Northern Ireland Assembly

Committee for the Environment

OFFICIAL REPORT (Hansard)

Planning Bill: Informal Clause-by-clause Consideration

2 May 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Ms Anna Lo (Chairperson)
Mr Simon Hamilton (Deputy Chairperson)
Mr Cathal Boylan
Mr Tom Elliott
Mrs Dolores Kelly
Mr Ian Milne
Lord Morrow
Mr Alastair Ross
Mr Peter Weir

Witnesses:

Mr Brian Gorman	Department of the Environment
Ms Irene Kennedy	Department of the Environment
Mr Angus Kerr	Department of the Environment
Mr Simon Kirk	Department of the Environment
Mr Tom Mathews	Department of the Environment

The Chairperson: We move to the second session of our initial clause-by-clause consideration of the Bill. Members' meeting papers include a summary of responses to the Planning Bill from stakeholders and the Department's responses to those stakeholders' comments. We will restart our deliberations at clause 7. I welcome the departmental officials, who are here in strength. I ask members to turn to page 27 of the clause-by-clause summary paper.

Mrs D Kelly: Is this to do with the economic considerations, Chair?

The Chairperson: Clause 7. We discussed economic considerations last week, but we will come back to that subject later because we omitted to mention a few issues last time. We will talk about it right at the end. We did not ask the officials about a few issues, and we want to be thorough.

Clause 7 deals with the power to decline to determine subsequent application. The majority of respondents welcomed the clause, but one respondent called for a clarification of "similar application". Another respondent felt that the clause should not prevent subsequent applications from being determined if they are proposals that are clearly distinguishable from those previously submitted. I invite the Department to respond to those issues.

Ms Irene Kennedy (Department of the Environment): Thank you, Chair. A "similar application" is defined in the legislation as similar developments on the same site. The idea of this provision is to prevent repeat applications, which can be quite distracting. In the past, many objectors have been

concerned about the same proposal coming in on the same site a number of times. The provision is already in place, and this simply extends it to cover applications that are deemed applications on foot of an enforcement appeal.

The Chairperson: OK, that is an application on the same site, even if there are changes to it.

Ms I Kennedy: If there is a significant change, the Department may accept the application and process it. This is to prevent similar applications on the same site coming in on a repeat basis.

Mrs D Kelly: If I heard you right, Irene, that deals with cases where there is an enforcement action and an application comes in for the exact same thing, which prevents the enforcement action from being taken.

Ms I Kennedy: Yes, if there is an enforcement action and an appeal on foot of an enforcement notice, there is with that a deemed application. So the person who is making the appeal is also making an application for planning permission for that development. Sometimes, a developer will submit an application in parallel with that.

Mrs D Kelly: The Pedlow one in Craigavon is a case in point, is it not?

Ms I Kennedy: I am not familiar with that case.

Mrs D Kelly: It is an application on a green belt area. Simon knows it very well. The clause is to deal with the like of that. It will not preclude the ability of an applicant to go to the Planning Appeals Commission (PAC) on the initial determination.

Ms I Kennedy: Yes.

Mrs D Kelly: OK, that is fine, thank you. I welcome that.

The Chairperson: It would usually delay things much further. The appeal would have to wait until the new application is determined.

Ms I Kennedy: That is correct. This provision deals with where a decision has been made on a deemed application with an enforcement. The next provision, clause 8, deals with a parallel application at the same time as enforcement action.

The Chairperson: OK. Members, is it the case that you do not need more information, do not want the clause amended and are happy to move on?

Members indicated assent.

The Chairperson: Clause 8 deals with the power to decline to determine overlapping applications. The majority of respondents welcomed the clause, but several felt that the word "may" could be strengthened to the word "shall" to avoid inconsistency in approach. Another respondent felt that a developer should be free to pursue various development options on a specific site at the same time in order to realise the best possible development opportunity within the same time frame, which could stifle development.

Ms I Kennedy: The word "may", as opposed to "shall", provides for discretion, so there could be circumstances where the Department may wish to accept an application for processing. If an application is significantly different and the proposal is different, the Department will accept that and will look at different options. The whole idea behind these two clauses is really to prevent similar applications on the same site causing confusion.

The Chairperson: Are members content with the explanation?

Members indicated assent.

The Chairperson: We move on to clause 9. The majority of respondents welcomed the clause, but one respondent recommended the inclusion of nature conservation as a use for closed mineral works.

Ms I Kennedy: The current wording "use for ecological purposes" was introduced to the Planning Act by an amendment at Further Consideration Stage by a Member of the House. Our view is that the particular amendment that the Royal Society for the Protection of Birds (RSPB) suggests here is similar in wording. In fact "use for nature conservation" could be included in the wording — "use for ecological purposes" — that is proposed.

The Chairperson: That is good enough, yes. Are members content with clause 9?

Members indicated assent.

The Chairperson: Clause 10 is next, "Public inquiries: major planning applications". Responses to it are in a separate part of your meeting papers, set aside for the more controversial clauses.

The majority of respondents were opposed to the Department having the power to appoint a person other than the Planning Appeals Commission to hold a public local inquiry. Their view was that to do so would compromise the independence of decisions and introduce the risk of inconsistency in decisions. The view of respondents was that the power to appoint persons other than the PAC should rest with either the PAC itself or the Office of the First Minister and deputy First Minister (OFMDFM).

Ms I Kennedy: This clause carries forward a provision in the 2011 Act and would allow the Department to appoint an independent inspector other than the Planning Appeals Commission. The Minister and, at the stakeholders' event, the Department clarified that this would be used in very rare circumstances. The first port of call will always be the Planning Appeals Commission for inquiries or hearings on article 31 applications. This provision, however, provides flexibility for the Department of the Environment (DOE) to appoint someone independent. Due process would need to be followed to ensure that the person is independent and is properly appointed to conduct an inquiry. We would imagine the inquiry or hearing procedures being similar to those of the Planning Appeals Commission and, for consistency purposes because people will appreciate the same approach, following the same format.

The Chairperson: The PAC can appoint people on a temporary basis as and when required, so what is the point of this clause?

Ms I Kennedy: It is really to make sure that there is the opportunity and flexibility to look elsewhere, were the commission's workload to be such that it could not respond to an inquiry or hearing into major article 31-type applications within a reasonable time frame.

The Chairperson: A lot of people expressed concerns about the independence of a person who would be appointed and paid for by the Department. How do you manage that public confidence?

Ms I Kennedy: Clearly, we would have to go through appointment procedures to ensure that independence and probity. It is not unusual. Other Departments go through that route, including the Department for Regional Development (DRD) for roads inquiries. Under article 123 of the 1991 Planning Order, the Department already has the power to appoint independent people other than the PAC.

The Chairperson: It will cost the Department money to appoint a person. There are going to be extra costs.

Ms I Kennedy: Yes, and there will be costs for the Planning Appeals Commission for holding inquiries and hearings.

The Chairperson: But that is not DOE's budget.

Mr Weir: Whoever is doing the appointment, whether it is the Planning Appeals Commission or DOE — the alternative might be, and people will probably raise their eyebrows at this, planning appeals coming through OFMDFM and another Department doing the appointment — ultimately, the public purse is picking up the tab. One of the reasons why there is a need for this is that there have been a

lot of concerns expressed about the backlog that has built up at times in the PAC. Mention has been made that there is a power for it to appoint temporarily. The concern is that it is a power that the PAC has not used that often.

We have had debates in the Chamber about the backlog of major planning applications. Whether you are for or against particular applications, people want certainty about what is happening, and they want things done in a timely fashion. If the PAC is taking the thing on fully or is showing a remarkable reluctance to let anybody else tamper with what it regards as its bailiwick, it will inevitably lead to high levels of delay. There has to be something in place, such as the ability to appoint somebody, to ensure that the process moves along in a timely fashion. I assume that the person who would be appointed would be some sort of planning expert. You are probably talking about a lawyer or an academic who would have direct links to planning. Presumably, we are not talking about a man or woman off the street. I do not know if there might be consultancy work for any of us at a later stage. However, on a broader level, it seems to make reasonable sense. If there is a side argument about whether it should be the Department or somebody else doing the appointment, so be it, but, from a practical point of view, to remove it from the exclusive role of the PAC may be quite helpful.

Mr Elliott: I do not see why it is necessary. To me, it is blurring the lines. There is a process for going through the PAC, so why do you need a second option?

Mr Weir: Is the PAC using it? Is that the problem?

Mr Elliott: Who is to say that the Department will use it? If there were specific reasons given as to when it could be used or why it would be used, I would probably have more confidence in it, but, as it stands, I do not see the purpose of it.

The Chairperson: The need for it?

