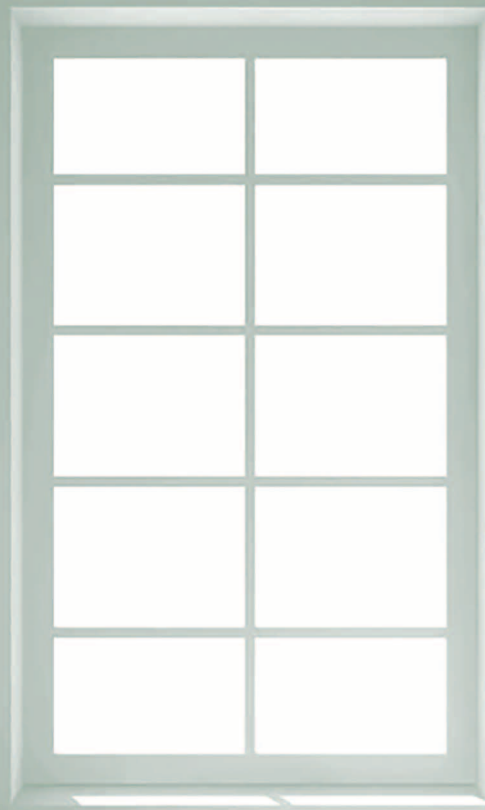




What Impact Will the Government's 'Planning for the Future' Have on Rights to Light?

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In August 2020, the Government released a policy document titled 'White Paper: Planning for the Future'. In this document, the Government sets out its broad plan for reform of the regulatory framework for planning in England.

Here we explain the key elements of this white paper, how it relates to other recent planning reforms, and what impact any reforms might have on individuals who seek to enforce their 'rights to light' against property developers.

1. What is 'Planning for the Future?'

In recent years, there have been many changes to planning rules and regulations aimed at removing barriers to development, encouraging growth in housing stock, and enabling commercial property development.

The Government's 'White Paper: Planning for the Future' (henceforth, 'Planning for the Future') proposes to completely reform the English planning system. The stated goal of Planning for the Future is to "streamline and modernise" England's regulatory framework for planning and development. This system is still based on the principles set out in the original Town and Country Planning Act 1947 - a

framework which is now a little outdated, to say the least.

Planning for the Future identifies a range of problems with the existing planning framework:

- **Uncertainty.** England's planning system, shaped by the 1947 Act (with its latest incarnation being the Town and Country Planning Act 1990), makes the system discretionary in character: At the heart of the system is the right of 'Local Planning Authorities' (henceforth 'local authorities') to give (and refuse) permission to planning applications. It is suggested that the uncertainty involved makes the costs prohibitive for all but the largest developers;

- **Cumbersome 'Local Plan' processes:** While it is a statutory obligation to have such a plan in place, only 50 per cent of local authorities currently do, with the average preparation time being seven years;

- **Excessively bureaucratic planning processes.** Assessments of housing need, viability and environmental impact are complex and opaque;

- **Lack of public trust.** A recent poll showed only seven percent of respondents trusted their local authority to determine whether large scale developments were good for the area;

- **Outdated technology and data use.** Planning systems are largely document-based, rather than data-based, with little use of interactive digital tools and consultation mechanisms;

- **The developer contribution process** is inefficient. Developers are required to make contributions to affordable housing and infrastructure, but the process is complex and lacks transparency;

- **Little focus on quality and aesthetics.** It is suggested there is no place in the existing system to incentivise beautiful and high quality developments;

- **Too few homes being built.** A chronic undersupply of housing has pushed up prices: In Italy, Germany or the Netherlands, residents get around twice the amount of living space for the price;

In response to these problems, in Planning for the Future, the Government seeks an overhaul of the planning system to:

- Streamline the planning application approval process;
- Simplify the role of Local Plans;
- Adopt a ‘digital-first’ approach to the planning process. That means moving from documents to data;
- Bring a new focus on design and sustainability;
- Improve public infrastructure delivery;
- Open up land for development.

2. How Does Planning for the Future Relate to Other Recent Changes to the Planning System?

Planning for the Future is part of a broader move in recent years to make the planning system more friendly to development. One of the more significant changes in recent years was the extension of Permitted Development Rights (PDRs) through 2020 and 2021.

A PDR is a right to develop property without the need to go through the full planning permission process. Though, crucially, ‘prior approval’ from the local authority is still usually required for development.

Significant changes to the PDR system over past two years include:

- A new permanent PDR which allows the enlargement of dwellinghouses without planning permission;
- New PDRs allowing additional stories to be built on dwellinghouses without planning permission;
- New ‘adequate natural light’ requirements. In order for developments authorised by PDRs to be approved, it is often required that the developer show evidence of “the provision of adequate natural light in all habitable rooms of the dwellinghouses”. It is now a requirement for any PDR that facilitates transition of a property from a commercial or industrial use, to a dwellinghouse.

3. What Impact does Planning for the Future and Other Changes Have on Rights to Light?

While recent changes, and Planning for the Future,

may well help to deal with the housing crisis in the UK, these changes may also present a source of conflict: Neighbouring property owners and residents affected by the new developments may complain on a range of grounds.

‘Rights to light’ (also called ‘Rights of light’ or ‘Right of Light’), are a key mechanism which would allow a neighbour to interfere with a development scheme, regardless of planning permission or proposed changes to planning rules. In short, rights of light are a form of easement available in England, which gives owners a right to block developments which would impede natural daylight. It usually requires that the daylight was ‘received’ by that property for a period of at least 20 years. These rights can be passed on via a deed, or implicitly through the conveyance of property.

