

27th May 2011

Local Financial Considerations

The RTPI Position

1. At Report Stage on the Localism Bill (17th May 2011) the Commons agreed an amendment to introduce a new clause (124) which states that:
A local planning authority is to have regard to material considerations in dealing with applications including any local finance considerations, so far as material to the application. "local finance consideration" means: a grant or other financial assistance that has been, or will or could be, provided to a relevant authority by a Minister of the Crown [this may be taken to cover the payment of New Homes Bonus], or sums that a relevant authority has received, or will or could receive, in payment of Community Infrastructure Levy;
2. The Royal Town Planning Institute (RTPI) included this issue in its Report Stage Briefing to MPs¹. That briefing quoted a recent Government statement that:
Local planning authorities will be well aware that when deciding whether or not to grant planning permission they cannot take into account immaterial considerations. The New Homes Bonus cannot change this and nor is it intended to.
3. The RTPI believes that the Government position stated just three months ago is the correct one and following the passing of new Clause 124 (was 15) at Report Stage, **the RTPI calls for this Clause to be withdrawn and for the Government to publically re-inforce the basic principle that wider financial considerations are not material considerations when considering an application. There needs to be an open debate on the wider issues raised by the introduction of this Clause and, in particular, the ways in which the incentive schemes to which the Government is wedded should be applied in practice.** The RTPI is willing to engage fully in such a debate, including helping to draft guidance to clarify the position.
4. The RTPI feels that the policy position set out by the Minister of State at Report Stage Debate is correctly stated but we query the need for legislation on this policy issue if this Clause is merely re-stating the current position. The Clause creates precedence in trying to define in statute that which, up until now, has quite satisfactorily been defined in policy guidance and practice. If the purpose is to make the New Homes Bonus itself legal, then this is not the proper way to do this.
5. The Clause could, on the contrary, be potential harmful as the existence of the Clause itself gives undue prominence to financial considerations as a material consideration and will lead to challenges of legal interpretation. This will lead to even greater uncertainty – not least for investors. Added to this; the Clause, as drafted, does not reflect the Minister's policy position. The Clause will only increase public suspicion that permissions are bought and sold – not reduce it.

footnotes

¹

<http://www.rtpi.org.uk/download/11863/Localism-Bill-RTPI-Briefing-Commons-Report-Stage-16-05-11.pdf>

The RTPI and the Localism Bill

6. This Briefing on the Localism Bill from the Royal Town Planning Institute (RTPI) is written following the House of Commons Report Stage and Third Reading on 17th and 18th May and before the Localism Bill enters the House of Lords for its second Reading on 7th June 2011.
7. The RTPI has over 23,000 members who work in the public, private, voluntary and education sectors. It is a charity whose purpose is to develop the art and science of town planning for the benefit of the public. The RTPI develops and shapes policy affecting the built environment, works to raise professional standards and supports members through continuous education, practice advice, training and development. We run Planning Aid in England – supporting communities and individuals through a locally-based network of 1,200 RTPI members who give their time and expertise free of charge – a service at the heart of localism.
8. The RTPI supports the objectives that underlie the Localism Bill and is keen to continue working with the Government and others to make the Bill effective. The RTPI very much welcomes the Bill placing planning at the heart of the localism agenda. Planning is central to enabling communities to develop their vision for the future of their area, to provide the means for areas and the nation to decide on priorities for investment and to tackle the challenges of climate change, sustainable economic growth and social inequity.
9. Within this overall position, the RTPI has seven main areas of concern:
 - i. arrangements for strategic planning between the local and national levels needed to be strengthened – and we now welcome the new Clause 90 based on an RTPI amendment;
 - ii. the National Planning Policy Framework announced in the Coalition Agreement needs to be embodied in statute;
 - iii. the proposed neighbourhood planning system is overly complex and may mean that neighbourhood planning will not be as visionary, widespread or effective as intended;
 - iv. the Clauses relating to enforcement need clarifying and strengthening the Bill;
 - v. the provisions of the Bill relating to local planning, and pre-application consultation, whilst generally welcomed, should be made more straightforward and may have unintended consequences to the detriment of effective planning;
 - vi. **new Clause 124 on financial matters as planning considerations must be withdrawn because, as drafted, it represents a fundamental and potentially very damaging shift in the basis on which planning decisions should be made;**
 - vii. some of the other provisions that are not in the ‘planning’ related sections of the Bill but which have the potential to have a direct impact on the delivery of planning.
10. The RTPI is writing Briefing Papers on all these concerns. This briefing paper addresses the sixth of these concerns. Other Lords Second Reading Briefing Notes will be placed on the RTPI website.
11. The following sections of this note provide further background information on the key points made on the first page.