Mr Elliott: Yes, the need for it. I assume that the PAC can appoint people. I accept Peter's point that it may not use it very often, but the power is there. Why does it not use it? An indication could be given that the power would be used if there was not the potential for the inquiry to be dealt with within three or four months by the PAC, but there is nothing like that whatsoever. I know that the officials are saying that it would be used only in exceptional circumstances, but it does not even say that. It is almost carte blanche. It is almost giving a free ticket.

The Chairperson: Do you want to respond to that, Irene?

Ms I Kennedy: My understanding is that the Planning Appeals Commission may appoint temporary commissioners to deal with planning appeals. What we are talking about here are major article 31-type planning applications. There would be different appointment arrangements, although you could argue that by appointing commissioners to cover appeals, it would free up the more experienced commissioners to deal with major article 31 applications. It is an option for DOE, if there were a major backlog of applications, to find a mechanism to ensure that major, strategic, significant applications could be processed as quickly as possible.

Mr Angus Kerr (Department of the Environment): Obviously, times have changed, but when the policy initially emerged through the Planning Act, there were huge delays in the Planning Appeals Commission, not just with article 31 applications, but with the development plan programme. At that time, there was no move to bring in additional resources in an attempt to move the planning system, as a whole, forward. Eventually, that power, when it comes through in the post-2015 scenario, will apply to both plans and article 31s.

At that time, there was huge frustration on the part of the planning Minister and the Department, because there were calls across the board to try to speed up the planning system more generally and the Minister was powerless to do that because it was dependent on decisions by OFMDFM on apportioning additional resources, and so forth. Therefore, it was really only in those quite exceptional circumstances that it was felt that it would be needed. If you do not have it, then that is it: the Minister in charge of planning is really passing over all of that critical aspect of the planning system to another Department to manage and handle in the way that it sees fit. In the work that we were doing in those early days on how to speed up the planning system generally, there were a lot of delays within the Planning Service. A huge number of delays were tied up within the appeal and inquiry system, which were really beyond the control of DOE at that time. That is the background as to why it was

considered quite important at that time. If we get into a situation where there is a recovery, things could be very different and the system could begin to grind to a halt again in that way.

Mr Elliott: Although I totally accept Angus's point on the delays that there were within the Planning Appeals Commission, the Department was not immune to those delays either.

Mr Kerr: Absolutely; I totally agree.

Mr Elliott: Not only article 31 applications but ordinary run-of-the-mill applications were extremely slow in being processed, with people having to wait a number of years for outcomes. I am not so sure that we can just look at the delays within the PAC when, around the same time, the same delays happened within the Department. I fail to see how it is of huge benefit. If I were absolutely sure that it was there only to be used as an absolute last resort, I would probably not see a great deal of harm in it, but it does not say that.

Mr Boylan: I understand Angus's response. When we brought the Act through, there were concerns about the amount of time it took. I have a little bit of concern in relation to independence and the message that has been sent out from the Department. Although it states "major planning applications", I foresee that, in the transition period, until it beds down, it may be that even ordinary appeals increase. They may or may not, but I could see that. We can free up the experienced people for article 31s, but I still think that we may need more people. Is there is a suggestion — it is only a suggestion — that, to address the issue of independence, which is the question here, maybe two Departments could work together in relation to that? Is there an opportunity for that to be put in, so that the likes of DOE and OFMDFM, or whoever, can work jointly? I agree on the principle about appointees and that we will need them in the future. It would address that issue if it was not just your own Department, but if there were an opportunity to work across two Departments. That is only a suggestion around the independence issue.

Mr Kerr: There may be something in that. From our point of view, this is quite a common process across government, whereby a Department goes through very rigorous appointment procedures to make sure that people who are appointed for different types of work, such as hearings, and so on, have no conflict of interest, are independent and have the proper expertise. You can imagine the types of processes gone through by DRD, for example, to appoint inspectors to carry out the big roads inquiries. I am thinking back to earlier in my career when I worked on the regional development strategy.

Mr Elliott: Not many would admit that. *[Laughter.]*

Mr Kerr: It was a long time ago; it was the first one. DRD appointed external examiners to do the public examination for the regional development strategy, including a retired planning academic from Northern Ireland, a planning inspector from England and "A N Other". They were people with the legal planning experience to undertake that work, and their independence was not really an issue at that time. It was just accepted that these people were being brought in to undertake an independent public examination of the regional development strategy, and that is what they did. There might be ways of examining the processes to see whether the involvement of other Departments could make that even more copper-fastened.

Mr Boylan: What is being said, in layperson's terms, is that the decision-maker and the appointee are one and the same body. That is how it reads. All I am saying is that, because of some of the issues that have been raised, I think it would alleviate the issue if at least responsibility were shared across two Departments. It is just something to consider. I do not know whether that can be done, but I think it might be a way forward.

Mrs D Kelly: When Ministers and Departments adhere to the standards of public appointments as overseen by the Commissioner for Public Appointments, we can all be safeguarded and reassured in relation to independence, so I do not see why this should be any different.

To pick up on the point that Cathal made about how people might see the Department being both poacher and gamekeeper, it is about the Department appointing in cases where we want to get something through. Let us face it, politicians from every party have complained about the slowness of the planning appeals procedure. Surely this mechanism allows for things to be moved along when

there is a logjam. I think we have been reassured about the level of independence of examiners or the inquiry chairs. I support this clause.

The Chairperson: At what point would you say that delay or logjam is not acceptable and that you would trigger this power? At 10 months? A year?

Mr Boylan: Chair, it has already happened through the PAC. Once the logjam arose, other people were appointed and it was dealt with. We have already dealt with this situation. I am only responding to some of the remarks made on behalf of some of the consultees. Either way, we agreed at the time on the need for it. The only issue raised last time was who was paying for it. I think, initially, that was the question.

The Chairperson: What is the process? Would you pass it on to the PAC first and then go ahead and appoint someone if you thought the delay had been unacceptable?

Ms I Kennedy: The PAC would be the first port of call.

The Chairperson: Is there any way you can direct PAC to appoint more people?

Mr Kerr: It is not part of our Department.

Mrs D Kelly: OFMDFM must give it more resources to do that.

The Chairperson: OK. If members are content, we will move on.

Members indicated assent.

Clause 11 concerns appeal time limits. The majority of respondents welcomed the clause, but one respondent expressed concern that, if more policies are removed, there will be scope for more inconsistency, giving rise to an increased number of appeals. Another respondent felt that time limits should be matched by additional limits, whereby applicants must submit all relevant material and additional information within a defined and reasonable time.

Ms I Kennedy: I think that the issue of the time limits for submitting information relates more to the application than the appeal.

The Chairperson: Sorry; say that again.

Ms I Kennedy: The second issue on time limits relates more to the submission of information during the processing of the application, rather than the appeal stage.

The point about inconsistency relates to the strategic single planning policy statement that the Department will bring forward later in the year. It is certainly not the intention to dilute the Department's policy, which would, arguably, lead to more appeals. I think that the comments on that point would perhaps be better addressed and looked at in the single planning policy statement.

The Chairperson: OK.

Mr Boylan: Sorry; I missed that. Is this the time limits issue?

Ms I Kennedy: Yes.

Mr Boylan: Sorry; I had a point about the next clause.

Ms I Kennedy: This will simply reduce the time limits for most appeals from six weeks to four weeks.

The Chairperson: I think that that clause was widely welcomed by stakeholders. If members are content, we will move on.

Members indicated assent.

Clause 12 deals with matters that may be raised in an appeal. The majority of respondents welcomed the clause. However, three respondents from the business sector stated that there may be practical difficulties in obtaining full information before an appeal is scheduled for hearing, which could end up delaying an application until all the information is available. They also stated that, if a robust decision is to be taken, all relevant considerations need to be taken at appeal stage.

Ms I Kennedy: This brings forward a provision of the 2011 Act. That was discussed at great length by the previous Committee, which encouraged the Department to bring forward an amendment. The policy behind the provision is to encourage developers and applicants to negotiate and to provide as much information as possible during the processing of the application, rather than introducing new matters at the appeal stage.

If more information is provided during the application process and options are explored that may address some of the concerns raised by the Department, I think that that should overcome some of the concerns from the development industry that you mentioned. The Department would encourage that.

Mrs D Kelly: Greater accessibility of planning officers to the public would help.

Mr Boylan: I agree. Even though I argued the case for third-party right of appeal, this is a front-loading mechanism, and I agree that the more that is done up front, the better. I keep coming back to the point that we need to look at the application process. The pre-application discussion would certainly allow you to tease out a lot of these things. Let us be honest: if an applicant comes forward, they should be prepared.

