Localism and Growth

Hugh Bullock*

On December 13, 2010, the Coalition Government introduced the Localism Bill to the House of Commons. This was a much presaged piece of legislation that sought to encapsulate many strands of Conservative Party thinking on the devolution of power. These had formed a centre piece to their Manifesto in the run up to the May 2010 General Election. The Liberal Democrats are also proponents of localist thinking. Since that time, there has been a noticeable shift in language and tone from the Coalition Government in response to lacklustre economic growth, not least in the March 2011 Budget and associated Plan for Growth.[1]

This paper seeks to establish the ideological background to the Localism concept. The paper then considers its effects on both the planning system, and Local Government more widely, as well as whether localism is likely to contribute to achieving broader objectives that can be ascribed to the planning system. In doing so the paper identifies a degree of tension in the interaction of the localism system envisaged by the Government and the new plan for growth.

Part I

Support for deregulation and economic liberalisation has always been a key strand of post war Conservative Party policy, albeit one sometimes tempered by statist tendencies within some elements of the party and a pragmatic decision to rely on a more corporatist approach. The Conservative Party has frequently expressed a desire to turn its deregulatory zeal to the planning system. Indeed, as early as 1950, only three years after the passing of the original 1947 Town and Country Planning Act, Winston Churchill's election Manifesto said that "The present [planning] machinery is much too cumbersome, too rigid and too slow" and needed to be "drastically changed".[2] Despite this, planning controls continued to develop during the 1960s and 1970s, through the 1962 and 1971 Town and Country Planning Acts. The post-war consensus on the role of planning remained essentially unchallenged by both successive Conservative and Labour governments and the difficulties raised by the local government reforms of April 1974.[3],[4] The turn of the ideological tide in 1979 thus had significant implications for the planning system.

An early example of this was Circular 22/80, "Development Control — Policy and Practice". This noted that, when the development control system works badly, the costs of it are out of all proportion to the benefits and that development control should "avoid placing unjustified obstacles in the way of any development especially if it is for industry, commerce, housing or any other purpose relevant to the economic regeneration of the country".[5]

This Circular had two expressed aims: "to secure a general speeding up of the system" and "to ensure that development is only prevented or restricted when this serves a clear planning purpose and economic effects have been taken into account". Planning authorities were consequently required to "always grant planning permission, having regard to all material considerations, unless there are sound and clear-cut reasons for refusal".[6]

* Gerald Eve LLP, Senior Partner and Head of Planning and Development (written with James Wickham BA, Msc, MRTPI, Associate.

[1] HM Treasury, Department for Business, Innovation & Skills, *The Plan for Growth* (London, March 2011)

[2] Churchill, Winston S., *The Right Road for Britain: the Conservative Party's Statement of Policy* (viewed online at *http://www.conservative-party.net/manifestos/1950/1950-conservative-manifesto.shtml*, June 3, 2011)

[3] Thornley, Andy, *Urban planning under Thatcherism* (London: Routledge, 1993) p.15

[4] Moor, Nigel, *The Look and Shape of England* (Book Guild, Brighton, 2010) p.119

[5] Department of the Environment *Circular 22/80: Development Control — Policy and Practice* (London, November 1980), para.3.

[6] Department of the Environment *Circular 22/80: Development Control — Policy and Practice* (London, November 1980), para.3.

The 1985 White Paper "Lifting the Burden" noted that, inevitably, plans become out of date and tend to lag behind current needs and conditions. In particular, two priorities of generating jobs and providing sufficient land for housing were not being reflected fully or quickly enough in Structure Plans and the planning decisions of local authorities.[7] On its publication, the Financial Secretary to the Treasury explained that Government had "stifled much-needed enterprise with restriction and regulation", a situation the White Paper was designed to correct.[8]Annex 2 of Circular 14/85 further emphasised this, stating that:

> "There is therefore always a presumption in favour of allowing applications for development, having regard to all material considerations, unless that development would cause demonstrable harm to interests of acknowledged importance."[9]

The effect of Circulars 22/80 and 14/85 was to establish a presumption in favour of development that remained in place until s.54A of the Town and Country Planning Act 1990 changed the formulation in favour of determination in accordance with the development plan, unless material considerations indicate otherwise.

Changes made to the City of London Local Plan to remove restrictions on office development at the time of the "Big Bang" deregulation of financial services, on the urging of politicians such as Nicholas Ridley, have subsequently been recognised as a high point of the interaction of the then newly resurgent market economics with the planning system.[10]

The Conservative Party, therefore, has a long standing unease with planning control conceptually. But there is no historical reason or precedent to assume that deregulation or liberalisation will necessarily go hand-in-hand with decentralisation. The Party has often attempted to enforce its liberalising tendencies from the centre. For example, the presumption in favour was frequently deployed on appeal against resisting local planning authorities. This deregulatory and liberalising enthusiasm was of course tempered in some areas by local political expediency. The Conservative commitment to maintaining the Green Belt in Tory heartlands is a prime example.

This began to change in the early 2000s when Greg Clark, then head of the Conservative Party Policy Unit, amongst others, suggested that the conflation of command planning (as witnessed in the 1970s and defeated in the 1980s) with the centralising of power was a key defect of the Blair Labour Government. He described a "command state" in which centralised bureaucracies took power and control that should properly belong to individuals, communities and professionals.[11] He did not specifically identify the town and country planning system but rather applied this critique across Government activity to fields including transport, healthcare and education. Greg Clark's conclusions were therefore illustrative of a framework that would later be turned to analysing the perceived defects of the planning system. This would lead to conventional Conservative support for liberalisation being coupled with a newer, decentralising ideology.

As the 2010 General Election approached, and the 2008 credit crunch slowly unveiled the true nature of the challenge posed by the public finances, other Conservative politicians were reported as expressing an interest in trends in behavioural economics emerging from the United States.[12][13] Ideas popularised in books such as *Nudge: Improving Decisions about Health, Wealth and Happiness* and *Influence: The Psychology of Persuasion*[14][15] provided possible roots to resolving the historic tensions between the libertarian

[7] HMSO, *Lifting the Burden*, (White Paper, Cmnd. 9571, 1985).
[8] *HC Debates*, July 16, 1985, vol.83 cc.171–185.
[9] Department of the Environment *Circular 14/85: Economic Development* (London, November 1980) Annex 2.
[10] Thornley, *Urban Planning Under Thatcherism*, p.131.
[11] Greg Clark, James Mathers (eds.), *Total Politics: Labour's Command State* (London: Conservative Policy Unit, 2003), p.2.
[12] Bagehot, "Wink, Wink" *The Economist* (London, July 24, 2008).
[13] Oliver, Jonathan, "David Cameron throws the book at MPs" *Sunday Times* (London, August 3, 2008).
[14] Thaler, Richard H. *Nudge: Improving Decisions about Health, Wealth and Happiness* (London: Yale University Press, 2008).
[15] Cialdini, Robert, *Influence: The Psychology of Persuasion* (London: HarperBusiness, 2007).

and authoritarian wings within the Party, in a manner that could decentralise power by trying to incentivise and encourage behaviour considered to be desirable by small (and inexpensive) regulatory changes instead of relying on a centralised, command approach.

The Conservatives also used language more commonly associated with the software industry to describe how planning could be undertaken in the future in the Open Source Planning Green Paper of February 2010. Open source based computer software, such as the Linux operating system, promotes an open, collaborative and "bottom-up" approach to development, where participants have access to the source material of an end product. This is in contrast to the more conventional closed approach to software development adopted by companies such as Microsoft. The Green Paper suggested that this could serve as a model for the preparation of development plans. It noted that:

> "without a transformed planning system, our chances of getting the investment and growth we need will be hampered and possibly crippled, because today's centralised, bureaucratic planning system gives local communities little option but to rebel against Whitehall and regional diktats and, all too often, against the notion of development itself."[16]

A great strength of the open source software model is the ability for users to avoid potentially limiting centralised control. Users who feel restricted by a particular piece of software are free (subject of course to their programming ability) to alter it to suit their own needs. Different branches of programs, or different programs using the same core or "kernel" to serve different purposes or users, are common.

In contrast, the planning system is a natural monopoly at a local level. Businesses or residents unhappy with the development plan in place in their area cannot, unlike dissatisfied IT users, simply decide to "branch" and develop a more satisfactory alternative. Instead, they are compelled to work within the existing framework. The analogy between the collaborative preparation of software and development plans is interesting, but it somewhat breaks down when the underlying motives are taken into account. IT users on the one hand know that ultimately they will be able to develop a product that meets their own needs, whereas participants in the planning system will be aware that they will inevitably be required to compromise and accept a solution that, to them at least, is less than ideal.

The Liberal Democrats, as they approached the election, did not have an established position on championing market reform and economic liberalisation. Yet significant parts of the party's manifesto on planning and local government were compatible with the localist discourse the Conservatives had established. These included the abolition of the IPC, the development of a local competition test for retail planning applications, giving LPAs the option to require planning permission for second homes, and the much-discussed introduction of third party rights of appeal.[17] Whilst not all of these specific proposals were adopted by the Coalition Government, these demonstrate that clear areas of overlap between Conservative and Liberal Democrat thinking on planning and local government had developed by May 2010.

This new link between decentralisation and deregulation was therefore the crucial new characteristic of the localist agenda, and one that both Coalition partners could, to a certain extent, share. The link was consequently retained in the May 2010 Programme for Government[18] which included a commitment to:

- Radically devolve power to local government and community groups;
- Return decision making powers on housing and planning to local councils;
- Give neighbourhoods far more ability to determine the shape of the places in which their inhabitants live;
- Abolish the Infrastructure Planning Commission;

[16] Conservative Party, *Open Source Planning* (London, February 2010), p.1.
[17] Liberal Democrats, *Liberal Democrat Manifesto 2010* (2010).
[18] HM Government, *The Coalition: Our Programme for Government* (May 2010).

