# DEPARTMENT OF THE ENVIRONMENT (NI)

# PLANNING BILL: PROPOSED AMENDMENTS

## O P I N I O N

### Introduction

1. We are instructed to advise the Department of the Environment ("**DOE**") with regard to potential amendments to the Planning Bill that is currently before the Assembly and is to be debated on Monday 24 June. We will keep this Opinion as brief as possible given the very urgent need for the advice.

2. The proposed amendments comprise:

   (1) **New clause 3A**: The designation of economically significant planning zones ("**ESPZs**") by the Office of the First Minister and Deputy First Minister ("**OFMDFM**"); and

   (2) **New Clause 12A**: Restrictions on judicial review ("**JR**") of planning decisions specified in an order by OFMDFM both with regard to the time for challenge and the basis of challenge.

3. We are asked to consider the following questions in Angus Kerr's email of 19 June 2013 (at 14:11):

   (1) Would the proposed provision, in particular the new role for OFMDFM in designating ESPZs and the requirement for DOE to provide assistance for OFMDFM to carry out its new functions, be compatible with the Northern Ireland

Act 1998 and associated provisions governing the role of Ministers and NI Departments?

(2) Are there any legal implications for the decision not to provide certain land exclusions, particularly in relation to European Statutory obligations?

(3) What are the implications more generally for other existing requirements for Environmental Impact Assessment and Appropriate Assessment under the Habitats Directive?

(4) To what extent does this proposed amendment limit the scope currently available to judicially review planning decisions under the 1991 Planning Order (as amended by the Planning Bill) and the 2011 Act. Are there implications for the ECHR or other Conventions?

(5) The draft provision refers to decisions by OFMDFM to refuse planning permission, yet no reference appears to be made to refusal of planning permission under the new ESPZs designation. How would you interpret this? Does this draft provision suggest that OFMDFM's planning role may expand beyond ESPZs?

(6) The potential amendments are significant and have not gone through public consultation by DOE, the Environment Committee or OFMDFM. What are the risks of a successful legal challenge to this or, as previous legal advice indicated, is the Parliamentary/Assembly process sufficient?

(7) General comments and advice on the legal and practical implications of these amendments.

4. We will deal with (7) as part of our advice on the other issues.

## Summary of our advice

5. In summary we consider that on the basis of the current form of the amendments proposed:

(1) The proposed ESPZ provisions are likely to be "cross-cutting" and have not been considered by the Executive in accordance with the Ministerial Code, if proposed by a Minister of the Executive;

(2) The Assembly lacks legislative competence to make the clause 3A/ESPZ amendments since they would breach EU law in respect at least of the Habitats and EIA Directives (and possibly others) and so fall within s. 6(2)(d) as being incompatible with EU law;

(3) The Assembly also lacks legislative competence to make the clause 12A/JR amendments since they the restriction of JR would mean that article 6 ECHR rights could not be met and thus fall within s. 6(2)(c) as being incompatible with the ECHR;

(4) It would be within the competence of the Assembly to shorten the timescale for planning/environmental JRs to 6 weeks but without the restriction on the grounds of challenge proposed;

(5) The failure to consult may not give rise to a basis for legal challenge but it fails to meet the requirements of best practice in OFMDFM's own Practical Guide to Policy Making in Northern Ireland and is inconsistent with the consultation which has taken place on the Bill generally.

## A. Legislative competence issues

Question 1

6. In terms of legislative competence, for the reasons set out under Questions 2-5, we do not consider that the Assembly is competent to enact the proposals as they currently stand. For the reasons set out below, we consider that they fall within s. 6(2)(c) and (d) of the Northern Ireland Act 1998 and are outside competence on the ground that they would be incompatible with Convention Rights and also EU law.

7. In addition to the question of the Assembly's legislative competence, we understand that we are also asked to consider whether the proposed amendments would require to be considered by the Executive prior to being placed before the Assembly. The answer to this question will depend largely upon whether or not the amendments are proposed by a Minister. If so, for the reasons set out below, we consider that they are likely to be required to be considered by the Executive in advance. If not, then it is unlikely to be necessary. The amendments will simply be proposed by a member of the Assembly debated by it in accordance with its procedures. Members of the Assembly are not subject to the requirements of the Ministerial Code and therefore would not be subject to a requirement to ensure the proposals are considered by the Executive. The remainder of this section of the opinion applies only in the event that the amendments are proposed by the Minister.

