

Hogan Lovells Planning Bulletin

INTRODUCTION: THE LOCALISM BILL - A RADICAL NEW APPROACH

Finally, after a lengthy delay - due in large part, we are told, to congestion in the Parliamentary timetable - the Localism Bill was introduced in the House of Commons on Monday 13 December.

Whatever its merits (and there are strong, although widely differing, views on this question) there can be no denying that the Bill represents a bold and imaginative vision for fundamental reform - a striking proposal for change in a manner and on a scale not seen in recent years, even by an industry that has dealt with more than its fair share of change.

Why is the Localism Bill quite so different to that which has gone before? It is the unavoidable impression that being proposed here is not simply a set of mechanical amendments - some new rules here, a loophole tightened there, an altered procedure or two - but instead an entirely redefined culture, a fresh way of approaching the concept of local governance and the role of the community. We - the people, the community, "the Big Society" - are being offered the reins. The administrators are being ushered away, leaving us to take control. Planning the development of our own neighbourhoods, adopting responsibility for public service provision, triggering local referenda - these, among others, are to be our responsibility under the Coalition Government. It is a striking and imaginative plan. It is attractive in principle. But it is also brave and, like many brave proposals, it faces great challenges. As will emerge from our detailed analysis of the Bill's various parts in this Bulletin below, there are two overarching concerns.

First, it is not at this stage clear whether there exists the appetite amongst local communities to accept the responsibilities urged upon them. This is new territory, and whether there is amongst local people the enthusiasm to engage to the extent and in the numbers envisaged, is difficult to gauge. Indeed, whether in today's not-so-big society, the concept of the local community exists in the cities, towns and villages in the manner assumed by Government, and in a state sufficiently cohesive and robust to accept and perform its new responsibilities, is doubted by some. It is only through experience that the answer will become clear; in this regard, time will tell.

Second, whatever the appetite, there is the question of resources. Resources in the widest sense, including funding, expertise and time, will be essential to the Big Society's effective role in planning. At this stage, it is not clear whether those essential ingredients are available in sufficient quantities.

In our Bulletin below, we give detailed consideration to the various parts of the Localism Bill, and their implications. We run through the main proposals one by one, setting out what is proposed and the issues that they raise.

For more information on any of this, to discuss the Bill or to arrange a meeting or seminar for more detailed, bespoke training, please talk to your usual contact in the Planning Team at Hogan Lovells.

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POWER TO THE PEOPLE - NEIGHBOURHOOD PLANNING

At the heart of the Localism Bill is the Coalition Government's desire to give communities more control over development in their areas. The Bill therefore proposes a new tier of planning - "neighbourhood planning". This is to be facilitated in two ways – by giving neighbourhoods the right to draw up their own neighbourhood development plans ("NDPs") and also to produce neighbourhood development orders ("NDOs") and community right to build orders ("CRBOs"), effectively granting planning permission for certain types of development.

Much of the procedural detail will be covered by secondary legislation, including fees payable on commencement of development for which planning permission is granted by an NDO (to reimburse LPAs for costs incurred in their neighbourhood planning function). However, the new provisions clearly constitute a radical, and controversial, shift in power away from professional officers and trained, accountable members, towards communities. We question whether communities are indeed best placed to make difficult planning decisions in the wider public interest.

Neighbourhoods

The Bill specifies the persons who can take responsibility for neighbourhood planning (referred to below as the Neighbourhood Planning Authority or NPA). The NPA will be the Parish Council (where it exists) in respect of their area or, where there is no Parish Council, an organisation designated by the LPA to be a "Neighbourhood Forum" (there can be only one such Forum for an area).

Organisations will be entitled to apply to the LPA for designation as a Forum so long as (i) they are established for the express purpose of furthering the social, economic and environmental wellbeing of individuals living (or wanting to live) in the area, (ii) their membership is open to local individuals, (iii) at least three members live in the area and (iv) the organisation has a written constitution. Other conditions may be prescribed by secondary legislation. It will therefore be very easy to set up bodies which comply with such requirements. LPAs must ensure that people are aware when the opportunity to apply to be designated as Neighbourhood Forums exists. Once a Forum is designated, it will take effect for five years without the possibility of withdrawal. The absence of any mechanism to allow the constitution and activities of Forums to be scrutinised and their designation removed if necessary is disappointing and undemocratic, and suggests on the part of Government a somewhat optimistic assumption as to the quality of policy- and decision-making at this level.