I have only one issue. I am still concerned about a legal challenge to all of this and how this stacks up. I do not want to get into situation in which we support this clause, and colleagues are dealing with applications to support business and encouraging people to bring forward information at the start of the process to try to alleviate time frames and everything else, only for there to be an appeal and a legal challenge. That issue was brought up in the Chamber. I wonder whether the Department will respond about where we are, specifically on the legal challenge aspect. Maybe you could talk about the point that was raised in the Chamber about that.

Ms I Kennedy: From our point of view, the provision is sound. It is very closely worded to a provision that has been in place in Scotland since, I think, 2006. The wording is very familiar. It was quite controversial and contentious when it was introduced, but it has settled down. We are not aware of any legal challenge to it.

Mr Boylan: So there is a case proving that it stands up?

Ms I Kennedy: It is certainly in operation in the Scottish planning system.

Mr Kerr: There is discretion in the clause. If the circumstances are there, you can still —

Mr Boylan: Yes. There are some circumstances. That is grand.

Mr Kerr: — introduce new information if it could not have been brought forward and there is a good reason for that.

Mr Boylan: I just wanted to check the legal issue. Thank you.

The Chairperson: The PAC said that the clause, as currently worded, is contradictory because, on the one hand, it seeks to restrict the matters that may be raised at an appeal, and, on the other, it maintains the requirement to have regard to material considerations.

Ms I Kennedy: We need to produce guidance on how it would work. That is the case in Scotland; they have produced guidance. It is important to clarify what matters can be introduced at a later stage.

The Chairperson: We will move on to clause 13, which concerns the power to make non-material changes to planning permission. The clause was generally welcomed, but several councils felt that

some constraint should be imposed on the Department where it wishes to impose new non-material conditions and it is conceivable that some conditions, if applied, could be impractical if a cut-off date is not established from the outset in the legislation. The councils also felt that, if the request comes from the Department or the developers, it was not clear who initiates the application for the non-material change to planning permission.

Ms I Kennedy: I will begin with the second point. It is important to remind ourselves of what the provision does. It is carried forward from the 2011 Act. It is a mechanism to allow insignificant non-material changes to a permission to be approved by the Department. It is to address a situation in which a developer is taking forward a scheme and, as it progresses and they move on site, there is some minor insignificant change that is not material. Rather than having to go through the planning process and submit a planning application, and deal with the delay and cost associated with that, it will allow the minor, insignificant non-material change to be approved. It is important to remember that it is insignificant. It is non-material. It should not impact on any views that have been expressed by, for example, local residents or objectors to the scheme.

The legislation allows the Department to apply conditions. However, the Department would have to assess whether something is going beyond the original permission. It is likely that the condition is that the scheme must be completed in accordance with, for instance, revised drawings that have been submitted to illustrate the non-material change.

The Chairperson: Give me an example of what you think is a non-material change.

Mr Boylan: I was going to ask about that.

Ms I Kennedy: It is a fair question. It could be a change to the type of roof tiles from concrete to slate: something that is so insignificant that the Department judges that it really does not make a lot of difference. It must be —

The Chairperson: That may change the look, though.

Ms I Kennedy: It could, but it could be a change in the materials and it may not change the look. There will be a matter of fact and degree in each case. The Department would have to judge whether something constitutes a material change. It could be a different type of glass in windows. Finishes are a good example.

Mr Elliott: I support this. Obviously, a lot of problems are created for genuine developers who want to come back and make fairly minor changes. However, I am more concerned about those developers who make wider and bigger changes and do not look for permission at all. That will help those who do it genuinely and do it right, and I support it.

The Chairperson: I know of a block of flats where the window glass has been changed from plain glass to frosted glass because neighbours objected.

Mr Kerr: Sometimes, there are issues around that sort of thing. We can require frosted glass because there have been objections. That would not be considered a non-material change.

Mr Weir: From a practical point of view, this just reinforces what actually happens. I know that, for various reasons, there can be some frustration for constituents. I am sure that, from practical experience, a lot of us will have had a complaint from someone who neighbours a development. When you go out, the change is, objectively, relatively minor, although it may be beyond what was asked for. The reality is that, when enforcement is being pushed in any way with the planning authorities, they may say that it is so small that they, from a practical point of view, will not knock off those three inches, or whatever the change happens to be. This may be codifying what already happens in practice. To take Tom's point, we need to recognise those who do things genuinely and responsibly, as opposed to those who try to pinch a bit of ground — in a metaphorical sense, pushing the envelope. However, responsible developers will not be in a straitjacket. It probably reflects the reality.

The Chairperson: I suppose it is a common-sense approach.

Mr Boylan: I support it, as long as it is not a structural change, which is the key element. Would it apply if the nature of one development affected the amenity of another development? Is there is an opportunity in policy to address that anyway?

Mr Kerr: That would be a material change so it would require a new application. There are different stages in this. You can have a non-material change and, therefore, no application is required and it is stamped "approved". However, a material change needs approval.

Mr Boylan: Does that system not exist at the minute? Is there not an opportunity to do that already?

Mr Kerr: In practice, you will find that the officers use the de minimis system when the change is very small. This is putting that in legislative wording.

Mr Boylan: It is not for structural changes; it is only for a minor change?

Ms I Kennedy: Yes, it is really for non-material changes.

The Chairperson: OK. We will move on to clause 14, which concerns aftercare conditions imposed on revocation or modification of mineral planning permission. This clause was generally welcomed, but one respondent asked the Department to explain why it had chosen "thinks" as the level of certainly. Is that not an unusual word to use in legislation?

Ms I Kennedy: It is used in legislation; it is quite common. It allows the Department to use its discretion and judgement. It is certainly relatively common in planning legislation.

The Chairperson: What about the word "deems", which would be stronger than "thinks"?

Ms I Kennedy: We could look at using different wording. We would need to talk to the legislative draftsmen.

Mr Hamilton: It says "thinks" does it not?

The Chairperson: It says "thinks".

Mr Hamilton: It is good news that the Department "thinks". *[Laughter.]*

Mr Boylan: So long as it does not say "methinks".

The Chairperson: I just thought that "thinks" does not sound much like a legal term.

Clause 15 is next, which is named "Planning agreements: payments to departments". The clause was generally welcomed, but several councils felt that payments should also be made available to councils and that the English model of the community infrastructure levy should be considered. A respondent from the business sector stated that the system would work in a more efficient and timely manner if such contributions were organised and decided upon by one single Department and recorded in one document.

Ms I Kennedy: This is a very minor provision that really just confirms that payments under planning agreements may be made to other Departments and not just to DOE. The clause serves to confirm for people what our understanding is.

The Chairperson: That is the case anyway.

Ms I Kennedy: Yes, and this —

The Chairperson: They pay DRD and —

Ms I Kennedy: This is just confirming it in legislation, to make sure that there is no doubt that that can happen.

Councils will be able to receive payments when planning agreement powers transfer to them, although I suppose that a council could, on occasion, be involved in a planning agreement now. The question in response to the consultation related to councils' involvement in planning agreements as the planning authority.

The community infrastructure levy was discussed by the previous Committee, and it was agreed at that time that it needed to be discussed much more widely across the Executive.

The Chairperson: Are members content with that explanation?

Members indicated assent.

The Chairperson: Clause 16 concerns increases in certain penalties. The clause was welcomed by the majority of respondents. However, one respondent felt that fines should be proportionate to the scale of the development and the potential value to the applicant, without an upper ceiling. Another respondent stated that the penalty applied should be commensurate with the scale of the breach of the legislation. Those comments are quite valid.

Ms I Kennedy: Yes; it is important to remember that the clause carries forward provisions in the 2011 Act, which increased the range of penalties. Although the Department can provide penalties within the legislation, it is for the courts to decide on the level of fine in an individual case.

The Chairperson: Those are not fixed, are they?

Lord Morrow: Is there a minimum fine?

Ms I Kennedy: No.

Lord Morrow: So could it be a fiver?

Ms I Kennedy: It is very much at the court's discretion.

Lord Morrow: So, in respect of a development worth £5 million or £6 million, there could be a discretionary fine of £5.

Ms I Kennedy: Depending on the route of the prosecution — whether it was on summary conviction through the courts or conviction on foot of indictment — I suppose that there would be options to impose an unlimited fine in some cases, depending on the breach. However, it is very much at the discretion of the courts.

Lord Morrow: I have previously raised the fact that I believe that the fine should be linked because that would serve as a great deterrent. Being asked to pay a £50,000 fine on a very large project worth £5 million or £6 million would be insignificant, and it would eventually be handed on anyway.

The Chairperson: Is this going with the statutory fine levels?

Ms I Kennedy: It will apply to some of the breaches. There is a whole series of different offences, some of which will be tied to the statutory level while others will have a figure attached in the legislation. The 2011 Act raised many of the fines from a maximum £30,000 summary conviction to £100,000, which was quite a significant change.