8. There are two limbs to this consideration. First is the question of whether a proposal by OFMDFM to designate a ESPZ ought to be considered by the Executive and second, whether a decision by a Minister to place these amendments before the Assembly,

ought to be considered by the Executive.

9. In relation to the first issue, the new amendments to the Act introduce ss. 38A – 38G. Without repeating the detail of these provisions, they enable OFMDFM to designate and thereafter to modify new ESPZs. DOE has a statutory duty to provide such administrative assistance as is necessary to enable OFMDFM to carry out these functions. A decision to designate an ESPZ scheme, or to modify it, therefore involves more than one Department. To that extent, we consider that such a decision is likely to be "cross-cutting". The 1998 Act does not prohibit the Assembly from enacting legislation which involves two or more Departments in decision-making. However, the Ministerial Code does require that any "matters" which cuts across the responsibility of two or more Ministers, should be brought to the attention of the Executive for its consideration.

10. Accordingly, the Act itself (if passed with the amendments) is unlikely infringe the 1998 Act on the ground that it provides for a "cross-cutting" decision making process. However, individual decisions on the designation of ESPZs are likely to do so and therefore ought to be considered by the Executive in advance. A failure to ensure that the matter is considered by the Executive is likely to be unlawful under s. 28(10) of the 1998 Act, since it would constitute a breach of the Ministerial Code, for which OFMDFM had no authority.

11. In relation to the second issue, the Ministerial Code requires consideration by the Executive of any "*matter*" which falls within a number of categories. These include whether the "*matter*" cuts across the responsibility of two or more ministers, whether it requires agreement on prioritisation or whether it is significant and controversial and falls outside the *Programme for Government*. The Code does not contain any definition of a "*matter*", however, it certainly seems conceivable that it could encompass a decision to move an amendment before the Assembly, which would introduce a cross-cutting decision making process. We are of the view that this is likely to be the correct interpretation, in which event, the amendments themselves could be considered to be a cross cutting "matter". It is unclear whether these amendments have been considered by the Executive. If not, we are of the view that any Minister who proposes the amendments in the Assembly is likely to be acting in breach of the Ministerial Code, without authority and in an unlawful manner.

12. On the Assumption that Executive Approval has not been obtained and that it is not possible to do so before the Bill is considered by the Assembly, we make two further observations:

(1) Pursuant to the Ministerial Code, it is possible to obtain retrospective approval from the Executive. Hence, if there are circumstances of urgency, it would be possible to obtain approval after the Bill has passed. If the Minister is in any way concerned that such approval may not be forthcoming, he should perhaps proceed with caution and at the very least try to canvass informal consent from colleagues before moving Amendments; and

(2) S. 5(5) of the Northern Ireland Act 1998 provides that the validity of any proceedings leading to the enactment of an Act of the Assembly shall not be called into question in any legal proceedings. Accordingly, even if the failure to obtain executive approval for the amendments could amount to a breach of the Ministerial Code, once the Assembly has passed the Bill, the resulting Act could not be challenged on the ground of legal irregularity in the process leading to its enactment. This provision would save the Act, however it would not cure the possible breach of the Code by the Minister.

## B. ESPZ amendments

Questions 2 and 3

13. There are problems with European obligations in that the proposals envisage that planning permission will be granted by the designation of an ESPZ for whatever is specified in the scheme:

> "13A. (1) An economically significant planning zone is an area in respect of which an economically significant planning zone scheme is in force.
>
> (2) The adoption of an economically significant planning zone **scheme has effect to grant in relation to the zone, or any part of it specified in the scheme, planning permission** for development specified in the scheme or for development of any class so specified."

