PLANNING DEPARTMENT

Customers & Communities OSP, 6th February 2013

Clause 5 of the Growth and Infrastructure Bill

Introduction

On 18th October 2012 the Growth and Infrastructure Bill was laid before Parliament. It makes provision for promoting growth and facilitating infrastructure. On 21st November 2012 the Growth & Prosperity Overview and Scrutiny Panel considered a report on the Government's proposed reforms of the planning system. Amongst other matters the panel resolved to ask the Customer and Communities Overview and Scrutiny Panel to review the impact of Clause 5 (modification or discharge of affordable housing requirements secured through Section 106 agreements) in the Growth and Infrastructure Bill, to determine the impact this clause may have on local communities as a result of applicants applying to the local authority for modifications to or the removal of agreed Section106 agreements with respect to affordable housing where an authority fails to make a determination within the specified time or determines that no modification will be made, the applicant may appeal to the Planning Inspectorate.

Growth and Infrastructure Bill

The Bill is currently at Committee Stage in the House of Lords. Clause 5 inserts new Sections 106BA and 106BB into the Town and Country Planning Act 1990. Clause 5 allows for the modification or discharge of affordable housing requirements secured through Section 106 agreements attached to the grant of planning permission. Specifically it:

- Allows a developer to apply to change the affordable housing requirement, for it to be replaced with a different requirement, for it to be completely removed, or, where it is the only obligation, for it to be discharged – S.106BA (1) (2).

- Requires the Local Planning Authority to determine any application made to make the application viable if the cause of unviability was the affordable housing element –S.106BA (1) (3) (a) .

- Prevents any obligation changes being more onerous on the developer – S.106BA (1) (7).

- Requires Local Planning Authorities to have regard to any guidance issued by the Secretary of State – S.106BA (1) (8).

- Requires the Local Planning Authority to determine the application within a period to be prescribed by the Secretary of State – S.106BA (1) (9).

- Allows specifically for appeals to be made on affordable housing obligations only– S.106BB (1)

- Irrespective of what modifications may have been acceptable to the Local Planning Authority, the Secretary of State will determine any appeal as if were the original obligation - S.106BB (2)

In its impact assessment on the Bill the Department for Communities and Local Government indicate that the strategic problem this clause is trying to address is the low levels of housing delivery and the high number of stalled sites. It states that the objective is to "unlock stalled development by allowing and ***encouraging*** applicants to renegotiate the level of affordable housing…" (My emphasis). It is envisaged that appeals determined by the Planning Inspectorate under these provisions will be valid for 3 years – thus providing an incentive to build out the development early.

Possible Impacts of Clause 5

Localism and Democracy

Clause 1 of the Growth and Infrastructure Bill, together with other clauses and various other implemented and proposed Government reforms to the planning system, enable greater central control and direction over local decision-making. Clause 1 would remove planning powers from local authorities that the Government declares as poorly performing and Clause 5 would allow by-passing of agreed affordable housing provisions to be determined by unelected Planning Inspectors. Both are inherently undemocratic and therefore fundamentally flawed provisions. The implicit encouragement to developers to renegotiate agreed affordable housing requirements undermines current Core Strategy policy and the targets based on it.

Unintended Delays in Development

The proposed review mechanisms suggested by Clause 5 could themselves cause developments to be delayed as developers wait for these provisions to be enacted rather than discuss new or revised planning applications and Deeds of Variation on existing Section 106 agreements to get development moving on sites. Although there are a number of lapsed planning permissions and sites that have planning permission but have yet to commence, it is clear that the level of affordable housing secured as part of Section 106 agreements is not the only factor preventing some investment decisions being taken forward. There are more demand side factors such as limited mortgage availability and much more restrictive developer access to finance.

Additional Burdens

At a time of significant resource reductions within English local planning departments these set of legislative burdens will cause additional workload pressures. Moreover there has to be a fundamental concern about using **primary** legislation as a means to determine **how** Section 106 agreements are renegotiated at the local level. It is a crude and completely disproportionate tool which rules out other solutions – for example in relation to the density of a scheme, mix of uses, tenure balance, phasing, timing of other Section 106 payments or even the overall scale of development - all of which can help development viability.

In addition proactive and positive planning departments can work with developers to address other deliverability issues such as utility requirements, land assembly issues, and other site constraints. In Plymouth these have all been done: alongside coordination and direct support for funding bids to help overall scheme viability.