Background

12. The debate that the RTPI calls for on the issues raised by this Clause should start from two basic principles. First, that there should never be any perception that planning permissions are being bought and sold. Secondly, the ways in which the community are incentivised to welcome development need to be spelt out clearly.

Planning Permissions must not be bought and sold

13. This principle is stated unequivocally in Circular 05/05²:
B6. The use of planning obligations must be governed by the fundamental principle that planning permission may not be bought or sold. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms.
14. This concern has a long history in planning. In 1997, the Nolan Committee's report on *Standards of Conduct in Local Government* highlighted the need to safeguard against any public perception that planning permissions were being bought and sold. Its recommendation (R36) was that the Government:
.... should consider whether present legislation on planning obligations is sufficiently tightly worded to prevent planning permissions from being bought and sold.
15. This was the current Government's stance three months ago when it stated in its February 2011 response to consultations on the New Homes Bonus that:
*Local planning authorities will be well aware that when deciding whether or not to grant planning permission they cannot take into account immaterial considerations. The New Homes Bonus cannot change this and nor is it intended to. Local planning authorities will continue to be bound by their obligations here.*³
16. This was reinforced by the Minister of State for Decentralisation in the Report Stage debate.
*local finance considerations, like any other considerations, should be taken into account only if they are material to the application that is being considered. Let me give an example to the right hon. Gentleman. Obviously, if it is perfectly appropriate for a payment made under a section 106 agreement to be taken into account by the planning authority, it would be perfectly reasonable for the CLF, for example, to be used to provide investment in a road scheme that accommodates a development.*⁴

footnotes

² <http://www.communities.gov.uk/documents/planningandbuilding/pdf/147537.pdf>

³ Department for Communities and Local Government (2011) *New Homes Bonus Scheme: Summary of responses to consultation*, February, p.28

⁴ It should be noted that this position appeared to differ from that expressed by a CLG Director General at the time of Report Stage: *speaking to Regeneration & Renewal, Communities and Local Government director-general for neighbourhoods Richard McCarthy said the change was important to allow councils to properly weigh the potential financial benefits of a planning decision. Without it, he said, it would be much more difficult to allow "overt consideration" of benefits that could be accrued through schemes such as the Community Infrastructure Levy and the New Homes Bonus. "Most ordinary people would say that this is the way it operates already. It's better to have something honest and transparent than something implied."*

17. Incentives in this context can be taken to include the community element of the Community Infrastructure Levy (CIL) and the New Homes Bonus (NHB). The RTPI does recognise that the NHB, although not ring-fenced is intended by the Government to be used by an authority in a way directly related to the acceptability of a development. The *New Homes Bonus: final scheme design* states that the application of the NHB: ... *may relate specifically to the new development or more widely to the local community.*⁵
18. While the Minister of State's position appears correct, the Clause as drafted does not state this. The Clause does state that: *(b) any local finance considerations, so far as material to the application.* This is the same phrase that is used to caveat the applicability of the provisions of the development plan in Section 70 of the 1990 Act and the RTPI considers that this is too general a phrase to reflect the more specific nature of the Minister's stance. One approach is to use the phraseology⁶ of the Community Infrastructure Levy Regulations 2010⁷.
19. There is also the need to ensure that any decisions that are made are made in an open and transparent way. It should be noted that currently, planning law⁸ only requires local authorities to give a summary of reasons for approving an application whilst they are required to *state clearly and precisely their full reasons* for a refusal of planning permission.
20. The RTPI recognises that the position on the relationship between financial considerations and the consideration of planning applications does need clarifying since the introduction of the New Homes Bonus and the Government's commitment to pay a meaningful sum of the funding derived from the Community Infrastructure Levy to local communities. The RTPI would be pleased to assist in the drafting on the guidance that is needed to set out the position in practice.

