PLANNING BILL (NI) 2013

NILGA Evidence to the NI Assembly Environment Committee

The following paper has been developed collaboratively between the NILGA Planning Working Group, officers from a number of councils, and the Transfer of Functions Working Group (Planning Sub-Group). The paper sets out strategic and specific considerations before progressing to a clause-by-clause review of the draft Bill. Further policy in relation to the proposed Bill and related secondary legislation will also be developed using a collaborative approach.

Councils were invited to use this paper in drafting evidences to the Environment Committee. Should you wish to discuss any of the content, please contact Karen Smyth k.smyth@nilga.org

Derek McCallan
Chief Executive, 13th March 2013.

1.0 Background

The primary objective of the Bill is to accelerate the implementation of reforms contained within the 2011 Planning Act. The Planning Bill aims to change numerous elements of the Planning Order (NI) 1991 and the Planning Act (NI) 2011 in advance of the transfer of functions. The Bill not only updates existing legislation, it also introduces some new key principles.

DoE intends to transfer planning functions to councils in 2015 in line with the Executive's commitment to reform local government. The Planning Act (Northern Ireland) 2011 provides for the transfer of the majority of planning powers to councils and for the modernisation of the planning system.

The Planning Bill was introduced to the Assembly on 14 January 2013, and will bring forward reforms in the 2011 Act (Royal assent received on 4th May 2011). It also brings forward provisions to underpin the role of planning in promoting economic development through amendments to both the Planning (Northern Ireland) Order 1991 and the 2011 Act.

The Bill represents an interim measure that will allow elements of the planning reforms to be introduced sooner than at the time of transfer, most of which will remain in place only until it is possible to fully develop the 2011 Act. In keeping with the 2011 Act, the Bill aims to modernise and strengthen the planning system by providing faster decisions on planning applications, enhanced community involvement, faster and fairer appeals, tougher and simpler enforcement as well as a strengthened departmental sustainable development duty.

If the Bill is progressed and introduced in advance of the transfer of planning functions it will also mean that DoE will transfer a system with which councils, planners, developers and the public are familiar BEFORE 2015.

The local government sector welcomed the publication of the Planning Bill (NI) in 2010, and supports the attempts to introduce the new structures necessary for a more effective planning system. However, there remains concern that much still relies on the production of secondary legislation and guidance.

2.0 Strategic Considerations

1. **NILGA is deeply concerned by the increasing time pressures on councils to deliver reform and transfer.**

2. The Planning Bill (Clause 2 (1) a, b, c) proposes that the Department or the PAC must exercise their planning function with the objective of:

- Furthering sustainable development;
- Promoting or improving well-being; and;
- Promoting economic development.

The latter two objectives are new additions to the Planning Act 2011 and the 1991 Order. The promotion of economic development is a fundamental change to the purpose of the planning system that is not reflected in comparable legislation in other UK jurisdictions. ***Promoting economic development can be found in the policy approach in other jurisdictions, but it is not embedded in legislation.***

The current overarching Planning Policy Statement for Northern Ireland (PPS1) outlines the current purpose of the planning system:

"The town and country planning system exists to regulate the development and use of land in the public interest. The public interest requires that all development is carried out in a way that would not cause demonstrable harm to interests of acknowledged importance. It is important to distinguish those matters which planning can influence from those which are outside its control. The central concerns of the planning system are to determine what kind of development is appropriate, how much is desirable, where it should best be located and what it looks like".

PPS 1 outlines 'issues of acknowledged importance' but does not currently single out promotion of economic development as a key objective. When a principle such as this is established in the primary legislation it should avoid introducing an inconsistency with other legal provisions required in respect of environmental obligations. A policy approach through the modification of PPS1 may be a more appropriate mechanism through which to introduce the desire to promote economic development - rather than primary legislation.

The promotion of economic development is in itself a positive provision, but it must be considered in the context of existing environmental and sustainable development obligations. There could be a legitimate risk that the specific introduction of the provision – without adequate balance - into legislation *may* promote the degree of importance attached to such consideration and give it determinative weight in the planning process. This could undermine

the provisions within development plans and other matters of acknowledged importance i.e. social and environmental considerations.