- Produce a simple and consolidated National Planning Framework; and
- Create a presumption in favour of sustainable development.

Since the Coalition Government came to power, there has been a steady downward revision in the UK's medium term economic outlook. Chart 1 demonstrates that expectations of GDP growth in 2011 have declined from 2.1 per cent in February 2010 to 1.4 per cent in August 2011.

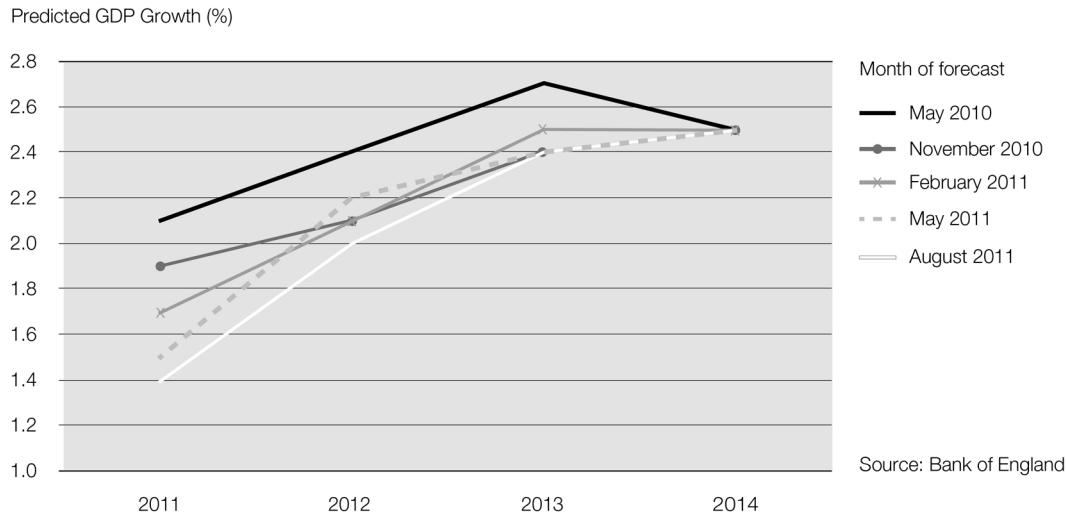

Chart 1: Independent predictions for medium term UK GDP growth (%)[19]

This is likely to have contributed to the Government broadening the focus of its economic policy from simply seeking to reduce the Government's deficit to actively driving and promoting growth. The need to promote growth is a recurrent theme of the March 2011 budget and the parallel Plan for Growth.[20][21] The Plan for Growth identified the planning system as one of the five key restrictions on growth in the UK and heralded further changes to the planning system, some of which have now been included as amendments to the Localism Bill during its progress through Parliament.

The planning system stands on the front line of responding to four key challenges which the UK faces:

i. **Demographic change and population growth**

The UK is the most densely populated of the major European economies and, unlike both Germany and Italy, is predicted to have a growing, rather than shrinking, population over the 40 years to 2050. The UK is the fourth most densely populated country within the G20, with a density that is expected to exceed that of Japan in 2050, as illustrated by Chart 2.[22]

[19] Data compiled from HM Treasury, *Forecasts for the UK economy: a comparison of independent forecasts* (February, May, November 2010, February, May and August 2011).
[20] HM Treasury, *Budget 2011* (HC 836, March 2011).
[21] HM Treasury, BIS *The Plan for Growth* (London: March 2011), p.3.
[22] United Nations Population Division, Department of Economic & Social Affairs

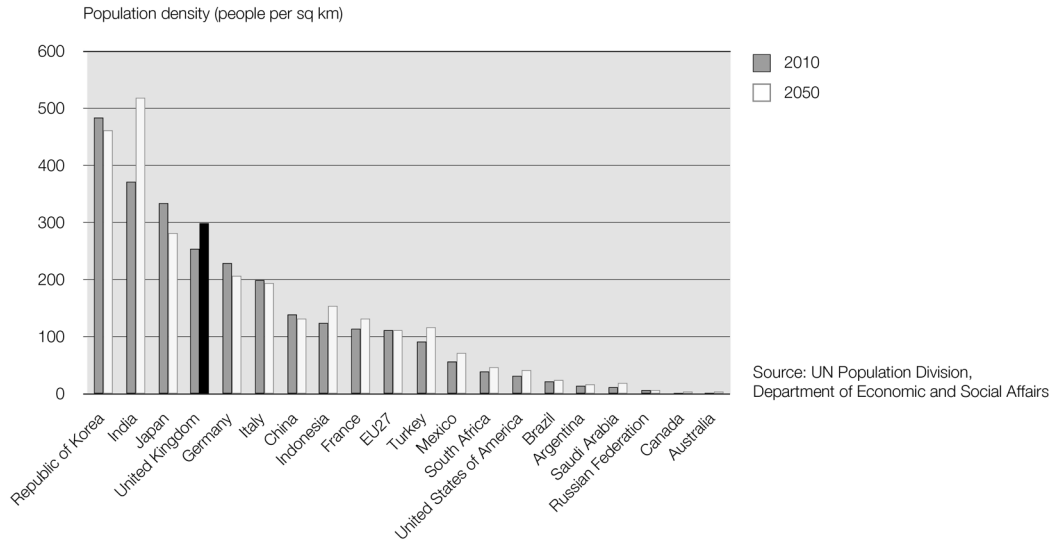

Chart 2: G20 Population Density (people/sq km) 2010/2050

The planning system will be required to provide sufficient housing for this growing and ageing population.

ii. **Economic growth and infrastructure**

Continued growth is, therefore, also essential to maintain living standards and meet the aspirations of this burgeoning population. Continued investment in the UK's infrastructure will also be necessary to support this growth. The concerns about the UK's long-term capacity to provide sufficient energy at a strategic level are well known,[23] but the need to provide sufficient infrastructure also includes other elements, such as water and transport.

iii. **The environment**

Whilst providing the necessary housing, jobs and infrastructure the UK's green infrastructure, environment and other natural resources must also be managed to ensure that their contribution to quality of life and intrinsic value is conserved.

iv. **Carbon emissions**

Underlying all these issues is the longer-term, but no less pressing, need to move towards a decarbonised economy. The Climate Change Act has established a legal requirement to reduce the UK's carbon emissions by 80 per cent by 2050.

These are difficult issues to tackle, much less answer, in both a technical and political sense. The Secretary of State has said that the purpose of the Localism Bill is to:

> "create genuine neighbourhood planning, by which the community will develop in ways that make sense for local people. Instead of instructions being handed down from on high, the Bill will offer incentives to invest in growth."[24]

[23] The Infrastructure Commission, London First, *World class infrastructure for a world city* (London First, November 2010).
[24] *HC Debates*, Jan 17, 2011: Column 558.

This section has identified that recent Conservative Party thinking has led to an attempt to combine radical decentralisation with more conventional deregulation, whilst, since the election, the Coalition Government has been forced by lacklustre economic performance to place more specific emphasis on driving growth. Having a planning system that "makes sense" for local people is no doubt a laudable objective but this gain for localism may be at the cost of providing England with a planning system that is properly equipped to lead the response to these very significant, macro-scale challenges and to respond to the need for growth.

Part II

Having summarised the ideological background to the Bill and suggested some objectives that the planning system should seek to deliver, the following Part reviews the principal clauses and changes in the Bill against their potential to contribute to delivering on these objectives.

General Power of Competence and local government finance reform

The general power of competence afforded to local authorities by Clauses 1–8 has been promoted as a key element of the localism agenda, insofar as it will enable local authorities to do "anything that individuals may do" (Clause 1), subject to the limitations in Clauses 2–4. This brings into stark relief a key question that remains unanswered, and perhaps is unanswerable: that of what a local community actually is, and whom it is desirable to empower. In some areas, the prevailing attitude of local residents towards their council is one of suspicion, if not outright hostility. Whilst the authorities themselves may welcome the general power, there may be some groups or neighbourhoods within local authority areas that find that the Government has simply strengthened the hand of local councils to carry out actions that they oppose.

The power of general competence, and more specifically the power of the Secretary of State to adjust the limitations on its use, was the subject of extensive debate at the Third Reading in the Commons.

The Parliamentary Under-Secretary of State noted:

> "It will give local authorities real freedom to innovate and act in the interests of their communities."[25]

It is in this area, when combined with the New Homes Bonus system which has already come into effect to incentivise local authorities[26] and proposed changes to the formula for the distribution of business rates, that the Government's ideological priorities are most clearly expressed in the Bill and in parallel developments in local authority funding.[27] The Government has clearly indicated that it sees the New Homes Bonus, the local authority resource review and, more generally, the general power of competence, as providing local authorities with the incentives and tools to deliver on community aspirations in their

[25] *HC Debates*, May 17, 2011, c.206.

[26] DCLG *New Homes Bonus: Final Scheme Design* (February 2011).

[27] The Government reaffirmed its commitment to reforming business rates in the 2010 *Local Growth White Paper*. At present business rates, although collected locally, are redistributed across local authorities by central government according to a formula, so limiting the direct financial incentives for local authorities that promote business growth in their areas. Measures proposed include the Business Increase Bonus which would reward authorities that achieved growth in their business rates yield above a specific threshold, by allowing them to keep some or all of the increase for six years.

The City Finance Commission, chaired by Sir Stuart Lipton and funded by Westminster CC, Birmingham CC and Manchester CC, reported in May 2011. Its report, *Setting Cities Free—Releasing the Potential of Cities to Drive Growth*, set out more detailed recommendations to deliver on this concept, including the use of Business Improvement Districts, Tax Increment Financing, restructuring the distribution of business rates to provide genuine incentives to authorities that support economic growth, and the devolution of Whitehall budgets to local authorities in areas such as social care, education and health. It also recommended piloting devolution of more powers to high performing local authorities.

