THE LOCALISM BILL

A BRIEFING NOTE PREPARED JOINTLY BY BARTON WILLMORE, HBF AND FIELD FISHER WATERHOUSE LLP

INTRODUCTION

On 13th December 2010, the Government published its much anticipated Localism Bill. When doing so, Eric Pickles, the Secretary of State for Communities and Local Government said "it will herald a ground-breaking shift in power to councils and communities overturning decades of central government control and starting a new era of people power." The Bill is a central theme of the Coalition's policy and the proposed changes to the planning system are but one element of the broader strategy.

With 207 detailed clauses and 31 schedules contained in 2 volumes comprising just over 400 pages, the Bill proposes significant changes to existing legislation.

As the Bill was published, the press was concentrating on the cuts in funding to Local Authorities that were announced the same day. These cuts will set the wider context whilst the proposals are implemented - many Local Authorities are currently facing cuts in staff at the same time as the Bill is placing new burdens on planning departments.

The proposals cover a wide range of matters which define the relative roles of government, Local Authorities (LPAs) and communities. Most of the changes relating to planning are contained in the 5th of the 7 parts of the Bill. Other areas of change relate to matters such as council tax or local authority governance as well as public housing provision.

The Bill is expected to take well over a year to make its way through the required parliamentary procedures before a new Act comes into force.

In considering the content and implications of the Bill, it is worth remembering the Conservative Green Papers Control Shift and Open Source Planning, published at the time of the election which heralded many of the principles behind the new proposals.

It is also important to note that we currently only have some of the information required to understand how the new system will work. Much of the detail about new processes and procedures is to be set out in Regulations or orders which have not yet been released and which are unlikely to be available any time soon.

KEY PROVISIONS OF THE BILL

PART 1 - LOCAL GOVERNMENT

New very wide powers for Councils

Wider powers are to be awarded to local authorities. They will, like individuals currently can, be able to do anything, for any purpose, unless it is specifically prevented by common law or statute.

Councillor's can act in matters they have previously been involved with

Chapter 4/Clause 13. This ends the rules of predetermination which currently provide that Councillors/Members/elected Mayors are prevented from acting on local issues because of the risk of challenge that they might be biased.

A number of planning decisions have been successfully challenged (and permission quashed) because of an allegation regarding bias or predetermination. In future a decision maker will not be taken to have had a closed mind just because he has previously done something which directly or indirectly indicates what view he takes or would or might take in relation to the matter.

PART 4 – COMMUNITY EMPOWERMENT

There are a number of provisions in this Part dealing with changes to council tax, and business rate discounts. However, there is nothing in the detail of the Bill which relates to the proposed New Homes Bonus, the financial incentive trailed by the Government to encourage communities to accept additional homes in their area. We understand that the Government will issue a Local Government Resource Review in January next year and we expect the details of the New Homes Bonus, and other incentivisation measures to be found in there.

This part of the Bill contains detailed provisions enabling local referendums to be held in relation to local matters. A referendum may be sought by way of a petition (signed by more than 5% of registered voters in the whole of that ward or for a county council the electoral division) or a request (by members of an electoral area). The local authority must decide whether it is appropriate to hold the referendum and may only refuse it on one of the following grounds i.e. the matter is not a local matter over which the authority has any influence, it does not affect their area, it is vexacious or abusive, or it is contrary to law.

Chapter 3 - Community Right to Challenge

It is unclear why is called "community right to challenge". This chapter describes the provision as meaning "local communities will be able to get more involved in the delivery of public services and shape them in a way that will meet local preferences".

Members of communities (including voluntary/community bodies, a Parish Council, two or more employees of that authority) are to be given a right to submit an expression of interest (EoI) to provide or assist in providing local authority services on behalf of that authority.

The authority must consider the EoI and accept or reject it. If accepted it must then carry out a procurement exercise (having regard to the value and nature of the contract) and consider how the EoI might promote or improve the social, economic or environmental well being of the authority's area.

Chapter 4 - Assets of Community Value and Community Right to Buy

Chapter 4 of Part 4 sets out proposals in respect of "Assets of Community Value". The Government has called this the "Community Right to Buy" and it applies to private land or buildings as well as public assets.