You can read more about these rights at Fact Sheet 3: A Guide to Legal Rights of Light.
www.right-of-light.co.uk/resources/factsheet-3/

Recently, we have seen how far courts are willing to go to protect neighbouring properties’ rights of light. *Beaumont Business Centres Ltd v Florala Properties Ltd* [2020] EWHC 550 (Ch) is the most recent example of rights of light case law the industry needs to take into account. In that case, the court found that there had been an infringement of the plaintiff’s right to light and accordingly made the following Declaration: The claimant (Beaumont) was entitled to an injunction that ordered the defendant (Florala) to reduce its development to remove the right of light injury that had occurred.

On the facts of that case (as an occupying tenant was not a party to proceedings), the court declared that the injury could alternatively be remedied through compensatory damages.

The court’s recognition of this right to injunctive relief is something that the industry is needs to take seriously: The cost of altering a development to remove the injury to a claimant’s right to light could be catastrophic

4. What Is the Difference Between Rights of Light and “Adequate Natural Light” Requirements in Planning?

As ‘rights of light’ disputes are considered a civil issue, reforms in the planning process are unlikely to remove this barrier to development. Rights of light are not currently a material planning consideration (i.e., the local authority do not need to consider these when making their decisions on planning permission), and can therefore be a surprise to many later down the line.

However, when making decisions on planning permission, local authorities do often consider the impact and availability of daylight and sunlight when making decisions. In calculating whether a development will still allow for sufficient sunlight/daylight, local authorities often follow the BRE Guide: Site Layout Planning for Daylight and Sunlight criteria for neighbouring properties.

In addition to this, as mentioned earlier, is the requirement for local authorities to consider whether a development would allow for "adequate natural light" as part of the prior approval process for PDRs.

The differences between daylight and sunlight, as they are treated for planning purposes, and legal rights of light, are an area where developers are often caught out. We look at these key differences below.

The first major difference is that when considering 'adequate natural light' for planning purposes, usually only habitable rooms in domestic properties are considered. This means that compliance with the daylight/sunlight criteria for planning purposes, does not eliminate rights of light risk.

The second major difference is that rights of light are assessed using different measurement methods. Given a right of light injury is determined by whether a neighbouring room drops below a certain threshold, rather than the loss of light that occurs (though this can be a factor in the strength of the neighbour's claim), in urban areas, neighbouring properties are likely to already be below the threshold even before any development takes place. Therefore, any further reduction to the light would automatically constitute a right of light injury. This means that unless an application proposal is replacing what is on the site already, which is unlikely to be the case with most development, there is going to be right of light risk associated with the new schemes.

5. What Is Our Overall Assessment of 'Planning for the Future'?

With Planning for the Future proposing to remove barriers in the planning process and encourage development, we would expect to see an increase in neighbourly opposition to development, including opposition based on rights of light. Whilst the housing crisis in England is ample evidence that the current planning system is no longer fit-for-purpose, we have to consider whether the proposed reforms would place an unfair burden on neighbouring owners. Planning for the Future does acknowledge that some may view the proposed reforms as 'too much change, too fast', but the Government is clearly of the view that the potential benefits of change far outweigh the potential negative impacts.

One area of potential additional conflict is the focus in Planning for the Future on designating land for housing development, while still continuing to protect the green belt. This suggests the focus for housing sites will be in already populated areas where there is the potential to cause a loss of light to nearby neighbouring properties. Whilst housing developments are unlikely to be under any more threat from rights of light than previously, developers should remain mindful of their proximity to existing neighbouring properties.

It is inevitable that moving to a more rule-based, rather than discretionary, system will make it harder for some individuals to protect their interests: While Planning for the Future does focus on improving

community engagement with local plan processes, by their nature, as policy documents, local plans will not be able to consider the interests of individuals in individual cases.

Although the planning reforms are likely to lead to more development, rights of light may continue to be a barrier that may impact and threaten new housing schemes and developments later down the line. What is important for developers and local authorities going forward is to remain mindful of rights of light, regardless of compliance at planning and the process to obtain permission.

6. How to Mitigate the Risk of 'Rights to Light' Litigation

There are a number of options available developers to manage this risk. Key options include:

- **Liability insurance.** Developers can insure against the possibility of rights to light litigation;
- **Amending the proposed development.** Developers can negotiate their development with neighbours to reduce any loss of light, in return for an agreement not to bring a civil suit against the developer for rights of light;
- **Negotiating compensation.** Developers can actively contact neighbours to offer compensation for any potential loss of light;

Appropriation of rights of light from local authorities. Local authorities have the power to override a neighbour's entitlement to seek an injunction on rights to light. Where doing so it is the responsibility of the local authority to compensate the affected individuals for their loss of light. The basis for compensation is the same as 'compulsory purchase' principles. Note, however, that this power will only be exercised by local authorities with caution.

Conclusion

The Government's recent white paper, Planning for the Future, as well as reforms to planning rules and regulations over the last couple of years, indicate a clear direction for planning law in England: Rules and regulations will be relaxed to enable development of more dwellings, as well as to support more efficient use of existing industrial and commercial premises. It is worth noting, that any easing of planning constraints runs the risk of increased 'rights to light' litigation from neighbours whose light is, or could be, affected.

Paul Fawell acts on behalf of claimants, defendants and in the capacity of joint expert; on cases relating to daylight and sunlight for planning and legal rights of light. Paul Fawell has acted on the following in a number of key cases including *Ottercroft Ltd v Scandia Care Ltd*; 2016, which went on to be decided in the Court of Appeal and his work is in London, Essex and Nationwide.

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