

## **Technical Guidance:**

### **The Right to Build Standard Calculation**

Calculating and reporting the performance of relevant planning authorities, under the Right to Build legislation, using publicly reported data.

This guidance has been prepared by the National Custom & Self Build Association (NaCSBA).

Version: Draft

#### Important

This paper has been prepared on the basis of NaCSBA's best understanding of the Right to Build with regards to the letter and the spirit of the legislation. The ultimate and definitive interpretation can only be determined by due judicial process.

## Context:

The Right to Build is the term generally used to refer to the duty placed on local planning authorities in England to ensure that they provide sufficient suitable permissions for those seeking to build or commission their own home.

The duty is set out in primary legislation - [The Self-build and Custom Housebuilding Act 2015](#) as amended by the Housing & Planning Act 2016. The Act is supported by secondary Regulation and National Planning Policy Guidance.

The aim of the legislation is “to make it much easier for people to find land to build or commission their own home, diversifying housing supply and revitalising smaller builders who have not experienced the same level of recovery as the large housebuilders since the financial crisis.”<sup>1</sup>

The legislation requires local planning authorities to compile a Register of persons seeking to acquire land to build or commission their own home and to ensure that there are sufficient serviced permissioned plots consistent with the local demand on their Registers. Central to the mechanism of the Act are the processes of maintaining the Register and assessing the number of suitable plots.

Every year therefore, the local authority must count the number of people who have joined the Register. They then have 3 years in which to permit an equivalent number of suitable plots.

The legislation applies to all the local authorities with planning powers in England (around 300) and the 10 English National Parks (which have their own planning powers).

More detail about the act can be found here - <https://www.gov.uk/guidance/self-build-and-custom-housebuilding>.

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<sup>1</sup> <https://www.legislation.gov.uk/ukpga/2016/22/notes/division/1/index.htm> Para 18

## The Data:

To support oversight of performance of the Right to Build legislation, since 30 October 2016, the Department for Levelling Up, Housing & Communities (DLUHC) has used data requests to collect information from data relevant planning bodies.

The Right to Build operates in base periods ending on 30 October each year, starting from 2016.

The information that is collected has evolved over the years to provide an increasing complete amount of data. Regular collecting is important as the duty is derived from the cumulative performance of each authority rather than simply the performance in each individual year.

This data is published annually and can be found here –

<https://www.gov.uk/government/publications/self-build-and-custom-housebuilding-data-2016-2017-2018-19/data-release-self-build-and-custom-housebuilding-data-2016-to-2020-21>.

(Note despite the web address the data is available up to 30 October 2022 – Base period 7)

Collecting and releasing this data is useful to the sector and the general public to help monitor local authorities progress towards providing more opportunities for Self and Custom build housing. It provides an authoritative source of information and avoids individual planning consultants, self builders, and architects having to seek out reporting by individual authorities or by having to access the data by conducting Freedom of Information Act requests to individual councils.

## Data Usage

To optimise the data provided by DLUHC, it is important to undertake the following steps:

1. Undertake the base calculation.
2. Give due consideration to the following:
  - a. The impact of gaps in the data that is requested by DLUHC.
  - b. The impact of gaps or errors / inconsistencies in the data that is reported.
  - c. The reporting impact of other specific challengeable actions undertaken by local authorities in respect of the management of the Register.
  - d. The approach undertaken to identify permissions to count towards delivery.

In other words to use the combination of numbers and other data to derive at a more complete assessment of performance.

## General principles

The general principles that have been used to develop this methodology are as follows:

- The methodology should comply with the letter and the spirit of the legislation.
- The methodology should be transparent.
- The methodology should be fair.
- The methodology should be clear, precise, and authoritative.
- The approach should be repeatable.

## The Base Calculation

### Overview

The base calculation is the way through which the duty under the legislation can be expressed numerically for the majority of local authorities.

The calculation involved matching the entries onto the Register (the demand) with the relevant plots that have been permissioned (the supply)

Adjustments to the base calculation are needed in the cases of:

1. Groups.
2. A Split Register (giving rise to sections 1 and 2).
3. Those leaving the Registers.

How to accommodate these elements is set out in the next section.

### Calculating supply and demand

The Register operates in base periods linked to the date in which the legislation was enacted. The first base period ended on 30 October 2016, and each subsequent base period ending on 30 October each year thereafter.

