Localism, Planning and Local Authorities — A Perspective

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Introduction

In January of this year, the Government declared that "the Localism Bill signifies our commitment to decentralise, and brings forward many of the measures that will be required to drive a fundamental transfer of power". In some parts of the Bill (for example, Part 1, dealing with "Local Government", and Part 4, dealing with "Community Empowerment"), this drive can clearly be discerned.

However, with respect to Pt 5, dealing with "Planning", it is less clear what the Bill's provisions are driving, and the January declaration is best read alongside the Secretary of State's speech to the CBI on March 21, 2011.

In this speech, Mr Pickles said that the Government were determined that the planning system should cease to be "the drag anchor to growth" and should act, instead, "as a driver for growth". This expectation was subsequently confirmed (albeit, in more muted terms) in the written ministerial statement, "Planning for Growth", issued later that same week.

In the light of the above, this paper seeks to identify some of the challenges that local authorities will face, over the coming months, as the Government strive to re-engineer some parts of the country's planning system in pursuit of the twin objectives of greater decentralisation and the promotion of sustainable economic growth.

Paper's coverage

The paper considers some of the implications for local authorities of the Bill's revocation of regional strategies, its dismantling of the machinery for the production of such strategies, and its introduction of a new duty upon authorities, and others, to work co-operatively to ensure that local development plans are appropriately informed and suitably extensive.

The paper also looks at the law with respect to whether, and when, an authority may have regard to the likely impact of the exercise of their functions (including planning functions) upon their own resources. Against the backdrop of these reflections, it considers the need for the Bill's current provision with respect to the treatment to be afforded to payments that will or may accrue to authorities approving particular categories of planning application.

Finally, the paper looks at the likely effectiveness of the Government's New Homes Bonus as an incentivising mechanism in this area, and at the equity of the funding arrangements that have been put in place to support the scheme.

Author's perspective

The paper is not written from the perspective of a professional planner or specialist development lawyer.

Until last year, the author acted as the principal policy adviser to a northern, city-region partnership established to promote economic growth within meaningful, functional boundaries. He was also, for a good few years, chief executive of the largest of the partnership's authorities.

Accordingly, there is a focus within the paper upon the risks/opportunities which the Bill's provisions present to/for the sensible integration of economic and spatial planning, more particularly at the city-region level outside of London. There is also a focus on some of the wider social-policy consequences of the pro-growth measures that have been, or are in the course of being, adopted by the Government.

Collaborative planning

In 2009, the Chief Planner delivered a paper to this Conference entitled "Regional Spatial Planning—Don't Stop Me Now!" In the paper, Steve Quartermain argued strongly that it was no time to abandon regional perspectives, and he put out a challenge to his audience to support measures (then on the stocks) aimed at making "regional planning more effective". Steve must be impressed by the speed and thoroughness with which the new Secretary of State and his Ministerial team have responded (in their own very distinctive way) to this challenge.

But Steve was right, of course, to point to the long history of regional/strategic planning initiatives since the 1920s. In more recent years, structure plans, regional planning guidance, regional spatial strategies and integrated regional strategies, have all enjoyed their day in the sun or, perhaps more accurately in the case of the latter, the promise of a run out.

If "regional planning" *per se* is getting closer to the exit door, the last few months have seen the case for the retention of arrangements to support collaborative, cross-boundary, larger-than-local planning almost universally accepted. In the Communities and Local Government Select Committee and the Bill Committees in the Commons and the Lords, there were few (amongst either witnesses or legislators) who seriously questioned the need for locally prepared plans to sit within/continue to be informed by a wider, cross-boundary, spatial framework.

True, before the Select Committee, the Secretary of State himself did venture the view that strategic planning was essentially "for the comfort of planners". However, at the Localism Bill's report stage in the House of Commons (when the Government effectively withdrew the original cl.90 of the Bill and agreed to adopt what has now become cl.98), the Minister for Decentralisation and Planning (and now Cities), Greg Clark, said he saw the Government's task as one of replacing arrangements that had had their day "with a means of addressing larger than local issues that is robust and captures the need for strategic planning". He said too that he saw the new duty to cooperate as "bring(ing) local authorities together in a more natural way … to collaborate" on such issues.

In policy terms, then, it seems clear that the Government have travelled some distance from the proposals with respect to strategic planning that were contained in the Conservatives' green paper, "Open Source Planning", published in February of last year.

The green paper committed an incoming Conservative Government to abolishing "the entire bureaucratic and undemocratic tier of regional planning, including Regional Spatial Strategies, the Regional Planning Bodies, and national and regional building targets". With this removal of "the regional planning architecture' effected, the paper offered the reassurance that 'control over development will revert to the local level".

