Planning Bill

Comments by

Northern Ireland Environment Link

15 March 2013

Northern Ireland Environment Link (NIEL) is the networking and forum body for non-statutory organisations concerned with the environment of Northern Ireland. Its 62 Full Members represent over 90,000 individuals, 262 subsidiary groups, have an annual turnover of £70 million and manage over 314,000 acres of land. Members are involved in environmental issues of all types and at all levels from the local community to the global environment. NIEL brings together a wide range of knowledge, experience and expertise which can be used to help develop policy, practice and implementation across a wide range of environmental fields.

These comments are made on behalf of Members, but some members may be providing independent comments as well. If you would like to discuss these comments further we would be delighted to do so.

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NIEL welcomes the opportunity to comment on the Planning Bill, many aspects of which are most welcome in attempting to streamline the NI planning system. However, some serious issues arise which we suggest may, perversely and counter to the intention of the Bill, result in slowing down the planning system and potentially impacting negatively on the environment. We stress that it is a *good* planning system that is needed in Northern Ireland, and that does not always mean *fast*. The goal of streamlining the planning system is laudable – however, some assessments of planning applications (impacting on, for example, migratory birds) require longer term monitoring and research. This should be recognised and, accordingly, there should be a mechanism in place to allow for longer consideration times when necessary.

Specific clauses are dealt with below.

Clause 2 (General function of the Department and the planning appeals commission)
The concept of 'promoting well-being' needs further clarification – what are the criteria for 'well-being' and who decides how or whether these are met?

A clear definition of 'sustainable development' should negate the need to include a further objective of 'promoting economic development' (see following paragraph).

NIEL believes that including the objective of 'promoting economic development' within this clause is unnecessary and unhelpful. We are concerned that the Bill provides a statutory duty to consider the promotion of economic development in the planning process (where it never was before). The economy is already an integral part of 'sustainable development', and so repeating it explicitly essentially increases its weight in any assessment of considerations (and suggests a misunderstanding of the term 'sustainable development'). While the Minister has stated that this does not give economic considerations determinative weight (Hansard, Planning Bill: Second Stage), there is a clear risk that the clause could be interpreted differently by different planners, or subsequent Ministers.

There are major questions introduced by this clause: How is the 'promotion of economic development' defined (for whom, and on what timescale)? Who determines what it is? Who assesses it? In light of these questions, the clause seems to increase scope for (and even invite) litigation, leaving the system open to legal challenges by any who are refused development permission or those who object to specific applications. The NI planning system is not equipped to define economic need, therefore in order to reach conclusions on economic benefits as a material consideration (which this clause will require), the authorities are likely to rely on assessment of developer-submitted materials. These submissions are likely to be biased in favour of the development they are proposing / promoting.

There is a danger in explicitly stating the promotion of economic development as an objective of the planning system because it frames the economy as competing against the environment – rather than recognising that the two must be fully integrated (the environment is the envelope within which the economy exists). A true economic valuation of natural capital / ecosystem services within NI would support economic development as well as promoting an educated and responsible attitude toward the environment. An understanding of this, along with 'sustainable development' should be reflected in the Bill. Having a separation of one aspect rather than recognition of their inter-relationships within the concept of sustainable development, undermines this and invites confusion and difficulties in practical determinations.

If economic factors are to be given particular emphasis, and thus potentially more weight, the precautionary principle (PPS1, paragraph 13) is likely to be ignored. It is important to appreciate that the over-riding public interest argument (stated in PPS1) can only really be used convincingly with regard to state-backed infrastructure or defence developments and cannot normally apply to commercial activities which are primarily in the interest of the person or company promoting them. Failure to comply with the precautionary principle as set out in PPS 1 could lead to legal challenges.

Clarification is required on the difference between 'furthering' and 'promoting'; is there a 'hierarchy', or what is the difference in emphasis?

'Good design' needs further clarification – what are the criteria and who decides? Does 'good' refer to aesthetics, function or both? While we are aware of multiple design guides in NI, there needs to be clarity on which carries the most weight. In all of these issues, ill-defined concepts will increase the time needed to process applications, running counter to the aim to speed the process, and encouraging litigation.

NIEL suggests the following wording for clause 2(a):

"(1) Where the Department or the Planning Appeals Commission exercises any function under Part 2 of this Part, the Department or, as the case may be, the Commission, must exercise that function with the objective of furthering sustainable development, which secures:

- Protection and enhancement of the environment;
- Economic prosperity; and
- A strong, healthy, just and equal society."

Clause 4 (Publicity, etc., in relation to applications)
NIEL suggests that notice of applications should be placed on site, as well as publication and neighbour notification.

Clause 5 (Pre-application community consultation)
Enhanced community involvement in the planning process is welcomed by NIEL in reducing objections to applications and facilitating the development of local spaces valued at local community level. We would however wish to see some safeguards to ensure that any group representing a community is genuinely representative of that community, with a mechanism whereby interests are declared.
We stress, however, that community consultation should not be considered to be *in lieu* of third party right of appeal, which should be in place as a safeguard if community consultation breaks down.

Clause 6 (Determination of planning applications)
A key principle of planning is that it considers issues related to the use and development of land. In introducing the assessment of economic advantages and disadvantages, the planning system could be used for a purpose for which it was not legally designed. Clause 6 seeks to expand the issues that planners need to take into account and, as a consequence, the NI planning system will no longer be able to rely on the stability of 40 years of case law that have determined the boundaries of planning considerations – this will have to be redefined, through a series of legal challenges, to establish case law. This will inevitably

introduce a great deal of instability and delay into the planning system in NI, potentially making it unworkable.