LPAs are also to retain responsibility for deciding what constitutes the relevant "Neighbourhood Area" for the purposes of neighbourhood planning. However, an LPA will be entitled to make a decision only where a body has applied to be an NPA for a particular area. For Parish Councils, the relevant area must consist of or include the whole or part of its administrative area. Where there is a Parish Council, only the Parish Council can be the NPA - a Neighbourhood Forum cannot apply. Designations already made will be capable of modification, but areas must not overlap.

Neighbourhood development orders

NPAs will be empowered to require LPAs to make Neighbourhood Development Orders ("NDO"). An NDO will effectively grant planning permission in relation to the relevant neighbourhood area for a specified development or class of development. NDOs are to relate to all or part of or a specific site within the specified neighbourhood area.

In brief, NDOs will be initiated by an NPA, but checked by an LPA, then subjected to independent examination and referendum before being made by the LPA - further details on procedure are given below, but much detail is reserved for secondary legislation.

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If more than half of those voting in a referendum are in favour of the NDO, the LPA will be obliged to make the NDO as soon as reasonably practical thereafter. However, LPAs will not be obliged to make NDOs if doing so would breach, or be incompatible with, any EU obligation or any Convention right (ie would breach human rights). The LPA does, therefore, retain the final decision but with limited scope for exercising its discretion.

NDOs will not be entitled to grant planning permission if permission has already been granted, or for certain types of excluded development (i.e. minerals applications, certain waste applications, development requiring environmental impact assessment (Annex 1 developments), nationally significant infrastructure projects and other prescribed developments).

NDOs may be made unconditional or subject to conditions, including the requirement to obtain further detailed approval from the LPA. However, regulations may in due course provide that Parish Councils can grant such detailed approvals rather than the LPA. This would further limit the powers of LPAs. NDOs may also require development to commence before the end of a specified period.

NDOs may be revoked by the Secretary of State, or by LPAs with the Secretary of State's consent. If revoked (thereby withdrawing planning permission) any development that has already commenced may be completed. However, the Bill suggests that revoking orders may exclude this effect in relation to specified developments. This raises the prospect of unhelpful uncertainty.

Neighbourhood development plans

Neighbourhood Development Plans ("NDPs") will set out policies in relation to the development and use of land in a specified neighbourhood area. They will form part of the formal development plan and therefore planning applications will need to be determined in accordance with an NDP unless material considerations indicate otherwise.

An NDP will be initiated by an NPA and made by the LPA (further details on procedure are set out below). Again, LPAs will not be obliged to make an NDP if it would breach any EU obligations or Convention rights (i.e. relating to human rights). Subject to that, an NDP must (and can only) be made by an LPA as soon as reasonably practical after a referendum if supported by more than half of those voting. Again, therefore, the LPA retains the final decision but with limited scope for exercising its decision.

An NDP will relate to one neighbourhood area and specify the period for which it will have effect. Where an NDP is in force, the NPA may propose that it is replaced, following which the same procedure will apply for the replacement plan.

If a policy in an NDP conflicts with other statements or information contained in it, the conflict will be resolved in favour of the policy.

Procedure – NDOs and NDPs

The same procedure for examination and referendum appears to be intended to apply to both NDOs and NDPs - in short, initiation by the NPA, making by the LPA, independent examination and referendum. Surprisingly, the Bill sets out only the procedure for NDOs; insofar as NDPs are concerned it states simply that the same provisions will apply. This is unfortunate; it appears that little thought has been given to how this will work in practice. We set out below the provisions relating to NDOs, but further details will be required through secondary legislation.