The legislation sets out how supply and demand are to be determined:<sup>2</sup>

*the demand for self-build and custom housebuilding arising in an authority's area in a base period is the demand as evidenced by the number of entries added during that period to the register under section 1 kept by the authority.*

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<sup>2</sup> <https://www.legislation.gov.uk/ukpga/2016/22/section/10/enacted> 10 (1)

*development permission is “suitable” if it is permission in respect of development that could include self-build and custom housebuilding.*

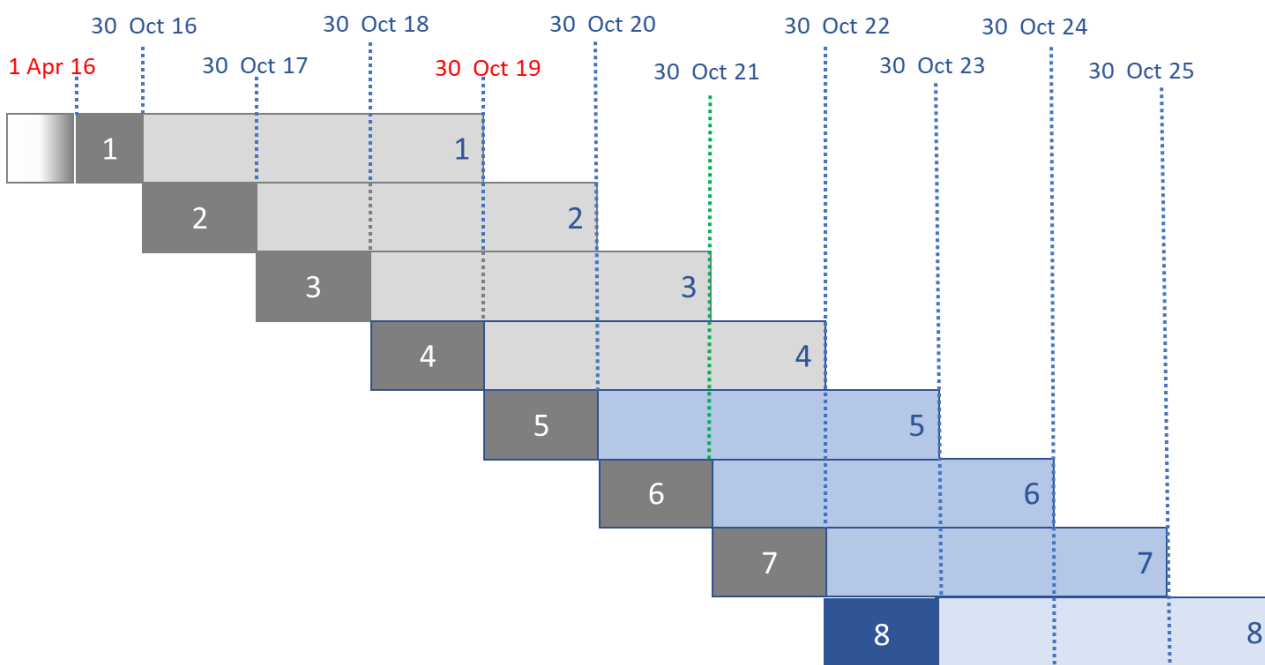
Matching supply and demand

Given that it takes time to deliver supply to meet demand, local authorities are given time to meet their duty. National Planning Policy Guidance then states<sup>3</sup>:

*At the end of each base period, relevant authorities have 3 years in which to permission an equivalent number of plots of land, which are suitable for self-build and custom housebuilding, as there are entries for that base period.*

This is effectively a restatement of Statutory Instrument 2106. No. 1027 (The Self-Build and Custom Housebuilding (Time for Compliance) Regulations 2016 - Section 2. It is a straightforward principle and makes sense at a general level.

How this works in practice can be illustrated as follows (showing the position as at 1 January 2023):



<sup>3</sup> <https://www.gov.uk/guidance/self-build-and-custom-housebuilding> Paragraph: 023 Reference ID: 57-023-201760728

## Note

- All local authorities had to have a Register in place 1 April 2016.
- The first Base period closed on 30 October 2016
- In the next three years (from 31 October 2016 to 30 October 2019) the local authority must have permissioned enough plots to at least match the number who joined the Register in the first base period.
- Note that whilst a permission can be counted against an entry on the Register in any of the three previous base periods, it can only be counted once. In practice this means that it should always be offset against the earliest base period for which demand remains unmet.
- 30 October 2019 was the first date on which compliance with the legislation could be tested.
- As at 1 January 2023:
  - 8 Base periods have been started for joining the Register, 7 base periods have since closed.
  - Whether the duty has been met can be assessed in each of the first four base periods
  - Whether the duty has been met is yet to be assessed in each of the most recent 4 base periods.