14. In connection with the lack of exclusion of designated areas:

(1) There is no exception made for sites designated pursuant to the Wild Birds Directive[1] (special protection areas) or Habitats Directive[2] (special areas of conservation) which have the protection of Article 6(3) and (4) of the Habitats Directive. These matters have been recently been emphasised by the ***A5 Alternative Alliance*** case [2013] NIQB 30 and the decision of the CJEU in ***Sweetman v. An Bord Pleanála*** Case C-258/11, 11.4.13. Since those provisions prohibit the grant of consent unless there are no likely significant effects caused

[1] Directive 2009/147/EC.
[2] Directive 92/43/EEC.

to the designated site by the development or, following an appropriate assessment, it is found that there will be no adverse effect on the integrity of the site, article 13A(2)[3] would be in breach of the Directive since it could grant consent for a Natura 2000 site without any of the protections required and thus grant consent in breach of article 6(3). In summary, the provisions need to provide either for the exclusion of ESPZs where Habitats issues arise (see below) or to make provision that they can only be made where there will be no likely significant effect on the site[4] or, having concluded there will be, that there will be no adverse effect in integrity of the European Site having carried out an appropriate assessment[5].

(2) This would expose DOE to challenge to the legality of the provision and expose the UK to infraction proceedings by the Commission. In our view the proposals would fail the legislative competence requirements of s. 6 of the Northern Ireland Act 1998, since s. 6(2)(d) would apply as the draft currently stands.

(3) The point could be dealt with by express provision, by an amendment to reg. 49 the Conservation (Nature Habitats, etc.) Regulations (Northern Ireland) 1995 to apply the regs. 43 and 44 procedure to the making of ESPZs, or buy an express exclusion in the 1995 Regulations, but as the 1995 Regulations currently stand the new ESPZs are not included in reg. 49 and the terminology of the general wording of reg. 43(1)

> "before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project"

is not especially apt to cover the making of a scheme under art. 13A. The better approach would be to make express provision in the Bill (whether by amendment to the 1995 Regulations or otherwise). In the case of simplified planning zones or enterprise zone there is express exclusion in regs. 58 and 59 of the 1995 Regulations and this might be the best precedent to use.

15. The effect of ensuring competence would be to exclude Habitats cases from the scope of the provisions or at least to prevent the making of ESPZ Schemes without first satisfying the requirements of Article 6(3) of the Habitats Directive in terms of assessment.

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[3] And s. 38A(2) of the 2011 Act inserted by article 13E(2). Our comments also apply to the provisions to amend the 2001 Act.

[4] This is a very low, precautionary threshold and is triggered if there is simply a risk of such effects. See ***Sweetman*** - Advocate General Sharpston's Opinion at [47]-[50] and the CJEU at [28]-[31].

[5] A high test, requiring that the decision maker is certain, based on the best scientific evidence. See ***Sweetman***.

16. We also consider that the provisions as currently formulated would breach the EIA Directive[6]:

(1) Since art 13A(2) has the effect of granting planning permission for the ESPZ Scheme, it would breach the EIA Directive since development consent would be granted in the terms of article 2 of the Directive for projects within Annexes 1 or 2 of the Directive (see article 4) without having first gone through the EIA process (environmental statement, consultation with public bodies and the public, decision taking into account all the environmental information including consultation responses). This would also involve a breach of the Aarhus Convention on access to environmental justice which is embodied in the consultation requirements of Article 6 of the EIA Directive which requires public consultation;

(2) Articles 2(1) and 8 of the EIA Directive prohibit the grant of consent without taking into account the environmental information, including that gathered from public and trans-boundary consultation;

(3) Regs. 33, 34 and 35 of the Environmental Impact Assessment Regulations 2012 make provision for enterprise zones, simplified planning zones and development orders so that they do not avoid EIA and this underlines the need for some similar provision for ESPZs. The effect, however, would be to take EIA development outside the scope of the ESPZs.

17. It is possible that the Scheme under an ESPZ could be construed as a "plan or programme" for strategic environmental assessment purposes[7], although it appears on its face to be granting a project specific consent[8], it might be regarded as a "programme" granting consent for a series of potential projects[9] and thus be within articles 2 and 3 of that directive. The Commission's SEA Guidance[10] at 3.6 notes:

> "In some Member States, programme is usually thought of as the plan covering a set of projects in a given area, for example a scheme for regeneration of an urban area, comprising a number of separate construction projects, might be classed as a programme. In this sense, 'programme' would be quite detailed and concrete. One good example of such a programme could be the Icelandic Integrated Transportation Programme which is planned to take the place of independent programmes for road, airport, harbour and coastal defence projects. The transport infrastructure is defined and policy on transport infrastructure is laid out for a period of 12 years (identifying projects by name, location

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[6] Directive 2011/92/EU, 13.12.11

[7] See Directive 2011/42

[8] See ***Walton v. Scottish Ministers*** [2013] P.T.S.R. 51.