The Chairperson: Most people welcomed that.

Mr Boylan: I remember that we had a bit of a debate over the £100,000 figure. I take Lord Morrow's point: the £30,000 fine was set way back 25 or 30 years ago. I agree that the fine should fit the offence. If the development costs £6 million, £30,000 is nothing, so that is something that we need to look at.

We have to go back to the process. We are talking about new applications in the future. We have to deal with the issue at the start of the process so that developers in particular know exactly what it is.

You have said that subsequent legislation will have to set out a role for, say, a building control officer, to maintain proper checks and balances as a development continues. I would like that to be rolled out, and I want to reiterate that point.

We had a debate in the Chamber about incomplete sites. We need to look at completion on a phased basis. That might be difficult, but we need to put in proper checks and balances. There are sites with one phase completed and other sites with no tarmac, lights or finish. In future we need to look at development and that process starts at the beginning.

I want to pick up on another point. Clause 14 deals with aftercare conditions. We need to look at aftercare because there are developers who develop sites and leave; for example, the uncompleted building that the Minister ordered to be knocked down in Portstewart. That needs to be an element of the process. It is not just about giving planning permission and, five years later, allowing the developer to leave behind an uncompleted four-storey building. We need to look at that, and it needs to be talked about at the early development stage. I would like to see some checks and balances in relation to that.

Mrs D Kelly: I agree with Lord Morrow about enforcement. In Craigavon for example, I recall that the case of an illegal landfill site went to court and resulted in a £100 fine being imposed by the magistrate. Two skiploads paid for that fine.

There are illegal car parks around airports, the owners of which can live within their budgets allowing for the fines. Surely there should be a minimum percentage fine linked to the value. That is in no way a detriment. There have been loads of breaches.

We need a pragmatic approach. It may well be that an individual may apply to make a minor change to a household dwelling, but that is not a big enforcement notice issue. However, there are absolute breaches, where people are thumbing their nose at the Department. We need to ask the Department to look at some sort of link to the value of the development and have a minimum penalty. A maximum penalty is seldom invoked; we all know that, even where there has been flagrant disregard.

Another example is the case of the transfer of functions to the Department of the Environment under the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011 and the High Hedges Act (Northern Ireland) 2011. You could have one set of government policies and legislation laughing at the other if the enforcement powers do not help the local authority to take action under the clean neighbourhoods legislation. Does that make sense to you? I would ask the Department to have a look at that.

The Chairperson: Would members be happy for the Department to look at a minimum penalty, in proportion to the value of the damage?

Lord Morrow: There is another value that has to be considered here. A terraced row of listed buildings in Armagh was unceremoniously demolished. That can never be restored. How do you put a value on retaining listed buildings of that quality, which, all of a sudden, are no more? Quite frankly, £100,000 would be absolutely nothing. I acknowledge that the Department is trying to address the issue. It had looked at £30,000 and increased that to £100,000. That is a substantial jump in anybody's estimation, and I acknowledge that, but another aspect of it has to be taken into consideration. We ask the Department to do that.

Mr Kerr: I am not sure whether we should have a look at the possibility of setting a minimum. On first thoughts, I wonder how that would sit with the discretion that the courts have in such circumstances. At a more general level, I heard a number of comments here about the effectiveness of enforcement in its widest sense. The Minister has identified that as a key area. Not so long ago, he held a summit to which he brought in representatives from the Public Prosecution Service, the judiciary, and so on, to discuss the matter. He recognises, and there is recognition, that in Northern Ireland, the value that has been put on some of these issues over the years, with where we have come from, and so on, has not been high. They are, perhaps, not seen as a severe and serious offence, and so on, by the judiciary. I know that the Minister is keen to address that and to move it to a new dispensation. Work is ongoing at an informal level to move things in that direction. At the same time, some of that is beyond the Department's control in a sense, so we should move forward with the stuff that we can control. That is why we have these proposals here today. There is also the fixed penalty notice proposal, which we will talk about shortly. There are also the procedural improvements in how we undertake enforcement action, the priority we give the Department and the resources that are put

towards it. We have been looking at those areas. Certainly, we can take away those thoughts and come back to the Committee on where we stand with it.

Mr Boylan: I know of a couple of sites on which only one house has been started. There is a site for 28 houses, and a foundation is sitting there. We can argue that that is down to the challenging economic times we live in, but we need to ensure that if, in the future, land is zoned for development — no matter what development — and is given permission, the work has to be undertaken in a set period. We need to set that in stone. I am concerned now, as we transfer the powers to local authorities, we need to give them the proper checks and balances. They will be trying to develop their own communities and grow. They will be given the powers to do that, but also to stop whatever is necessary.

Mr Kerr: There are powers for the completion notice to require development to be completed by a point in time, and if that is not done, the approval is removed. Although the media have highlighted some recent success, how effective is that in a general sense? If you are a bankrupt developer who does not have the money to move a development forward, it is unlikely that that particular intervention will make a huge difference. If a developer does not have the money, and the bank will not give them the money to do the work —

Mr Boylan: I understand that, but I am talking about the future. We have problems to deal with now, but, in future, it needs to be set in stone. That is the issue.

The Chairperson: It is not only a problem up here; it is a problem in the South as well where there are many half-finished houses.

Mr Kerr: It is a very difficult problem to deal with.

The Chairperson: I remind members to switch off their mobile phones; we have some interference with the recording machines.

Mr Weir: Is this truth and reconciliation?

Mr Boylan: Call in the bouncers.

The Chairperson: OK. Angus, you and Irene can come back to us with some answers.

Clause 17, "Conservation areas", was generally welcomed, but two respondents felt that it should not included because it was a poorly worded and ill-conceived provision. They further felt that if that provision was included, investors were likely to avoid conservation areas strenuously, with the result that they would stagnate, with a consequent increase in dereliction and decay. They felt that there was also a strong likelihood that any development proposals could become mired in legal challenges in relation to whether an opportunity existed to enhance the area.

Ms I Kennedy: This carries forward a provision in the 2011 Act; it reinforces policy already in the planning policy statement that deals with conservation areas. The provision is in response to a legal ruling some time ago that suggested that new development in conservation areas meant merely that it did not bring harm. The intention in designating conservation areas is to enhance and preserve their character; the legal judgement indicated merely that development needed to do no harm.

Our policy has been that efforts should be made in conservation areas to ensure that they are improved, with the consequent benefits to the economy and regeneration. This provision says that, where possible and where there is an opportunity to do so, enhancement should take place; where it is not possible, development proposals should preserve the character of a conservation area.

The Chairperson: It just raised a gear a bit.

Ms I Kennedy: The clause clarifies and reinforces the policy that we have in place for conservation areas, which are designated because of their special architectural or historic character.

Mr Hamilton: I recall this issue being raised by, I think, the Royal Town Planning Institute during our stakeholder event a couple of weeks ago. I thought that it was an interesting point. I appreciate that it

is already in the 2011 Act and would be interested to know of any experience that the Department has had of how it has worked in operation.

It is a reasonable point that special regard is required for conservation areas to ensure that their character is preserved and enhanced. I think that "enhanced" is the word that caused difficulty. There is a difference between "maintaining" and "enhancing". A conservation area in my constituency has several derelict buildings, one of which recently went on the market. There is no way that you can preserve such a building as it is and get any useful function out of it.

Therefore, the likelihood is that the building will be knocked down. Nobody will build a skyscraper on the site, but it will be rebuilt in a style similar to the rest of the street. However, that will not enhance the character or appearance of the area. At best it will restore the character or appearance, and may even slightly diminish them, but that is the only practicable, reasonable and viable thing that could be done to restore that building properly and get it back into economic use. At present, you can see its character. It was a nice building in its time, but it will never be useful as it currently is.

There is a concern about enhancing and preserving the character of an area. There are many good examples around Northern Ireland of very old buildings that have been extended or amended. The Grand Opera House, for example, is a very old and distinctive building; it was extended, and a completely different new annex was put onto it and it looks fantastic. It is functional and has not taken away from the original building. It is those sorts of things that win prizes nowadays. You can replicate what was built 50 years ago but not what was built 100 years ago or more. I am concerned about the words "enhancing" and "preserving the character". It might be impossible to preserve the character, and it may be absolutely impossible to enhance it. That is a long-winded way of asking: what does "enhance" mean? How can you ensure that planners are not then saying rigidly "That is not enhancing" and, therefore, nothing happens?