## Output of the calculation

Three years after the base period has ended it is possible to assess whether the duty has been met.

If the numbers on the Register for any one year exceed the number of suitable permissions that can be counted towards delivery, then the duty placed on the local authority by the legislation has not been met. At this point the authority should do all it can to close this delivery gap. In practice this means taking active steps to permission more plots not least through giving a higher weighting in favour of custom and self build planning applications.

This deficit that then exists rolls forward into future years to be matched against future permissions. Where there are multiple years of under delivery then the deficit can continue to grow over time.

If the number of permissions granted exceeds the demand, then the duty has been met. However, in this case the excess supply cannot be carried forward. This is because to do so would mean that it would be matching past supply against future demand. This is clearly inappropriate.

This means that to calculate the position of any local authority at any particular point in time it is necessary to have all the relevant previous data.

## Gaps in the data collected by DLUHC

The data collected and published by DLUHC has evolved over time. However even now the data collection is not sufficient to establish with certainty whether the duty under the legislation has or has not been met. The overall numbers of groups are small relative to the numbers of individuals.

More complete data collection (as proposed by NaCSBA) is required, however even when introduced this will not address the gaps that already exist in the data. In these cases, the existence of the gap can be highlighted and this impact the conclusions that can be drawn, although the impact may not be sufficient to change the core position as to whether the duty has or has not been met.

Such gaps therefore imply the need to treat the output with caution and where possible seek additional information to address the gap.

### Groups

The legislation is clear that the Right to Build applies to both individuals and groups. DLUHC collects data on the number of groups but not the number of plots that the group requires.

Where the data includes groups then where possible the full details should be gathered, however for the purpose of using the available data the following options are recommended:

1. That each group is counted as just one individual – this will always deliver an understatement of demand.
2. That each group is counted as 5 individuals (an average derived from known group sizes) – this will deliver a more accurate estimate but may overstate demand in some cases.
3. That the analysis is based in individuals only – where there is a group this will underestimate demand.

Note where a group exists then supply should match both the number of plots and the arrangement of plots – the group is most likely to be seeking a single multi-plot site.

### Local Connection Tests

Intended for the “*small number of local authorities in this country that are very heavily constrained in terms of their land supply.*”<sup>4</sup> The introduction of a Local Connection Test has the effect of putting all new joiners of the Register into Part 1 or Part 2.

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<sup>4</sup> Draft Self-build and Custom Housebuilding (Time for compliance and fees) Regulations 2016 Debate. Gavin Barwell MP Housing Minister Monday 17th October 2016

Part 1 applies to those who meet the test and for which the duty to meet demand with supply applies.

The duty does not apply to those on Part 2

*“Entries on Part 2 do not count towards demand for the purpose of the 2015 Act (as amended) but relevant authorities must have regard to the entries on Part 2 when carrying out their planning, housing, land disposal and regeneration”<sup>5</sup>*

It is therefore important to understand (1) if a local connection test is in place and from when and (2) whether those joining the Register join Part 1 or Part 2.

For the year in which the test is also introduced it is important to also identify those that joined before the test was introduced (for whom the duty continues to apply).

This data is not available from DLUHC. The DLUHC analysis for more recent years does split the total entries of individuals and Groups at the end of the base period into Part 1 (including those before the test was introduced) and Part 2.

This use of cumulative data can be used to fill the gap. Net new additions in the year can be calculated based on the totals in the current and previous year. However, the introduction of such a test is often associated with the removal of entries from the Register in ways which NaCSBA considers contrary to the spirit and letter of the legislation (see below).

Where this is the case then the total at the end of the year will be lower than the total at the end of the previous year plus any additions during the year. Where this is the case, the approach should be challenged.

#### Removal of entries from the Register

The primary legislation is clear that the demand is evidenced by the number of entries added to the Register, in any base period.