In July 2011 the Government published a consultation on its own proposals for the redistribution of business rates incomes (DCLG, *Local Government Resource Review: Proposals for Business Rates Retention*, July 2011). In essence, this suggested setting a baseline projected Business Rate income for each local authority that would be subject to redistribution as normal, as at present, but would allow that authority to retain additional business rates raised over that base line projection.

area without the need for top-down, centralised targets.[28] By seeking to empower local authorities to benefit from the proceeds of growth and development in their area, at a time in which local authority financing will otherwise decrease, the Government is sending a pro-growth and pro-development signal that is, in its intent at least, unambiguous. This is to be strongly and unreservedly welcomed.

Its actual effect remains less clear. The Year One (2011/2012) New Homes Bonus settlement provided a total of £148m to English lower tier and unitary authorities, although the median grant in the South East region equates to only c. £380,000 per authority, or an additional £3.33 per resident.[29] As this is the first year in which the Bonus has been distributed, it is too early to establish whether it is changing practices or attitudes towards development in individual boroughs or districts, but given the relatively low level of the grant, a risk must remain that some local communities themselves do not feel that the bonus is sufficient to offset the perceived negative implications of more development, and thus change prevailing political attitudes.

The political risk to local politicians exists at the time of grant of planning permission but the New Homes Bonus is only payable for those properties granted permission once they are actually built and feature on the Council Tax list. This could create a gap of several years between local politicians taking the political leap of faith and reaping the—arguably limited—financial benefits on offer. This gap will widen for the larger, more strategic developments where there is almost invariably a significant gap between the grant of permission and construction. It is more than likely that the benefits of such development will accrue to a differently-coloured administration if there is a change of political control in the intervening period.

The distribution of the NHB at a local authority level will also not address the potential "free rider" problem, in which a specific community in the vicinity of a development area will feel it bears the brunt of the impact of the development whilst the local authority area as a whole is the beneficiary. The Government has introduced powers to require a meaningful proportion of Community Infrastructure Levy payments to be directed to individual communities which may help address this.

The effect of allowing local authorities to opt to retain additional business rates income raised by growth has similarly not been tested. This will do little to affect residential development rates, unless it inaugurates a more fundamental shift in attitudes to development, but the creation of an incentive is to be welcomed. This is particularly likely to be beneficial in areas that have historically enjoyed stronger demand from commercial uses, in which local authorities have not been under the same local political pressures to deliver development and growth, and thus sometimes take a less positive approach to planning applications that promote commercial development. The ability to capture some of the additional rates income generated by such development may help counterbalance pressure to resist development. At the other end of the economic spectrum, authorities in more deprived areas are already under pressure from their electorates to provide new employment opportunities and deliver growth as a priority and the prospect of additional rates income may have limited additional incentivising effect.

The alteration of s.70 of the 1990 Act as proposed by the amended cl.130 of the Bill was one of the principal points of controversy during the Bill's passage through Parliament. Clause 130(2)(b) requires local authorities to take account of "any local finance considerations, so far as material to the application" when determining planning application. The definition of "local finance considerations" is relatively narrow, being limited by cl.130(4) to either grants to be received from the Government or CIL payments. The amendment will not, therefore, require or enable local authorities to take into account payments or benefits in kind offered up by developers and result in planning permissions being bought and sold. Rather,

[28] E.g. Department of Business, Innovation and Skills, *Local Growth: realising every place's potential* (White Paper, Cm 7961, 2010), para.3.35, DCLG, *Local Government Resource Review: Proposals for Business Rates Retention* (London, July 2011), Ministerial Forward, paras 1.5, 1.8 and 2.4.

[29] Gerald Eve calculations, based on Year One NHB final allocations (*http://www.communities.gov.uk/documents/housing/xls/1879890.xls*, viewed online on June 9, 2011) and local authority populations, Total Population, 2001 Census (National Statistics, Dataset UV01).

the amendment clarifies that New Homes Bonus and CIL can be material. The Government has emphasised that this does no more than to recognise the existing position, that s.106 payments could be material to planning decisions.[30]

In reality this seems to bring about little change from the conventional formulation that if a planning obligation "has some connection with the proposed development which is not *de minimis*, then regard must be had to it". [31]

Although perhaps ideologically unpopular to some, there is an argument that, contrary to media comment, the alterations to s.70 are striking in their lack of ambition. The relatively low level of New Homes Bonus has been discussed above. The Government indicated in the Lords that it was its intention that even NHB would only meet the materiality test posed by cl.130(2)(b) if the purposes to which the NHB was to be put would be related to the development that gave rise to it. Using NHB to fund a new parkway rail station close to a new development would be material; funding a new swimming pool on the opposite side of the town would not be.[32] This formulation appears to limit the incentive effect of NHB, in that local authorities will only be able to take it into account in planning decision making if the benefits of the Bonus are used to support new development, rather than services for existing users.

The amendments certainly do not go so far as to allow developers to offer direct benefits above New Homes Bonus to which local authorities could attach weight, thus overturning Lord Keith's formulation, and its more recent confirmation by the Supreme Court in the Wolverhampton case.[33] These could be either financial or in kind, for example the developer of a new out of centre retail park also providing the swimming pool as an incentive. One can argue that this would be consistent with the spirit of localism, allowing local authorities either to seek to benefit more directly from a development if they wish, or to adopt policy to prevent these inducements from being taken into account should they be uncomfortable with doing so, rather than continue in the imposition of one particular brand of ideological orthodoxy from Whitehall.

Furthermore, the amendments do not, on their face, appear to allow local authorities to take into account the additional business rates that they would receive from new development. This is curious given the Government's clearly expressed intention for reform of the business rate system to give local authorities "greater incentives to grant planning permissions for appropriately-sited and well-planned non-residential development and go for growth" by allowing them to retain additional business rates raised.[34] Consideration of this incentive in planning decision making does not receive statutory protection and must continue to run the gauntlet of judicial review as a conventional material consideration. Ultimately the explicit effect of local government finance reform on planning decision making may therefore be limited, although the effects of changes to mindset and attitude may be hard to quantify.

No doubt the extent to which New Homes Bonus, in particular that Bonus arising from a particular development, is "material to the application", as required by cl.130(2)(b), will be thoroughly tested by the Courts, which will be left to resolve whether local authorities can go beyond considering whether the "financial considerations" of new development mitigate the effect of development, to considering the additional funding potentially released as a benefit in its own right.

The impact of the amended s.70 may also affect negotiations on affordable housing, in which the New Homes Bonus released by new residential development may be used to fund a higher proportion of affordable housing than would otherwise be viable, if the local authority is willing to divert the Bonus in this manner. This may raise local political risks, depending on the political context, and create additional

[30] *HC Debates*, May 17, 2011, c.269.
[31] Keith LJ, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All E.R. 636.
[32] Lord Attlee, HL Deb, July 20, 2011, c.1422.
[33] *R. (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton CC* [2010] UKSC 20. The Supreme Court found that Wolverhampton City Council had acted unlawfully in undertaking a CPO benefitting Tesco, over Sainburys, on the grounds that the former would undertake to redevelop a challenging town centre site were the Council to facilitate through CPO its acquisition of a potential supermarket site part owned by both operators.
[34] DCLG, *Local Government Resource Review: Proposals for Business Rates Retention—Consultation* (DCLG, July 2011), p.12.

uncertainty for developers promoting residential development. Some communities may also be less receptive to residential development when the Bonus that development attracts is immediately diverted to affordable housing, instead of other local priorities that may be more politically attractive. Procedurally, it may be necessary to explore whether it is even possible to commit local authorities to spending New Homes Bonus in Section 106 agreements.

The Minister has indicated that there may be scope for the amended s.70 to be more widely drawn to include affordable housing provision, although it was not extensively altered during the Bill's passage through the Lords, as of the time of writing.[35] The Government did recognise that: "there is merit in looking again at the wording [of the alterations to s.70] to ensure that it does not inadvertently place local finance matters in any particular place in the pecking order of material considerations."[36]

Incentivising local authorities to promote growth and to retain the benefits of this growth is a positive and welcome change to the local authority finance system. It has the potential to change local authority mindsets and outlook and is supported. It is therefore critical that the incentivising effect of planning decisions is put on a sound and clear statutory basis, so that local authorities are clearly empowered to grasp the incentives that the Government is structuring development to bring. Doing so would be both pro-growth and pro-localist.

Section 70 is therefore of great importance, but the scale of the changes proposed is already somewhat unambitious. These changes do not match the rhetoric of incentive that the Government has used elsewhere. Given the tone of much of the parliamentary debate around this clause, there is a clear risk that the promised further review of the wording will simply lead to the effect of it being yet further diluted. This would be unfortunate for both localism and growth.

Pre-determination

Clause 14 of the Bill allows for members of local authorities to express an opinion on a matter prior to the making of a formal decision. This change is to be welcomed as it introduces additional flexibility into an area that has become increasingly problematic for both elected members and for developers. Being able to have meaningful engagement with local decision makers is vital to making the localist agenda work.

Case law has conclusively established that Members expressing a firmly held pre-considered view is acceptable. Some authorities have evolved pragmatic systems by which applicants can present proposals to key Members such as ward councillors and development control committee Members. The feedback that has been received from these meetings has been vital in both saving developers abortive time and cost in pursuing proposals that would otherwise be unacceptable, and in allowing Members to feel that they can play a constructive role in the planning system in shaping developments during the pre-application process. The somewhat binary approach of refusing or approving applications as they are presented at committee is thus mitigated. Despite this, many other local authorities still remain reticent about allowing meaningful access to, and discussions with, Members.

More broadly, it can be hoped that explicitly giving Members a statutory basis upon which to justify expressing views about applications will help combat creeping disillusionment with local politics, one symptom of which is the cynicism engendered when Members with strong views on emerging proposals are forced to remain silent lest they be seen to have predetermined them. They thereby become unable to vote, leaving the public questioning the role of councillors who seem unable to express an opinion or to represent their views effectively.