The paper did acknowledge, however (in a brief section on "local infrastructure"), that there would always be some elements of planning "in particular the provision of the various types of infrastructure that support development that will require some form of co-operation between adjoining local authorities". In this connection, the paper contained a commitment "to legislate to give all local planning authorities and other public authorities a Duty to Co-operate which will ensure that they consult all relevant parties, including all bordering local authorities, in drawing up their plans including infrastructure plans".

In seeking to assess the extent to which the revised arrangements can fairly be claimed to capture the continuing need for strategic planning, it is proposed to consider the Bill's cl.98 (which inserts a new s.33A into the Planning and Compulsory Purchase Act 2004) as it has now been supplemented by provisions

contained in the draft Town and Country Planning (Local Planning) (England) Regulations ("draft local planning regulations"), and by guidance offered in the Government's recently-published draft National Planning Policy Framework ("draft national framework").

The first point to note is that, as was always envisaged, the new section imposes a "must-co-operate" requirement not just on local planning authorities but also upon county councils and the other public bodies listed in reg.6(1) of the draft local planning regulations. These bodies have a duty to co-operate with one another, and each of them also has the duty to co-operate with local enterprise partnerships, as the only bodies so far prescribed for the purposes of the section's subs.(9).

However, in considering where and how the new s.33A(1) duty will bite, it is to be observed that, under cl.98(3) of the Bill, a new s.20(5)(c) is inserted into the 2004 Act. This provides for the "purpose" of an independent examination under s.20(5) of the Act to be extended to include "whether the local planning authority [i.e. the plan-making authority submitting the relevant development plan document to the Secretary of State for independent examination] complied with any duty imposed on the authority by section 33A in relation to its preparation".

Accordingly, it will be the actions of the plan-making authority that will fall to be scrutinised under this provision, just as it will be the plan-making authority who will effectively be 'penalised' by a non-adoption recommendation if the examination determines that there has been a failure on their part to comply with the duty. It is also most important to note though that they (the plan-making authority) will be likely to suffer a similar fate if non-compliance with the duty to co-operate, on the part of any other s.33A(1) body, is considered by the person appointed to carry out the examination to bring into question the soundness of the submitted document under s.20(5)(b) of the Act.

From the plan-making authority's perspective, therefore, the new s.33A impacts very considerably upon the "preparing the way" activities such authorities are currently called upon to undertake under s.13 of the 2004 Act. This section imposes a duty upon a local planning authority to keep under review the principal physical, economic, social and environment characteristics of their area (together with other matters which may be expected to affect the development of their area or the planning of its development). But, whilst s.13(4) empowers the authority to keep under review, and examine, the same matters "in relation to any neighbouring area", this is only "to the extent that those matters may be expected to affect the area of the authority".

In (stark) contrast, the new section imposes a duty to co-operate upon a plan-making authority and others "in maximising the effectiveness with which activities [essentially those with respect to plan-making] are undertaken", so far as those activities relate to "a strategic matter". Importantly, this latter expression is then defined—in s.33A(4)(a) and (b)—as development that has or would have a significant impact on at least two planning areas, development for or in connection with infrastructure that is strategic [sic] and has or would have a significant impact on at least two planning areas, and, finally, development in a two-tier area that is a county matter or has or would have a significant impact on a county matter.

Whereas, therefore, s.13 focuses solely upon an assessment of the conditions in/characteristics of neighbouring areas that might be expected to "affect" the plan-making authority's own area, under the new provision such an authority face the far more formidable task of seeking in the first instance to assess whether, and to what extent, development within their own area appears likely to have a significant impact in another planning area or areas (as well of course as vice versa) in order to determine whether they have a duty to co-operate with that or those authorities and/or other bodies, to maximise the effectiveness of their own (or other relevant authorities') plan-making and related activities.

It is perhaps fortunate, then, that the guidance which the draft national framework now offers to authorities about how the duty under s.33A(1) is to be complied with, does not seek to follow the convoluted wording of s.33A(3) and (4) too closely, and is couched in relatively simple terms.

By way of illustration, the framework offers the following guidance with respect to housing, business and infrastructure requirements. As regards the first, para.28 of the draft framework states that, in order to have a clear understanding of housing requirements in their area, authorities should "prepare a strategic Housing Market Assessment to assess their full housing requirements, working with neighbouring authorities where housing market areas cross administrative boundaries". With respect to the second, the guidance states, in para.29, that in order to "have a clear understanding of business needs within the economic markets operating in and across their area", authorities should work together with other authorities, and local enterprise partnerships, to prepare and maintain a robust evidence base, to understand, inter alia, likely changes in the market. And, finally, as regards infrastructure requirements, authorities are advised, in para.31, to "work with other authorities and providers to assess the quality and capacity of transport, water, energy, telecommunications, utilities, health and social care, waste and flood defence infrastructure and its ability to meet forecast demands".