3.0 Specific Considerations

A number of initial areas are highlighted:

- Clause 6 specifically mentions economic advantages and disadvantages as material considerations. The same concerns as outlined in the strategic considerations would apply – if these considerations are not going to have greater weight in the decision making process, it is questionable as to the value / appropriateness of their very specific inclusion. **NILGA would query whether the Planning Bill is the appropriate vehicle to strengthen economic development considerations whilst recognising and supporting the need to sustainably develop local economies.**

- Clause 15 relates to payments, under Article 40 Agreements, to be made to any Government Department - not just the DoE. This should be extended to local councils. On a related issue, it should be noted that the Department receives £10,000 for every Environmental Statement (ES) requiring consideration as part of the application process. Whilst the Department receives the ES, it is usually forwarded to consultees - including the Council - for assessment, without any consideration of the re-distribution of fees to reflect the additional work required, and the likely resource impact that this may have. It may be appropriate to consider this matter as part of the payments to departments in the context of the widened scope to include local councils.

- In all likelihood, local councils would also want to be closely involved in the formulation of the Development Order as outlined in Clause 23, and which will set-out consultation response procedures. This will be a critical element of the potential to improve performance. The ability to enforce compliance with consultation requests, or progress determinations in the absence of responses from other Government Departments, will be critical. It may be appropriate that, where no adequate responses are received by the agreed dates, there is provision for this to be considered as a non-objection (at the risk of the consultee).

- Other changes proposed by the Bill relate to achieving consistency with other legislative / EU requirements e.g. Clause 3 on the meaning of development brings consistency with EIA regulations. As outlined above, this should not be undermined by the integration of economic considerations into the primary legislation.

4.0 Commentary on the Clauses in the 2013 Bill & suggested responses

As stated, the primary objective of the Bill is to accelerate the implementation of reforms contained within the 2011 Act. The following section offers a review of each of the proposed clauses with some suggested amendments included.

Clause 1: Statement of Community Involvement (SCI)

This clause introduces the requirement for the Department to produce a statement of its policy for involving the community in its development plan and planning management functions within one year of the clause coming into operation.

Comment: Further regulations will set out how DoE should go about preparing a Statement of Community Involvement and what it should contain. NILGA would question the evidence for the viability of the proposed one year delivery timeframe, especially in lieu of the 'in situ' planning deficit within the local government sector. At a practical level, the Department's SCI may not be published until late 2014 if the Bill is commenced in December 2013, leaving Councils only six months prior to the proposed transfer of planning functions. This is not sufficient, and consideration of this is urgently required – a Clause 1 (b) could be introduced to accommodate a working arrangement between the Department and the 11 council clusters in respect of SCIs in advance of the transfer as a solution.

Furthermore, these regulations are likely to stipulate that community groups and the public should be involved in the preparation of this statement. Again, the details as to how this will happen are scant. As this is a process that councils will have to carry on after the transfer of functions (ToF), it is incumbent upon DoE to ensure that the process is efficient, fit for purpose and fully resourced.

Arguably it is the Council that is better informed regarding the local community whereas the DoE is removed from this local context. Further clarity on this issue is required, particularly with regard to future governance arrangements, the adoption of updated development plans/policies and the attendant resource issues that will play a major part in determining the effectiveness of the local government sector in delivering the new planning system.

Clause 2: General functions of the Department and Planning Appeals Commission

The Bill introduces a new requirement for DoE, the Planning Appeals Commission, and local councils (when they take on planning responsibilities), to carry out their functions with the objective of:

- Furthering sustainable development;
- Promoting or improving well-being; and,
- Promoting economic development.

They must also "have regard to the desirability of promoting good design."

Other provisions in the Planning Bill require the economic advantages or disadvantages of granting or refusing planning permission to be considered.

Comment: Although this looks reasonably innocuous, it represents a fundamental shift in what the planning system has previously represented. It currently balances many material considerations such as environmental, heritage or social issues but this new clause implies that economic considerations may be given greater importance. The provision of the Bill which requires economic advantages and

disadvantages to be considered is likely to be difficult in practice. For example, it is unlikely that any developer will put forward a case illustrating the economic disadvantages of a proposed development. The Bill should be re-worded to make it clear how economic benefits will be measured, or to provide a list of criteria with local government to ensure regional consistency.

NILGA would suggest to the Committee that the inclusion of this suggested clause may open the process up to scrutiny and challenge which may in turn lead to further delays. This is a very real possibility and as such, may be better confirmed in a PPS rather than primary legislation.

Of some concern is the fact that, following the consultation process in support of draft Planning Policy Statement 24 'Economic Considerations' in January 2011, the Minister determined not to adopt the policy. This clause suggests a change in that stance, and this needs to be clarified.

Clause 3: Meaning of development

This clause amends Article 11 of the Planning (Northern Ireland) Order 1991 by expanding the operations or uses of land to now include the structural alterations of buildings specified in a direction where the alteration consists of demolishing part of the building.