[35] *HC Debates*, May 17, 2011, c.272.
[36] *HL Debates*, July 20, 2011, c.1420.

This does raise a question of degree as the actual prohibition on pre-determination will remain. It seems inevitable that the line between expressing an opinion on a matter, such as a planning application, as permitted by s.14(2) and actual predetermination will need to be tested and examined by the Courts.

An example could be a local councillor elected specifically on the grounds that s/he would vote against a specific development, with this as a pre-election pledge. In this case it could be suggested that s/he had gone further than expressing an opinion and that, had s/he voted against the proposals later, this amounted to actual pre-determination. Members and prospective Members will need to continue to frame their comments on potential new development, and other decisions, with care, and in reality practice may not differ substantially from what has already emerged in the more proactively engaged local authorities. This good practice becoming more widespread would certainly be good for growth, localism, and local democracy more generally.

Local referenda

Part 4 Ch.1 of the Bill would introduce a broad power allowing local communities to petition their councils to hold local referenda. These would be triggered on receipt of a petition signed by at least 5 per cent of the local government electors in the area that would be covered by the referendum. This could be either a whole local authority area or a part thereof. The Bill refers to these as "petition" referenda. Clause 44 provides the Secretary of State to amend this percentage requirement. Alternatively, a referendum could be triggered by members of the local authority. In multi-member wards a majority of the members would need to request a referendum. These are referred to as "request" referenda.

Clause 47 requires local authorities to consider whether the referendum requested or petitioned is "appropriate". The grounds for assessing its appropriateness were originally fairly narrow, although the introduction of the concept of special petitions, discussed below, broadens this considerably. Referenda would only be inappropriate in the following circumstances:

- If the local authority considered that supporting or opposing a referendum was likely to lead to "the contravention of an enactment or a rule of law";
- If the matter in question was not a local matter over which the authority had influence;
- If the matter in question related to an order of the Secretary of State; or
- If the authority considered the request to be vexatious or abusive.

If the referendum were considered to be appropriate cl.49 then requires the local authority to call a meeting to decide, on resolution, whether the referendum should be held. Although this has been presented as a safeguard to prevent individual members from promoting referenda for their own narrow political agenda, the Council's discretion at this stage appears to be entirely unfettered, in contrast to the narrow, administrative grounds on which a petition can be found to be either a special case or inappropriate. This seems curious and may require clarification by the courts should a Council resolve to decline to hold a referendum that has otherwise satisfied the necessary tests.

The local authority is then obliged to arrange to hold the referendum within two months of the receipt of the request or petition, unless an election or other referendum (not necessarily a local referendum), is to be held within six months, in which case the two can be combined. Importantly, Clause 56 provides that the local authority is not required to take any action in response to the result of the referendum beyond "considering" whether to take steps to give effect to the result. If the authority decides not to take any steps, it is obliged to publish the reasons for that decision.

The possible permutations created by this broad ranging power are too numerous to elaborate fully in this paper, although some are immediately apparent. These include the use of the power to request referenda on a locally contentious or high-profile topic as a means of obtaining publicity or motivating local political support as part of a local election campaign. The ability of an incumbent local Member to call a referendum,

especially if s/he is the sole ward Member or a ward is controlled by a single party, is a clear advantage over prospective candidates, who will need to mobilise more extensive popular support in order to call a similar referendum, even if ultimately that Member will need majority support in Council for a resolution to allow the vote.

The relatively low proportion of signatories necessary to trigger a "petition" referendum could allow referenda to be used as tools by extremist minorities in some communities. A well organised minority group could be able to secure the necessary levels of support to trigger a referendum, as a means of generating publicity or sowing discord, even if ultimately it cannot secure either a Council resolution in favour or a positive outcome should the referendum be held.[37] This could have serious implications on overall community cohesion and integration.

The cost implications of extensive local referenda could also become significant.

The power to call for local referenda could therefore become a powerful political tool, especially for incumbent local politicians, whilst not actually providing local people with powers to reverse an unpopular decision by their local authority.

The potential for local referenda to become platforms for marshalling opposition to unpopular planning applications has, however, been substantially reduced by Government amendments introduced at Committee stage in the House of Lords. Clause 48 previously allowed for the Secretary of State to specify certain matters on which local authorities would not be required to undertake referenda. This has now been revised to introduce the concept of "special case petitions". The local authority will retain discretion on whether to hold referenda which arise from "special case petitions". Petitions for referenda on matters that have been the subject of a previous referendum in the last four years will be "special case petitions", as will petitions where the estimated costs of the referendum would exceed 5 per cent of the authority's council tax income.

More significantly, from a planning perspective, will be the provision that matters on which the public are consulted and on which there is a right of appeal on the substance of a decision will also be "special case petitions". The Government has been clear that it is the intention of this amendment to prevent planning decisions being the subject of local referenda.[38] This is most welcome; a statutory referendum process that could take effect in parallel to the usual planning applications process would cause considerable delay and uncertainty. What remains unclear is whether, in the absence of third party rights of appeal, this restriction would be sufficient to prevent requests for referenda by aggrieved neighbours after a Council resolves to grant permission. This could be of concern for larger applications where there may be a considerable period of time between the resolution to grant and the completion of a s106 agreement and formal issue of the permission. If a referendum was called during this period calling on the local authority to reverse its decision, it could still cause considerable delay and uncertainty for a developer. The precise scope of "special case petitions" and their interaction with the planning system may require further clarification by the courts.

The introduction of the "special case petition" concept may limit the effect of the local referendum power on the planning system and its ability to deliver on growth, subject to clarification on the use of referenda by third parties. In the absence of any actual power to reverse unpopular decisions, there is a concern that local referenda may develop into more niche tools for political mischief-making, rather than becoming genuinely popular and useful local powers.

[37] The ONS estimates that the median population of a ward area is 5,213 (2010 Ward Population Estimates for England and Wales, mid-2009). On average, therefore, fewer than 300 signatories would be necessary to trigger a referendum. Ravenstonedale (Eden DC), has a population of less than 1,000. A referendum could be requested by less than 50 signatories.

[38] HL Deb, June 30, 2011, c.1866.

Assets of Community Value

Part 4 Ch.4 introduces the concept of "Assets of Community Value", which requires local authorities to maintain a list of land and buildings that are of community value in their areas.

Before disposing (through either a freehold sale with vacant possession or the assignment, grant or surrender of a lease with an unexpired term of 25 years) of assets that are included on the list landowners will be required to notify the local planning authority. Clause 83 prevents the landowner from disposing of the asset until either an "interim moratorium period" has elapsed and no bids for the land have been received from community groups or a "full moratorium period", which must be no shorter than the interim period, has elapsed.

The effect of this is to provide community groups with a window to express an interest in purchasing land that is of community value. An asset may be considered to be of community value either if its use falls into a class specified by the Secretary of State, or by community nomination. Parish councils, and community councils in Wales, are empowered to nominate land, and the Secretary of State may designate other groups that may similarly make community nominations.

Clause 77 requires a local planning authority to add land to the community asset list in response to community nominations if the land is within a specified category, having regard to the regulations made. This is therefore a requirement rather than a discretionary power.

Regulations will provide for procedures for applications to remove assets from the list, including the methods of appeal, as well as for possible compensation.

Concerns relating to the community asset list can be generalised under three headings.

The first is ideological. The proposals will extend the reach and scope of the planning system into an area hitherto unaffected by it; the ability of private landowners to buy and sell land and property. This is a significant new limitation on private property rights. This restriction is all the more concerning given both the undefined, and potentially wide, nature of "community value" and the ability of very localised groups such as parish councils and, one can foresee, neighbourhood forums, to delay private land sales by nominating land for inclusion on the list. It is surprising to see this new restriction on private property rights being advocated by a Coalition government with a strong free market ideological pedigree. Private property rights are frequently cited as a key determinant of economic performance and it has been suggested that disparities in property rights can account for as much as 75 per cent of the difference in the economic performance of economies.[39] Eroding rights to freely dispose of property—however limited the Government may consider them to be—will have a cost on growth.

Whether the community benefits are worth this cost are questionable when one considers both the likelihood of adverse unintended consequences and the limited efficacy of the proposal. Anecdotally, many land owners have reported that they are now reluctant to allow the informal use of their land and property for community events, however occasional. Property advisors have advised them to cease such activities. This could range from farmers allowing occasional use of fields for activities such as Bonfire Night and village fetes to estate landowners preventing use of vacant properties for temporary exhibitions or meeting spaces. All are concerned that allowing such activity may mean their land risks inclusion on the community asset list, and that consequently they are unable to sell or lease it at will. Discouraging responsible and civic-minded landowners from participating in community life seems at odds with both the localist and Big Society agenda, and for this reason this proposal seems ill judged. At the very least the definition of community value should be clarified as a matter of urgency, to set landowners' minds at ease that the sort of informal use described above will not qualify their assets for inclusion.

[39] Acemoglu, D., Johnson, S.H. and Robinson, J.A. *An African Success Story: Botswana* (MIT Department of Economics Working Paper No.01-37), p.6.

Village pubs are the classic example of an asset of community value that the proposals are designed to save, but the proposals appear to be trying to remedy the wrong problem. The sale of an asset, such as the hypothetical Dog and Duck so beloved of MPs during the Bill's Commons Committee Stage, from one landlord to another, does not, in itself, cause a loss of community value. Rather, it is the change of use of that asset that is the source of concern, for example converting the Dog and Duck to flats. The change of use of such premises is already adequately controlled through the planning system, which often requires extensive marketing evidence to demonstrate that there are no viable alternative uses that would retain community value. The benefit to the local community of a delay period in the sale of the Dog and Duck from one landlord to another is therefore unclear. Indeed, it could lead to a period in which the facility was closed, thus depriving the community of a service unnecessarily, when both the buyer and seller were keen to expedite a sale and keep the service open.