It is to be observed, however, that the activities whose effectiveness is to be maximised by such working are not limited, by s.33A(3), to plan-making but, as noted above, include associated preparatory and supporting activities, and, by virtue of s.33A(2), the duty that is imposed by the section requires the authorities and bodies concerned: (i) to "engage constructively, actively and on an ongoing basis in any process by means of which [such] activities … are undertaken", and (ii) to have regard to the activities of local enterprise partnerships (and possibly other bodies in due course) so far as these are relevant to the preparation of the plans and documents to which the section refers.

Moreover, as regards "engagement", whilst this covers, if the body concerned is a local planning authority, "considering whether to agree under section 28 to prepare local development documents", it also covers, by virtue of s.33A(6)(a), "considering whether to consult on and prepare, and enter into and publish, agreements on joint approaches to" such plan preparation and/or supporting activities.

These latter provisions would appear then to be of real importance in paving the way for greater flexibility, and less uniformity, in plan-preparation processes, and in allowing for proper account to be taken, in this regard, of different geographies and different experiences of effective joint working between authorities in different places.

Certainly, in the draft national framework's section on 'planning strategically across local boundaries', this seems to be the Government's view of the provisions' import. One of the key paragraphs in this connection is para.46, where it is stated that: "local planning authorities will be expected to demonstrate evidence of having successfully co-operated to plan for issues with cross-boundary impacts when their Local Plans are submitted for consideration. This could be by way of plans or policies prepared as part of a joint committee, a memorandum of understanding or a jointly prepared strategy which is presented as evidence of an agreed position."

The same theme is continued in para.47, where reference is made to the need for joint working to enable authorities to work together to meet development requirements which cannot wholly be met within their own areas, and for them to consider, as part and parcel of their joint working in these situations, the production of "joint planning policies on strategic matters and informal strategies such as joint infrastructure and investment plans".

A less tidy world may, therefore, be upon us and, if this is the case, there are many who would say, "bring it on". They would contend that the country has paid a high price (on several fronts) for the determination of successive Governments, these last twenty or more years, to maintain a rigid, single-model approach to strategic planning at the larger-than-local level. Probably, too, there are few today (even in Whitehall) who would admit to being persuaded of the logic of calling for the preparation of integrated economic and spatial development plans by reference to the boundaries of regional government office areas that were established, in the early 1990s, for wholly different purposes.

Hopefully, then, one of the effects of the arrangements that are being ushered in will be to allow authorities within the country's major conurbations to work and plan together, more effectively than they have been able to do in the past, to promote sustainable economic growth within their respective "city-region" areas.

Needless to say, not everyone sees matters this way. In their report on "The Abolition of Regional Spatial Strategies: a planning vacuum", the CLG Select Committee expressed it to be their view that local enterprise partnerships would be inappropriate bodies to exercise planning powers. Two of the reasons given for this view were that such partnerships are "voluntary [in] nature" and that they "do not, and presumably will not necessarily, cover the whole country".

Now, there are some very good reasons why planning powers should not sit with local enterprise partnerships (pertaining principally to the lack of democratic accountability of half or more of such partnerships' members) but the claim that "strategic planning, if it is to be both fair (in taking account of the needs and preferences of all affected communities) and effective, needs to be undertaken on a much more consistent basis" is simply not supportable. Fairness does not require different cases to be treated in a like fashion; nor do arrangements need to be the same to be effective.

Responding to the Select Committee's recommendations, the Government have said that their "top priority" is "reforming the planning system … to promote sustainable economic growth and jobs", and that, in this connection, they wish to strengthen "local economic co-operation".

This being the case, it seems likely that authorities in membership of bodies such as the Greater Manchester Combined Authority (established by the Greater Manchester Combined Authority Order 2011) and the Leeds City Region Partnership (established as a joint committee under ss.101 and 102 of the Local Government Act 1972) will have every reason to seek to extend the current remits of these bodies to cover the doing of anything that is calculated to facilitate, or is conducive or incidental to, the exercise by the authorities concerned of their functions under Pt 2 of the Planning and Compulsory Purchase Act 2004 (including, of course, the prospective s.33A of the Act).

In this same connection, it is interesting to note that the Leeds City Region Partnership recently approved a report recommending the adoption of a "City Region Strategy Statement" to "provide an interim position on key strategic spatial planning issues where a city-region overview could assist local decision-making — until such time as [a] City Region Integrated Strategy is prepared". The Partnership took this action in advance of the publication of the draft national framework and so must now be gratified (or at least relieved) to read what is said about such approaches in paras 46 and 47 of that document.