Proposals for an NDO must be submitted to an LPA accompanied by a draft order and a summary and statement of reasons. The proposal must comply with any standards established by the Secretary of State. LPAs will be required to give advice or assistance to NPAs as they consider appropriate to facilitate NDOs but not to give financial assistance.

LPAs will be obliged to consider only whether the NDO complies with legal requirements set out in the Bill and to have regard to guidance issued by the Secretary of State. If the LPA in question is not satisfied that the NDO does so comply, it will be entitled to refuse to make it. Where it is satisfied that the legal requirements have been met, the NDO will be submitted for independent examination.

The LPA may appoint an examiner but only if the NPA consents (otherwise, the Secretary of State will make the appointment). The examiner must be independent, without an interest in the land, be appropriately qualified and not an employee of the Crown or an authority with local government functions.

The examiner must determine whether the draft order is appropriate having regard to national policies and advice, whether it is in general conformity with strategic policies contained in the development plan (but not, strangely, the NDP), whether it complies with EU obligations and whether it meets all prescribed criteria. The examiner may also consider whether the neighbourhood area to which the NDO relates is appropriate or should be extended.

In the circumstances, it seems that matters such as appropriateness of design will be dealt with via local referendum only, save where they are the subject of specific national guidance or strategic policy.

Section 106 agreements and other traditional material considerations also have no place in determination of NDO proposals.

As a general rule, examination will be by written representations, but a hearing may be held where the examiner considers it necessary to ensure adequate examination or to give a person a "fair chance" to put their case. Questioning will usually be done by the examiner.

The examiner will produce a report recommending either that the NDO is submitted to referendum (modified to meet the requirements of the Bill or unmodified) or refused. The LPA must consider the recommendation and decide what action to take. The LPA is not bound by the examiner's proposed modifications but if the LPA propose to make a different decision in certain circumstances (including, controversially, where it takes a different view on a particular question of fact) further representations must be sought.

Where the LPA is satisfied that the requirements of the Bill are met or could be met if modifications are made, the NDO will pass to a referendum. The referendum must, as a minimum, involve the population of the neighbourhood area to which the NDO relates, but may include other areas.

Any challenges to decisions made in connection with NDOs must be brought by judicial review within six weeks of publication of the decision.

Community Right to Build

There are specific provisions for a particular type of NDO, known as a Community Right to Build Order ("CRBO"). CRBOs grant planning permission for specific development on a specified site within limits which will be prescribed by secondary legislation.

The main difference between CRBOs and NDOs is that the former will be able to be proposed by community organisations, i.e. corporate entities that are established expressly for furthering the social, environmental and economic well-being of individuals living or wanting to live in an area and that meet other prescribed conditions. These community organisations will not need to be the Parish Council or designated Neighbourhood Forum. However, more than half of their membership will need to live in the relevant neighbourhood area. Community organisations wanting to rely on CRBOs will need to check whether the purposes for which they were created comply with these requirements. The concept of CRBOs is therefore designed to benefit a wider range of community organisations seeking permission for specific development in the community.

There are, however, limitations. For example, CRBOs will not be granted where a development is likely to have significant effects on the environment or European sites protected under the Conservation of Habitats and Species Regulations.

The Bill allows for regulations to be made to prevent or limit enfranchisement rights where a CRBO has been granted. It is not clear why these provisions are included.

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ABOLISHING THE REGIONS - THE DEVELOPMENT PLAN SYSTEM

In addition to the introduction of a new tier of neighbourhood planning, the Bill proposes a number of other changes to the existing development plan system. The changes are relatively minor. In the near future, the Coalition Government also proposes to consolidate existing national planning policy (PPGs and PPSs) into a streamlined and simplified national policy framework. Existing national policies contain much guidance on the preparation of development plans, including importantly guidance on assessing housing need. We will be monitoring changes to that framework as they emerge.

Abolition of regional strategies

The Government's attempts to abolish regional planning through the back door have been much publicised. On 6 July, Secretary of State Eric Pickles issued a direction revoking all regional spatial strategies with immediate effect. That direction was quashed on 10 November following a High Court challenge and the decision of Mr Justice Sales that the Secretary of State had acted unlawfully.