Despite the delay mechanism there is, sensibly, no compulsion on the vendor to accept any community offers that might arise. Ultimately, therefore, the moratorium period is unlikely to achieve anything beyond delay as it cannot guarantee, in any way, that a bid from a community group will be successful.

These proposals therefore remain very much open to question. They appear to run contrary to the Big Society concept, in that they are actively discouraging landowners from responsible community involvement, whilst they are likely to detract from delivering growth and do very little in practical terms to promote local communities.

Community Infrastructure Levy

The Bill contains further adjustments to the statutory basis of the Community Infrastructure Levy ("CIL"), contained in the Planning Act 2008.

The 2008 Act requires local authorities intending to charge CIL to produce charging schedules setting out what types of development will be charged CIL, and how much they will pay. These schedules are subject to independent examination. Clause 102 of the Bill amends the provisions for independent examination. The examiner will be able to recommend changes to the schedule but these will not be binding on an authority, which will be obliged only to consider the changes and make those it considers necessary to secure compliance with the statutory regulations. Authorities are not obliged to make those changes recommended by the examiner. Curiously however if the examiner considers that no changes would secure compliance with the requirements he may reject the schedule.

Clause 103 would amend s.205 of the Planning Act 2008 so that CIL payments can be used for both the initial provision and for the ongoing maintenance of infrastructure.

It would also insert a new s.216A into the Planning Act 2008 which would allow for the CIL regulations to specify and require that CIL receipts be passed on to a separate body, which may relate to part of the local planning authority's area. Subsection 4 allows for the proportion of CIL, up to 100 per cent, to be required to be passed to separate groups to be set. The Government has indicated that it is its intention that this power should be used to channel a meaningful proportion of CIL receipts directly to neighbourhoods to ensure that "the people who say 'yes' to new development feel the benefit of that decision".[40]

CIL has important implications for the growth agenda as a mechanism that can deliver the infrastructure necessary to support growth, but it is vital that it is an effective and transparent system that does actually provide infrastructure at a local level. It otherwise risks disincentivising rather than encouraging the growth agenda. The lack of assurance that monies contributed to CIL will be used to bring about the timely delivery of infrastructure has been raised by the development industry as a concern. Allowing CIL to be used to fund existing infrastructure also raises concerns that CIL may potentially be used to make up

[40] DCLG, *A Plain English Guide to the Localism Bill* (DCLG, January 2011), p.12.

existing shortfalls in local government funding rather than used to deliver new infrastructure needed by development, for which CIL should be used. The introduction of a mechanism to allow—or even require—the transfer of some or all CIL contributions to other organisations, especially neighbourhood groups, also adds to the same concerns that CIL payments may not actually lead to infrastructure delivery, especially if those groups to whom money is transferred are not enabled or equipped to deliver. Whilst the Government may see the transfer of some money to neighbourhood groups as a potential way of overcoming local opposition to development and assuaging fears about lack of local benefit there is a risk that, should it be found that this element of the CIL is used for matters other than the infrastructure delivery for which it was designed, it will lose legitimacy and the industry support that it has broadly enjoyed. Equally, local support for development is an important goal in its own right. Neighbourhood groups are likely to seek more discretion over how their proportion of CIL is spent.

Concerns also remain in the development industry about the continuing risk of double charging, the lack of flexibility in the regulations for exceptions to CIL especially associated with financial viability, and the fact that works in kind cannot be taken into account.

A further major concern is the interaction between minor changes to existing permissions achieved through s.73 applications and a new additional 100 per cent CIL liability on the "new" planning permissions. The floor space of extant planning permissions should be exempted from CIL liability so that only additional floorspace in a second or subsequent planning permission creates a CIL liability.

The changes to the system envisaged by the Localism Bill at present will not fundamentally address these remaining concerns.

Neighbourhood Planning

Much of the early discussion around the Localism Bill centred around the proposed introduction of a suite of new powers for neighbourhood groups to apply at a more local level than that of local authorities. These new powers are:

- Neighbourhood Development Orders ("NDO");
- Neighbourhood Development Plans ("NDP");
- Neighbourhood Right to Build Orders.

In respect of NDOs, Sch.9 will insert a new s.61E into the 1990 Act. Section 61E(2) defines an NDO as an order granting planning permission for a development or development of a specific class in a particular specified area. Section 61E effectively grants qualifying neighbourhood groups the same powers to adjust the planning regime to permit certain types of development that local authorities and the Secretary of State already had under s.59 and s.61A of the 1990 Act, respectively.

Similarly, any qualifying neighbourhood group would be entitled to seek to make a neighbourhood plan under s.38A, to be introduced to the 1990 Act by Sch.9, although only one neighbourhood plan can relate to a neighbourhood area. Paragraph 6 of Sch.9 will provide for NDPs to form part of the statutory development plan by amending s.38 of the 2004 Act.

The process for making these orders or plans is complex and is described in greater detail below. In summary, the NDPs/NDOs are prepared in draft by the promoting qualifying body and submitted to the local planning authority which arranges for an independent examination. Subject to the findings of that examination, the authority is then obliged to arrange a local referendum on the order/plan, the results of which are binding.

The definition and constitution of the new "qualifying bodies" that can access these powers is a key aspect of the emerging neighbourhood planning system. There are two types of qualifying body. In non-parished areas, which for historical reasons include many urban areas of England including London,

s.61F provides for neighbourhood groups to apply to local planning authorities for registration as "neighbourhood forums". In parished areas, parish councils are qualifying bodies. Neighbourhood forums may not be registered in parished areas.

The role of neighbourhood forums was amended during the Commons report stage to include reference to promoting business. Section 61F(5)(a) would quite specifically define the role of neighbourhood forums as either or both of:

> "(i) furthering the social, economic and environmental well-being of individuals living, or wanting to live, in an area that consists of or includes the neighbourhood area concerned,
>
> (ii) promoting the carrying on of trades, professions or other businesses in such an area."

The Government amendments introduced at Commons report stage to give effect to some of the recommendations of the Plan for Growth in relation to the role and membership of neighbourhood forums are welcome although there is still no obligation for forums to promote trade, professions or business. The amendments also widened the membership of forums to those working in the area covered, as well as local residents plus district and county councillors covering that area, as originally proposed. Whilst only 21 people are required to form a neighbourhood forum this is a significant increase from the three originally proposed.

This provision was amended yet further during the Committee stage in the House of Lords to introduce subcategories of neighbourhood forums. Section 61H would require that when local planning authorities are exercising their powers to designate a neighbourhood area they must consider whether it should be designated as a "business area". They may only do so if they consider that the area is "wholly or predominantly in business use". In designated business areas, businesses will be entitled to vote in a second, parallel referendum on NDOs/NDPs. In a business area, the local planning authority will only be obliged to adopt the NDO/NDP if both residents' and businesses' referenda support the proposal; if the results of the two conflict the decision will be left to the discretion of the authority.

The recognition that businesses can be involved and become members of neighbourhood forums is particularly welcome as it will allow the forums to be more widely representative of economic activity taking place within their areas, so lessening the risk that, were they only to include residents, their interests could be potentially quite narrow. The recognition that some areas have a strong business characteristic is also positive and welcome. Since the publication of the Bill, business organisations have indicated that they are keen to be included in formulating NDPs; giving statutory recognition to their role and the requirement set out in s.61F(7) that those applying to register as a neighbourhood forum must have at least tried to involve business does lessen the chance that neighbourhood forums become vehicles for anti-development sentiment. The increase in the number of people needed to form a forum from 3 to 21 is similarly to be welcomed as it will again protect against groups mobilised for very specific, highly localised purposes.

The evolution of the proposals for neighbourhood planning during the Bill's passage is therefore a particularly telling indicator of the Government's developing expectations for the system. In May 2011, the Government published details of the Business Neighbourhood Frontrunners, eight business groups that will trial the new neighbourhood planning powers and will prepare "business led" Neighbourhood Plans.[41] These groups are often based on existing business groupings such as the New West End Company, a Business Improvement District. This could be a promising example of how existing business groups could make use of neighbourhood planning powers to further develop and support initiatives that they are already engaged in, such as BID supported streetscape improvements. This is consistent with the recognition that some areas will in fact be strongly business, rather than residential, in character and that businesses in such areas should be entitled to a vote on NDP/NDO proposals.

[41] DCLG Press Release, *Business and communities to unite in driving neighbourhood growth*, May 17, 2011.

By involving existing business organisations, one of the frequently levelled criticisms of neighbourhood planning, that of resourcing, may also be addressed in part, although the use of NDOs in particular may still be limited since Local Development Orders have not been used extensively.

Implicitly, by identifying existing business-based organisations in areas that also include substantial residential populations, existing amenity societies and residents' associations that may have hoped to form the basis of neighbourhood forums, have been excluded from taking a leading role, as only one forum may serve a particular area.

This brings one other area of concern with neighbourhood forums into relief, that of democratic accountability and legitimacy. Whilst there are established and understood procedures for electing parish councillors, no such arrangements are required of neighbourhood forums, be they business or resident backed. Business-backed neighbourhood plans will still need to win the support of local residential communities through local referenda, although in designated business areas where dual referenda are required, residents will no longer be able either to veto business led proposals or to drive through proposals that are sufficiently unpalatable to businesses that they oppose them in a business referendum. In the case of conflicting results the local authority will be obliged to arbitrate and decide between the conflicting interest groups. Nonetheless, it will be instructive to see how the Business Neighbourhood Frontrunners, and other similar groups that may emerge, go about trying to engage with the communities in their area and create a sense of legitimacy and inclusion. The success of this may well inform the uptake and participation in neighbourhood planning by businesses elsewhere.