[9] See Commission SEA Guidance at 3.3 to 3.6.

[10] Which is not legally binding but guidance only: see ***Heard v. Broadland DC*** [2012] Env. L.R. 23.

> and cost). But these distinctions are not clear cut and need to be considered case by case. Other Member States use the word 'programme' to mean 'the way it is proposed to carry out a policy' – the sense in which 'plan' was used in the previous paragraph. In town and country planning in Sweden, for instance, the programme is thought of as preceding a plan and as being an inquiry into the need for, and appropriateness and feasibility of, a plan."

18. SEA does not require duplication of effort[11] but would, in contradistinction to EIA, require the assessment of reasonable alternatives including an assessment of the likely significant effects of those alternatives comparable to the scheme under consideration – which on that basis at least is more onerous than EIA.

19. There is therefore some uncertainty as to whether SEA applies as opposed to EIA and, while we consider it would be possible to deal with the issue merely by EIA, this at least must be the subject of appropriate provisions as set out above. If the objective is therefore for the OFMDFM to be able to designate an ESPZ without assessment or regardless of the impact (provided it is justified) this is not achievable without breach of EU law.

20. We also note that:

    (1) no provision is made to cover any other consent which might be required under national law, whether they are overridden or whether they remain in place notwithstanding the blanket permission granted by art. 13A(2).

    (2) There is not protection provided for other significant designations as compared, for example, to simplified planning zones in s. 38 of the Planning Act (Northern Ireland) 2011. Whilst this may not be legally necessary per se, it is necessary to have regard to the implications for EIA or SEA and the likely requirement for assessment if important designated sites are likely to be affected.

21. Accordingly on EIA (and possibly SEA) grounds, as well as Habitats, the proposals as they currently stand are in breach of EU law and fail the legislative competence requirement of s. 6 of the Northern Ireland Act 1998.

## C. Restrictions on judicial review

Questions 4 and 5

22. The potential amendments seek to restrict or exclude challenge where planning JRs are brought under RSC Order 53 or, in certain cases by virtue of statutory provisions such as article 67BA of the Roads (NI) Order 1993:

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[11] See article 4(3) of the SEA Directive.

"33A.—(1) This Article applies to—

(a) any decision by the Department or OFMDFM to—

(i) grant or refuse planning permission;

(ii) grant or refuse any consent, agreement or approval of the Department or OFMDFM required by a condition imposed on a grant of planning permission; or

(iii) grant or refuse any approval of the Department or OFMDFM required under a development order;

(b) any determination of an appeal under Article 32 by the planning appeals commission,

where the decision or determination is one which is specified in, or is of a class of decision or determination which is specified in, an order made by OFMDFM which has been laid before, and approved by resolution of, the Assembly.

(2) Subject to paragraph (3), a decision or determination to which this Article applies shall not be subject to appeal or liable to be questioned in any court.

(3) A person aggrieved by a decision or determination to which this Article applies may, within 6 weeks of the decision being taken or the determination being made, appeal to the High Court on any question of law material to the decision or determination only where the question of law raises matters of—

(a) the compatibility of the decision or determination with the Convention rights; or

(b) the compatibility of the decision or determination with EU Law.

(4) The period referred to in paragraph (3) may be extended if, in the opinion of the High Court, there are exceptional reasons for doing so."

### *Omission of ESPZs*

23. If it is intended to exclude JR of ESPZs it does appear strange that it has not been specifically included in the list in (a), but we also note that simplified planning zones and enterprise zones are also not expressly included even though they also have a similar effect to ESPZs in terms of granting planning permission. It may be that it is thought that such provisions fall within (i) though that is not clear since the decision is to make a scheme, rather than directly to grant permission, though the effect of the scheme is that permission is granted. On a similar footing, if a request is made to Ministers to make an ESPZ, and the request is refused, it is not clear whether it is intended that such a refusal would be subject to the restrictions.