The Secretary of State however suggested in a statement made on the same day that the Court's ruling "changed very little" because the forthcoming Localism Bill would sweep away RSSs in any event. Steve Quartermain, the Government's chief planner, therefore confirmed to LPAs that they should have regard to the Government's proposals when making decisions. But the statement and letter were subject to a further challenge and, as an interim measure, Mr Justice Lindblom ordered that their effect be stayed until the case be fully argued in Court. Lindblom J's order was the subject of a further Court hearing on 3 December where a compromise was reached. The stay was lifted on the condition that the Government would draw public attention to the ongoing challenge to the statement and letter. Accordingly, the Government now acknowledges that decision makers need to consider whether the judicial review challenge affects the significance which they give to the Secretary of State's statement and Quartermain's letter. The case is anticipated to be heard at a full hearing on 17 January.

In the meantime, the Bill contains the promised provisions to repeal the legislation pursuant to which regional strategies have been produced and expressly to revoke all regional strategies already in place. It should be noted, however, that the Courts indicated in their judgement that any revocation should be subject to strategic environmental assessment.

The Bill also proposes that any Secretary of State directions to 'save' development plan policies contained in structure plans are revoked. This may cause difficulties in promoting development in areas where core strategies have not yet been adopted and allocations in structure plans have been relied on.

Duty to cooperate

The Bill promotes a new duty on LPAs and certain other bodies who exercise functions for the purposes of statute. The duty will be to cooperate with a view to "maximising the effectiveness" with which various activities are undertaken. Those activities are the preparation of development plans and other development documents and other activities that "support the planning of development" so far as it relates to sustainable development and use of land (including in connection with strategic infrastructure). The duty includes a requirement to "engage constructively, actively and on an ongoing basis".

Whilst cooperation between such bodies is to be welcomed, it is difficult to see what such a duty to cooperate will actually add in practice. If an authority fails to cooperate, the only remedy will be by judicial review. Given the time and cost of pursuing judicial review through the courts, this is likely to be an effective remedy in rare cases only. In any event, the requirement to "maximise effectiveness" is itself extremely subjective and so a claim on public law grounds (irrationality and so on) is likely to be difficult to bring. Furthermore, it is not clear why the duty has been limited to sustainable development rather than generally in connection with planning functions. This is surely an opportunity missed.

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Local development schemes

Under the existing regime, Local Development Schemes ("LDSs") set out the LPA's programme and timetable for producing development plan and associated documents. The current requirement to submit LDSs to the Secretary of State, who can require amendments to be made, is to be removed. Instead, the Secretary of State and the Mayor of London in London will be entitled to direct amendments to the LDS only where necessary to ensure "effective coverage" of the authority's area by development plan documents. Requirements relating to LDS publicity have also been amended - the Bill proposes merely that LPAs should be required to resolve that their LDSs have effect from a specified date. These changes are to be welcomed.

Inspector's Reports

Under the existing development plan system introduced by the Labour Government, where an Inspector recommends changes to a core strategy or development plan document, those recommendations are binding. Publicity in the run up to issue of the Bill suggested that an Inspector's power to make changes to an LPA's document would be curtailed. In practice, the changes do not go as far as had been anticipated.

It is now proposed that an independent examiner must recommend that a document is adopted where he considers that, in all the circumstances, it would be reasonable to conclude that the document satisfies legal requirements and is sound. Otherwise, he must recommend that it is not adopted. He can only recommend modifications if asked to do so by the LPA. It therefore seems likely that most LPAs will ask for necessary modifications to be recommended, although this remains to be seen.

If the examiner considers the document to be sound, the LPA may proceed to adoption of the document as drafted or with further modifications proposed by the LPA, provided that those modifications do not "materially affect" the policies set out in the document. If the examiner recommends modifications following a request by the authority, then again the authority may adopt the document either as modified by the examiner or with additional modifications so long as they do not materially affect the policies.

We anticipate that there will be challenges to adoption of development plan documents in the future on the basis that changes proposed by an authority do "materially affect" policies.