Secondary regulation does set out limited number of events through which an entry can be removed from the Register – these are either in response to a written request from the individual or group or:<sup>6</sup>

- (2) A relevant authority may remove an entry from the register—
- (a) if the authority considers that the individual (or in the case of an association, any member of the association) is no longer eligible for entry in the register;
  - (b) where the person has acquired land suitable for building a house; or

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<sup>5</sup> <https://www.gov.uk/guidance/self-build-and-custom-housebuilding> Paragraph: 018 Reference ID: 57-018-20210208

<sup>6</sup> <https://www.legislation.gov.uk/ukxi/2016/950/regulation/10/made> Paragraph 10



*(c) if an individual or association fails to pay any fee required to remain in the register.*

NaCSBA is of the view that (a) and (c) only arise in circumstances where the arrangements at the time the individual joined the Register are not met as a result of actions by that individual. NaCSBA is of the view that (b) is only relevant where the land acquired is outside the local authority area (as the better approach is for the local authority to match the entry for demand with an appropriate entry for supply).

NaCSBA is aware of one further area where entries may be validly removed from the Register, and that is when local authorities merge. Individuals are permitted to join more than one Register (although this is discouraged by NaCSBA). As a result, a merger may result in duplicate entries, which can be removed such that only a single entry is retained.

NaCSBA would like to see the disclosure of any entries removed from the Register, however this data is not provided by DLUHC. In some cases, removals can be inferred but the process is not transparent.

NaCSBA is of the view that removals in line with the letter and the spirit of the Right to Build should be few and far between, and a prudent assumption is that there are none during the period.

This may overstate the duty, in particular in the case of merged authorities.

## Gaps or errors / inconsistencies in the data that is reported

In addition to gaps due to the incomplete data collection by DLUHC, issues can arise with the data that is provided by the local authority. Examples include:

- The local authority does not return its data. Each year a small number of local authorities fail to respond to the data request and hence their data is missing.
- The local authority data contains unexplained inconsistencies. This is most typically the case when the number on the Register at the start of the year is not equal to the number on the Register at the end of the year, plus those who have joined during the year. This may be linked to the removal of entries (see above)

Where such inconsistencies are identified they should be flagged. From the data it may not be possible to identify where the error is. Flagging such data issues is the best way to deal with the fact that further investigation of the local authority. Best practice when dealing with such inconsistencies is to see investigate with the local authority to seek to agree on a revised data set that is consistent with these guidelines.

Specific challengeable actions undertaken by local authorities in respect of the management of the Register.

Whilst the initial focus is on the ensuring that the duty under the legislation has been appropriately calculated, NaCSBA has significant concerns that actions undertaken by local authorities may not be in keeping with the letter and the spirit of the Right to Build.

Hence it may be the case that the calculation has been undertaken in accordance with this guidance however the size of the Register has been constrained in ways that are open to challenge.

In other words, the issue is with the approach used to manage the Register and not with the calculation.

Three key issues have been identified together with further element with regards the approach to implementation. These are set out in more detail below.

#### Introduction of a local connection test

Implementation of a local connection test has the effect of reducing the numbers on the key part of the Register for which the duty to match demand and supply applies. As noted above, local connection tests are intended for a “small number of local authorities in this country that are very heavily constrained in terms of their land supply. The Government *“expect that relevant authorities will apply one or both of these tests only where they have a strong justification for doing so.”*<sup>7</sup>

The hurdles to be met in implementing such an approach are set out within National Planning Policy Guidance<sup>8</sup>.

#### ***What can the local eligibility tests look like?***

*It is for each relevant authority to determine the rationale for introducing a local eligibility test and hence the specific conditions set. Any eligibility test introduced by an authority needs to be proportionate, reasonable and reviewed periodically to ensure that it responds to issues in the local area, for example for areas with exceptional demand or limited land availability.*

Where such a test is in place it then it should be challenged to ensure that it meets these criteria.

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<sup>7</sup> <https://www.gov.uk/guidance/self-build-and-custom-housebuilding> Paragraph: 019 Reference ID: 57-019-20210208

<sup>8</sup> <https://www.gov.uk/guidance/self-build-and-custom-housebuilding> Paragraph: 020 Reference ID: 57-020-20210508

## Introduction of a Financial Solvency Test

Implementation of a Financial Solvency Test has the effect of reducing the numbers on the Register. The legislation is clear that it applies to the occupant and not solely a homeowner so the legislation is compatible with affordable home ownership.

*“In designing a financial solvency test, relevant authorities may wish to assess whether the applicant can afford to purchase the land. Authorities should be aware that self-build and custom build can provide a route to affordable home ownership for those on low incomes and so will need to take this into consideration if introducing a financial solvency test.”<sup>9</sup>*

In addition to ensuring any financial assessment of means is not too restrictive, NaCSBA has identified additional policies implemented by some local authorities that place inappropriate demand on an individual seeking to join a Register. For example, by requiring a mortgage offer (which requires planning permission on a plot and hence negates the need to join the Register), or other involvement of mortgage personnel (that is not needed at this stage of the self-commissioning journey).