The report to the Partnership's eleven Council Leaders recognised, however, that it would be vital, going forward, to be able to demonstrate that any policies being advocated at the city-region level were ones that had been tested with a wide range of interests. This was sound advice, and it is instructive to observe that, in the years leading up to 1990, before the preparation of regional planning guidance had been put on a statutory footing, the Government sensibly took steps, prior to issuing their final advice, to publicise a draft, consult widely upon it, and arrange for the holding of an examination in public, by an independent panel, to test its proposals.

It might be helpful, then, if, in the final version of the national planning policy framework, the Government drew to the attention of city-region and other collaborating authorities the desirability of actions such as these being considered in connection with their own joint preparation of strategies on larger-than-local matters.

The financial consequences of local authority decisions

Moving to what is now cl.130 of the Bill, it is interesting to note that Mr Clark defended the Government's decision to bring forward the clause upon the basis that it really did little more than confirm the current legal position.

Commenting on the new clause at report stage, he said it simply made clear "that local finance matters that are relevant to planning considerations can be taken into account" and did "not change the law in any way". Given this claim, and the strong opposition which the clause has excited, it is proposed to examine briefly the circumstances in which the financial implications/consequences of local authority decisions have indeed been accepted by the courts as being material to those determinations, both generally and then, more particularly, in relation to decision-taking with respect to planning matters.

Formally, of course, such decisions always turn upon the court's construction of the precise wording of the particular statutory provision under consideration. However, the Secretary of State referred recently to the "insidious accumulation" of statutory duties imposed on local authorities by Parliament and, in truth, what most of these provisions have in common (including those in the planning sphere) is the usual, if not invariable, absence from them of any reference at all to the materiality or otherwise of the costs to an authority of exercising the relevant functions, and/or as to the availability of resources on their part to meet those costs.

So, in the Supreme Court's recent and widely-publicised decision in the case of *R. (on the application of McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33, an important question that arose was whether, in discharging their duty to make an assessment of needs under the National Health Service and Community Care Act 1990, a local authority could lawfully take into account the likely impact of any decision upon their own resources. The majority of the court took the view that this question had already been settled by the House of Lords in the case of *R. v Gloucestershire CC ex p. Barry* [1997] A.C. 584. Speaking for the majority, Lord Brown regarded the House of Lords' majority decision in the *Barry* case as having established that, in carrying out an assessment of an applicant's needs for services, an authority were not required to take their decision in a vacuum from which all considerations of cost had been expelled. Nor, noted Lord Brown, had it been suggested to the Supreme Court, in the instant case, that it might like to revisit the decision in *Barry*, "controversial though at the time (1997) that was".

However, Lady Hale saw matters rather differently. She said that she would have wished that counsel had taken the opportunity presented by coming to the court to argue that *Barry* was wrongly decided. "After all", she said, "it was a comparatively recent decision, taken by a bare majority, on a highly arguable point of statutory construction". Moreover, she said:

> "the majority view was obviously heavily influenced by the impossible position in which the local authority had been put at the time: wishing to maintain the services which their clients needed but unable to do so because of the combination of rate-capping and reduction in central government grant. The principled view, taken by the minority, was that this was not a good enough reason to interpret the authority's statutory duties otherwise than in accordance with their plain meaning."

Whilst, then, it may be fair to state that the courts have, of late, taken a more pro-taxpayer stance and shown themselves to be readier than previously they were to hold that, save where Parliament has expressed a clear intent to the contrary, authorities can have regard to cost/resource considerations when exercising their statutory functions, the marked differences of judicial opinion (at the highest level) referred to above, should caution practitioners and commentators against seeking to draw too many general conclusions from these judgments.

Moreover, with respect to the exercise of planning functions specifically, a number of the judgments that have been given in cases coming before the courts over the last few years (and comments that have been offered in those judgments) make this a particularly difficult terrain to navigate with any degree of confidence.

Just a year or so ago, in *The Health and Safety Executive v Wolverhampton CC* [2010] EWCA Civ 892, the Court of Appeal quashed the respondent council's refusal to consider making a revocation or modification order. However, whilst the court's decision on this issue was unanimous, the court's members expressed differing views as to whether the financial consequences of making such an order could be taken into account by the council when they took their decision.