Local Authorities are required to maintain a list of land that is of "Community Value" (Clause 71). The definition of what constitutes community value is to be determined in accordance with regulations made in due course (we do not know now what they might be). Procedures for the nomination of land by Parish Councils and others are, however, set out. Nominations must be accepted by the authority, if they are of community value, and they must notify the owner. A landowner whose land is thought suitable for inclusion on the list will have the opportunity to ask for a review of that decision, and to appeal if the review decision is unfavourable. If included on the list land will remain on it for 5 years.

If land is included on the list its owner will not be able to dispose of it unless he has met three conditions:-

- He has notified the local authority that he wishes to dispose of the land
- Either the interim moratorium period had ended without the owner having received a written request from a community interest group to be treated as a potential bidder or the "full moratorium period has ended"; and
- The "protected period" has not ended

We have no information as to how long the "interim moratorium period", "full moratorium period" or "protected period" will be. Nor do we know what is being "protected" or the procedure which will need to be followed. All of these are matters for Regulations (which are not yet available).

HBF Comment:
Whilst it is difficult to assess the detail of these provisions in the absence of the secondary legistation, the inclusion of privately held assets on the LPA's list of land with "community value" has every potential to frustrate an owner's ability to dispose of it as and when they see fit. Inclusion on the list may itself have significant adverse impact on value. There must also be a concern that those wishing to object to specific development proposals will seek to use such powers to cause delay and uncertainty.

This is, therefore, a potentially dangerous new provision for all landowners and developers. It is intended to help local communities to ensure that local facilities such as post offices, shops or pubs can survive. However, as drafted, it will prohibit landowners whose land is deemed by the local authority, parish council or a community group as being of "community value" from disposing of that land without notifying the local authority that it wants to do so and giving a community group the opportunity to bid for the land. At the very least this will create huge potential for delay and interfere with private property rights.

It could easily be the case that vacant land owned by a developer could be affected, in an attempt to frustrate development in a similar way to the applications for Village Green status suffered by many landowners and developers.

PART 5 - PLANNING

Abolition of Regional Strategies

Clause 89 confirms that all Regional Strategies are to be revoked as soon as the new Act comes into force (until such time, the High Court has stated in response to the Challenge by CALA Homes that Regional Strategies remain part of the Development Plan despite the Secretary of State's previous attempt to get rid of them). Schedule 8 of the Bill contains amendments to other legislation that will be required as a consequence of the revocation.

Duty to Co-operate

Clause 90 provides a new duty on local authorities and other prescribed bodies (expected to be the Highways Agency and Environment Agency etc) to co-operate when preparing local development documents etc. The duty requires them to engage constructively, actively and on an on-going basis. This includes responding to consultation and information requests. The Secretary of State will issue guidance on this in due course. The Government has already said that "The duty will be a key element of our proposals of strategic working once Regional Strategies are abolished".

Minor amendments are made through Clauses 91 and 92 to the provisions dealing with local development schemes and with provisions for adoption and withdrawal of development plan documents following examination by an independent examiner. Examiners reports will no longer be binding and local authorities will have greater scope to make further changes to development plan documents following examination provided those modifications (taken together) do not materially affect the policies. Where development plan documents are found not to be sound then provided the examiner recommends modifications that would make it sound, the authority may adopt the plan with the main modifications and non material amendments. Whether proposed amendments are material or not is likely to be a new area of judicial review challenge.

Chapter 2 - Community Infrastructure Levy

The Coaliton has already confirmed that it intends to proceed with CIL albeit in revised form and the Bill seeks to enact the necessary changes in Clauses 94 and 95.

Charging authorities are required to take an evidence-based approach to preparing schedules and the changes remove the binding effect of an examiners' reports, although an authority cannot approve a charging schedule where the examiner recommends rejection. CIL receipts can be spent on ongoing costs of infrastructure as well as initial costs. It makes provision for regulations to be made which will include a duty on charging authorities to pass on a proportion of the CIL revenues to the neighbourhood affected by the development. These regulations will also enable the issue of passing revenues to upper tier authorities (County Councils and GLA) to be addressed.