Where such a test is in place it then it should be challenged to ensure that it meets the criteria, and is not inappropriate.

## Charge for joining and remaining on the Register

Some local authorities apply charges to join or to stay on the Register. The guidance is clear that such charges should not act as a deterrent, and therefore the charge if introduced should not result in either a reduction of entries onto the Register or those already on the Register choosing to leave.

The key Guidance is here:<sup>10</sup>

*Relevant authorities can only set fees on a cost recovery basis. Any fees charged must therefore be proportionate, reflect genuine costs incurred, should not act as a deterrent for people to be entered on or remain on the register and should not be viewed as a mechanism to manage demand. Authorities are advised to provide a transparent rationale for why they are charging, and how charges have been arrived at, and to review this to ensure costs remain proportionate and fair.*

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<sup>9</sup> <https://www.gov.uk/guidance/self-build-and-custom-housebuilding> Paragraph: 020 Reference ID: 57-020-20210508

<sup>10</sup> <https://www.gov.uk/guidance/self-build-and-custom-housebuilding> Paragraph 034 Reference ID: 57-034-20210208

Where such a test is in place it then it should be challenged to ensure that it meets these criteria.

### Retrospective action

It may be that the local authority is able to demonstrate that its restrictions have been adopted in line with the Guidance.

However even where this can be shown to be the cases then NaCSBA has seen examples of these constraints being applied retrospectively. By this we mean that the terms under which individuals have signed onto the Register have been changed in ways that challenge the ability and willingness of the individual or group of individuals to remain on the Register. This is clearly unfair.

In the worst examples NaCSBA has seen local authorities has sought to remove entries even many years after the duty to match supply with demand has not been met.

NaCSBA is of the view that the basis on which an individual or Group joins the Register should represent the basis on which they remain on the Register and no retrospective action should take place and where this is the case then it should be challenged.

The easiest way to identify if such action has taken place is where there is a large reduction on numbers on the Register from one year to the next.

### Identifying permissions that count towards supply

The DLUHC data includes details of the number of permissions that have been used to count towards supply.

The data does not provide the details of the specific permissions that have been granted, and therefore cannot be directly validated. The details should be available from local authorities on request.

NaCSBA is aware of a number of issues with regards this number. In many cases the number has been wrongly calculated. The issues identified include:

- Some local authorities have counted all small developments as custom and self build even when they are aware that this is not the plan for the site. These local authorities can often be identified by the large number of permissions – often well in excess of the numbers joining the Register.
- Some local authorities count home extensions, and agricultural dwellings as custom and self-build even when they do not meet the definition in the legislation.

- Many local authorities are requiring a percentage of large sites to be set aside for custom and self build, however in many cases this is not what is happening with the sites reverting to speculative build homes. Such sites should only be included within the supply when the following tests are met:
  1. The plots will be available within a time frame appropriate to meeting the duty (ie within 3 years of permission being granted) and
  2. There is a strong expectation and likelihood that the plots will end up being taken up by custom and self builders – as demonstrated by the controls in place, and the requirements on the developer) to ensure that this is the case.

## Summary

The data published by DLUHC calculation can be used to calculate whether a local authority has met its duty under the Right to Build Legislation subject to the following caveats.

1. There are some gaps in the data that is collected by DLUHC that in some cases can prevent a fully accurate assessment being made. Where this is the case, the calculation can still be performed but additional care is required.
2. There are some gaps, errors, or omissions in the provision of data by local authorities, that prevents a fully accurate assessment being made. Where this is the case, this can be flagged – and separate investigation and challenge is encouraged.
3. There are some practices undertaken by local authorities that can limit the numbers joining or remaining on the Register. These constraints may be operating in line with the spirit and letter of the legislation, but this may not be the case. Where this is the case, this should be flagged – and separate investigation and challenge is encouraged.
4. There may be practices undertaken that overstate the supply of plots to meet demand. The existence of such activity can be difficult to spot, and the data is not readily available. Where this number is critical to the performance of the authority then challenge is encouraged in particular when the number of permissioned plots appears high.

Meaningful analysis of the Right to Build data requires both the operation of an effective calculation and the provision of suitable additional insight to enable these numbers to be fully viewed in context.