Stifling Innovation and the Positive Planning Framework

It is always been good practice to formally review and monitor not only Section 106 obligations but the delivery of all planning permissions. There have been annual reports to the Growth & Prosperity Overview and Scrutiny Panel on progress with the delivery of Plymouth's ambitious and radical growth agenda. These reports contain commentaries as to what targets are on track and what are not being met – with an indication of the corrective planning action being taken to address these. In addition Plymouth has a record of innovative solutions to delivering development that meets its policy priorities as set out in the Core Strategy and its suite of adopted Area action Plans. These include: the Market Recovery Action Plan, the Market Recovery Scheme, the response to A Plan for Growth, the Barrier Busting Initiative, and the "Get Plymouth Building" programme. There is careful monitoring of developments and a regular and constructive dialogue with the local development community through the Plymouth Regeneration Forum and the Local Agents Forum in order to ensure that Plymouth's positive planning framework is responding to global, national and local economic issues. Most recently, this has included close working on the Community Infrastructure Levy and the announcement of a programme of 10 City Council-owned sites to drive housing delivery. All of these locally-driven responses to housing delivery will potentially be prejudiced if the provisions of Clause 5 are enacted – as it will undermine confidence in these local measures.

Less Affordable Housing Delivery

The Government's own impact assessment accepts that there is a risk that applicants may be successful in revising down affordable housing obligations where the initial Section 106 requirement did not make the site unviable. The rather weak response to this is that the proposed guidance will "encourage" open book assessments and a "focus on evidence". The City Council's own Section 106 processes already require both – so this is no safeguard at all for the situation in Plymouth. Moreover because the clause includes a provision that the modified obligation cannot be more onerous on the developer this means that should market conditions improve then there is no mechanism for a higher level of affordable housing to be secured to meet local needs at some point in the future when development viability would be better. There is no doubt that were a number of larger major developments which have already secured consent to successfully appeal under Clause 5 the result would be less affordable homes delivered overall, and, if sustained over a number of years, this would lead to the failure to achieve the Core Strategy target of 30% affordable homes by 2021(a target that is currently on track).

Less Sustainable Developments

Although each planning application is dealt with on its own merits, it is rarely the case that any proposed development can be seen in glorious isolation from the wider neighbourhood, and in the case of "super-majors" the wider city. There will be cases where the provision of infrastructure (either publically funded or provided in association with another development) would allow an increase in affordable housing on a site where the level is being challenged through these provisions. Equally the provision of this infrastructure could result in extremely lucrative profits for a site that had successfully appealed its own affordable housing obligation. As such the levels of affordable housing will suffer even if there are other reasons for non-viability or non-delivery of a planning permission. Moreover, new policy changes (brought about through for example the Plymouth Plan) could be avoided by the provisions of Clause 106BA (1) (7). Again this militates against locally determined solutions to the long-term needs of cities like Plymouth.

More Legal Challenges

There have been a number of court cases where judges have ended up determining the viability of developments through legal challenges to planning decisions and appeals. These provisions increase the possibility of legal challenge and will potentially place a further burden on local authority resources in order to respond to any litigation.

Conclusions

The provisions in Clause 5, when taken alongside the powers that will be conferred on the Secretary of State by Clause 1 of the Growth and Infrastructure Bill, run contrary to local democratic decision making over planning matters that affect local people. It is hard to see how these provisions are themselves consistent with the Coalition Government's flagship legislation – the Localism Act 2011.

Clause 5, if enacted as drafted, could result in delaying developments, rather than speeding up the planning system which is one of the stated aims of the Coalition Government. Developers will have the ability to negotiate, apparently in good faith, levels of affordable housing in accordance with locally determined adopted policies that have been the subject of extensive public consultation themselves, and then use this power to by-pass the Local Planning Authority to seek the reduction or complete removal of affordable housing provision.

The provisions in Clause 5 are likely to result in more unsustainable developments and planning permissions that no longer meet local housing needs. In addition they are likely to place an even greater administrative burden on already stretched local planning departments.

Clause 5 is fundamentally flawed and will have potentially significant impacts on the city's growth agenda generally and specifically on the levels of affordable homes that will be delivered in the future to meet the needs of local communities.

Recommendations

That the Customer and Communities Overview and Scrutiny Panel note the implications of Clause 5 of the Growth and Infrastructure Bill as set out in the report.