24. We advise that, if it is intended to include such decisions within the exclusion, then it would be advisable to amend the terms to make that clear. The Courts are not likely to be willing to construe in a broad manner significant restrictions on access to the Courts (even if otherwise lawful – see below), especially in view of the Aarhus Convention, and the absence of their clear inclusion could prevent the provisions applying. This could mean that if the Order were made designating challenges to ESPZs as within the restrictions, the Court might hold the Order as ultra vires the provisions of cl. 33A in any event (quite apart from the concerns set out below).

### *The proposed restrictions generally*

25. Whilst we consider that the restriction of challenge to 6 weeks is lawful and compatible with EU law and the ECHR, we do not consider the limitations on the basis of JR/challenge are likely to be so compatible.

### *Restriction of ground of challenge*

26. Planning decisions are generally regarded as determinative of civil rights: see ***Ortenberg v. Austria*** [1994] 19 E.H.R.R. 524 at [28] and ***R (Alconbury Developments Ltd & others) v. Secretary of State for the Environment, Transport and the Regions*** [2003] 2 A.C. 295, applied by Kerr J. in ***Re Ronald Foster's Application*** [2004] NIQB 1[12]. However, judicial review is generally required to secure compliance with article 6 of the ECHR since decisions by government (local or national) are not considered to be independent, i.e. not independent of the executive. PAC decisions may be independent providing the PAC is the final decision-maker since (unlike the planning inspectorate in England) it is an independent body.

27. If JR is restricted to EU and ECHR grounds then we do not consider that this would secure compliance with article 6 ECHR except in a narrow group of cases. JRs on traditional common law grounds of breach of procedural requirements, failures of consultation, ***Wednesbury*** unreasonableness and the like would not be within the narrow grounds permitted unless they overlapped with a permitted ground, e.g. some grounds relating to natural justice might overlap with article 6 ECHR. Even challenges based on ultra vires would be sought to be excluded.

28. Our view is that the exclusion proposed in terms of the grounds of challenges would amount to incompatibility with the ECHR and thus fail the legislative competence requirements of s. 6 of the Northern Ireland Act 1998, since s. 6(2)(c) applies.

### *Restriction on period of challenge*

29. The restriction on JR in terms of the 6 weeks challenge period appears to be us to be lawful and compatible with EU law and the ECHR. The period is a certain one (which does not raise the issues which the application of "promptness" under Order 53 creates) and in terms of EU law meets the principles of effectiveness and equality. These were explained in Case C-201/02 ***R. (Delena Wells) v Secretary of State Case*** [2004] Env. L.R. 27 at [67] as follows

> "67 The detailed procedural rules applicable are a matter for the domestic legal order of

[12] Though not reaching a definite conclusion on the issue of civil rights.

> each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) (see to this effect, inter alia, Case C-312/93 *Peterbroeck* [1995] E.C.R. I-4599 , para.[12], and Case C-78/98 *Preston* [2000] E.C.R. I-3201 , parag.[31])."

30. In ***Matthews v Secretary of State for the Environment, Transport and the Regions*** [2002] 2 P. & C.R. 34 at [30]-[35] Sullivan J. found the 6 week time limit for planning challenges in England and Wales (including its non-extendable nature) to be compliant with Article 6, applying ***Perez de Rada Cavanilles v. Spain*** (1998) 29 E.H.R.R. 109, at [44] and [45]: here there is also discretion to extend time exceptionally.

31. Indeed, relatively short, non-extendable limitation periods are familiar to EU law: see e.g. Article 263 TFEU (ex Article 230) provides that the legality of acts of the European Institutions must be challenged before the CJEU within two months. In ***Internationale Fruchtimport Gesellschaft Weichert & Co*** Case C-73/10 P [2010] E.C.R. I-11535 both the Court of First Instance and CJUE rejected a claim as inadmissible on the basis that is was brought outside of the two month limit (despite the claim being brought late due to a "*genuine misunderstanding as to the operation of the Rules of Procedure*").

32. It follows that while it would be possible to have a general limitation in planning cases to a 6 week challenge period, we do not consider that the Assembly has the legislative competence to limit challenges as is proposed.

## D. Lack of public consultation

Question 6

33. We understand that the earlier draft of the Bill has been the subject of public consultation in the ordinary way, but that these amendments have been made at a late stage, after close of the consultation period and following scrutiny of the Bill by the Committee. The issue here is whether the new Planning Act (if passed to include these provisions) maybe challenged on the ground that these provisions have not been the subject of consultation. The first question is whether there is any legal requirement to consult.