Comment: This is to be welcomed as it means that developers, in certain circumstances, can no longer demolish without planning permission. This is in line with previous local government responses to the April 2012 consultation process which considered demolition and development.

Clause 4: Publicity etc. in relation to applications

This clause substitutes Article 21 of the Planning (Northern Ireland) Order 1991 and makes provision for a development order to set out the detailed publicity requirements for applications for planning permission. The Department must not consider an application if the publicity requirements are not satisfied.

Article 25 as amended also makes provision that a development order may prescribe that the Department must not determine an application before the end of a certain period and must take any representations into account in that determination.

Similar amendments are made at Schedule 1 for applications for listed buildings consent.

Comment: NILGA has no objection to this Clause.

Clause 5: Pre-application community consultation

Clause 5 inserts three articles into the Planning (Northern Ireland) Order 1991 to introduce pre-application community consultation.

Comment: Pre application consultation will only be carried out for certain types of planning applications. Therefore it is important that the thresholds that are set to

determine which applications will require pre-application consultation, and which ones will not, are appropriate. For example, pre-application consultation may not be required for large scale developments that are split into smaller phases (which in turn, may present a loophole that developers may exploit).

Article 22A places an obligation on developers to consult the community in advance of submitting an application. The prospective applicant must give 12 weeks' notice that an application is to be submitted and provide details of the application including a description of the development and address of the site. Regulations will prescribe the minimum consultation requirements placed on the applicant. Additional requirements may be placed on a particular development if the Department considers it appropriate.

Comment: There is no indication of what the community consultation requirements might entail. As this is an area which many developers have no experience of, clear guidance from DoE is essential. Whilst the pre-application consultation is welcomed it is felt that, for it to be effective, it would have to be carried out within the context of an up to date development plan. This is currently absent in many areas of NI. Clarification is needed as to which types of development will be covered by this clause, and in relation to thresholds, guidance will be needed for developers. This should be drafted in partnership with local government.

Clause 5 also inserts Article 22B which requires the applicant to produce a report indicating what has been done to comply with the pre-application community consultation requirements, and is required to accompany the application. The form of the pre-application consultation report may be set out in Regulations.

In addition Clause 5 inserts Article 25AB. If the pre-application community consultation requirements have not been complied with, the Department must decline to determine the application. The Department can request additional information in order to decide whether to decline the application.

Clause 5 also places a requirement upon the Department to include notices of pre-application community consultations and consultation reports in the planning register prepared in accordance with Article 124 of the Planning (Northern Ireland) Order 1991.

Clause 6: Determination of planning applications

Clause 6 amends Article 25 of the Planning (Northern Ireland) Order 1991 and Section 45 of the Planning Act (Northern Ireland) 2011 by including provision that material considerations in the determination of planning applications includes a reference to considerations relating to any economic advantages or disadvantages likely to result in granting or refusing planning permission.

Comment: See Clause 2 above. The key issue is how much weight, relative to other factors, is to be given to economic considerations.

Clauses 7 and 8: Power to decline to determine applications

These clauses extend DoE's power to decline subsequent and overlapping applications for planning permission or listed building consent. It includes the power to decline applications

where the Department has refused more than one similar application and there has been an appeal to the Planning Appeals Commission which has been withdrawn. It also includes the power to decline to determine similar applications made on the same day, as well as the power to decline to determine a planning application where the Commission has refused a similar "deemed application" arising from an appeal against an Enforcement Notice within the last two years.

Comment: This is to be welcomed as it will prevent developers from submitting repeat applications on the same site. The Bill may be better served by strengthening the proposed terminology e.g. with 'shall' instead of 'may' where appropriate.

Clause 9: Aftercare conditions for ecological purposes on grant of mineral planning permission

Comment: No objections.

Clause 10: Public inquiries: major planning applications

This clause amends Article 31 of the Planning (Northern Ireland) Order 1991 to allow the Department to appoint a person other than the Planning Appeals Commission to hold a public local inquiry [or hearing] to consider representations made in respect of any application to which Article 31 (major planning application) has been applied.

Comment: The legislation states that persons other than the PAC can be appointed by DoE to carry out public inquiries and conduct appeals. However, the Planning Appeals Commission currently falls under the remit of OFMDFM. The power to appoint "persons other than the PAC" should lie with OFMDFM rather than DoE to maintain the independence of these persons from the DoE.

