments, artificially constraining the scope of changes to the EIA regulations in

a way that may prevent their proper application to SVDOs. The delegated powers will be used to make such modifications to EIA regulations so far as they concern SVDOs as are necessary to ensure the EIA regulations are capable of applying in the course of the SVDO process.

4. Where development that is consented under an SVDO is EIA development it will continue to be prohibited unless an EIA has been undertaken: this power is aimed at introducing the necessary process for undertaking that assessment. The Government is committed to ensuring that development enabled by SVDOs is subject to the same principles in relation to EIA as development enabled by other routes to planning permission. We are committed to implementing EIA policy so it has the same effect for SVDOs as other routes to development, and delegation offers flexibility to ensure we can tailor the requirements under the EIA regulations to this new form of development order.

5. Development of a type listed in Schedule 1 of the EIA regulations is already expressly prohibited in clause 61QH(1)(a). The power will be used to make provision for procedural matters in respect of environmental impact assessments in relation to SVDOs.

Justification for procedure selected

6. The negative procedure is appropriate as the power will only be used to tailor the relevant administrative procedure for EIAs so that they operate effectively for SVDOs and that environmental effects can be properly assessed for the purpose of this new route to planning permission.

Build out: Government amendments to clause 105 in Lords Committee

Powers conferred on: Local Planning Authorities
Powers exercised by: Regulations made by statutory instrument
Parliamentary Procedure: Negative procedure

Context and Purpose

7. Clause 105 of the Levelling Up and Regeneration Bill (LURB) inserts section 70D into the Town and Country Planning Act 1990 (TCPA). Clause 105 is being amended (italicised) to the extent that the power will be expanded to allow local planning authorities (LPAs) to decline to determine applications for planning permission for development in England where the application is made by a person who has previously made an application for planning permission for development of *land all or any part of which is in the LPA's area at the time the current application is made* ("the earlier application"), or by a person who has a connection with the development to which the earlier application related ("the earlier development") (section 70D(1)(b)). The power will apply if the earlier development has not begun, or if it has begun but has not been substantially completed and the LPA is of the opinion that the carrying out of the development has been unreasonably slow (section 70D(2) and (3)).

8. The effect of this amendment is that LPAs will be able to take account of not just the site to which the current application relates, but all sites that have previously been granted planning permission for development, with which the applicant has a connection, within their area when considering whether to exercise their discretion under section 70D. If the LPA declines to determine the application on the basis of non-implementation, or unreasonably slow build out, of an earlier permission anywhere within their area then the applicant is prevented from gaining the benefit of planning permission. The applicant could alternatively vary the existing permission, propose a different scheme that is not within scope of section 70D (e.g. non-residential), or seek permission for development outside of the LPA's area. We are therefore significantly amending powers that already exist within the LURB.

9. We are therefore significantly broadening the scope of the discretionary power given to LPAs that already exist within the LURB to which the delegated powers relate. However, the delegated powers included within clause 105 remain unchanged by this amendment; they are as set out in paragraphs 822 to 828 of the Delegated Powers Memorandum already submitted to Parliament.

Justification for delegation

10. Please see paragraphs 829 to 833 of the Delegated Powers Memorandum.

Justification for procedure selected

11. Please see paragraphs 834 to 840 of the Delegated Powers Memorandum.

Self and Custom Build: Government amendments to clause 115 in Lords Committee

Powers conferred on: *Secretary of State*
Powers exercised by: *Regulations made by statutory instrument*
Parliamentary Procedure: *Negative procedure*

Context and Purpose

12. The Self-build and Custom Housebuilding Act 2015 (c.17) ('the Act') came into force on 1 April 2016, with the objective of improving access to suitable land for individuals or groups of individuals who wish to build their own home in England.

13. Section 1 of the Act requires specified local authorities to establish a Register of those who wish to acquire a serviced plot in the authority's area in order to build their own house.

14. Section 2A of the Act requires the specified local authorities who are also the local planning authority to give suitable development permission (planning permission) in respect of enough serviced plots to meet the demand for self-build and custom housebuilding in their area arising in each 'base period' (the 'section 2A duty'). A base period is a period of 12 months ending on 30 October each year. Demand is

evidenced by the number of entries added to the Register in that base period. Section 2A(6)(c) sets out that development permission is 'suitable' if it is permission in respect of development that *could include* self-build and custom housebuilding.

15. Clause 115 of the Bill (introduced at Committee stage in the Commons) amends section 2A duty to ensure that local authorities can only meet demand by giving development permission which is *specifically for* self-build and custom housebuilding (rather than development permission which could potentially be used for self-build and custom housebuilding). This is with the aim of ensuring that local authorities can no longer count *any* development permission they grant towards meeting their section 2A duty on the basis that it *could* potentially be used for self-build and custom housebuilding, but which would not necessarily be used for that.

16. A further amendment being introduced in Lords Committee gives the Secretary of State a power to make regulations to further define what is meant by 'development permission' for the purposes of the duty.

Justification for delegation

17. The permissive power to make regulations to further define what is meant by development permission will allow the Secretary of State to consider whether it would assist local authorities in meeting their duty, and improve transparency, to require the addition of a planning condition or obligation to the grant of development permission so that the development can only be built out as a self-build or custom build project, and not in any other way. The details of a such a condition or obligation are likely to be technical and can only be properly captured after consultation with local authorities and other stakeholders.