34. We are unaware of any Act of the Assembly or other law (NI or UK generally) which requires public consultation on a proposed piece of legislation. As advised by Philip Gunn previously, in the case of ***R (UNISON) v Sec of State for Health*** [2010] EWHC 2655, Mitting J. held that in the absence of a statutory requirement to consult on primary legislation, there was no obligation to do so. The normal procedures within

Parliament provided the opportunity for public participation in the law making process by democratic means. The court could not make a prohibitory or mandatory order which in any way inhibited the minister from introducing legislation to Parliament at a time and of a nature of his choosing since that would go against the restraint exercised by the judiciary in relation to parliamentary functions.

35. In Northern Ireland, there is no statute which requires consultation, however policy guidance produced by OFMDFM called "A Practical Guide to Policy Making in Northern Ireland" (2011) suggests that there should be consultation during the preparation of policy which ultimately becomes a Bill laid before the Assembly. See Chapter 8 and Annex B – "*Consultation is at the heart of the Executive's commitment to openness and inclusivity*" (8.2). The document also refers to a further guidance document called "Primary Legislation Guidance". We have been unable to track down a copy of the latter. At least as a matter of practice, the Practical Guide supports public consultation, which has not been carried out.

36. On the assumption that the only requirement for public consultation on the content of a proposed Bill lies in guidance (as distinct from legislation), this will normally only give rise to potential illegality on the ground that there has been a breach of legitimate expectation of consultation. In ***Central Craigavon*** [2010] NIQB 102, Treacy J. quashed a policy statement by a minister for failing to carry out consultation, contrary to PPS 1. However, in this case, we are concerned with an Act of the Assembly, not a decision of the Minister. Under the Northern Ireland Act 1998, a Court may quash the Act if it is outside the legislative competence of the Assembly. However, a failure to consult would not bring the Act into that category.

37. In ***AXA Insurance v Lord Advocate*** [2012] 1 A.C. 868, the Supreme Court held that an Act of the Scottish Parliament is susceptible to judicial review at common law, but not on grounds of rationality. The Court did not identify those common law grounds of review which might be applicable. It held that the boundaries of review for the Act of a devolved Assembly should be determined by the principles of the "rule of law". Importantly, Acts of the Assembly cannot be challenged at common law on the ground that they are irrational, unreasonable or arbitrary.

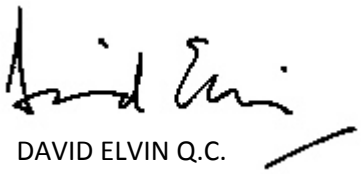
38. It is a very complex question whether a challenge based upon legitimate expectation could fall within the category of permissible grounds of challenge. Some cases involving breach of an expectation by a statutory body can be unlawful on the ground that they are so unfair substantively that they amount to an "abuse of power". Cases of this nature tend to relate to the substance of the decision, rather than the process which

was followed in reaching it (unless such process is very seriously flawed). Normally, they will involve strong assurances by the authority that it will act in a particular fashion, but later it acts differently. If an Act of the Assembly fell within the category of "abuse of power" cases, we would be inclined to consider that it could be susceptible to JR at common law.

39. However, in this case, the potential legal flaw is procedural in nature (i.e. failure to consult the public on some late amendments to the Bill) rather than an attack on the substantive fairness of the new provisions. It is also subject to debate as part of the democratic process. We do not understand that there has been any prior indication that proposals of a different nature would be included within the Bill. For that reason, it is considered to be unlikely that any failure to consult on these provisions would render the new Act itself vulnerable to challenge. We point out that this issue is highly complex and, given the time constraints, our view is necessarily a preliminary one.

40. Apart from the legal issues, it is not clear why OFMDFM is not complying with its own guidance on consultation consistently with its approach to the Bill generally, which leads to the conclusion it is not following best practice and is not acting in a consistent or open manner.

41. We have nothing to add as presently instructed.



DAVID ELVIN Q.C.

PAUL MCLAUGHLIN

20 June 2013

(Revised 3 July 2013)

**DEPARTMENT OF THE ENVIRONMENT (NI)**

**PLANNING BILL: PROPOSED AMENDMENTS**

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**O P I N I O N**

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