Giving the lead judgment, Sullivan L.J. noted that, whilst s.97 (2) of the Town and Country Planning Act 1990 was expressed in terms similar to those of s.70(2) of the Act, it was (contrary to the position under s.70) for the authority to initiate the decision-making process under s.97. He noted too that s.97(1) provided for the revocation or modification of any permission 'if it appears to the local planning authority that it is expedient' so to do. Accordingly, he held that the council here could take into account the compensation that they would be liable to pay to the developer (Victoria Hall Ltd), under s.107 of the Act, should they be minded to revoke the permission previously granted by them for the construction of a student accommodation block in close proximity to a liquefied petroleum gas facility.

In so holding, Sullivan L.J. said:

> "I do not consider that the obligation imposed by subsection 97(2) to have regard to the development plan and any other material considerations should be read as an express prohibition against the local planning authority also having regard to the other provisions of the 1990 Act, and in particular to [their] liability to pay compensation under section 107, when deciding whether to exercise the power conferred by section 97. Subsection 97(2) tells the local planning authority that in deciding whether it is expedient to make a revocation order [they] must have regard to certain matters, [it does] not say that the authority must not have regard to the other provisions of the Act, including those relating to compensation."

In adopting the above approach, with which Longmore L.J. agreed, Sullivan L.J. approved Ouseley J.'s decision in *R. (Usk Valley Conservation Group) v Brecon Beacons National Park Authority* [2010] EWHC 71 (Admin). This case had involved the failure by the respondent authority to make a discontinuance order in respect of a caravaning and camping use of land under (the similarly framed) s.102 of the 1990 Act. Ouseley J. had held that the authority had not acted unlawfully in having regard to their liability to pay compensation (in this instance under s.115) when taking their decision. Sullivan L.J. was of the view, however, that the case of *Alnwick DC v Secretary of State for the Environment,Transport and the Regions* [1999] EWHC 782 (Admin), in which Richards J. had refused to quash a default order that had been made by the Secretary of State under s.97, without taking account of the local planning authority's liability to pay compensation, had been wrongly decided on this issue and should not, therefore, be followed. For his part, Pill L.J. did not accept Sullivan L.J.'s analysis and thought that the *Alnwick* case had been rightly decided; accordingly, he indicated his disagreement with the views of the majority.

Interestingly, however, Pill L.J. was the only member of the court to consider whether the risk of an award of costs being made on an appeal against a refusal of planning permission was capable of being a material consideration under s.70(2). Citing a paper by Sir Frank Layfield QC (given to this very Conference in 1990) in support of his view, Pill L.J. reasoned that it was not. Whilst it would be difficult to fault the logic of the judge's reasoning, it certainly produces a strange result. The whole purpose of a costs regime is to "encourage" those involved in proceedings to behave acceptably, stick to the rules and follow good practice. Moreover, if Pill L.J. is right, then it appears to be not at all unlikely that the attention of members of local planning authorities is being drawn to this particular unlawful consideration every other day of the week.

But, is Pill L.J. right? Certainly, Otton J. did not appear to think so in *Royal Borough of Kensington and Chelsea Ex p. Stoop* (1991) J.P.L. 1129. The challenge in this case came from a local objector (Mr Stoop) who, effectively, questioned the legality of advice that had been given to the council's planning

committee by the authority's director of legal services, after which a vote of seven to three in favour of refusing the application, with two abstentions, was converted into a vote of eight to four in favour of granting planning permission. In truth, much of the judgment focussed on the propriety of such advice having been given to the committee in closed session, under s.100A of the Local Government Act 1972. However, Otton J. plainly thought that the advice offered by the director, on the prospects of the council having to pay costs in the event of an appeal, and on the likely (substantial) order of those costs, was perfectly unexceptionable.

Perhaps, then, were the same issue to come before the court today, a judge sharing Otton J.'s view of the world might be tempted to extend the approach commended by Sullivan L.J. in the *Wolverhampton* case and hold that whilst such advice might not be something that the committee were obliged to have regard to under s.70(2) of the 1990 Act, they could, looking at the Act as a whole, properly take it into account, given the terms of s.320(2) of the Act which apply s.250(2)–(5) of the Local Government Act 1972 to local inquiries caused to be held under the 1990 Act, and thus empower the Secretary of State to specify the circumstances in which the costs of such an inquiry shall be paid by a local authority.

But, returning to the broader question of how s.70(2) of the 1990 Act ought properly to be construed, it is of the utmost importance to note that Sullivan L.J. himself went out of his way, in the *Wolverhampton* case, to say that he readily accepted "that there must be a consistent approach to the meaning of 'material considerations' in the enactments which comprise the planning code". Moreover, he noted that it was common ground (amongst all of the judges referred to both at first instance and in the appeal court) "that a financial benefit or disbenefit to a local planning authority as a result of a grant or refusal of planning permission, devoid of any land use consequences of the decision, is not a material consideration for the purposes of section 70(2) of the 1990 Act".