Mr Kerr: This is like many aspects of planning, particularly when you get into issues of character and design in which subjective judgement is required. That operates on a daily basis with the system as it is at the moment, because 'PPS 6: Planning, Archaeology and The Built Heritage', which sets out the approach, already requires us to look at that. Therefore, you are into the issue of planning judgement. Perhaps the Department thought, in the example that you gave, that the opportunity to enhance is not there, because to do so would mean that the building would never come forward and there would never be anything there so that we would be in a worse position than we were in before. However, we recognise that this is not clear-cut or black and white.

Mr Hamilton: How do you enhance? A conservation area is not just an area with a line drawn around it; they are created because of a particular character that is there. Clearly, built heritage is an important part of that. How can you enhance something that was built 200 years ago and has been largely maintained, with perhaps a few exceptions? It is hard to enhance that.

Mr Kerr: If you were renovating a building sensitively, that would be an enhancement. Bringing it back to its former glory is an enhancement, even though it is also, in a way, preservation. It is not clear-cut. It is not as though you have to do anything over and above that to achieve enhancement.

The Chairperson: Even when it is an old building, falling down and you really cannot rescue it, you can build something new but sympathetic to all the surrounding buildings; if they are all of red brick and of the same height and style and you build in that way, that would keep the character of the area.

Mr Kerr: This is something that we will look at again through the new strategic planning policy statement, and it might be something that we can touch on again with the Committee: how to achieve that balance, because it is a balance. Simon, you might want to comment on this, but with respect to how things operate at the moment, this is not a big issue; there have been no judicial reviews on this to my knowledge. Sometimes, people are unhappy with some of the outcomes that we get. Not everyone is happy with the Opera House extension, for example, although I agree that it is very good. However, not everyone likes it, and that is where subjectivity comes in. Generally, it seems to be working OK. However, we can look at it again through the strategic planning policy statement when we get there.

The Chairperson: I know several architects who do not think that that Opera House extension is at all good.

Mr Hamilton: It is too adventurous for them.

The Chairperson: As you say, it is very subjective.

Mr Boylan: Simon, when you are Minister of Finance and Personnel, you will have all the money you want to do whatever you want and in the end you can keep your area.

Mr Hamilton: That is a plan. *[Laughter.]*

The Chairperson: OK. Let us move on. Are members happy with that answer?

Mr Hamilton: It is more an issue of implementation. You made an interesting point about the reform or review of the planning policy statement. I do not want to disagree with the clause, but I can just see why concerns were raised.

The Chairperson: Queen's University has expressed concerns about it, as it has a number of building plans for the conservation area. However, many residents in the conservation area are very happy about this new clause. It is a balancing act.

Mr Hamilton: It is probably not the biggest problem that there is with conservation areas. When you talk to people who live in towns with them, you find that it is not their biggest concern. It is the enforcement of simple things such as signage that cause bigger concern.

The Chairperson: We move to clause 18, which deals with control of demolition in conservation areas. The clause was generally welcomed, but several councils stated that where demolition is approved in conservation areas, it is considered that the timescale for the rebuilding should be included to ensure the preservation of the overall amenity of the area and be rigorously enforced. Many people will support that.

Ms I Kennedy: Again, this clause introduces a similar provision from the 2011 Act. Where demolition is approved in a conservation area, under PPS 6, it is normally conditional that prior agreement for the redevelopment of the site is provided. Conditions will normally be imposed prohibiting the demolition of a building until planning permission for redevelopment has been granted and contracts have been signed.

The Chairperson: Is there a timescale to which they must build after they demolish? Is it two years?

Ms I Kennedy: It could depend on the case. A link is normally provided.

The Chairperson: There could be an eyesore or a gap in a row of houses for two years.

Ms I Kennedy: The aim is to try to keep it as seamless as possible, but individual circumstances may dictate otherwise.

Mr Boylan: It depends on what is going there and what it is for. The use of the building will determine how quickly it goes up. I think that it is a reasonable clause.

The Chairperson: If there are no more questions, we will move on to clause 19, which is on tree preservation orders (TPO) for dying trees. The clause was welcomed by most respondents, but several councils raised concerns about where some trees have diseases, such as the recent ash dieback outbreak. They felt that the application of this clause could mean that such trees could not be felled and stated that it appears that this scenario has not been taken into account and that there are practicalities in the application of such legislation that require further consideration.

Ms I Kennedy: Chair, you will recall that this provision was included in the 2011 Act. This will mean that consent will be required to fell dying trees. If a new disease were to emerge or there was a need for trees to be felled, the Department would consider that; it is not saying that consent will not be granted but that consent will be required.

The Chairperson: It is a blanket statement.

Mrs D Kelly: Having had recent experience of the turnaround period for the Northern Ireland Environment Agency (NIEA) to issue permits as a no-brainer, one despairs. You mentioned the issue of the consent period, but NIEA is talking about a month to turn around a bit of paperwork, and that was under some pressure. Therefore, you could have the Department of Agriculture and Rural Development calling for the felling of these trees, and you could have some officer sitting somewhere saying that it takes a month to get round to doing the paperwork. There has to be something in the guidance or the regulations to allow for situations where one Department is laughing at the other and the public is being taken for a ride. That is my real experience in the past six weeks: one month to turn around a bit of paperwork.

The Chairperson: I am sure that you can take that back to the Department.

Mr Weir: I very much concur with what Dolores said. There is a specific good intention behind the provision. We do not want people trying to flout TPOs by way of finding what one might describe as a spurious disease. I do not know, from a technical point of view, just how quickly tree diseases spread, but there may be a need for a degree of urgency on that side of things. Is it possible to make provision for a few people to provide a rapid response or for them to at least have a degree of specialism in that area? I suppose that I agree with Dolores: what we are really looking for is the creation of a "special branch". *[Laughter.]*

Mrs D Kelly: Informers.

Mr Weir: We cannot get the National Crime Agency, but we might be able to get a "special branch".

Mr Boylan: You only meet them on the road.

During the debate in the Chamber, my colleague Willie Clarke said — I loved this comment — that trees are dying from the moment they are born. I hope that we do not cut them all down.

The Chairperson: We are all dying from the moment that we are born.

Mr Boylan: I thought that that was a class comment.

Mr Weir: It is that spirit of sunny optimism from Mr Clarke that we miss on the Committee. *[Laughter.]*

Mr Boylan: Born to die.

The Chairperson: Apparently, trees can take 100 years or so to die.

Mr Weir: I suppose, in all seriousness, some trees can take years to die. As I said, I take genuinely the situation where, for instance —

The Chairperson: You need to act quickly.

Mr Weir: Yes. It does sometimes require fairly swift action.

The Chairperson: OK. Clause 20 deals with fixed penalties. Although most respondents to the Committee's call for evidence were in favour of the use of fixed penalties, many expressed concern about the risk of immunity from prosecution for ongoing breaches. A fear expressed was that a developer would build in the cost of a fixed penalty for breach of a planning condition to the overall development costs and that, once the fixed penalty had been paid, no further action would be taken. Overall, fixed penalties were seen as a useful deterrent but not a remedy to breaches of planning conditions and that it would be useful if guidance was produced on their use. I think that there is concern that once people pay the one-off fine, that is it.

Ms I Kennedy: That is certainly not the intention of the provision, which has been carried forward from the 2011 Act. It is to provide an alternative to costly and lengthy prosecutions through the courts. The intention is certainly not to provide immunity from a breach.

The Chairperson: Therefore, if they do not remedy it, they would be prosecuted?

Ms I Kennedy: We would have to take a look at further enforcement action to address that.

The Chairperson: Can you give them daily fines after the fixed penalty to make them sit up and do something quickly?

Ms I Kennedy: You can for some breaches of planning control.

Mr Brian Gorman (Department of the Environment): The immunity is about ensuring that somebody cannot pay a fixed penalty and be prosecuted for the offence. The offence is failure to comply with the enforcement notice or breach of a condition notice; it is not the breach of planning controls. There will remain the requirement to remedy that breach, and the Department will not close off further enforcement action. There will be decisions made about where that discretionary power is exercised. It be may be decided, on the merits of a case, that the Department will not issue a fixed penalty but go straight to prosecution, particularly for significant breaches, as the Department will want to ensure that such cases are taken through the courts and publicised. That is not the intention of this. Working through an enforcement case and issuing a fixed penalty is intended to offer an alternative and ensure that the breach is remedied more quickly. If a breach remains outstanding, however, the Department would take further enforcement action.

The Chairperson: To warn people that they face the risk of a fixed penalty if they do not do it right?

Mr Gorman: Yes. Once again, this is a power that will be carried forward by councils. We may see councils exercise their powers and discretion to ensure that, relevant to their approach to enforcement, that deterrent effect is established.

Mr Elliott: Can you give me a brief explanation of the stage at which a fixed penalty would be issued? Would it be after the initial enforcement notice had been given? Often, that has not given the person the opportunity to appeal the enforcement notice.