Chapter 3 - Neighbourhood Planning

Neighbourhood Planning can only be initiated by a "qualifying body" . This could be a Parish Council, where applicable, and elsewhere a "Neighbourhood Forum". It is for the LPA to designate Neighbourhood Forums and agree the neighbourhood area boundary. The starting point is to establish the geographical boundary of the 'neighbourhood area'. This could be a part of or the whole area covered by a Parish Council, or elsewhere, an established administrative area i.e. a Ward. Only one Forum can be designated for each neighbourhood area.

Charges for Neighbourhood Planning may be made in Regulations (not yet available) to enable authorities to charge for administering the neighbourhood planning regime. These sums (set out in charging schedules similar to those required to be prepared for CIL) would become payable – it seems by the owner or developer - when development is commenced. Regulations will also include details about the collection and enforcement of this charge, again similar to the administration of CIL.

Provision for Neighbourhood Development Orders (NDO)

An NDO would grant planning permission for specified development or any class of development which is specified in the order. Provision is made for Community Right to Build Orders, which are a type of NDO (see Schedule 11). These would grant planning permission for a specified development for a specified site within the neighbourhood area. Only the Secretary of State may revoke an NDO.

A parish council or an organisation or body designated as a Neighbourhood Forum and authorised to act in relation to a Neighbourhood Area may apply to the local planning authority to make a NDO in respect of their Neighbourhood Area.

In essence a NDO grants planning permission for the "Neighbourhood Area". This is an area designated by the authority following an application by the parish council or a body capable of being designated as a Neighbourhood Forum where there is no parish council.

A parish council or Neighbourhood Forum may apply to the local authority to designate a Neighbourhood Area. The local authority can modify the area proposed to be designated when deciding whether or not to grant the application. Regulations (not yet available) are likely to specify the detail of designation of Neighbourhood Areas.

Designation of a body/organisation as a Neighbourhood Forum (NF)

A body or organisation can be designated as a NF if they make an application to the authority and the authority agrees it is:-

- established for the express purpose of furthering the social, economic and environmental well being of individuals living or wanting to live in that area
- membership of the organisation or body is open to individuals living or wanting to live in that area
- at least 3 members of the organisation or body live in the area
- the organisation or body has a written constitution

Authorities must make arrangements to inform people when applications can be made (i.e. they can't be made at any time). Only one organisation may be designated as a NF for each neighbourhood area. If the application to designate is refused the authority must give reasons.

Once a body is designated as a NF it cannot lose that designation and it will not be affected by any change in its membership. However designation ceases after 5 years.

Regulations (not yet available) are likely to specify the detail of designation of NFs

Applications for NDOs

Only one proposal for a NDO can be made by a parish council/NF at any one time. Further applications cannot be made whilst an existing application is outstanding for that area.

Regulations (not yet available) will specify the detail for submitting proposals for a NDO and the standards for preparing the order and documents, collection and presentation of evidence together with notice and publicity requirements, consultation with the public, the making of representations etc. However, the process for making the NDO is identified in Schedule 10 to the Bill. This requires that a proposal for a NDO must be made in a prescribed form and accompanied by:-

- a draft of the order
- a summary of the proposals and the reasons why the order should be made
- other documents and information as prescribed

Copies of the proposal must be sent to prescribed persons (not defined).

The authority is required to give such advice and assistance with a proposal for NDO as they consider appropriate. This does not extend to financial assistance.

Authorities may decline to consider a proposal they consider to be a repeat proposal i.e. one that was refused or received less than 50% of the votes at a referendum in the preceding 2 years, if the authority consider there has been no significant changes in national policy or local plan policy considerations.

The authority must consider the proposal and decide whether it complies with all statutory requirements and those prescribed in regulations. If it does not they must refuse the proposal and explain why. If it does comply they must submit the proposal for independent examination.

Examination of the NDO

Regulations (not yet available) will specify how the proposed order will be examined, consulted upon, publicised, be subject to representations etc.

