

Planning Bill : Speeding up the System?

Background

Ministers have long maintained that the planning system, in the words of Communities Secretary Hazel Blears in introducing the Planning Bill on 27th November, is “too complex, bureaucratic and inefficient”. The UK’s prosperity and its capacity to respond to the challenges of climate change, they suggest, are compromised by the length of time it takes to approve applications for major projects. Authorisation for nationally significant infrastructure projects has developed in a piecemeal fashion. Decisions on airports are taken under the Town and Country planning system, but there are special statutory regimes for other types of infrastructure.

The White Paper “Planning for a Sustainable Future”, published on 21st May 2007, indicated the Government’s intention to reform the planning regime for major infrastructure projects in England and (in some cases) in Wales by establishing an independent “Infrastructure Planning Commission” to determine applications in accordance with core principles set out in a Government framework. The Bill generally follows the approach set out in the White Paper and aims to:-

- Simplify the planning process
- Halve the time taken for major infrastructure projects to be approved
- Address sustainable development and climate change
- Improve the appeal process
- Increase public participation in policy-making

This paper highlights the implications of the new regime for those considering promoting major schemes.

Meaning of “nationally significant infrastructure projects”

The new regime will apply to so-called “nationally significant infrastructure projects” in England and (in some cases) in Wales. Thirteen fields within the categories of energy, transport, water, waste water and waste are listed in the Bill as “nationally significant” and would accordingly be subject to the new regime. They are as follows:-

- 1 The construction or extension of an onshore power station with a capacity exceeding 50 megawatts or an offshore power station with a capacity exceeding 100 megawatts
- 2 The installation of an electric line above ground, having a nominal voltage of more than 20 kilovolts and supplying more than one consumer
- 3 Underground storage of gas in England
- 4 The construction of commercial pipelines above a threshold of 10 miles in length and the diversion of nationally significant pipelines
- 5 The construction of motorways, trunk roads or roads requiring the preparation of an environmental statement in England only

- 6 The construction or extension of an airport in England only if the effect would provide or increase the number of passengers by at least 10 million a year
- 7 The construction or extension of harbour facilities capable of handling in the case of container ships 500,000 TEU, 250,000 items of wheeled cargo in the case of ships used for carrying wheeled cargo and 5 million tonnes for other cargo ships
- 8 The construction of a railway as part of the English railway network
- 9 The construction of a rail freight interchange on land in England of at least 60 hectares
- 10 The construction or extension of a dam or reservoir in England only where the volume of water to be held back by the dam or stored in the reservoir exceeds 10 million cubic metres
- 11 Works for the transfer of water resources in England, other than piped drinking water, between river basins or water undertakers' supply areas, where the volume of water transferred exceeds 100 million cubic metres per year
- 12 The construction of waste water treatment plant in England where the capacity exceeds a specified amount
- 13 The construction of certain prescribed hazardous waste plants in England

The Secretary of State has an order-making power to extend or amend these fields, but such new fields must be within the categories of energy, transport, water, waste water and waste.

The provision for the construction of railways differs from other fields in that there is no threshold rendering it genuinely nationally significant. In the case of airports, for example, the construction or extension of an airport is only "nationally significant" if its effect would generate at least 10 million passengers per year. The construction of part of a railway network is automatically "nationally significant". The railway network is defined as any railway line or continuation of two or more railway lines together with any installations associated with any of the track encompassed in that line or lines used in connection with the support, guidance and operation of trains. The construction of a station would not be nationally significant under this definition, but even very small extensions of railway lines and the construction of heritage lines would be. The Bill only deals with railways in England raising questions of how consent for cross-border railways would be obtained.

More generally, the Bill seems to interfere with statutory undertakers' permitted development rights. Statutory undertakers enjoy general permission to carry out a wide range of development without requiring an application for planning permission. Under the Bill, it seems that such automatic authorisations for development will no longer apply if the development forms part of a national significant infrastructure project. It is understood that officials are reviewing the Bill's application to permitted development rights.

