The Localism Act

The Localism Act 2011 received Royal Assent on 15 November 2011 and includes provisions relevant to planning such as:

- The power to abolish regional strategies;
- A duty to co-operate in relation to the planning of sustainable development;
- Amendments to the procedure for the preparation of local development schemes and the adoption of development plan documents;
- New provisions regarding the Community Infrastructure Levy (CIL);
- Neighbourhood Planning, including neighbourhood development orders, neighbourhood development plans and community right to build orders.
- Requirements for consultation before applying for planning permission;
- Amendments to the planning enforcement regime, particularly in relation to concealed breaches of planning control;
- The abolition of the Infrastructure Planning Commission;

Also included in the Act is Section 143 which makes provision for "local finance considerations" to be potential material considerations in the determination of planning applications. Section 143 came into force on 15th January 2012.

Local Finance Considerations (Section 143)

Section 143 amends Section 70(2) of the Town and Country Planning Act 1990 so as to require Local Planning Authorities (LPAs) (in England) dealing with planning applications to have regard not only to the development plan, so far as material to the application and any other material considerations, but also to *"local finance considerations, so far as material to the application*".

"Local finance considerations" are defined as:

(a) 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; or

(b) sums that a relevant authority has received, or will or could receive, in payment of Community Infrastructure Levy;

Why?

The Government said that the aim of Section 143 was not to change the law but to resolve confusion as to when local finance considerations could be taken into account in planning decisions. This is reflected in the Explanatory Note to Section 143 which states that the provision is *"clarificatory, making it clear to decision-makers (without the need to consult case law) that local finance considerations are capable of being taken into account when determining a planning application – in so far as they are material to the application"*.

In particular, it was hoped that this would clarify that LPAs would be protected from legal challenge if they took into account future receipts from the New Homes Bonus (NHB) and Community Infrastructure Levy (CIL), or other relevant grant funding[1].

Opposition

The provision was criticised during the passage of the Act. In May 2011, the RTPI branded it "completely unacceptable". The National Trust and CPRE also criticised the proposal, with the CPRE calling it *"a brazen attempt to legalise cash for sprawl"*[2]. The main concern was that local finance considerations could outweigh other considerations that would normally render a development unacceptable. There would be a perception that planning permission could be 'bought and sold' and that financial incentives could be the deciding factor for some planning applications.

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[1] http://www.theyworkforyou.com/lords/?id=2011-10-17a.95.0#g126.0

[2] http://www.cpre.org.uk/media-centre/latest-news-releases/item/2056-dismay-as-pickles-moves-to-legalise-cash-for-sprawl

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Further Clarification

In October 2011 the Government included an additional sub-clause which states that the provision does not alter whether regard is to be had to any particular consideration, or the weight to be given to any consideration to which regard is to be had. The Government said that this clarified that there was no suggestion that local finance considerations should be any more important than other material considerations. Ultimately, the weight to attach to each material consideration would remain a matter for the decision-maker. During the debate in the House of Lords, Earl Atlee (Conservative), citing Stringer v Minister of Housing and Local Government[3] said that:

> *"What this means in practice is that regard should be had where, and only where, the case law tests on materiality are satisfied; that is, where the local finance consideration in question relates to the use and development of land and relates to the planning merits of the development in question".*

Baroness Parminter (Liberal Democrat) doubtful, saying that *"while the government amendment goes some way to try to tackle that ambiguity, there still remains a lack of clarity about when such financial considerations could be considered material".*

What about the New Homes Bonus?

The Government's proclamation raises an interesting question mark over NHB which is not a ring fenced grant and is a *"powerful, simple and transparent incentive"*[4] to increase housing supply which may or (more likely) may not be spent in order to support the development that resulted in its payment. In June 2011 the updated "Plain English Guide to the Localism Bill"[5] stated in relation to local finance considerations that *"payments must be relevant to the planning application under consideration or they cannot be taken into account".* However, what does 'relevant' mean in this context and in what circumstances can NHB be material?

One simple approach is to conclude that NHB must be material to a planning application for housing development because, regardless of how it is to be spent, the housing development will result in the payment of NHB to the authority. As NHB is a financial incentive to encourage local authorities to grant permission for new homes, how can it not be material to such an application as a local finance consideration?