There are detailed provisions relating to examination. An independent examiner may only be appointed if the applicant agrees although one may be appointed if the Secretary of State considers it necessary.

The examiner must consider whether the proposal meets "basic conditions", complies with all relevant requirements and whether the area for referendum should extend beyond the neighbourhood area. The draft order will meet basic conditions if:

- it is appropriate to make the order having regard to national policy and guidance
- the order is in "general conformity" with strategic policies in the Local Plan
- the order is compatible with EU obligations
- other prescribed conditions are met (not defined)

The examination may be conducted by written representations or by way of an oral hearing if considered necessary to ensure adequate examination of issues. It will be for the examiner to decide how the hearing should be conducted and he will carry out any questioning unless he thinks questioning by another is necessary.

The examiner will prepare a report and make recommendations that either:-

- the draft order should be submitted to a referendum
- modifications should be made to the order (but the extent of these are limited) and the modified order submitted to a referendum
- the order is refused

The authority must consider the examiner's recommendations and may make further modifications to the draft order. If they are satisfied with the draft a referendum must be held in the Neighbourhood Area to which the order relates. If they are not satisfied they must refuse the order.

The Referendum

The arrangements for the referendum must be made by the authority. A person may vote if they are entitled to vote in an election of the authority and the person's address is in the referendum area. Different provisions apply to the City of London.

Regulations (not yet available) will be made as to the holding of the referendum, how votes are cast etc.

Making the NDO

The authority must make the order as soon as reasonably practicable after a referendum where more than 50% of voters agree to its making. However they do not have to make the order if they think it would breach an EU obligation or provision of the Human Rights Act.

The order may apply to all of the land within the Neighbourhood Area or particular sites. It can only relate to one neighbourhood area.

Permission cannot be given for the following types of development:-

- development that is a County matter
- waste development
- EIA development
- major infrastructure projects of the type governed by the IPC/MIPU
- prescribed development (details unknown)

It may be granted unconditionally or subject to conditions. These include conditions requiring the further approval of the authority and the period within which such applications for approval must be made. In some circumstances the approval of conditions may be made by the Parish Council rather than the authority and regulations will be made setting out the detail of this. It would seem NDOs may be subject to time conditions within which development must be commenced but this does not seem to be an absolute requirement and the proposed time period is as yet unknown.

All legal challenges in respect of decisions to make NDOs/ referendums etc must be made by judicial review and within 6 weeks of the decision to make the NDO or the day on which the result of the referendum is declared.

Provision is made for the revocation and modification of NDOs

Community Right to Build Order (CRBO)

This is one particular type of NDO and the detail is set out in Schedule 11 of the Bill.

The proposal for such an order must be made by a community organisation (i.e. a body corporate expressly established to further the social, economic and environmental well being of the area of individuals living or wanting to live in the area) and relates to a specified development within a neighbourhood area. Regulations may limit the extent, area or type of use or operation of the development.

A community organisation may submit a proposal for a right to build in respect of a Neighbourhood Area which includes the area of a Parish Council and more than half of its members live in that area. It may also apply to the authority to designate an area as a Neighbourhood Area. Many of the provisions which relate to submission, consideration, examination and holding of a referendum of a NDO apply to CRBOs.

If a CRBO is likely to be considered EIA development or likely to have effects on European protected sites then the authority must refuse the application.

Neighbourhood Development Plans (NDP)

An NDP will set out policies in relation to the development and use of land i.e. allocate for specified development, within a neighbourhood area. Provision for NDPs will be made in Section 38 of the Planning and Compulsory Purchase Act 2004.

The details of NDOs are set out in Part 2 of schedule 10 to the Bill. Neighbourhood Development Plans (NDPs) will form part of the statutory development plan for an area together with the Local Plan.

Parish councils and bodies/organisations designated as Neighbourhood Forums may apply to the authority to make a NDP.

What is a NDP?

This is a plan which sets out policies (however expressed) in relation to the development and use of land in a particular Neighbourhood Area in the plan. It must specify the period for which it is to have effect. It may not make provision for excluded development (as discussed above for NDOs) nor relate to more than one Neighbourhood Area

If a policy in the NDP conflicts with any other statement or information in the plan the conflict must be resolved in favour of the policy.