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A NEW APPROACH TO LOCAL GOVERNANCE

The Bill is not just about planning. On the contrary, it contains a series of measures designed to implement localism across a wider local government agenda. Whilst this Bulletin focuses primarily on those matters relevant to the planning regime, we summarise below, for the sake of completeness, some of the other important proposals.

Power of competence

Clause 1 of the Bill proposes a new general power of competence in local authorities. The purpose behind this measure is to change the terms on which councils operate - freeing them from the statutory constraints within which they have historically been required to act. Councils, being creatures of statute, have historically been entitled to do something only where legislation gives them a specific power for this purpose. This proposal is to confer a freedom to take whatever decisions most likely to promote the interests of the communities on whose behalf they act, whatever the legislative position. This is a welcome measure which could, over time, encourage authorities to operate with a degree of innovation and imagination that is an absent feature of today's local government.

Community Right to Challenge

In a bid to encourage voluntary and community groups to become involved in the provision of local services, the Government is proposing a new "right to challenge". This will allow such groups to trigger a procurement exercise, in which the group in question will be entitled to participate.

This is a neat idea in principle, going to the heart of the Government's Big Society agenda. In practice it will be interesting to see how many voluntary groups have the appetite and resources for what looks set to be a complex, uncertain and potentially expensive process.

Assets of community value

The purpose of Part 2, Chapter 4, of the Bill is to protect land and buildings seen as valuable to local communities. The arrangements will involve the compilation of a list of such assets, and a temporary moratorium on their sale, save where certain conditions are met. The idea is to allow communities the opportunity to bid for and acquire the assets in question and so "contribute to tackling social need and building up resources in their neighbourhood." Two points arise.

First, this raises the prospect of a significant constraint on the normal rights of a landowner to dispose of his assets as he chooses. Second, there must be questions over how frequently, in practice, communities will secure access to the resources sufficient to acquire the assets in question.

Nevertheless, the provisions represent an innovative approach to protecting places and spaces which are important to communities.

Local referendums

In a further bid to allow local communities to influence policy and decision-making the Government is proposing a right to a local referendum on any question relating to the economic, social or environmental well-being of the area. A local authority will be under a duty to hold such a referendum where either (a) at least 5% of local people petition for one; (b) a member requests one; or (c) the authority resolves to hold one; so long as certain conditions are met in all cases. The outcome of such a referendum will not be binding, but the authority in question will be obliged to "consider what steps (if any) [it] proposes to take to give effect to the result."

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These arrangements are not likely to confer much effective power onto communities. Properly exploited, however, they offer the opportunity for well-organised campaign groups to influence policy at a local level.

Directly elected mayors

The Bill makes provision for changes in the system of governance in authorities. The Government has already made clear that, in 12 UK cities (Birmingham, Bradford, Bristol, Coventry, Leeds, Leicester, Liverpool, Manchester, Newcastle-upon-Tyne, Nottingham, Sheffield and Wakefield) there will in due course be mayoral referendums, and the Bill allows for other areas to decide to do the same. Referendums are expected in April 2012. There is also provision to allow authorities to change to the committee system of governance.

London

The Bill also makes changes to governance in London.

- The GLA is to be responsible for housing functions in London in place of the Homes and Communities Agency. The prohibition on the GLA incurring expenditure on housing is to be removed and the GLA will have associated powers and duties, including the power to acquire land compulsorily for housing or regeneration, subject to obtaining the Secretary of State's consent.
- The London Development Agency is to be abolished. Its roles on the regeneration and management of European funding is to be transferred to the GLA. The Mayor will be responsible for the economic development strategy for London.
- There are new powers for the Mayor to create Mayoral Development Corporations ("MDCs") within Greater London to further the GLA's purposes and secure regeneration. Before doing so, he will need to consult specified bodies, including the London Assembly and the relevant MPs and London Borough Councils.

The Secretary of State will be entitled to make a scheme transferring to an MDC property, rights and liabilities of specified bodies including London Borough Councils, the HCA and the Olympic Delivery Authority. The Mayor is to have the same power in respect of the GLA.

