

27th June 2011

Clause 124: Local Financial Considerations

Introduction

1. At Report Stage on the Localism Bill (17th May 2011) the House of Commons agreed an amendment to introduce a new Clause (124) which states that:
Local planning authorities are 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. It stated at that time that **the Clause must be withdrawn**. The RTPI maintains that stance.
3. The RTPI believes that this Clause raises four basic issues for planning. These are summarised below and further detail is provided in the second part of this Brief:
 - Perceived threats to the probity of planning;
A key principle of planning has been that applications are decided on their planning merits – which can already include specific financial considerations – led by the development plan for the area. Financial considerations, notably ‘Planning Obligations’, have long been taken into account where funding is used to make an otherwise unacceptable application acceptable in planning terms. The RTPI will resist any legislation that could be read to imply that financial inducements that are not specifically to be used to make a development acceptable in planning terms can be taken into account when deciding on an otherwise unacceptable application. Planning permissions must never be perceived to be ‘bought and sold’.
 - The primacy of the development plan in guiding decisions on planning applications;
The principle that the development plan for an area is the prime determinant for a planning decision has been a key feature of the planning system since 1947 and was made explicit in 2004. The inclusion of another specified material consideration could be seen to water down the primacy of the plan and would be a fundamental change to the planning system.
 - The definition of a ‘material consideration’;
Material considerations have been defined through case law – and not in statute - since 1947. A definition in statute will lead to further legal challenge and thus delay.

footnotes

¹

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

- How the Government’s incentives are to influence planning decisions;
The RTPI recognises that the use of incentives to stimulate development is at the heart of the Government’s approach to growth. However, we firmly believe that the point at which incentives should affect policies and cultures is when local authorities and communities are preparing plans for their areas – not at the point of deciding on the individual applications that deliver that plan.
- 4. The RTPI believes that the Government does understand these points. We have sought to frame amendments that would address all the issues set out above but, having been through this process, now believe that any amendment could lead to possibly greater uncertainty and threat of legal challenge.
- 5. The Minister of State for Decentralisation has stated that the Clause does not change the law in any way but is an incidental measure for clarification [*Hansard* 17 May 2011 Cols. 270, 271]. The RTPI does not believe that the Clause achieves this aim and, therefore, that it needs to be withdrawn. **Guidance is required rather than legislation and the RTPI would be pleased to assist the Government in framing that guidance.**
- 6. For this reason, the RTPI supports the amendment tabled by Baroness Parminter and Lord Greaves that the Clause does not stand as part of the Localism Bill.
- 7. We do this not through any lack of support for sustainable growth and development – the RTPI has long campaigned for more housing to address housing need and for planning to play its part in helping to deliver this. Nor is it through any lack of belief that a progressive incentive system can form part of a policy approach to achieve that. We do so because we believe that this Clause threatens to bring the planning system into disrepute and to lead to legal challenge, delay and uncertainty – all factors that could militate against achieving the sustainable development – including housing - that the nation needs.

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Background

8. This section provides background detail on the four issues that the RTPI has identified.

The principle that planning does not 'buy and sell' planning permissions

9. This principle is stated unequivocally in Circular 05/05²:

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.

10. 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 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.*

11. This was the current Government's stance four 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 Relevantly, this statement was repeated in the 23rd June 2011 response to the CLG Select Committee's Inquiry into the abolition of RSS⁴ which stated that: *Our position on this has not changed.*

12. This position was reinforced by the Minister of State for Decentralisation at the Report Stage:
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 CIL, for example, to be used to provide investment in a road scheme that accommodates a development.

13. 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. It is worth comparing this with the much tighter wording⁵ of the Community Infrastructure Levy Regulations 2010⁶.

footnotes

² Para B6 <http://www.communities.gov.uk/documents/planningandbuilding/pdf/147537.pdf>

³ DCLG (2011) *New Homes Bonus Scheme: Summary of responses to consultation*, February, p.28

⁴ <http://www.official-documents.gov.uk/document/cm81/8103/8103.pdf>

⁵ *Limitation on use of planning obligations*

14. Planning authorities already take into account financial considerations where these are directly related to the application and where they are used to make it acceptable in planning terms. The tests that are already applied in the planning system are set out clearly in Circular 05/05⁷. Further, they can already take into account a limited range of other financial considerations. In *Westminster City Council v Great Portland Estates plc*⁸, Lord Scarman observed that: *Personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control.*
15. There must be some, doubt, therefore, as to whether this new clause is needed at all and whether clear guidance would not be a better, clearer and more certain approach. 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 part of 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.

The primacy of the development plan in guiding decisions on planning applications

16. The primacy of the development plan in deciding on planning applications was originally stated in Section 14 of the 1947 Town and Country Planning Act. It has been clearly established in law since 2004⁹ and is at the heart of the UK planning system.
17. The RTPI considers that the addition of another defined category of material consideration will undermine the primacy of the development.

footnotes (cont.)

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;

⁶ The Community Infrastructure Levy Regulations 2010

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

⁷ Circ. 05/2005 Planning Obligations sets five tests for planning obligations:

A planning obligation must be:

(i) *relevant to planning;*

(ii) *necessary to make the proposed development acceptable in planning terms;*

(iii) *directly related to the proposed development;*

(iv) *fairly and reasonably related in scale and kind to the proposed development; and*

(v) *reasonable in all other respects.*

⁸ [1985] 1 AC 661, 670

⁹ Section 38 (6) of the Planning and Compulsory Purchase Act 2004 states that:

If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.

The definition of a ‘material consideration’

18. The term ‘material consideration’ was first introduced in the 1947 Town and Country Planning Act and has been embedded in legislation since then. It has, however, never been defined in statute but has been defined in successive cases. This allows a degree of flexibility and common sense within a legal framework. This position will be changed if the localism Bill defines one particular element of a material consideration and could lead not only to the uncertainties, challenges and delays outlined in this RTPI Briefing but to calls for other specified material considerations to be defined in legislation.

How the Government’s incentives are to influence planning decisions

19. 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.*¹⁰
20. However, there is still some uncertainty about both the legality of the New Homes Bonus¹¹ and about the stage in the development planning process at which it should have an effect.
21. 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.¹²
22. 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 be an important factor in informing the decisions on how much growth an area needs and wants when local authorities are preparing their plans and consulting and consulting on them? Local authorities are already required to take into account the resources available to implement the plan. Are they, on the other hand, designed to encourage elected members to approve those applications that come before them and to be a material consideration that Councillors, planning officers and, if necessary, the Planning Inspectorate need to take into account when they are making recommendations and decisions?
23. The RTPI believes that the Clause, as worded, only adds to the confusion on this.

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

footnotes

¹⁰ *The Coalition: our programme for government*

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

¹¹ For example, CPRE published an opinion from John Hobson Q.C. and Stephen Whale, 4-5 Gray’s Inn Square on 13th December 2010

¹² 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>