In the light, then, of these judicial observations, Mr Clark's claim, that cl.130 should be seen as no more than "an incidental measure for clarification", sounds just a tad disingenuous, even when allowance is made for the fact: (i) that financial considerations which fairly and reasonably relate to a proposed development are, of course, capable of being material considerations; and (ii) that, under the clause as drafted, regard may only be had to "local finance considerations" so far as they are material to the application in hand.

However, what the observations also suggest is that it was almost certainly right for Ministers to conclude that, were they not to have moved for s.70(2) of the Act of 1990 to be amended, there would have been a better than even chance of the courts thwarting the Government's policy of seeking to embolden local planning authorities to make more pro-growth planning decisions (by allowing their members to take account of financial benefits that would or might be paid to or received by the authority in consequence of a permission being granted), even in those cases where demonstrable benefits could be identified as being likely to accrue to the communities most closely impacted by the development in question.

But, the clause remains contentious, and when it was debated in Committee in the House of Lords, the Minister, Lord Attlee, found himself again asked to explain why the Government had come to the view that clarification of the law by way of primary legislation was called for. He was asked too to give their Lordships "an example of when receipt of a new homes bonus would not be a material consideration". The Minister largely side-stepped the first request but suggested, in responding to the second, that where the monies received were to be pooled with others to help fund, say, a new parkway station on a commuter line, then, "in determining an application for a major housing development on a site within the catchment of the proposed station, it would be perfectly reasonable for the local planning authority to have regard to - as a material consideration - the fact that the development would generate revenues which would contribute to the new parkway station that would serve that development". If, on the other hand, the new

development was particularly aimed at the retirement market, or on a site far removed from the station, Lord Attlee considered that "the provision of the station would not be material to the determination of [these] application(s) because it would not relate to the planning merits of the development proposed".

Well, who knows? What the new s.70(2)(b) of the 1990 Act states is that regard shall be had to "any local finance considerations, so far as material to the application", and such a consideration is defined, in the new s.70(4)(a) and (b), to mean (no more than) "a grant, or other financial assistance that has been, or will or could be, provided to a relevant authority by a Minister of the Crown, or sums that a relevant authority has received or will or could receive in payment of Community Infrastructure Levy".

It is not entirely clear, then, why Ministers have been advised that the decision of a court on the application of the new provision would likely turn on the purpose for which the local planning authority were proposing to spend any relevant receipts, and the closeness of the relation between that purpose and the development proposals in hand. Plainly, a simpler reading of the provision would be that a "local finance consideration", as defined, might properly be held to be material to an application where the relevant grant, assistance or sums have been, will or might be received by the authority in consequence of that specific application being approved and implemented. That said, these are obviously "highly arguable points of statutory construction" which, having now been stirred, might be better left, as Lord Denning once comfortingly observed, for "wiser heads in time [to] settle".

A matter that might be settled more easily, however, is whether cl.130, as drafted, "might in some way oblige decision makers to give more weight to local finance considerations…than to other material considerations". Lord Attlee was confident that it didn't, but accepted that there would be merit in the Government "looking again at the wording to ensure that it does not inadvertently place local finance matters in any particular place in the pecking order of material considerations". Further changes to the clause may yet, therefore, be in the offing.

[And this has indeed proved to be the case, as a Government amendment to the clause was agreed at the Bill's report stage in the House of Lords on October 17, 2011. However, as well as clarifying that the clause's changes to s.70(2) do not alter the weight to be attached to any consideration to which regard is had under the subsection, the newly introduced subclause has gone considerably further in stating that the changes do no alter (either) whether, under s.70(2) "regard is to be had to any particular consideration". On the face of things, then, this late amendment would appear to deprive s.70(2)(b) and (4) of even such little substance as they had.]

Finally, in this area, it remains only to note that cl.130 of the Bill (which, as pointed out above, amends s.70(2) of the 1990 Act and inserts two new subsections into the section) concerns itself solely with decision-taking under that section, and with certain apprehended benefits (but not disbenefits) arising from decisions on individual applications taken under the section. However, in relation to local authorities' more general plan-making responsibilities, s.19 of the Planning and Compulsory Purchase Act 2004 provides—in s.19(2)(i)—that, in preparing any local development document, a local planning authority not only may but must have regard to "the resources likely to be available for implementing the proposals in the document".