The Mayor may determine that the MDC shall become the local planning authority for an area for the purposes of plan-making, development control and neighbourhood planning.

MDCs will have the power to acquire land by agreement or compulsorily (with the Secretary of State's consent), provide and facilitate infrastructure, regenerate or develop land, bring about the more effective use of land and provide buildings

- The six current statutory environmental strategies which the Mayor produces are to be consolidated into one - to be known as the London Environment Strategy. The Assembly will have the power to reject the strategy by a two-thirds majority. The Mayor will no longer have to produce four yearly reports on the statement of the environment in Greater London.

Standards

The standards regime for local government is to be reformed fundamentally. The statutory requirement on authorities to have standards committees is to be abolished, as is its regulatory body, the Standards Board for England. There will be a new duty to promote high standards of conduct, and an invitation to authorities to adopt their own voluntary codes. Registers of interests are to be established, with criminal sanctions for breaches of the rules in this regard.

Various other measures

Various other measures, outside the scope of this Bulletin, include proposals in relation to a right of veto over council tax rises, the powers of fire and rescue authorities, transparency and accountability in the pay of certain senior authority employees, non-domestic rates and the payment by authorities of fines relating to EU financial sanctions.

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THE REST OF THE BILL - WHAT'S IN, WHAT'S OUT?

We have dealt, in other chapters of this Bulletin, with the most significant reforms proposed in the Bill. There are, in addition, various other important matters for which provision is made. We summarise those, and consider their implications, below. We also look at one or two omissions, and consider the implications.

WHAT'S IN?

Localism and the Levy

Not long ago, the Community Infrastructure Levy was facing abolition under the Coalition. Open Source Planning, the Tory green paper, promised: "we will scrap CIL [...] and instead introduce a single unified tariff..." Subsequently the Government changed its mind, CIL has been granted a reprieve, and now the Bill contains proposals for minor adaptation. The following is a summary of the more important points, all reflecting the application of localism across the planning system.

- The role of the independent examiner in the process for adopting charging schedules is to be diluted; LPAs are to be given more autonomy, including the power to adopt their own measures to address an examiner's recommendations.
- LPAs will be entitled to use CIL funds not only for the establishment of new infrastructure, but in addition for their provision "on an ongoing basis." This will help to pay for the maintenance of such infrastructure, and is to be welcomed.
- Finally, there is provision to require CIL funds to be passed to the neighbourhood in which the development in question is taking place, where it is to be spent on the provision of infrastructure.

Meanwhile, a comprehensive account of the Government's plans for CIL may be found in its recent publication: *The Community Infrastructure Levy - An overview*, published last month. This document, which "is not guidance [...] explains the key features of the new charge, its rationale and how it will work in practice." It is a useful indicator of the Government's plans for CIL, and the best source of information currently available.

Another quango abolished - reforms in national infrastructure planning

It is no surprise to see provision for abolition of the Infrastructure Planning Commission, created by the last Government to determine applications for nationally significant infrastructure projects, or NSIPs. The Coalition has made no secret of its opposition to the current arrangements, promising well before the last general election that Sir Michael Pitt, IPC Chairman, and his colleagues, would in due course be relieved of their posts, and the unit incorporated within the Planning Inspectorate. In essence, the charge is one of democratic unaccountability; the principal complaint has been that important planning decisions should be taken by elected Ministers rather than an appointed quango. For this reason responsibility for determining all applications for NSIPs is to be transferred to the Secretary of State, and the Bill contains detailed provisions dealing with the logistics of individual application handling - all of which is outside the scope of this Bulletin. Transitional arrangements are also proposed for applications already in the system; these are to be dealt with in due course by direction of the Secretary of State.

Consistent with this theme is a proposal to subject all National Policy Statements - the policy documents dealing with the various classes of infrastructure development - to a Parliamentary approval process before they take effect. The Bill proposes what is, in effect, a Parliamentary right of veto over NPSs.