Mr Gorman: An enforcement notice has to be issued because the offence is a failure to comply with that, and failure to comply is after the period set out in the enforcement notice. Therefore, the opportunities will be there to comply with the enforcement notice and — my planning colleagues can correct me if I am wrong — appeal. The Department will have the discretion to dish out a fixed penalty once that compliance period has been passed and the breach of planning control is still outstanding.

Mr Elliott: Does that mean that, if the person put in an appeal application, the fixed penalty notice would not be issued? Alternatively, if they thought that they had permitted development rights, had done a piece of work in discussion with planners and the enforcement notice was issued but the applicant then put in an application, would the penalty notice not be issued?

Mr Gorman: Again, that is discretionary, but if that is the case, the notice would not be issued.

Mr Boylan: I am slightly concerned. I am glad that Tom raised that point. There may be issues about permitted developments, and people might just act outside the scope of that. Depending on the issue, that could have an impact. We need to be very aware of instances where it could go wrong. You could see a situation where fixed penalties need to be introduced, because once something has been built, it is very hard to remedy it. So, I would be careful of that situation.

The Chairperson: We will move on to clause 21, which deals with the Planning Appeals Commission's power to award costs. This clause was generally welcomed, but one respondent strongly objected, as he felt that it created further obstacles for small voluntary groups to raise objections to major projects by large developers. Another respondent felt that the cost should not apply to the developer who initiates the proceedings.

Ms I Kennedy: It is important to clarify what this provision does. It carries forward section 205 of the 2011 Act. It allows the Planning Appeals Commission to award costs to parties at an appeal where the unreasonable behaviour of one party has left another out of pocket. It is not in any way seen to put an obstacle in the way for objectors. If objectors made a submission in the case and at the appeal, there is nothing to fear. If they have behaved reasonably in their approach, I cannot see that that will be an issue.

I think that the point relating to costs assumes that it goes beyond the power of the provision, which is really to deal with unreasonable behaviour in the context of an appeal. It is not about dealing with the costs. We often think of cases where someone is taking an action against someone else, but this is about where the unreasonable behaviour of one party has left another party out of pocket.

Mr Elliott: Could you give me an example?

Ms I Kennedy: Yes, it cuts both ways, in that it could apply to a planning authority, the Department or, in the future, councils that have perhaps produced a reason for refusal that does not stand up when it goes to appeal or was unreasonable. At the same time, there could be evidence coming in late that requires another expert to go off and do work that was not anticipated. So, it is about ensuring that the proceedings move in a timely, reasonable fashion.

The Chairperson: We will move to clause 22, which relates to grants. The majority of respondents welcomed this clause, but several councils asked whether they will be required to continue with such funding arrangements. They also asked what level of funding will be required and requested that criteria and clarification be provided on who can avail themselves of that support.

Ms I Kennedy: For clarification, the legislation gives the Department the ability to provide funding. It does not talk about councils. It does not apply to councils, so they will not be expected to carry that funding across. The level of funding would depend on the applications that are made to the Department and in individual cases.

The Chairperson: What type of grants would those be?

Ms I Kennedy: This is the legislation that will allow the Department to provide funding to groups such as Community Places.

The Chairperson: Is that for capacity building?

Mr Kerr: Disability Action is another example.

The Chairperson: Does that mean that that funding will not be passed on to councils to carry on?

Ms I Kennedy: No.

The Chairperson: Are there one-off grants or short-term grants for two or three years?

Mr Kerr: They are usually for a year at a time. However, I think that it is possible to have a grant for a programme for a period of time, but at the moment —

The Chairperson: It applies to voluntary organisations.

We will move to clause 23, which deals with duty to respond to consultation. Several respondents from the non-governmental organisation sector feel that there needs to be recognition of the size, complexity and volume of detailed environmental impact assessments that accompany many larger planning applications, which may require careful and detailed scrutiny by consultees such as the NIEA. Those respondents feel that it would be unreasonable to demand a very quick response to more complex applications. It is not a one-size-fits-all issue.

Ms I Kennedy: I think that that is a fair point. Again, the legislation provides for that. The subordinate legislation will prescribe a time period within which consultees should respond. However, it also allows for a time period to be agreed between the Department and consultees where they are dealing with applications that are more complex and require more information and a longer response time.

The Chairperson: Are members content with that explanation?

Members indicated assent.

The Chairperson: We will now move to clause 24. The majority of respondents welcomed this clause. However, one respondent wants clarification of what the Department means by "multiple".

Another respondent feels that retrospective planning applications should not be an option at all, while another feels that the fee should be proportionate to the level of the development, the level of uncertainty surrounding the form of development and the associated provision for permitted development.

Ms Kennedy: This clause brings forward the provision, which, again, is in the 2011 Act, to allow the Department to charge a multiple of the fee — perhaps one or two times the fee — where a retrospective application has come in. It is part of the approach to dealing with front-loading and enforcement. So, the application should be made in a timely manner, or there may be a higher fee.

The Chairperson: It is a deterrent for people.

Ms I Kennedy: Yes, it is a deterrent so that people do not submit a retrospective application. The level of that multiple will have to be set out in subordinate legislation.

The Chairperson: So, it could be double or triple the fees.

Ms I Kennedy: That is a possibility; yes.

Mr Boylan: I agree with that clause, because, when we get all this bedded down, I think that there will be retrospective applications. The only question that I have relates to some of the mineral licences. We have to separate cases in which European regulations or waste licences have applied from ordinary retrospective planning applications where there has been a build. However, those are slightly different issues. Will you talk me through the example of a mineral or a waste licence issue? People may have been operating under a certain licence. The regulations have changed somewhat over the past couple of years, and they then have to change retrospectively. Obviously, the fee is in tandem with that. I am just trying to find an example, but I know that there have been some changes.

Mr Simon Kirk (Department of the Environment): Nobody will be operating with a waste licence without planning permission; planning permission must be in place first.

Mr Boylan: I understand that, Simon, but it is my understanding that, over a number of years, the regulations have changed through European law. Are you saying that there are no cases where people have to reapply? I do not know whether there are any instances of that; I am only asking.

Mr Kirk: I do not think so, because, even if you had to amend your waste licence, that may not impinge on your original planning permission.

Mr Boylan: I am only trying to find an example; I am not saying that there are any instances.

Mr Kirk: You might have to amend your facility, which would be development requiring planning permission in the first place.

Mr Boylan: In that case, because of the change in the regulation, it should stand on its own merits as an application as opposed to a retrospective application.

Ms I Kennedy: Yes.

The Chairperson: We will move on to clause 25. The clause was generally welcomed, but one respondent asked whether the Department will provide examples of what it may include as incidental, consequential or transitional provisions or savings under clause 20. I would also quite like to hear whether that is the case.

Ms I Kennedy: The clause provides the Department with the flexibility to deal with issues that may arise as we get to the point where this legislation is being repealed to allow the 2011 Act. At the moment, I am not aware of what examples those may be, but it is something that would often be provided in legislation to offer that flexibility so that, when we get to that stage, if there are any issues that we have not anticipated, they can be covered in the legislation.

The Chairperson: Does that mean when that function is transferred to the council?

Ms I Kennedy: Yes. If there is some issue, which we have not anticipated now and which will arise as we move from this legislation to the new, this provision will allow us to do that. An order has to be laid and approved by resolution of the Assembly if there are particular issues. So, that is the Assembly control.

The Chairperson: Do you anticipate that there will be anything?

Ms I Kennedy: It is difficult to say now. It is almost like a fail-safe mechanism that means that, subject to Assembly control, if issues arise, we can address them.

The Chairperson: So, that is your safety net to make any changes. Are members happy with that?

Members indicated assent.

The Chairperson: We will move on to clause 26, which relates to interpretation. There were no comments on the clause.

We will move on to clause 27, which relates to commencement. The clause was generally welcomed, but one council felt that provision should be included to allow councils to deal with strategic elements of the planning system prior to the full transfer of functions. Another respondent asked whether commencement can be linked to an actual date and/or a sunrise clause to ensure prompt commencement.

Ms I Kennedy: Where possible, a lot of the provisions will be commenced on Royal Assent. Other provisions may require subordinate legislation or guidance to be produced before they can be commenced. That is the approach. The Bill is bringing forward many of the provisions in the 2011 Act. Therefore, it is clear that the intention is that we want to bring in the subordinate legislation or guidance as soon as possible so that we can test the reforms before they transfer to councils in 2015. So, we want to move forward on that with haste.