This approach would seem to tie in with the logical explanation as to why Section 143 of the Localism Act came about in the first place. However it requires a broader view of materiality than that traditionally given to the relevance of financial payments to planning decisions. In this respect it reflects the type of broad interpretation which the RTPI and Baroness Parminter feared and would, for example, run counter to other provisions which apply to financial payments in planning such as Regulation 122 of the Community Infrastructure Levy Regulations 2010 concerning S.106 planning obligations.

However during the October 2011 debate in the House of Lords, Earl Atlee had sought to allay those concerns, saying:

> *"....the crucial issue is....whether at the local level there is a commitment to spend those funds on something that relates to the development and use of land and the planning merits of the planning application that is being considered. In practice it is likely that CIL will be more material in more instances than NHB. This is a natural consequence of the fact that authorities are free to spend NHB funds as they see fit while CIL must be spent on infrastructure needed to support the development of the area.*
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> *Of course, where regard is to be had to NHB or CIL, the local planning authority will need to be confident at the planning decision stage that the funds will be used to deliver the infrastruct ure anticipated....*

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[3] [1971] 1 All E R 65

[4] http://www.communities.gov.uk/housing/housingsupply/newhomesbonus/

[5] http://www.communities.gov.uk/documents/localgovernment/pdf/1923416.pdf

....Of course, none of this fetters the ability of an authority to choose not to spend its NHB moneys on matters relating to specific developments. The funds could, for example, be distributed as funds to local communities to spend as they wish. This would be a legitimate use of the funds, but in such circumstances the funds will not be a material consideration in planning decisions."

Baroness Parminter disagreed and moved removal of the clause, saying:

"….this key point about the direct link is not made at all in the clause or the government amendment. This direct linkage is what case law has determined makes a financial consideration material, and it is a fundamental principle- to me at least-that guarantees the probity of planning…..

….Without that clarity it can be read that financial inducements that are irrelevant to the merits of a particular development proposal can be material in determining planning applications….It is quite clear that guidance will have to be issued to local authorities on how government incentives are intended to influence planning and how this will work in practice…."

Ultimately, the provision remained in the Bill and Earl Atlee's comments suggest that the circumstances in which NHB will be a material consideration will be narrow and a distinction is being drawn between NHB and CIL. For CIL, there will be an independently examined Charging Schedule in place which will explain why a CIL is justified in relation to the provision of infrastructure in connection with development. For NHB it is more problematic and the above emphasises that a decision maker which does regard NHB as material to an application will need to have a clear paper trail in place to demonstrate how NHB will be spent on matters relating to the development. Failure to do so could result in legal challenge.

This creates an interesting dilemma for those LPAs which want to generate income from NHB by permitting more housing development. Those LPAs will of course know and have in mind that by allowing housing development they will receive NHB but more often than not they will want freedom and discretion in how they spend that money and will not want to tie it to a specific development. Do they surrender that flexibility and resolve to tie the expenditure of NHB receipts receivable from a development to that development to ensure that it can be a material consideration? Alternatively do they retain flexibility in how they spend NHB but make it clear that, despite NHB being a powerful incentive to grant permission, NHB is immaterial to their decision to grant permission?

For those LPAs for whom NHB is not an incentive the position seems clearer if the Courts interpret the provision as Earl Atlee has suggested. They can resolve to not ring-fence NHB and take no steps to tie the expenditure of NHB receipts to a specific development. In those circumstances, they cannot, according to Earl Atlee's comments, be required to have regard to NHB receivable in respect of a development under Section 70(2) of the 1990 Act as amended by Section 143 of the Localism Act 2011.

Local planning authorities should tread carefully when considering the materiality of local finance considerations to an application. Equally, Inspectors on appeal will need to interrogate local finance considerations carefully if they are to regard them as material to an application and give them weight. In appeals where local finance considerations are material, an interesting debate may arise as to what weight should be given to those considerations. For example in a finely balanced case, would an Inspector conclude that local finance considerations ought to tip the balance in favour of permission despite the authority which will receive the money taking a different view?

All things considered, Section 143 appears to create an unsatisfactory situation with regard to the materiality to planning decisions of local finance considerations and in particular NHB as the Government's flagship financial incentive to encourage house building. One has to ask whether in those circumstances Section 143 of the Localism Act actually achieved anything new at all except for uncertainty.