footnotes

⁵ <http://www.communities.gov.uk/documents/housing/pdf/1846530.pdf>

⁶ *Limitation on use of planning obligations*

122.—(1) *This regulation applies where a relevant determination is made which results in planning permission being granted for development.*

(2) *A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—*

(a) necessary to make the development acceptable in planning terms;

(b) directly related to the development; and

(c) fairly and reasonably related in scale and kind to the development.

(3) *In this regulation—*

“planning obligation” means a planning obligation under section 106 of TCPA 1990 and includes a proposed planning obligation;

⁷ The Community Infrastructure Levy Regulations 2010

<http://www.legislation.gov.uk/uksi/2010/948/regulation/122/made>

⁸ The Town and Country Planning (Development Management Procedure) (England) Order 2010

<http://www.legislation.gov.uk/uksi/2010/2184/part/4/made>

The implementation of incentives

21. The Government's belief in the use of incentives in planning and wider decision making is at the heart of its philosophy. The proposal to incentivise development is set out, *inter alia*, in three key documents. The Coalition Agreement states that: *We will provide incentives for local authorities to deliver sustainable development, including for new homes & businesses.*⁹
22. The Coalition Agreement followed from the introduction of this idea in the Conservative Party pre-election policy papers on housing with *Strong Foundations* stating that: *We can meet the housing challenge only if we acknowledge that local support for new development is the crucial missing element. a permanent, simple, transparent incentive for local government and local people to encourage, rather than resist, new housing – of types and in places that are sensitive to local concerns and with which local communities are, therefore, content*¹⁰ and on planning with *Open Source Planning* stating that: *we also commit to allowing neighbourhoods to keep some of the money contributed by developers to councils at the time when planning approval is given. This will generate real cash for local communities, be a real incentive for local people to welcome new homes and new businesses ...*¹¹
23. However, there is still uncertainty about both the legality of the New Homes Bonus¹² and about the stage in the development planning process at which it should have an effect.
24. The CLG Select Committee Inquiry on the Abolition of RSS addressed the question of the point in the planning system at which the NHB would be applied: *it would appear that the New Homes Bonus is intended to function as an incentive only at the development plan preparation stage, and not at the point of considering individual planning applications. If authorities were to start granting large numbers of permissions in excess of their planned number, the implication would be that they had been incentivised by the NHB to do so, which the Government's response suggests would usually be unlawful.*¹³
25. The introduction of this Clause raises the need for the Government to make more explicit how incentives are designed to operate. Are they, for example, designed to encourage communities to support applications, are they designed to encourage elected members to approve those applications that come before them or are they designed to be a material consideration that planning officers and, if necessary, the Planning Inspectorate need to take into account when they are making recommendations and decisions.

The RTPI is a charity registered in England (262865) and Scotland (SC 037841)

footnotes

⁹ *The Coalition: our programme for government*

http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf

¹⁰ Conservative Party (2009) *Strong Foundations: Building Homes and Communities*

www.conservatives.com/~media/Files/.../Housing-Green-Paper.ashx?dl=true

¹¹ Conservative Party (2009) *Open Source Planning*

<http://www.conservatives.com/~media/Files/Green%20Papers/planning-green-paper.ashx>

¹² For example, CPRE published an opinion from John Hobson Q.C. and Stephen Whale, 4-5 Gray's Inn Square on 13th December 2010

¹³ House of Commons Communities and Local Government Committee (2011) *Abolition of Regional Spatial Strategies: a planning vacuum*, Second Report of Session 2010–11, February

<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmcomloc/517/517.pdf>