Incentives, their likely effectiveness, and the fairness of revised arrangements for the funding of local expenditure

In his Ministerial Foreword to the "New Homes Bonus: Final Scheme Design" document published in February 2011, the Minister for Housing and Local Government, Grant Shapps, referred to the central role played by local authorities in facilitating economic and social growth, considered that this included the drawing of ambitious development plans, and expressed the view that the New Homes Bonus ("NHB") scheme would be seen as offering an assurance to authorities that "where they are proactive in securing growth they will reap the benefits".

But, how important a driver of the inclusion of pro-growth policies in their development plans will the prospective receipt of NHB payments be likely to be? What, in short, are we talking about, at individual authority level, in terms of quantum?

Well, some £200 million has been set aside by the Government to fund the scheme nationally in the current year (2011/2012), and £250 million has been set aside for each of the coming three years. Importantly, however, the Government have stated that payments made under the scheme in excess of these figures will be deducted (in and after the second year of the scheme) from the formula grant paid to authorities. What benefits, then, can a responsive (and favourably placed) local planning authority expect to receive under these new funding arrangements?

According to the Home Builders Federation, such receipts have the potential to be very considerable indeed. In a covering statement to research published by the Federation in March 2011, the Federation's Executive Chairman, Stewart Baseley, stated that: "In these austere times, with budgets being cut across the country [NHB] will prove invaluable … the financial rewards for meeting local needs will enable authorities to fund a wide range of services they want to provide for their electorate."

Moreover, said the Federation, their research had revealed that Leeds CC ("Leeds") was the country's "biggest potential loser". Leeds, said the report: "is missing out on £5.2 million of funding through the NHB this year alone. By year six — the year at which NHB peaks — the local authority will be missing out on £31 million of funding annually. £31 million is equal to 10% of its total central government funding (in 2011/12)."

Leeds have offered a response to the Federation's claims, and their response makes interesting reading.

First, they say that, in the current year (based on council-tax-base data running from October 2009 to October 2010), they have in fact received one of the highest NHB payments—at £2.7 million; they point out, however, that this is a very small sum in relation to other sources of funding available to them and amounts to just 0.76 per cent of total government grant received by Leeds for 2011/2012 (only excluding grant in respect of schools and PFI expenditure).

Secondly, they state that because new dwellings in Leeds tend, on average, to have council-tax bands lower than Band D, the Federation have overestimated the growth in dwellings required to meet projected household growth (from 4,580 to 5,520), with the result that the six-year difference posited by the HBF needs to be adjusted down from £31 to £23 million.

Thirdly, they claim that even if the growth in the number of domestic dwellings in the city over the six-year period was to match the average annual projected growth in the number of households derived from DCLG's November 2010 Household Growth Projections (and, in this connection, they note that this would necessitate a two- to threefold increase in the number of new homes being provided, year on year, within the city), the total NHB income received by the council for the period to 2016/2017 would amount to just 4.8 per cent of Leeds's aggregate net revenue budget (assuming a cash standstill) over that same period.

And, fourthly, they draw attention to the fact that the HBF projections take no account at all of the significant offsetting reductions in formula grant that Leeds (and all other authorities) will suffer by reason of the arrangements which the Government have adopted for the funding of the NHB scheme. Elaborating upon this latter point, Leeds estimate that because of these offsetting formula-grant reductions, the net benefit to the council by way of NHB payments (again using the household growth projections proposed by the HBF) is likely to be some £11million to £12 million less than the £31 million NHB payment projected to be receivable in year six of the scheme.

And then finally, putting all of these figures into their full, financial context, Leeds record that their net revenue budget, for the current year, is £582 million (£1.5 billion gross)and, for the six-year period to 2016/17, is projected to be of the order of £3.5 billion (£10 billion gross). It can be seen then that, whilst NHB payments will plainly represent a valuable, potential source of additional revenue for (some)

authorities, such payments will represent a relatively modest supplement to the total resources of even those councils who find themselves best placed to benefit from the scheme.It is to be observed too that under the scheme authorities will receive NHB payments even if planning permission for the relevant completed dwellings was initially refused by them and granted only on appeal.

In incentive terms (and fairness) , however, this is really only the half the story, and perhaps the less important half at that.

The Government have repeatedly stated that their objective in introducing the NHB scheme is to "let the communities most affected by housing development see the greatest benefits". This was confirmed by Greg Clark in his November 2010 announcement with respect to the Government's proposed retention and amendment of the Planning Act 2008's community infrastructure levy provisions, where he said that such payments would complement powerful incentives to be developed through the NHB scheme under which "communities that support the construction of new homes will receive direct and substantial extra funding to spend as they wish".

Similarly, in his Ministerial Foreword to the scheme design document referred to above, Grant Shapps declared that "just as communities know they need new homes, the NHB gives them the incentive to welcome them".