The Infrastructure Planning Commission and the policy framework

A promoter who has determined that his scheme is a nationally significant infrastructure project will need to apply to the proposed Infrastructure Planning Commission ("the Commission") for an order granting development consent. In making appointments to the Commission, the Secretary of State need only "have regard to the desirability of securing that the Commission is able to perform its functions effectively and efficiently". No objective criteria are specified. The Commission will, however, be required to determine an application for development largely in accordance with any national policy statement which will be issued by the Secretary of State following consultation. Any such statement would need to pay due regard to the achievement of sustainable development. In a faint echo of proposals put forward in 2001 (but quickly dropped) to give Parliament a greater role in relation to major infrastructure projects, ministers are suggesting that the House of Commons should establish a new Select Committee to hold inquiries into draft national policy statements.

These policy statements may deal with such matters as the type or size of development appropriate nationally or for a specified area, the criteria to be applied in deciding suitable locations and the appropriate statutory undertaker to carry out specified development. Ministers have already identified certain likely national policy statements. They include one covering energy issues (such as security of energy supply), a statement on ports based on work undertaken as part of the ports policy review and one for rail networks.

Only where there is a national policy statement will the Commission have jurisdiction to determine an application in respect of a nationally significant infrastructure project - in the absence of such a statement the Secretary of State will make the decision.

Pre-application procedure to be followed by a promoter

The procedure to be followed by a promoter of a nationally significant infrastructure project has some common features with the requirements on applicants applying for a transport and works order. There is an emphasis on consulting affected local authorities and those with rights over land and a promoter must publish a statement setting out how he proposes to consult local people about his scheme.

Application and determination

For the purposes of this Briefing Note it is assumed that the Commission will be the determining authority, although as mentioned before the Secretary of State may be the determining authority in the absence of a national policy statement. The Commission's first task on receiving an application for development consent will be to determine whether it has been submitted in the required form and whether it properly relates to a nationally significant infrastructure project.

If the Commission accepts that it has jurisdiction, it will have to appoint a panel comprised of three or more Commissioners, or a single Commissioner, to examine the application. A deadline of 6 months is prescribed for the examination of the application. The Bill provides for the examination primarily to take the form of written representations, but there may be hearings about specific issues (e.g. the acquisition of particular land) and an "open-floor" hearing if an affected local authority or certain other bodies (including the promoter) wish to make representations about the application. In a change from the White Paper, the Bill enables the Commission in reaching its decision to take account of representations that the adverse impact of the scheme would outweigh its benefits. Once examination is over, the Commission has 3 months to make its decision.

Effect and content of a development consent order

The primary aim of the proposed development consent order is that it establishes a single consent mechanism obviating the need to apply for such consents as planning permission, listed buildings consent, consent for works detrimental to navigation, consent for the construction of power stations and the installation of overhead lines. It follows that the Bill explicitly prevents parallel harbour revision orders or transport and works orders being made where an application for development consent has been made.

An order for development consent must necessarily contain all the authorisations a promoter will need in order to proceed to construct and operate his scheme. Such authorisations may include the diversion of watercourses or the stopping up or diversion of highways. The particular authorisations will clearly depend on the nature of the scheme, but most will contain powers for the acquisition of land. The Bill's provisions for the acquisition of land follow the pattern adopted in respect of compulsory purchase orders generally. In making provision for compensation, for example, the Commission must not deviate from the terms of the standard Compensation Code. In the case of the acquisition of various categories of land (e.g. local authority land) some form of Parliamentary scrutiny will be necessary. Such scrutiny will not generally apply to local authority and statutory undertaker promoters. It will, however, apply to passenger transport executives. Given that passenger transport executives are possible promoters of rail schemes the lack of an exemption for such bodies from the obligation to refer its acquisition of land to Parliamentary scrutiny would prove deleterious to their prospect of moving more quickly to the construction of a proposed scheme.

Alterations to the Existing Town and Country Planning Regime

The Bill makes various amendments to the Town and Country Planning Act 1990 to take account of the new development consent regime and the Infrastructure Planning Commission. It extends the regime providing for advance purchase of blighted property to land when blighted by a national policy statement or an application for development consent.