These reforms are sound in principle and, seen in the context of the Bill's other provisions, relatively uncontroversial. In procedural terms the proposals could be said to represent little more than the fine tuning of a Labour Government system designed to accelerate the decision-making process for large infrastructure proposals. Yet their principal effect - a

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democratisation of decision-making in respect of infrastructure planning – is significant and should be welcomed. As to NPSs, it might seem unlikely that the increased role for Parliament in their preparation will make much difference to their eventual contents but, again, it is difficult to fault the Government's objectives in this regard. Finally, the abolition of yet another quango at a time when public resources are stretched is difficult to criticise.

Pre-application consultation burden increased

There is to be a new obligation on those proposing certain classes of development - these are to be prescribed in due course, but the expectation is that only the largest projects will be included - to carry out their own pre-application consultation. Advocated as good practice for some years now, for the first time this becomes a legal requirement. Much of the detail, such as the particular requirements regarding, for example, publicity and dealing with consultation responses, is left to secondary legislation, but it is clear that the additional burden on developers will be considerable because presumably, for the first time, there will be sanctions for a failure to do things by the book.

Furthermore, what is proposed goes considerably further than current standard practice. The Bill contemplates, for example, "collaboration between [prospective applicants] and others on the design of the proposed development" and imposes a duty not only to "have regard to any responses" received from the general public, but in addition to show in the application how "account [has been] taken of those responses."

Such measures are set to add a degree of weight to the pre-application consultation stage. They are likely to contribute to the sense of public involvement in schemes. Nevertheless the proposals are likely to add significantly to the cost and timescale in the promotion of major schemes, and it remains to be seen whether in practice they will result in positive changes to submitted applications.

Fiddling the system - tightening up the enforcement regime

Given recent events, and in particular the infamous case of the farmer who built his castle behind a wall of bales, it should come as no surprise that the Bill proposes a tightening of the existing enforcement regime. There are a number of separate proposals, which we summarise as follows.

- First, there is a new power conferred on LPAs to refuse to determine a retrospective application for development already subject to an enforcement notice.
- Second, amendments to the enforcement notice appeal provisions will prevent developers from pursuing retrospective applications and enforcement notice provisions simultaneously.
- Third, there are minor changes to the rules on enforcement notice appeals under ground (a) - that planning permission should be granted for the development enforced against.
- Fourth, there are new rules to prevent the acquisition of immunity from enforcement by concealment.
- Fifth, there are changes to the system of fines for certain offences and in relation to enforcement against unlawful advertisements.

Of these proposals the most significant is the fourth. There is to be a new, somewhat complex, regime designed to assist LPAs in dealing with those who set out to deceive. The essence of the arrangement is to give LPAs an additional 6 months to enforce against unlawful development from the date on which the breach is discovered in cases where concealment can be shown to have taken place. The right to this additional enforcement window is available only upon successful application to a magistrates' court; the court may grant it only where it is satisfied that "the actions of a person or persons have resulted in, or contributed to, full or partial concealment of the apparent breach" and that "it is just to make the order having regard to all the circumstances."

The objective of the provisions is laudable. Their purpose is removal of the right to immunity in cases of deliberate deception. This is a welcome move. It is difficult to see why those who set out dishonestly to exploit a system designed to protect honest long-user should be allowed to benefit. Recent, well-publicised, cases have made an unanswerable case for reform in this regard.

However, it is clear to us that the Bill, as currently drafted, goes further than this. The proposed criterion in clause 171BC is not deliberate concealment, but simply concealment, whether by action or inaction. So if a developer or landowner is aware of non-compliance, but does not inform the authority, the latter will arguably be entitled to invoke the new procedure to extend the time limits for enforcement. At present, owners and purchasers of land, and their investors, rely on the time limits; they provide certainty by guaranteeing against the threat of planning enforcement. The new procedure undermines that certainty. Instead, landowners, purchasers and funders will need to consider the possibility that concealment will be adjudged to have taken place, whether deliberate or not, and the associated risk that a court might extend the time limits. The Government would be well advised to look at these provisions afresh.