The Local Government and Rating Act 1997 and the Local Government and Public Involvement in Health Act 2007 allowed local communities to decide on their own governance arrangements, including the formation of new parish councils in non-parished areas. It is possible that local communities, concerned about development in their area and the need to involve and promote business interests in neighbourhood forums, could decide to form parish or community councils under the 2007 Act, so obtaining the powers of neighbourhood forums envisaged under the Localism Bill without the need to involve the business community in the same manner required of neighbourhood forums.

The new Business Area designation and the identification of the Business Neighbourhood Frontrunners make the distinction in treatment of parished and non-parished areas all the more striking. As neighbourhood forums will not, as the legislation is currently drafted, be permitted in parished areas, the creation of business areas, or even neighbourhood forums with a business voice, will be impossible in these parts of the country.

Furthermore, parish councils do not have the same tightly defined focus given to neighbourhood forums by s.61F(5)(a) and local businesses are not formally represented on them. The geographical scope of parish councils is also frequently much broader than the relatively tightly defined areas that could form "neighbourhood areas", such as London's South Bank area, and in rural areas can represent several separate settlements. By excluding businesses, and by having a less tight geographical focus, both businesses and local residents may be disincentivised from participating in neighbourhood planning, thus affecting both enthusiasm and resourcing. Conversely, parish councils are well established and have a democratic legitimacy that neighbourhood forums may lack, and many have already produced parish plans or similar documents that could form the basis for a formal NDP.

The process for establishing an NDO or NDP is set out in a new Sch.4B to be inserted into the 1990 Act by Sch.10 of the Bill. It is complex and worth examining in more detail.

The new s.38A(3) of the 1990 Act would require that the same process for establishing NDOs would also apply to NDPs.

The "qualifying body" must firstly submit a draft of the plan/order and a summary of the proposals and the reasons for making them to the local planning authority (para.1 of new Sch.4B).

The local planning authority may refuse to consider an order or plan only if it has previously rejected a similar proposal, on such grounds as it is allowed to, or if a similar proposal has previously been turned down in a referendum (para.5). Subject to this, the authority is then required to confirm that both the qualifying body and the draft document have met the relevant statutory requirements, and give notice of its findings (para.6).

If the local planning authority is satisfied on these points the local planning authority must submit the plan/order for independent examination. The independent examiner must have appropriate qualifications and experience, be independent of the authority and not have interest in any land within the area of the order. Examiners may be provided by the Secretary of State or other authorities (para.7).

The examiner is required to consider a number of matters specified in para.8(1), which may be added to. These include whether:

> "Having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order"(para.8(2)(a)); and
>
> "the making of the order is in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area),"(para.8(2)(d))

The examiner may not consider matters outside of the scope provided. The examination will usually be by written representations, but the Bill provides for hearing sessions where these are necessary. The conduct of any hearing sessions is left to the discretion of the examiner although cross-examination is discouraged unless considered to be necessary.

Following the examination, the examiner can recommend the plan/order be submitted to a referendum, amended to ensure the order addresses the statutory requirements including the requirements of para.8(1), and then submitted to a referendum, or refused.

On receipt of the report the local planning authority is itself then obliged to consider the recommendations on the order/plan and decide whether or not to incorporate them. If it is satisfied that the order/plan (be it amended or not, by the authority or by the examiner) can meet the necessary requirements, it is then required to submit the order/plan as suitably amended for a referendum. If it makes changes other than those recommended by the examiner it is required to invite representations on them and if necessary can refer the matter to independent examination.

Paragraph 14 then requires the order or plan to be put to a local referendum.

Subsection 64E(4)(a) provides that a plan/order would require the support of half the voters voting in the local referendum. Assuming these conditions were met the local authority would be required to then formally make the order or plan. It would have no discretion except that to be provided by s.61E(8), in the event that in making the NDO/NDP it would breach an EU obligation or the Human Rights Act. The number of voters actually positively voting in favour of an NDO or NDP, could, therefore be a small fraction of the total electorate in any one area if turnout was low. The low number potentially involved suggests that it could be possible to secure contradictory results in separate referenda on the same topic in the same area, subject to the relatively limited safeguards provided on applications for duplicate or repeat NDOs/NDPs in para.5 in the new Sch.4B. There is no suggestion how conflicting results in local referenda should be resolved within the Bill.[42]

Usually only one referendum is required but, under the same set of amendments introduced in the Lords to establish "business areas", the Government also introduced a secondary requirement for referenda for businesses in areas so designated. Paragraph 15(3) of new Sch.4B will allow "non-domestic ratepayers" and other persons meeting prescribed conditions to vote in this secondary referendum. Notably the franchise for business referenda is, on the face of it, relatively limited, not including freeholders, investors/developers

[42] This scenario is explored further in Robert Gordon Clarke's paper.

or others who do not pay business rates. It may be that leases or tenancies are structured with one eye towards creating as many eligible business rate payers as possible. The local planning authority will only be required to make the NDO or NDP if both referenda of businesses and residents support the proposals; should one result support the proposals and the other oppose, it would then be left to the discretion of the authority whether to make the NDO or NDP.

The Secretary of State is empowered to publish a document setting standards for the preparation of the plan/order and its coverage of relevant topics, and regulations on the preparation and consultation on a plan/order; their receipt by the local planning authority; the examination of the documents; and the conduct of local referenda.

Paragraph 3 of Sch.4B provides that local planning authorities are required to give such advice or assistance as they consider appropriate in respect of making NDOs and NDPs although this does not extend to a requirement to provide financial assistance.

The community right to build power conferred by Sch.11 allows "community organisations", which may be distinct from neighbourhood forums, to promote their own neighbourhood development orders, to be known as community right to build orders, that may grant planning permission for specific development on a specific site. The orders will be subject to independent examination and a local referendum in the same way as a conventional NDO.

In amending the Bill to allow for neighbourhood forums to include businesses, and to require them to promote economic development and jobs, many of the initial criticisms of neighbourhood plans are, in part, neutralised. The introduction of defined business areas is another clear statement of intent, and the dual referenda system established does go a considerable way to addressing concerns that businesses could otherwise be under-represented in a resident-led system. The identification of the Business Neighbourhood Frontrunners is a clear further expression of intent from the Government on how these will positively drive growth. The changes made to the Bill do strengthen the pro-growth elements of the proposed neighbourhood planning system whilst successfully retaining distinctively localist characteristics.

Some scope for concern does however remain.

The decision to prevent the formation of forums in parished areas limits the potential of the proposals especially in rural areas.

Moreover, the procedures for NDOs and NDPs are complex and time consuming, and may discourage all but the most well-equipped and confident communities from braving the regulatory thicket that will inevitably grow between them and the successful use of these new powers. It is unfortunate that as a result communities with less social capital may not be able to take advantage of the real opportunities that do lie within the powers.

As they relate to the new business areas, one can see the new powers almost coming full circle. Should the aspirations of businesses (at least those able to vote) and residents, as expressed through the dual referenda, conflict, the local planning authority will be required to arbitrate and decide on the appropriate use of land in the face of competing objectives. This sounds very like a classic formulation of the purpose of the planning system.

Duty to Cooperate

The abolition of the regional tier of the planning system has caused consternation in some quarters. The RTPI has criticised the revocation of the Regional Spatial Strategies and warned about the weakness of the replacement duty to cooperate in the original bill.[43][44] The Communities and Local Government Committee has also voiced concern about the loss of the regional tier of the system and recommended changes to the Bill in response to this:

> "The drafting of the Localism Bill needs to be improved, so that it provides a framework for local authorities to work within, outlining what actions local authorities should take in their duty to co-operate, how they measure success or failure, how parties insist on the delivery of what has been agreed, and default options if there is inadequate co-operation. The Government must ensure that the beneficial and positive aspects of RSSs, in particular for integrating infrastructure, economic development, housing and environmental protection, are not swept away, but are retained in any new planning framework."[45]

One wonders if the word "integrating" used by the committee to describe the positive function of the RSSs is a carefully chosen neutral verb to allow it to obliquely acknowledge the benefits of "supra-local" planning and cooperation, without using terms ideologically unacceptable to the Coalition such as "securing" or even "enforcing".

As described above, the ability of the planning system to engage with issues of a supra-local significance is of vital importance to the overall well-being of our country. It is something of a stereotype to say that the British are poor at continental-style *grands projets* although this particular stereotype may contain a degree of truth. Strategic planning issues are not just restricted to infrastructure provision, which will be addressed in the National Policy Statements, but also does cover issues such as housing. Providing sufficient housing and jobs for a rapidly growing population, as well as delivering on other aspirations not least the transport and utility networks necessary to sustain this, is indisputably a strategic issue with implications that cross local authority borders.

The Government may feel that a centrist, regional based approach has not delivered the necessary growth and actually distorts behaviour. Even so, these strategic issues remain and require a strategic response. No individual local authority from Adur DC to York CC will be able to respond comprehensively to these issues in isolation. A degree of detoxification of regionalism as a concept, or at least regional joint working, is therefore required. During the House of Commons Committee Stage, it was suggested that Local Enterprise Partnerships could be given a statutory basis and a strategic function in planning and infrastructure but this was rejected by the Minister.[46]

The Government has, subsequently, conceded that the original duty to cooperate in cl.90 of the Bill was "minimalist" and that it has, in response, been "significantly strengthened".[47] A new s.33A would be inserted into the 2004 Act, sub-s.(2) of which would require bodies on whom there is a duty to cooperate under sub-s.(1):

> "(a) to engage constructively, actively and on an ongoing basis in any process by means of which activities within subsection (3) are undertaken, and
>
> (b) to have regard to activities of a person within subsection (9) so far as they are relevant to activities within subsection (3)."