The inclusion of considerations relating to economic advantages and disadvantages creates significant scope for litigation and escalating challenges between competing developers. It gives objectors considerable weight, where any person who thinks they may be personally economically disadvantaged as a result of a planning decision (for example, one developer losing out to another) may make a valid objection to an application. As a result, this clause could seriously slow down the planning system. We stress that the planning system is intended to operate in the public interest rather than the interest of the private sector or the interests of any individual developer (PPS1 General Principles).

Furthermore, in relation to assessing economic advantages and disadvantages, it is clear that a development application may be submitted with a strong business case for job creation and high estimation of turnover and hence proposed economic benefit. However, there is no clear mechanism by which planning authorities may assess the quantitative negative implications which a development may have on, for example, our tourism market, other public goods, other proposed developments or local communities.

For the reasons stated above, and in the interests of streamlining the planning system, NIEL believes that this clause should be removed from the Bill.

Clauses 7 and 8 (Power to decline to determine subsequent application / overlapping applications)
NIEL welcomes these clauses as contributing to streamlining the planning system.

Clause 9 (Aftercare conditions for ecological purposes on grant of mineral planning permission)
NIEL welcomes this clause, in seeking to promote biodiversity in NI.

Clause 10 (Public inquiries: major planning applications)
NIEL believes that the independence, and the perception of independence, of those undertaking public inquiries is crucial to maintaining the credibility of the planning system. Any direct appointments by the DoE may cast doubt on this, given that this is the role for which the PAC was established. The PAC could itself appoint temporary commissioners if in-house capacity was not available for a particular inquiry. Whatever procedure is established must ensure that there is no actual or perceived conflict of interest between the appointed commissioner and the parties involved.

Clause 11 (Appeals: time limits)
NIEL welcomes this clause as contributing to streamlining the planning system.

Clause 12 (Matters which may be raised in an appeal)
NIEL welcomes the restriction of new materials raised during appeals as contributing to streamlining the planning system.

Clause 13 (Power to make non-material changes to planning permission)
Guidance is needed as to what constitutes material/non-material change, and who determines that distinction. Ostensibly contributes to the streamlining of the planning system, but may have deleterious effects on environment (depending on definitions).

Clause 16 (Increase in penalties)
NIEL welcomes an increase in penalties as reflecting the seriousness of breaching planning conditions.

Clause 17 (Conservation areas)
NIEL welcomes this clause which actively gives special regard to the preservation and enhancement of conservation areas.

Clause 19 (Tree preservation orders: dying trees)
NIEL welcomes this clause promoting the preservation of biodiversity.

Clause 20 (Fixed penalties)
NIEL suggests that clarification is needed within this clause as to how many times fixed penalties may be given for a specific offense if the breach is not rectified. One possible interpretation of the clause 20 (2) (b) is that, once a fine has been paid, the offender is immune from further prosecution. The Bill should make it clear that the fixed penalty is the first step in enforcement and that offenders are subject to further prosecution if the breach of planning is not remedied after the fixed penalty is paid.

Clause 22 (Grants)
NIEL welcomes proposals allowing DoE to grant-aid non-profit organisations for the purposes of furthering an understanding of planning policy.

Clause 23: (Duty to respond to consultation)
NIEL supports the faster processing of planning applications as a general principle, but we believe that there needs to be a recognition of the size, complexity and volume of detailed Environmental Impact Assessments that accompany many larger planning applications, and which require careful and detailed scrutiny by consultees. We believe that it is unreasonable to demand a very quick response to more complex applications. NIEA, for example, has a duty to protect the environment which could be severely compromised by a duty to respond very rapidly to a planning application with potentially large environmental consequences. At best this could lead to damage to valuable habitats, while at worst it could result in infraction proceedings from the European Commission. We therefore recommend that response times are set to reflect the scale of the proposed development.

Clause 24 (Fees and charges)
NIEL welcomes multiple fees for retrospective planning applications, as a deterrent for breaches in the planning system.

Concluding comments

NIEL would like to register its discontent that the Planning Bill did not follow the normal process of public consultation that would be expected to accompany changes with such far-reaching implications. We appreciate that there are time constraints with the transfer of planning powers to local councils looming - however, fast law does not necessarily mean good law.

We again highlight that the objective of 'promoting economic development' in clause 2 gives a statutory duty to economic considerations – this has never been the case before, and is much stronger than, for example, guidance as part of a PPS. We feel that this is wholly unnecessary, given a full and proper understanding of the term 'sustainable development'.

A framework for planning in the marine environment is being introduced in the Marine Bill which is currently making its way through the Assembly. Terrestrial and marine planning administration should be as seamless and consistent as possible. However, clauses 2 and 6 in the Planning Bill are at odds with the sections of the proposed Marine Bill. NIEL is concerned that this will lead to confusion and difficulty when considering coastal developments that involve approval from both planning systems.

NIEL would like to take this opportunity to stress the importance of ensuring that the transfer of planning powers to new councils and community planning are properly resourced. Capacity building must be a crucial part of this process, and NIEL wishes to play a significant role in this.

We would also like to raise the importance of third party right of appeal as part of a healthy and robust planning system. The Minister has voiced his desire to bring forward third party right of appeal (Hansard, Planning Bill: Second Stage), and we would fully support this. This is particularly important in a situation in flux, as will be the system over the next few years due to transfer of powers to local authorities.

Finally, in light of the need for streamlining in the NI planning system, we support many of elements of the Planning Bill. However, we strongly believe that clauses 2 and 6 undermine this overarching goal and will lead to over-complication and serious scope for legal challenge, resulting in a slowing rather than speeding of the planning process.

NIEL looks forward to discussing these matters further with the Committee.