On the second point about the strategic elements for planning, it is not the intention to transfer those powers until the necessary council structures, ethical standards regime and governance arrangements, etc, are in place. However, the Minister has agreed that officials will engage with the transition committees in taking forward preliminary development plan work in preparation for the transfer of those powers to councils.

The Chairperson: That is where capacity building comes in. They need to learn about all that, and the ethics and code of conduct should be put in place first.

Ms I Kennedy: Yes.

The Chairperson: I agree with you.

Lord Morrow: Do we take it that the commencement of the order is not automatic so many days later but that the Department will determine that?

Ms I Kennedy: Yes. Some provisions will come in when the Bill receives Royal Assent, and others will come in under the appointed day mechanism — a commencement order — when you have put in place any other arrangements that you need to for subordinate legislation or guidance.

The Chairperson: Does that mean that the whole Act will not be commenced at the same time? Are you talking about bits and pieces coming at a later stage?

Ms I Kennedy: Yes.

The Chairperson: It sounds as though it will commence at the same time, but it will not.

Ms I Kennedy: No. That is the case with quite a lot of legislation.

Mr Boylan: We need to get the subsequent legislation in place. You get the Act passed, and that is grand, but the guidelines and everything else that go along with it enable you to carry out the work on the ground. That is the main part of it.

The Chairperson: When do you think it will be up and running? We really have a very short period between then and the councils taking over.

Ms I Kennedy: As quickly as we can get it through the Assembly process.

The Chairperson: When will Royal Assent be?

Ms I Kennedy: The end of the year, if we go —

The Chairperson: This year?

Ms I Kennedy: Yes.

Mr Kerr: We are already working on the subordinate legislation and the regulations, and so on, so that they can come in as quickly as possible after Royal Assent, thereby allowing commencement.

The Chairperson: So, there will be roughly a year and a bit to run before the councils take over. Are members content with the explanation?

Mr Boylan: I am grand. It could be a month or anything.

The Chairperson: You wonder whether there is any point in doing all this.

Mr Boylan: I am 100% content.

The Chairperson: The last clause is clause 28, which is the short title. There is no problem with that.

At last week's discussion, the officials agreed to come back with further information on the rationale for including clauses 2 and 6. I think that that was Tom's question.

Mr Kerr: We have received a written request for that update, and we will send a written response to the Committee. I think that that is due possibly tomorrow. You will get that from us. Aside from going back over what we said previously, the written response will hopefully deal with that issue.

The Chairperson: Some questions on clauses 2 and 6 were not addressed last week. Can you address the comments made by Daniel Greenberg, who advised the Committee? He used our Planning Bill as an example for better wording. Those questions were not about the policy behind clauses 2 and 6; they were on how the clauses were drafted and why particular terms were used. What is the Department's response to the issues that he raised? Given that he took time to work with us, I think that it is important that we mention those points. What is the risk of excluding the phrase "as the case may be" on each of the four occasions that it is used in clause 2? What are the sanctions if the Department or the commission does not comply with the four duties in clause 2?

Ms I Kennedy: On the first point, the use of the words "as the case may be" is very much a matter of drafting style. It follows the usual style used in Northern Ireland. We use the term "as the case may be" throughout our legislation.

Lord Morrow: Is that the way that we talk?

Mr Weir: Could you not just put "So it is"? *[Laughter.]*

Mrs D Kelly: So it is, so it is.

The Chairperson: That is a very Northern Irish thing that I could not get my head around at the very beginning. I wondered why people said that.

Mr Weir: You are here a brave few years before some of the idioms sink in.

Ms I Kennedy: It is very much drafting style rather than substance.

The Chairperson: If we were to do away with it, would it cause you any problem?

Ms I Kennedy: If the Committee wishes, the Department can raise that further with the Office of the Legislative Counsel (OLC). It is very much a drafting style. As I said, it follows the usual style in Northern Ireland.

The Chairperson: Do members want to take Mr Greenberg's advice and check that out with the OLC?

Mr Elliott: It is relevant because we are discussing the Bill at the moment. He made a point about something much broader. Instead of putting these officials under scrutiny, it might be a wider issue that you could raise at the Chairpersons' Liaison Group and try to get a meeting with the Chairs and the people who draft the Bills. That might be a better way of going, but it is only a suggestion.

The Chairperson: Whether, in general, we should use those phrases —

Mr Elliott: It was a much wider point that was being made.

Lord Morrow: It is a case for the Bill drafters.

Mrs D Kelly: I think that I am right in saying that there is considerable opposition to clause 2 being required. Some contributors noted the fact that sustainable development includes economic growth as part of the overarching sustainable development principle.

I record my objections to clauses 2 and 6. It is my understanding that there may well be a judicial review of those clauses. The Minister, at the Executive, was not in support of the clauses, but in order to get the Planning Bill before the Assembly, they had to be included at the insistence of other parties.

Mr Weir: It is good to see that there is no breach of ministerial confidentiality at the Executive.

The Chairperson: I think that that is common knowledge.

Mrs D Kelly: I do not think that there is any secret that there is considerable opposition —

Lord Morrow: There is none now, anyway.

The Chairperson: Yes. What sanctions are there if the Department or commission does not comply with the four duties in clause 2?

Ms I Kennedy: There would be no sanctions in legislation, but, clearly, the Department would be scrutinised by and accountable to the Committee and Assembly for its compliance.

The Chairperson: All the others things are just suggestions about our style.

Ms I Kennedy: Again, it is very much drafting style rather than substance.

The Chairperson: Could clause 2(1)(b) and clause 2(2)(a) be redrafted to reduce the paragraph subdivisions?

Ms I Kennedy: Again, it is a matter of presentation and drafting. We very much followed the suggestions that were made by the previous Committee when that clause was discussed.

The Chairperson: Are members content for us to query that?

Mr Boylan: We are content. If it is a drafting issue, it needs to be dealt with outside of this Committee.

Lord Morrow: Not here.

Mr Boylan: Yes.

The Chairperson: OK. We will perhaps bring that to the Chairpersons' Liaison Group and query whether we should have a more modern style for drafting legislation.

Mr Hamilton: We could use text language, with words like "GR8".

The Chairperson: OK, Simon, stop.

There are other things that we omitted the last time. An issue raised by a large number of stakeholders was the difference between "furthering", "promoting" and "improving" in clause 2. Does the Department think that all those terms mean the same thing? If so, should we not use one term rather than three different terms that all mean the same thing.

Mrs D Kelly: That might create difficulties for the Department of Enterprise, Trade and Investment, where it is "promoting" rather than "creating" jobs. There may be a difference in law.

Ms I Kennedy: There may well not be a difference in law. The Bill reflects amendments that were tabled by the previous Committee, which included phrases such as "furthering sustainable development" and "promoting well-being". We have carried those forward. I suspect that there may not be a significant difference between the terms "furthering" and "promoting".

Mr Weir: If a phrase or word has been used in the past, particularly in connection with something, I think that we have to be a little bit careful. If we use a generic word to replace those words, somebody in the future may query whether we are trying to draw a distinction between them. If we choose "furthering" sustainable development rather than "promoting" sustainable development, somebody may think that we used "promoting" in one context and "furthering" in another, and that, for good or ill, we meant the words to have a different emphasis. We need to be careful that we are not making a change for the sake of change.

The Chairperson: I am just raising the stakeholders' comments that we omitted the previous time.

I would like the Department to comment on the amendment to clause 2 that was proposed by Community Places. It did not suggest removing the phrase "economic development" from the clause but said:

"the protection ... of the environment" and *"the promotion of social development"*

should be added to it. What is the Department's view of that proposed amendment? Do members have a view on it?

Mr Kerr: I think that there was some discussion on this last week, and the Committee gave some thought as to whether it wanted us to look at that.

Mr Boylan: We asked you to look at it and come back to us.

The Chairperson: Are you going to send that to us in writing?

Mr Kerr: I was not clear that there was a specific request for us to look into that.

The Chairperson: I do not think that we requested that. Perhaps you can round the clause more so that there is environmental protection and social development.

Mr Boylan: Chair, this point was raised the last day and dealt with. Is that correct?

The Chairperson: Yes.

Mr Boylan: To be fair, we had ample time in the previous meeting to go through all that. Are we revisiting what has already been answered?

The Chairperson: I think that the first two were mentioned, but that one —

Mr Elliott: Chair, to be helpful, it was discussed the last time. In the Department's response in our table, it just says, "See response to Issue 1", and "Issue 1" was just a general summary and explanation of the clause. In light of that, it might be useful if the Department gave us a specific written response on the proposed amendment from Community Places. I am not saying whether I agree or disagree with it, but it might be useful if we could get that.

The Chairperson: Do members agree that we should ask the Department to look at this and come back to us?