Promoters of nationally significant infrastructure projects are enabled to enter into agreements with local authorities in the same way as developers seeking planning permission can do so pursuant to section 106 of the Town and Country Planning Act 1990.

Changes have been also made in relation to local development documents produced by local planning authorities and the requirement for the High Court to quash an entire plan when upholding a legal challenge has been removed. Judges will now be able to order a partial revision.

The scope of decisions taken by an officer through delegated authority has been increased and decisions will now be subject to review by the local planning authority (as opposed to an appeal to the Secretary of State), if requested by the applicant in the prescribed form. These decisions can be upheld, overturned or varied. There is a new power for authorities to make non-material changes to planning permissions. This includes the power to impose new conditions and to remove or alter existing conditions. There is no right to compensation where at least 12 months prior to planning permission granted by development order or local development order, notice has been given of withdrawal of planning permission.

The Secretary of State is to be given new powers to determine which route an appeal should take, i.e. by a local inquiry, a hearing or by written representations. The Planning and Compulsory Purchase Act 2004 is also amended to refer to climate change policies. Amendments have been also been made to Tree Preservation Regulations which govern how Tree Preservation Orders are made as well as changes to planning fee regulations.

Community Infrastructure Levy

The Bill proposes the maintenance of a Community Infrastructure Levy ("CIL") which has replaced original proposals for a "planning gain supplement". The aim of the levy is to enable local authorities to secure a higher contribution from developers towards the costs of providing infrastructure. Charging authorities include the local planning authority, the Secretary of State, Welsh Ministers, the Mayor of London and any other authority responsible for town and country planning. Charging authorities have the power to fix, revise and publish rates of CIL and to collect them directly.

- CIL is payable when development is commenced in reliance of planning permission.
- CIL is payable whether or not the land has increased in value as a result of the grant of the planning permission.
- CIL is payable by the owner of the land at the time when CIL becomes payable.
- The amount of CIL is determined at the time when the planning permission first permits the development.

Application of CIL

- One charging authority may collect CIL charged by another and payment can be made on account or in instalments.
- Payment may be in forms other than money such as making land available, carrying out works or providing services.

- CIL may be used to reimburse expenditure already incurred and it may be reserved for expenditure on future projects.
- CIL may be used for administrative expenses in connection with infrastructure or in connection with CIL.
- CIL may be used in the provision of loans, guarantees or indemnities.
- CIL funds may be used elsewhere when projects to which it was to be applied no longer require funding.
- CIL funds may be used by a charging authority in respect of things done outside its area.
- Non-payment or late payment of CIL may lead to the suspension or cancellation of a decision relating to planning permission and could constitute a criminal offence.
- The Secretary of State may set a maximum level of CIL to be raised by a charging authority in a particular period or in respect of one or more developments and can direct a charging authority on how the funds should be spent.

Conclusion

The Bill obtained its Second Reading in the Commons on 10th December and will soon be the subject of detailed scrutiny in Committee. Speaking in the debate, Conservative Local Government spokesman Eric Pickles commented unfavourably on the establishment of the Commission :-

“The Secretary of State intends to establish a new Government quango ... that will strip local authorities of their say on planning applications ... The quango is unaccountable and effectively unsackable”.

The Government, however, has supporters beyond its own backbenches. Although the Local Government Association has acknowledged “genuine concerns” about the possibility that the Commission may “undermine local democracy”, it emphasises that “excessive delays and uncertainty and the fact that most major development decisions are already taken centrally lead us to believe an independent commission could speed up the process”.

The Bill raises a large number of technical issues which, it is to be hoped, will be addressed during its Committee stage. Written submissions can be sent to scrutiny@parliament.uk

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This briefing note is not intended to be an exhaustive statement of the law and should not be relied on as legal advice to be applied to any particular set of circumstances. Instead, it is intended to act as a brief introductory view of some of the legal considerations relevant to the subject in question.