[43] RTPI, Press Release, *RTPI responds to revocation of regional spatial strategies*, July 6, 2010.
[44] Localism Bill Committee (2010–2011), January 27, 2011 (4) c.135.
[45] Communities and Local Government Committee, "Abolition of Regional Spatial Strategies: a planning vacuum", HC (2010–2011), 517-I, [3].
[46] House of Commons Library, *Localism Bill: Committee Stage Report*, Research Paper 11/32, p.30.
[47] *HC Debates*, May 17, 2011: c.262.

The clause has been amended to include reference to consultations with county councils, and now also requires bodies with a duty to cooperate to consider joint working on plan making activity and underlying studies. There is an enabling power providing for the Secretary of State to publish guidance on how the duty to co-operate should be complied with. Furthermore an additional enabling power has been introduced in subs.9 which allows Ministers to prescribe other bodies to which the duty of cooperation applies. A list of bodies, including the Environment Agency, English Heritage and the Homes and Communities Agency was produced in parallel with this, and enclosed as Annex 1. There is real concern over the potential lack of integration of the Infracos and their short life business plans, the regulators and their regime of control and long-term plan making. Clear gaps already exist.

The Minister has indicated that Local Enterprise Partnerships are "foremost" amongst organisations with which local authorities and others will be obliged to cooperate:

> "We intend to identify local enterprise partnerships as bodies that the prescribed bodies with the duty to co-operate must take into account and with which they will need to co-operate fully."[48]

It is unclear, however, whether this duty to cooperate will go sufficiently far in persuading local authorities to genuinely engage with significant cross-border issues. Housing is a particular concern because of the ambiguity contained in the definition of "strategic matter" provided in subs.(4)(a). This states that matters are strategic if they are:

> "sustainable development or use of land that has or would have a significant impact on at least two planning areas, including (in particular) sustainable development or use of land for or in connection with infrastructure that is strategic and has or would have a significant impact on at least two planning areas."

Whilst a single large-scale housing site falls within this definition, especially if it crosses or is close to a local authority boundary, there does not seem to be any requirement to consider overall housing targets in a strategic sense or in conjunction with other authorities. There is therefore no requirement to consider this key strategic element in a manner wider than the local. Adjusting and widening this definition further, to specifically include identifying and addressing regional housing demand and economic growth targets, perhaps based on LEP aspirations, could further strengthen this.

The contrast between the definition of "strategic matters" in subs.(4)(a) and the approach the Conservative Party indicated in *Open Source Planning* that it would take to planning applications for new "free" schools is also of note. *Open Source Planning* indicated it was the Party's intention to direct proposals to build new schools directly to the Planning Inspectorate (as with other major infrastructure, post the abolition of the IPC), to ensure "that unnecessary bureaucracy is not permitted to stifle the creation of new community schools".[49] This centrist approach to schools raises a question as to why not blocking the development of new schools is so important that they should be considered centrally despite individual new schools not necessarily having a "significant impact across two planning areas", whilst other matters are left to the discretion of local authorities. The concern that important proposals which the Government wishes to see delivered may be stifled by unnecessary bureaucracy is also not exclusive to schools; one could legitimately express similar concerns about providing sufficient homes for people to live in.[50]

[48] *HC Debates*, May 17, 2011: c.263.

[49] Conservative Party, *Open Source Planning*, p.17.

[50] Whilst no doubt the Government would cite the powerful vested interests that may rally against proposals for the new "Free Schools", including local education authorities, which may try to make use of the planning system to prevent their development, similar vested interests can generally be identified for other types of development that is arguably of strategic significance. Essentially excepting Free School proposals from the planning element of the localist agenda, whilst logical in its own right, seems somewhat inconsistent when viewed in context.

The Government's view remains that centralised planning, of which it sees regionalism as an adjunct, has failed to deliver both homes and growth and that a new approach is therefore needed. There is obviously a strong political desire to avoid being seen to centralise decision making on these issues but matters such as demographic change and population growth are national or international in scale. They are, for example, being driven by EU enlargement and the associated removal of immigration controls in the UK, the widening of the Schengen Area in continental Europe, and economic immigration from the rest of the world caused by economic imbalances, political instability and the effects of climate change, for example, on water and food supplies. The effects of these issues on the Comune di Lampedusa are well known and obvious; that they are less immediately obvious within the UK's boroughs and districts does not make them any less real. Requiring local authorities to address their effects in isolation may not produce outcomes that are satisfactory in the long run.

Consultation Requirements

Clause 110 of the Bill, by inserting new ss.61W, 61X and 61Y into the 1990 Act, will introduce a new requirement on developers to consult those living or otherwise occupying premises on developments in their locality above a certain threshold size. Developers will be required to:

> "set out how the person ("P") may be contacted by persons wishing to comment on, or collaborate with P on the design of, the proposed development, and give such information about the proposed timetable for the consultation as is sufficient to ensure that persons wishing to comment on the proposed development may do so in good time."

The Secretary of State is empowered to identify specific individuals who must also be consulted by the developer.

Section 61X will require the developer to "have regard to any responses to the consultation that the person has received".

Proper, meaningful consultation with local communities has long been good practice, followed by developers and landowners. As well as resolving misunderstandings consultation can provide valuable feedback that can allow potential problems to be overcome by a developer before an application is submitted, speeding determination periods and producing better quality developments. In reality, the new statutory requirement may not change this existing position significantly, and if it leads to more developers undertaking meaningful consultation it should be encouraged.

In order to ensure that a degree of flexibility remains, the thresholds for developments triggering the statutory consultation requirement should be set relatively high to avoid causing consultation fatigue. The option of consulting on smaller, contentious applications will remain open to developers. The detailed consultation procedures which the Secretary of State is empowered to make by s.61Y should, similarly, remain flexible to ensure that consultation remains a constructive and meaningful activity rather than a source of such complexity that developers become more concerned with procedural regularity than with the quality of engagement.

The extent to which the requirement to "have regard" to the comments made under s.61X requires detailed consideration or scheme changes will inevitably be examined by the courts. Again, it is to be hoped that a relatively flexible and light-touch doctrine emerges, and that developers do not find themselves obliged to make changes in response to consultation simply for fear of a successful judicial review. The experience of the Local Development Framework system and revisions to PPS12 illustrates that consultation requires meaningful engagement rather than procedural hoop-jumping. Hopefully this lesson will be applied to the requirement to consult on individual applications.

Subject to these caveats, this proposal will soothe the passage of otherwise potentially controversial applications through the planning system, whilst improving relations with local communities through genuine involvement. This will help both empower local groups, and deliver growth.

Infrastructure Planning

The Government's intention to abolish the Infrastructure Planning Commission was well signposted in the Conservative Party Manifesto. Clause 116 abolishes the IPC from the day the section comes into force, and its assets are transferred to the Secretary of State. Schedule 13 amends the 2008 Planning Act to transfer the functions of the Infrastructure Planning Commission to the Secretary of State. Clause 117 allows the Secretary of State to make transitional arrangements. Clause 118 amends the 2008 Planning Act to require the approval of the House of Commons for a National Policy Statement, before one can come into force.

National Planning Policy Framework and the presumption in favour of sustainable development

The Secretary of State has regularly criticised the existing gamut of planning policy and guidance as too lengthy and unwieldy and has expressed an intent to produce a single simplified, streamlined policy document, referred to as the National Planning Policy Framework that will consolidate national policy statements and guidance notes.[51]

A key element of the draft NPPF is the presumption in favour of sustainable development. This has been much heralded by both ministerial speeches, such as that of Vince Cable to the British Property Federation in May, and in the Plan for Growth. The Government has proposed adopting a definition based on the Brundtland Commission formulation.[52] The draft NPPF strongly emphasises the need to secure growth in order to deliver a sustainable future.[53] This is entirely consistent with the swing towards promoting development and growth that has been identified elsewhere in this paper.

The presumption in favour of sustainable development within the NPPF is a significant change of emphasis to the planning system. The Government expects the presumption to be a "golden thread" running through both plan making and decision taking.[54] The public debate has become broadsheet news rapidly.

The interpretation of the definition of sustainable development will be critical and one can foresee that this will be considered and dissected in detail by both Planning Inspectors and the courts. This will be especially true for areas that do not have "local plans"[55] that are consistent with the NPPF, as in such areas applications will be determined in accordance with the Framework. The practical effect of this could be extremely extensive; if the NPPF is adopted as published the requirements on housing land supply alone may be sufficient to render the vast majority of existing LDFs "inconsistent".[56]

[51] During his address to the CBI (March 21, 2011) the Secretary of State commented that "Today, there are something like 900,000 words in planning guidance. That makes War and Peace look like light reading. In fact, that's more than the complete works of Shakespeare. … I am absolutely determined to cut the planning system down to size. Less the length of a Shakespearian tragedy, more the brevity of the Gettysburg address."

[52] "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs", World Commission on Environment and Development, *Our Common Future* (London: Oxford University Press, 1987), Pt I para.1.

[53] DCLG, *Draft National Planning Policy Framework* (London, July 2011), para.13.

[54] DCLG, *Draft National Planning Policy Framework* (London, July 2011), para.14.

[55] The consultation document on the replacement to the Town and Country Planning (Local Development) (England) Regulations 2004 indicates that the Core Strategy/Local Development Framework terminology will be replaced and development plan documents referred to generically as local plans. DCLG, *Local planning regulations—consultation* (London, July 2011).

[56] Paragraph 109 of the Draft NPPF requires that local authorities demonstrate a five-year land supply, *including an allowance of 20 per cent*, to provide "choice and competition". This is not consistent with the basis on which LDFs have been prepared until now.

This is the key area in which there is potential for conflict between the growth agenda and specific aspects of the Localism Bill. The relationship between the presumption in favour of sustainable development and the weight to be attached to growth and the planning policy framework of a particular local authority area and neighbourhood has yet to be fully clarified. One can see a number of practical problems on the horizon.