The process for independent examination of NDPs and the holding of referendums broadly applies to NDPs as it applies to NDOs.

A NDP must be made if more than 50% of voters agree in a referendum and as soon as reasonably practicable.

Many of the same provisions apply to the procedure for making a NDP as they do for NDOs. The detail for the holding of the examination, notice and publicity, consultation with the public, publication of the NDP etc will be given in Regulations (not yet available). Regulations may also restrict provisions which may be included in a NDP about the use of land, or require certain matters to be included and the form of the plan.

If a NDP is in force the parish council or NF may make a proposal for the replacement of the plan, which would have to follow the same process as set out above.

Consequential amendments as a result of NDO, NDPs etc

There are a number of consequential amendments to both the Planning Act and Planning and Compulsory Purchase 2004. Of particular interest are:-

- the requirements upon authorities to have special regard to the effect of a proposal on a listed building or conservation area in the Planning (Listed Buildings and Conservation Areas) Act 1990 do not apply in relation to NDOs.
- NDOs may be called-in by the Secretary of State under s77 TCPA 1990 and appealed under s78

HBF Comment:

The Localism Bill could provide opportunities for local communities to have a direct positive influence on bringing forward development in their area. The proposed NDOs will allow communities to grant planning permission for development which is widely supported in their local area. Similarly, Neighbourhood Development Plans offer the opportunity for the development plan strategy to be established at a much more local level.

The Localism Bill will establish a framework for how Neighbourhood Planning should operate, to be supplemented by Regulations and Government Guidance. It will be important for LPAs to oversee the process and ensure they provide sufficient guidance for communities. The early examples of this will be seen through the DCLG's Neighbourhood Planning Vanguards Scheme.

The objective for LPAs should be to assist groups who genuinely wish to deliver positive outcomes for their communities and bring forward sustainable development opportunities which are supported. The provisions of the Bill rely upon an assumed maturity in local politics and decision making that is inclusive and democratic. The risk is that the provisions provide a platform for specific interest groups and sections of the community without the balancing of wider community needs and the views of the silent majority.

It is worth bearing in mind that those preparing Neighbourhood Plans will be under the same duty to demonstrate that their proposals are "sound" as Local Authorities will continue to be when preparing their Development Plans. In considering draft Neighbourhood Plans Inspectors must have regard to national policies and Secretary of State Guidance. In addition, Neighbourhood Plans will need to be in general conformity with the strategic policies of contained in the development plan for the Authorities' area. Taken together the test of soundness and the chain of conformity may have the potential to curtail the abilities of those communities looking to use neighbourhood plans to resist development pressures – but as is always the case, the devil will be in the detail! We will be monitoring events in 2011 and issuing further notes as additional detail becomes available.

Legal Duty to Consult Community Prior to making Planning Application

Chapter 4 imposes a new legal duty to consult with the community and local people about proposed development.

Applicants for planning permission for development of types to be specified in a development order must carry out consultation on the application. Oddly, this requirement is said to apply "whether before or after this sub-section comes into force". Developers would do well to note this, and to start working in the new way as soon as possible.

The application must be publicised "in such manner" (i.e. not defined and up to the applicant) as is reasonably likely to bring the application to the attention of the majority of people who live or occupy premises in the vicinity of the land. This includes a requirement to explain how people can contact the applicant to "comment on or collaborate with" the applicant on the design of the development and should give a reasonable timetable for this to occur.

The applicant must consult each "specified person" – the specifying is to be done by development order (not yet available) - about the application.

The applicant also has a duty to have regard to any responses to the consultation that have been received. In particular, the applicant has to have regard to the responses when deciding whether to make the application in the form proposed and consulted upon. This is a clear indication that developers will be expected to modify their proposals to reflect responses received, or to explain why they have not done so.