18. Given the range of forms a grant of planning permission may take, it is considered appropriate to leave the specification of the conditions/ s 106 obligations to secondary legislation so that consultation may take place with the persons or bodies concerned, particularly Local Planning Authorities, who will be responsible for ensuring such conditions/obligations are imposed, prior to enacting a definition. This should enable the definition to be pinned down precisely and robustly, in a form with which LPAs are comfortable.

19. As the new system is bedded in and the sector matures, there may be a need for definitions to be updated, and this is much easier to do with definitions captured in secondary legislation.

Justification for the procedure

20. Regulations made under clause 115 as amended will be subject to the negative procedure. Local authorities and other stakeholders will be consulted before such regulations are made to ensure that the regulations address stakeholder considerations adequately and appropriately. Given that the regulations are reserved to addressing technical matters of definition, with the policy having been set out in primary legislation, the Government considers that the negative procedure affords an appropriate level of parliamentary scrutiny.

Statutory Consultees. Clause TBC: Power of certain authorities to charge fees for advice in relation to applications under the planning Acts

Powers conferred on: *Secretary of State*

Powers exercised by: *Regulations/Order made by statutory instrument*

Parliamentary Procedure: *Negative procedure*

Context and Purpose

21. This is provision for a direct conferral of power on statutory consultees to charge fees and other charges for planning advice in respect of planning applications and proposals, subject to regulation making power exercisable by the Secretary of State. New section 303ZB is for insertion into Part XIV of the 1990 Act (Financial Provisions) and will be exercisable at a consultee's discretion. The power will only apply to charging in England and will exclude local planning authorities, the Mayor of London, combined mayoral authorities and the SoS from charging liability, other than in capacity as developer. A qualifying neighbourhood is excluded altogether.

22. Charging for statutory advice shall be on a cost recovery basis and statutory consultees will be required to publish their fees in schedules, which shall include the basis for calculation of fees and relationship of services to planning function. The consultees will be able to withhold advice in event of non-payment.

23. Statutory consultees provide a range of planning related services in the planning system, both in the fulfilment of statutory duty and providing discretionary planning services. There has previously been no express statutory provision for consultees charging for their planning services.

24. Statutory consultees play an important part of the planning application process. However, these organisations are facing growing financial and resource pressures which will become more acute as the volume and complexity of projects grows in accordance with the economic and environmental challenges we face.

25. There are 2 delegated powers within this provision.

26. The first power will enable the SoS to prescribe by regulation or order the bodies upon whom charging powers will be conferred.

27. The second power will enable the SoS to regulate, in a limited way, the consultee's charging: section 303ZB (3)(c) allows the Secretary of State to exclude advice from charging where it is prescribed.

Justification for delegation

Naming the consultees

28. Given the breadth of statutory consultees prescribed in secondary legislation, the delegated power anticipates a situation where careful consideration of statutory consultees, their financial pressures and role might need to be included within the scope of the power. This is especially for those whose remit in terms of volume of applications and other planning functions increase through requirements imposed through the planning reforms, such as duty to engage in local plan preparation and become involved in the preparation of design codes, impacting on their ability to fulfil their statutory duties without the ability to charge for specified planning services.

29. The delegation is narrow and constrained by its subject matter in only relating to consideration of a change to the list of named consultees. The rationale underlying the grant of the power is that consultees become more financially self-sufficient while improving their performance in terms of quality and timeliness of advice provided. Performance is subject to periodic non-statutory review across the sector. The prospect of removal of a consultee from the list will, it is hoped, incentivise performance.

30. In addition, the list of statutory consultees in secondary legislation continually evolves. The Health and Safety Executive were added in August 2021 on development of 'high rise residential buildings' (in relation to consideration of fire safety), and from 1 June 2023, Active Travel England will become a statutory consultee on developments of 150 homes or more.

31. The cost recovery power for Nationally Significant Infrastructure Projects follows a similar approach, allowing for greater flexibility as the statutory consultees and their roles evolve over time. The advantages of retaining this flexibility have been considered against the issue of the scope of delegated powers and found to be justified, particularly given the level of parliamentary and consultative scrutiny that will be afforded.

Regulating the charging power

32. The second power will enable the SoS to exclude certain types of consultee activity from, and set minimum thresholds for, charging liability. This is to satisfy the SoS's policy object of minimising impact on small and medium-scale development. This falls short of the SoS setting the fee and so does not cut across the consultee's obligation to publish schedules. In that respect, the delegation is appropriately constrained and the power is otherwise a direct conferral of power on the consultees.

Justification for procedure selected for both powers

33. Negative: it is proposed that both the delegated powers will be subject to the negative resolution procedure and preceded by consultation with those affected, or likely to have an interest, as required. This is consistent with the changes to the Development Management Procedure Order 2015 (the 2015 Order) to amend the list of statutory consultees.

34. Consultation is likely to include: (a) for the first power, which statutory consultees should be in scope, technical details and scope of planning services that can be charged; and (b) for the second, the description of development to be excluded to achieve the policy object above described. This accommodates the fact that the charging power will, by necessity, work differently for different statutory consultees, based on their areas of specialty and caseloads.