Although the NPPF has been much-discussed what is less frequently mentioned by both the Government and practitioners is the persistence of the plan-led system for determining planning applications encapsulated in s.38(6) of the Planning and Compulsory Purchase Act 2004, which will remain unchanged by alterations to Government guidance. At present the changes described in the NPPF will neither be incorporated directly into legislation themselves nor given development plan status, thus leaving the position established by s.38(6) unchanged. Nor will the adoption of the NPPF by the Government, in itself, remove development plan status from inconsistent local plans. The only certainty provided by Government guidance that requires local authorities to disregard their own statutory development plans in favour of non-statutory policy would seem to be that of extensive appeals and judicial review.

Again, there are possible echoes of the 1980s in this. The presumption in favour will no doubt be much pointed to on appeal, and the Secretary of State has already signalled his intent to give significant weight to growth in making decisions. If this is to be taken at face value, one can see the sustainability, or not, of proposed development being the main area of debate at appeal in areas without up to date development plans. The reality is, of course, that many in the industry remain keen to avoid the uncertainties of the appeal process. Instead, they seek to resolve matters with local authorities. These authorities, which in other parts of the Bill are being incentivised with local finance considerations, and communities which are being given powers to be heard and to benefit financially from development, may be less easily swayed by arguments that are based on a presumption that development should be permitted if it is sustainable. No doubt they will construct their own definitions of sustainability with this in mind. This may ultimately lead to additional development that would not come forward under the present system, but it is difficult to foresee how it will also provide the certainty and efficiency that developers and investors crave.

The persistence of the plan-led system also raises the question of the relationship of proposed neighbourhood plans with Core Strategies. Paragraph 3 of the proposed Sch.9 is clear that neighbourhood plans will have development plan status in their own right. There is no prematurity test explicitly referenced in the list of criteria that neighbourhood plans must satisfy at examination, although Paragraph (8)(2)(d) of the new Sch.4B of the 1990 Act indicates that they should be in "general conformity" with "the strategic policies contained in the development plan for the area of the authority (or any part of that area)".

The draft NPPF will require neighbourhood plans to be consistent with the NPPF and in "general conformity" with the strategic policies of the local plan[57] but give neighbourhood plans precedence, when adopted, over existing local plan policy.[58] Whether a neighbourhood plan could be effectively developed in advance of an "NPPF consistent" local plan is unclear, but surely it should follow.

Local planning authorities, in the regime set out in the proposed Sch.9 described above, appear to have little control over the timing with which neighbourhood plans emerge. They therefore do not seem to have the necessary regulatory tools to ensure that neighbourhood plans are programmed to emerge after an NPPF consistent local plan, providing strategic policies, has been adopted.

Despite pressure during the Commons Report stage, the Government has rejected proposals to include the presumption in favour of sustainable development, and its definition, within the Localism Bill. Given the growing emphasis that the Government is placing on the presumption as a driver of growth there may be merit in codifying the presumption in favour of sustainable development within legislation, rather than relying solely on the NPPF. Although this would be a more significant change to the "s38(6) balance",

[57] Draft NPPF, July 2011, para.52.
[58] Draft NPPF, July 2011, para.53.

providing a legal backbone to the NPPF would be a strong signal of intent. Inserting the presumption into legislation would provide welcome additional certainty to developers as well as creating a statutory obligation on LPAs to determine applications positively. This would go some way to overcome the concern that it may otherwise be difficult to consistently enforce the presumption in favour at a local level.

Part III: Conclusion

Some criticism has been directed towards the Localism Bill from all sides since its introduction, with it being hailed as a nimby's charter that will stop development dead by pandering to traditional Tory voters in the party's rural heartlands. This view is a fundamental misunderstanding of the Government's ideology and intention, which rather is based on a belief that centralised command planning is conceptually flawed. As centralised planning was perceived to have failed to deliver in all areas that it touched during the previous Government, including the Health Service and infrastructure as well as town planning, it would be inappropriate to continue and an alternative approach is necessary. This alternative is encapsulated in the Localism Bill.

This paper has suggested four principal challenges for the planning system, captured as "sustainable development"; providing homes for a dense and growing population; providing jobs, growth and the necessary infrastructure to meet that population's economic and social aspirations; whilst protecting the environment and decarbonising our society. Seen in this context, the extent to which the Localism Bill will directly assist in enhancing the country's ability to meet these challenges is uncertain.

The Localism Bill has evolved and changed considerably from its first introduction as the Government has grappled to resolve tensions between this pure localist and devolutionary agenda, and the pragmatic need to drive growth, in response to the UK's sluggish economic performance since the May 2010 General Election recognised in the March 2011 Budget. Latterly Ministers have begun to put more emphasis on the demographic issues.

The changes have been controversial but, on balance, sensible and positive. These positive changes made to the Bill include recognition of the role to be played by businesses in neighbourhood forums and—although controversial—clarification of the materiality of finance considerations in determining applications. These may help to improve growth, or, at the very least, limit the extent to which the localist agenda could otherwise become a further constraint on growth. A more radical approach to the extent to which financial considerations, including business rates income, can be taken into account in making planning decisions, could further incentivise local authorities to promote development and growth.

As for localism, the Bill undoubtedly will succeed in providing local authorities, and neighbourhood groups, with additional administrative tools. Ultimately, the target recipients of this administrative opportunity appear unclear. Who, or what, is local is a question that the Bill does not clearly address.

The localist philosophy covers the devolution of power to both local authorities and community groups. These groups may in practice have quite different views on local priorities. The additional powers devolved to local authorities, especially the general power of competence, may in some cases actually raise tensions in conflicts between borough/district authorities and community groups within their area.

There is often little cohesion even between community groups. The new tools provided are encased in complex procedures which may limit their actual practical utility. The powers to which local communities will have access will require a degree of commitment and enthusiasm to access and to make them work, which some groups will be better placed and equipped to deploy than others. There is a possibility that the powers provided will, ultimately, be controlled by one particular group.

Areas and communities with more limited social capital and financial resources may in particular be daunted by the apparent thicket of regulation with which they would have to contend in order to make use of the new powers granted. For example, young people may be unable to properly engage with the powers with which they are potentially entrusted, but those yet to enter the housing and labour markets

have an important perspective on matters such as local housing supply and the availability of affordable housing that is likely to differ considerably from older residents who may both have reached the top of the ladder, and also have more experience to deploy in making use of these powers.

Those living in deprived areas, especially when they are surrounded by more affluent neighbourhoods, may similarly be ill-equipped to be properly represented in the use of new neighbourhood powers despite having different perspectives on land use priorities.

In rural areas in particular, the decision not to allow the formation of neighbourhood forums, but instead to pass neighbourhood planning powers directly to the established order, in the form of the parish council, will further limit the ability of these more marginalised groups to access the process. Marginalised groups will be unable to be involved from the outset in the formation of new neighbourhood forums in the same way that they may be able to when new forums are established in urban areas. Coincidentally, the parished, rural areas generally lean towards supporting the Coalition.

Those who do overcome the regulatory, cultural and resourcing barriers to involvement may, depending on the final content of the NPPF, find that they are disillusioned with the limited scope and effect that these documents can actually have. The development plan led system put in place by s.54A of the Town and Country Planning Act 1990, and continued through PPG1, PPS1 and s.38(6) of the Planning and Compulsory Purchase Act 2004 remains fundamentally unchanged. The ability of both local groups and developers to rely on the seemingly significant new powers may be negated in practice by the local planning authority's continued control over the development plan and the continued statutory primacy in planning decisions provided to the development plan by s.38(6). This dynamic will nonetheless be changed by the principles set out in the draft NPPF.

The success of the Bill in delivering a genuine change in culture may therefore be limited to those communities with the abilities and resources to fully engage with their new powers. Elsewhere there is a risk that the additional powers provided to local authorities could simply add to existing tensions and conflict, especially in areas where community groups do not form easily to counterbalance an over-powerful local authority.

Even for economic growth, significant challenges remain, not least driven by global pressures that cannot be controlled by the UK. Sustaining and improving the quality of life in the UK and meeting aspirations for growth and development in the face of a highly integrated, competitive and rapidly restructuring global economy requires positive direction and encouragement. The Bill's provisions for cooperation between local authorities have been strengthened but whether a duty to cooperate between a group of local authorities is sufficient to provide the regions of England with the clear direction they need to respond to these macro-economic and structural pressures does remain doubtful. This may affect housing delivery, and the planning system's ability to contribute to providing decent homes for all, in particular.

In the face of low domestic growth, growing uncertainty about the UK's economic outlook, and the domestic implications of global challenges, unbridled localism, however attractive conceptually, may ultimately prove to be a luxury we cannot afford.

Addressing the challenges the country faces will require principally private sector, as well as necessarily limited public sector, investment and commitment. The global capital flows necessary to fund private sector investment in particular are footloose and will require encouragement and incentivising to invest in the UK; whether the Localism Bill provides sufficient certainty so that attempts to invest and promote development in England will not be "stifled by unnecessary bureaucracy" and that local incentives can overcome the anti-development sentiment that remains endemic in some parts of the country, is yet to be proven. The authors are cautiously optimistic that the pro-growth reforms proposed will ultimately assist development, but this paper has demonstrated that localism and growth can make uneasy bedfellows. All

things being equal, a government trying to reform the planning system and local government to explicitly drive sustainable growth would probably not have chosen to encapsulate attempts to deliver such reform in the language of localism. The pro-growth reforms are perhaps weaker for it.

Annex 1

Localism Bill—Duty to Cooperate

Draft list of prescribed bodies:

- The Environment Agency;
- The Historic Buildings and Monuments Commission for England;
- Natural England;
- The Mayor of London;
- The Civil Aviation Authority;
- The Homes and Comminities Agency;
- Primary Care Trusts;
- Marine Management Organisation;
- Office of Rail Regulation;
- The Highways Agency;
- Transport for London;
- Integrated Transport Authorities; and
- Highway Authorities

(As deposited in House of Commons Library, May 17, 2011, reference DEP 2011-0819.)