A development order (not yet available) will give details regarding publicity of applications, ways of responding to publicity, consultation with specified persons, collaboration on design and deadlines for carrying out each of these requirements. The development order will also require that the submitted application should be accompanied by a statement explaining how the applicant has complied with the consultation requirements and the responses received, and how account has been taken of those responses. This is similar to what developers sometimes do now in statements of community involvement but is now to be a strict legal requirement.

There is a rather odd provision which puts a seven year time limit on some of these amendments. It is not clear why this is needed or the purpose it is attempting to fulfil.

CHAPTER 5 - ENFORCEMENT

Currently, where an enforcement notice is served by an authority a land owner may apply for retrospective planning permission. It is proposed that local authorities may decline to determine such retrospective applications in future.

There are also new detailed provisions relating to enforcement of concealed breaches of planning control, defacement of buildings and unauthorised advertisements.

Authorities have new powers to deal with concealed breaches. They may apply to the Magistrates for a "planning enforcement order" within 6 months of the evidence of the breach coming to the authority's attention. This evidence is conclusive in justifying their intention to seek an order. Magistrates may make the order if they are satisfied that the actions of a person have resulted in or contributed to full or partial concealment and the court considers it just to make the order having regard to all the circumstances. These tests are drafted widely.

The authority may then take enforcement action at any time in the enforcement year. This new power will be of concern to buyers where historic breaches have occurred which are not revealed.

Further powers are introduced to deal with the removal of structures used for the unauthorised display of advertisements, the defacement of premises and to remedy persistent unauthorised advertisements.

The final provisions within Part 5 of the Bill relate to further changes and amendments to the IPC regime for nationally significant infrastructure projects.

WHAT IS NOT IN THE BILL

Perhaps just as important as what the Bill contains is the list of issues, previously contained in Conservative Green Papers, that are not dealt with by the Bill. These include:

- Reducing applicant's rights of appeal;
- Third party rights of appeal;
- Process for appeal;
- The definition or explanation of a presumption in favour of sustainable development; and
- The New Homes Bonus

However, some of these issues may be addressed through the existing legislation or through further Regulations made under existing Statute or, in some cases, through further Government guidance or information notes. For example, the presumption in favour of sustainable development is expected to be introduced in policy (not legislation) through the National Planning Policy Framework.

It is understood CLG will still be encouraging Local Authorities to undertake strategic planning and is looking to the "duty to co-operate" to achieve this (perhaps with Local Enterprise Partnerships) preparing joint strategic plans. Similarly, the Strategic Policies of a Local Authority's Development Plan are expected to identify housing requirements based on a professional assessment of housing need.

Whilst the Bill does not refer to the term "Local Plans" as previously flagged in the pre-election Green Paper, it is anticipated that the new system will move towards this term following regulation and guidance. There will be an expectation that most LPAs will have a district wide strategic plan but it may not be compulsory.

Explanatory notes from Government for the Bill and 'Best Practice' on neighbourhood plans are expected in the New Year.

CONCLUSION

There is no doubt that the new Bill presents many challenges for all of those involved in development: local authorities, developers and local communities. Many of the proposals contained in the Bill create new challenges and responsibilities for all of these groups yet many of the processes required to undertake those challenges are still to be written through Regulations.

The Bill now starts its long and arduous journey through both houses of Parliament and the necessary Committee discussions over both the key principles and the detailed wording of the various Clauses and Schedules.

In the meantime there is the potential for both confusion and opportunity as all those working towards the delivery of development and new homes examine and test the new approaches to be introduced by the Bill while attempting to create a clear and manageable transition from the existing system and processes.

CONTACT DETAILS

Simon Prescott – Partner
Barton Willmore
101 Victoria Street
Bristol
BS1 6PU

e: simon.prescott@bartonwillmore.co.uk
t: 0117 929 9677

Karen Cooksley – Partner
Field Fisher Waterhouse LLP
35 Vine Street
London
EC3N 2AA

e: karen.cooksley@ffw.com
t: 020 7861 4188

Andrew Whitaker – Planning Director
1st Floor
Byron House
7–9 St James's Street
London
SW1A 1DW

e: andrew.whitaker@hbf.co.uk
t: 020 7960 1626