Mrs D Kelly: I note that the RSPB asked for clarity in how the Department proposes to:

> *"legally enforce such economic claims (e.g. job creation, or revenue generation for an area)."*

It went on to state:

> *"As far as the RSPB is aware there is no legal mechanism to secure such benefits through planning conditions as they lie outwith the scope of planning."*

That concerns clause 6. I am reading across, because the two clauses are connected. I just wonder what sense of interpretation and subjectivity there is going to be within the consideration of the individual. We all know about interpretation across the Planning Service already.

Mr Weir: I would be cautious. We covered a lot of this last week.

Mrs D Kelly: I apologise for that.

Mr Weir: It would be helpful if the Department could get back to us in writing on the issues that have been raised on the various clauses. That would provide clarity. There is a danger of this getting very confusing, because we are touching on exactly the same things as we did last week, albeit from a slightly different angle. It might muddy the waters.

Mr Boylan: To be fair, Chair —

The Chairperson: Are you going to come back to us in writing about clause 6 as well? We asked about that as well.

Mr Kerr: — *[Inaudible.]*

Mr Boylan: My understanding from last week is that there were issues to be responded to in writing. I think that the same question was asked in a different way last week about eight times. To be fair, we have exhausted a lot of clauses 2 and 6. We gave those clauses a lot of time. We covered only six clauses last week. We gave them a good scope.

The Chairperson: We did spend a lot of time on them.

Mr Boylan: If there are other issues on which we need to ask them to come back to us in writing, I propose that we do so. To be fair to the officials, we gave it a good go last week —

Mr Elliott: For clarification, more than anything, I want to say that Angus said that he was not sure how the Community Places suggestion was left. Are the officials going to respond in writing to some of the issues that were brought forward last week? If they are, that is fine, and let us leave it at that.

Mr Kerr: We are happy to do that. I have to admit that I did not take it from last week that we were to respond on the amendment from Community Places. I thought that we were told not to.

The Chairperson: It was a bit vague; I do not think we asked you to. Can we ask you now? Are members happy for Angus to look at Community Places' proposed amendment?

Mr Boylan: Was this point raised in the responses?

Mr Kerr: Yes.

Mr Boylan: So it was responded to —

Ms I Kennedy: It was responded to in the table in your papers.

Mr Kerr: The response was to refer to issue 1.

Mrs D Kelly: Even in the early part of last week, we all recognised that clauses 2 and 6 were going to be the most problematic.

Mr Boylan: I think that we gave them a fair hearing, though.

The Chairperson: Therefore, you are going to come back to us in writing about the Community Places suggestion.

There are some general comments to be made on the Bill. I would like Irene or Angus to comment on each one of these general comments from stakeholders. The first concerns the lack of proper consultation.

Mr Kerr: We have time pressures and the objective of trying to get the Bill through in the time that we have discussed to try to allow us to test the provisions before 2015. The lack of consultation is really in reference to the new clauses, because, obviously, our view is that there was full consultation on the rest of the Bill in the past, as we discussed. The Department is of the opinion that the opportunity provided by Committee Stage and the level of consultation that has gone on in association with that has been effective and allowed the legislation to be scrutinised by the public.

The Chairperson: Compared with the previous consultation, which was extensive, how do we stand legally if we put in two clauses with not the same level of public consultation having been undertaken?

Mr Kerr: It is our view that it is acceptable to go forward on that basis. There is not an issue.

The Chairperson: I think that a lot of people are talking about judicial review, as Dolores said. If there were one, would it delay the whole thing?

Mr Kerr: Obviously there could be a delay if there is a judicial review. However, it is speculation as to whether that would take place. I would reflect on the process that we went through with the previous Committee, where, as part of the democratic and Committee process set out in the Assembly, quite a lot of changes were made to the now Planning Act — changes that were not consulted on previously. That to me is just part of the democratic system that we have.

Mr Weir: Everyone appreciates the value of consultation, but, from a legal point of view, if it were a question that consultation was required, that would rule out anything that was not consulted on. Then there would be no point in having a Consideration Stage or Further Consideration Stage for any Bill, because there is nothing to stop any of the 108 Members from putting down an amendment on any Bill that they want. Obviously, it would be better if it were consulted on. However, whether or not it is consulted on, it is still legally and technically correct. Probably quite often, given the timescales, you will have some changes at the Consideration Stage of any Bill, which, by definition, there would not physically be the time to consult on. That is the nature of legislation.

Mr Boylan: Let me just follow on from that. I could see the point had it not been discussed at all. However, through PPS 24, there was ample opportunity to discuss the argument, and it has been going on for a long period. It is not as though it has just arrived on the table.

The Chairperson: That is the point, though. People can say that, for PPS 24, we went for an extensive consultation but not for this Bill.

Mr Boylan: Yes, but there are people on both sides of the argument, do you understand me? What you are trying to make out here is that, because of lack of consultation, people did not get a fair say. I think that they have had a right good opportunity, and there is more opportunity to come over the next period as well, when we go to the Chamber and debate it. I think that it is fair enough.

The Chairperson: People can argue that the provision for public consultation is not the same as in the previous process.

Mr Hamilton: Chair, let me be absolutely —

The Chairperson: I am acting as devil's advocate.

Mr Hamilton: Let me be blunt, then. You proposed an amendment the other day to a piece of legislation, and that amendment received no public consultation.

The Chairperson: OK.

Mr Hamilton: It is part of the process. It is how it works.

The Chairperson: The second of the general comments on the Bill is that its introduction will mean added costs. Obviously, there are extra costs involved in bringing it in.

Mr Kerr: As part of the process, the Department undertook a regulatory impact assessment, which looked at the additional costs. With the outcome of that, it is our view that any additional costs are offset by the benefits that we will achieve from the various amendments and the changes that the Bill introduces.

The Chairperson: That justifies bringing the Bill in and the extra costs. Are members content with that?

Members indicated assent.

The Chairperson: What is the extra cost, roughly? Can you quantify it?

Mr Kerr: There would be certain provision to be made, including staff training. There are some extra costs to industry as well, when you think of some of the provisions, such as a pre-application community consultation, for example. That will have some impact. Therefore, there is a range of costs, at a very general level, across government and externally.

The Chairperson: There will be staff time involved in doing all that. Well, I suppose that that is not an added cost.

OK. The third general comment concerns the need to widen the list of statutory consultees.

Mr Kerr: The final list of statutory consultees will be set out in the subordinate legislation. That work is ongoing, and we will come back to the Committee with it. We will certainly look at what we consider to be an appropriate list.

The Chairperson: Are members content with that?

Members indicated assent.

The Chairperson: Next is the need to work with new councils ahead of the transfer of planning. I think that we answered that question already. Are members content?

Members indicated assent.

The Chairperson: The next general comment is the need for a third-party right of appeal.

Mr Kerr: I think that we covered that the last time. The point is that the Minister has an open mind on this, but he wants to see how the reforms bed in, and then he will come back to it.

The Chairperson: OK. Are members content?

Members indicated assent.

The Chairperson: Have you any further comments about the Bill? Are you just hoping that it will be over and done with quickly?

Mr Kerr: Yes. As soon as possible.

The Chairperson: OK. Now that we have gone through all the clauses informally —

Mr Boylan: I have one other comment to make. I want to raise an important point about all this. Obviously, there will be a period of transition, but there is also an issue at present whereby, once we transfer this function to local authorities, they will want to initiate development plans themselves. Each one will want an economic development plan for its own area.

We know, over the past number of years, the time that it has taken to develop area plans. Perhaps the Department will comment on whether there are development opportunities there for councils until we bed down the development plan or area plan for local areas. The reason why I ask the question is that some councils will think that now that they have the powers, they will want to get up and going, and they may believe that they have the power to do this, that or the other.

Mr Kerr: There are a couple of things to say on that. We are hoping that the development plans will come in as quickly as possible. That is why we are doing the pilot preparatory plan work across the 11 clusters, which we referred to before. In the gap before those plans come in, there is nothing holding back developers from coming forward with proposals, and councils from assessing those proposals on the basis of the existing policy framework. Actually, the councils will also have the new powers of regeneration, on which they can act immediately. They can immediately go into the areas within their council area that they have concerns about and that they feel need regeneration and start to bring forward schemes, and so forth. There is nothing to hold them back from doing that. It is probably better to do all of that work alongside the forward planning and the wider development planning function, but there is certainly nothing to stop them.

The Chairperson: OK, members, we have now completed the initial clause-by-clause analysis. Do you feel that you want any more information from the Department? Do you want any further work from the Assembly Bill Office, Research and Information Service or Legal Services?

Mr Hamilton: Not at this stage.

The Chairperson: OK, then that is all. Thank you very much, and we hope to see you back in three weeks — on 23 May. Thank you.