Now, "community" is a slippery concept and, insofar as the above statements are taken as referring to local authority areas, they are unexceptionable. It is clear, however, that what Ministers are really expecting to see are services and facilities, funded out of NHB payments, being provided by authorities for the benefit of those localities most closely impacted by development proposals for the provision of new homes. It seems clear too that Ministers are hoping that, when determining relevant applications, the prospect of such services/facilities being provided for these purposes will be a consideration to which planning members will wish (if not be required) to have regard, under the amended s.70(2) of the 1990 Act.

But, are NHB payments likely to be utilised by authorities in this way? Truth to tell, no one knows but, in many parts of the country, it seems extremely unlikely that they will.

This is because NHB, like formula grant, is paid to authorities under s.31 of the Local Government Act 2003 and is, therefore, again like formula grant, un-ringfenced. However, whereas, for many years, formula grant has been a key "equalisation" mechanism, providing for the distribution of tax revenues (including business rates) across the country in accordance with a comprehensive assessment of different areas' relative social and economic needs, the payment of NHB will turn solely upon the extent to which, and the rate at which, specified assets within authorities' areas are exploited. But, as we all know, the relevant assets here are ones that will be available for exploitation by some authorities in abundance, whilst being possessed by other authorities scarcely at all.

That said, the Government are plainly determined to make the new arrangements "a permanent feature of the local government finance system", and say that "even at a steady rate of build NHB payments by year six of the scheme (2016/17) will total more than £1 billion". Moreover, given the Government 's confidence that building rates will indeed increase over the course of the next few years, they expect "the grant to be significantly higher [than this figure] by year six".

With respect, however, to the likely impact of the operation of the NHB scheme on the distribution of formula grant, this could be only the start, for when Grant Shapps gave evidence to the Select Committee on September 13, 2010, and was asked what the Government would do if fewer houses were built as a result of the changes the Government were making, his response was that "Ultimately, if everything else fails, you would increase the incentives until they got built".

It would appear then that those authorities whose areas are characterised by the highest levels of social and economic disadvantage, and who can expect (under the arrangements as they currently stand) to suffer the greatest reductions in the formula grant they receive, are set to face a number of difficult years: they

will be hard hit if the increase in national house-building rates that the Government are anticipating does materialise, and, in the light of Mr Shapps' response, they are likely to find themselves even harder hit if it doesn't!

For their part, the Select Committee noted the Minister's answer and, in their report, observed (rightly) that it appeared to raise serious concerns "about … what effect [any such further action] would have on the distribution of Government grant funding to local authorities".

In closing this section, then, it would be fair to observe that, thanks to the efforts of many in the planning fraternity, there has been considerable discussion, over recent months, of the merits and likely effectiveness of policies that Ministers have laid out for the incentivisation of pro-housing-growth decisions by local planning authorities. To date, however, rather less consideration has been given to the significance of the Government's decision, in introducing the NHB scheme, to set about dismantling a mechanism that has been used by successive Governments to distribute grant to local authorities in accordance with a formula that takes account of authorities' relative needs and differing resources.

Accordingly, now that this mechanism is in the process of being dismantled—and the Government have announced their intention of carrying the process further by re-localising business rates—a key question that will call for (and hopefully receive) no less vigorous discussion is how, in the light of these changes, it is proposed that the very real disparities in prosperity and economic performance that exist between different parts of the country—and, indeed, between different places within those parts—will continue to be effectively addressed.

Concluding observations

Whilst the provision to be inserted into the 2004 Act, as s.33A, is undoubtedly clunky, the Government can fairly claim that the section, as now re-drawn, is capable of addressing the continuing (and largely unquestioned) need for effective, strategic planning. Moreover, the Government have sensibly resisted calls to over-prescribe what strategic planning frameworks should look like in different places, and with respect to different issues of cross-boundary significance. Accordingly, the new provision can, and doubtless will, be made to work by collaborating authorities, and is likely to work best, at least in the short term, in those areas where existing structures are in place to promote and facilitate joint working.

With respect to the more vexed question of incentives, the Secretary of State maintained in his CBI speech in March that the Government were committed to using "the financial carrot, rather than the legal stick", and this claim has continued to feature in the Government's pro-growth rhetoric. However, looking closely at the approach which the Government have now adopted in the draft national framework in relation to the treatment of development proposals where relevant plans and policies are absent or fall to be characterised as incomplete or out of date, it will almost certainly be the latter (stick), and not the former (carrot), that will deliver the growth the Government crave, more particularly in the crucial field of housing supply. The Government would be well advised, therefore, to keep the operation and effectiveness of schemes such as the NHB under regular review.