New rules on predetermination and bias

An issue which has dogged the examination and determination of planning applications in recent years is predetermination and bias. The extent of councillors' freedom to discuss, express views on and even campaign in relation to matters that are the subject of forthcoming votes has been surrounded by considerable uncertainty for some time. There has been a widespread fear that involvement by members will result in legal challenge arising out of perceived predetermination or bias. As a result many LPAs have adopted an overly cautious approach, excluding members until the point at which a decision is to be made. This has reduced the opportunity for valuable interaction between applicants and members and constructive debate between supporters and opponents.

Accordingly, there will be much interest in provisions in the Bill designed to reduce this uncertainty. In future, a decision-maker will "not be taken to have had [...] a closed mind" when making a decision just because he had "previously done anything that directly or indirectly indicated what view" he took.

This is an interesting move. The current law on predetermination and bias is entirely case-law based. The courts have, over the years, developed an elaborate and sophisticated set of rules for judging the fairness of decisions in this context. This legislative bolt-on will undoubtedly affect judicial consideration of claims, and it will take some time for a clear pattern to emerge. Undoubtedly, however, members will benefit from considerably more freedom to say what they think, and it will become more difficult to demonstrate unfairness. Convincing evidence of a closed mind will still, presumably, be enough to invalidate a decision, but it will be harder to produce evidence that is convincing. Evidence of conduct and statements has traditionally provided the basis of claims of unfairness; there is usually little else to rely on. The courts will need to be careful to avoid a councillor free-for-all.

Social Housing reform

The Bill contains a number of provisions on social housing. Of relevance to developers is the reform to the regulatory system. The short-lived Tenant Services Authority is to be abolished and its functions transferred to the Homes and Communities Agency. Other changes include allowing local authorities to determine who should qualify to go on their housing waiting list and grant social tenancies for fixed periods (not less than 2 years) rather than lifetime tenancies, to allow them to manage their stock and meet housing need better.

WHAT'S OUT?

New Homes Bonus

As expected, there is no reference in the Bill to the New Homes Bonus - this is currently the subject of consultation and we expect to hear more in 2011.

Presumption in favour of sustainable development, and a national policy framework

Some commentators have expressed surprise that the Bill contains no reference to the much-discussed presumption in favour of sustainable development. Yet it is clear from the publication last month of the CLG Business Plan 2011-15 that this will be introduced as part of a "radically simplified and consolidated national planning framework" in April 2012, so this omission ought to have raised no eyebrows.

Similarly, the Bill says nothing on the framework itself. This is presumably because the Government considers that existing legislation is sufficient to allow its preparation (which, we understand, is already underway) and publication in 2012. We have been led to expect a consultation draft in the spring of 2011.

All of this does, however, raise one interesting point, which is how the new presumption will relate to the existing statutory obligation (section 38(6) of the 2004 Act) to determine applications in accordance with the development plan, save where material considerations indicate otherwise. What will be the position, for example, where considerations of sustainability and the development plan pull in different directions? Will the new "presumption" (being only a policy presumption set in the context of existing legislation) be trumped by the development plan? Presumably so. Much will depend on the work of the policy draftsman. This is the sort of issue that, we hope, the Government will address in due course.

Changes to the appeals regime

The real relief for the development industry came in relation to appeals.

Intelligence has been suggesting for some time that the Open Source Planning proposal to introduce a third party right of appeal had been abandoned, or at least delayed indefinitely, and would not be reflected in the Bill; indeed more recently CLG issued a statement to this effect. Nevertheless it will have come as a relief to most in the industry that, in the event, this intelligence proved reliable. The question now is whether this damaging proposal will be revisited in due course; the Government would be applauded for making clear that the idea has been abandoned once and for all.

But it was with a sense of gloomy resignation that many awaited news of proposals to limit the right of appeal for unsuccessful applicants. Such a proposal was widely, if by no means eagerly, expected. Yet the Bill contains not a hint of the measure, and there has been no indication from elsewhere that it is to be pursued in due course. It is too early to celebrate, but the present silence from Government on this is justification for cautious optimism.