Clause 11: Appeals: time limits

Clause 11 reduces the period for making an appeal to the Planning Appeals Commission from six to four months or such other period as may be specified by development order.

Comment: This Clause is welcomed as it will seek to ensure that planning decisions are not delayed unnecessarily by lengthy timescales associated with appeal procedures, although the English experience has not been altogether positive in this instance.

Clause 12: Matters which may be raised in an appeal

Clause 12 inserts "Article 32A" in the Planning (Northern Ireland) Order 1991 so that any party to the proceedings of an appeal under Article 32 will not be able to raise any matter that was not in front of the Department when it made its original decision. The only exceptions will be if the party can demonstrate, to the satisfaction of the Planning Appeals Commission, that

the matter could not have been raised before that time or that its not being raised was due to exceptional circumstances.

Comment: This is to be welcomed as developers often bring revised or very different schemes to an appeal which may even have been approved in the first instance. This practice can waste time at an unnecessary appeal and may disadvantage the objectors as they have not had an opportunity to properly review the newly presented material.

Clause 13: Power to make non-material changes to planning permission

This clause inserts provision at Article 37A of the Planning (Northern Ireland) Order 1991 to allow the Department to make a change to a planning permission already granted on application. The change must not have any material effect on the permission, and it includes the power to amend or remove conditions or impose new ones. Consultation and publicity arrangements may be set out in Regulations.

***Comment: NILGA has no objection to this Clause*.**

Clause 14: Aftercare conditions imposed on revocation or modification of mineral planning permission.

This clause inserts a provision at Article 38A of the Planning (Northern Ireland) Order 1991 which permits the Department to impose aftercare conditions where a mineral planning permission has been modified or revoked by an order served under Article 38, provided a restoration condition is included or in place on the land/site.

***Comment: NILGA has no objection to this Clause*.**

Clause 15: Planning agreements: payments to departments

This clause amends Article 40 of the Planning (Northern Ireland) Order 1991 to enable any sum payable under a planning agreement to be made to any Northern Ireland department and not solely the Department of the Environment.

Comment: This is to be welcomed and may result in monies becoming available for other uses. It is suggested that these payments should also be available to councils in appropriate circumstances, perhaps in the form of the Community Infrastructure Levy (CIL) as implemented in England and Wales.

Clause 16: Increase in Certain Penalties

This Clause increases the level of fine that can be handed out by the courts for damage to listed buildings or failing to prevent further damage to a listed building; hazardous substances offences; failure to comply with stop notices and other enforcement offences.

It increases the maximum level of fine, on summary conviction, for a range of offences relating to breaches of planning control or consents from £30,000 to £100,000.

Comment: NILGA has no objection to this Clause, but would welcome a partnership approach on fee dtermination, utilising its Planning Working Group and other bespoke structures within the sector.

Clause 17: Conservation areas

Clause 17 amends Article 50 of the Planning (Northern Ireland) Order 1991 to include provision that the Department must pay special attention to (a) preserving the character or appearance of that area in cases where an opportunity for enhancing its character or appearance does not arise; or (b) enhancing the character or appearance of that area in cases where an opportunity to do so does arise.

Comment: NILGA has no objection to this Clause, although thought should be given to including applications in such areas within the parameters of the streamlined consultation process. This would, for example, enable applicants to respond more quickly to the regulations of, and ensure compliance with, Dangerous Structures Notices.

Clause 18: Control of demolition in conservation areas

Clause 18 amends Article 51 of the Planning (Northern Ireland) Order 1991 by adding additional provision that any structural alteration to a building in a conservation area, where the alteration consists of demolishing part of the building, shall be taken to be demolition for the purposes of Article 51.

Comment: NILGA has no objection to this Clause. Effective monitoring and enforcement will be necessary to support this.

Clause 19: Tree preservation orders: dying trees

Clause 19 amends Articles 65 and 65B of the Planning (Northern Ireland) Order 1991 and Section 125 of the Planning Act (Northern Ireland) 2011 by removing the reference to dying trees. Dying trees are no longer exempt from the provisions of a tree preservation order.

Comment: The implications of the recent ash dieback situation may force a re-think of this Clause. NILGA is concerned that very specific issues such as dead trees may pose a public safety issue.

Clause 20: Fixed Penalties

This clause inserts two articles into the Planning (Northern Ireland) Order 1991. Articles 76C and 76D enable an authorised officer to issue a fixed penalty notice for the offences of failing to comply with an Enforcement Notice or Breach of Condition Notice, offering the offender an opportunity to discharge any liability for the offence without having to go to court. The amount of the penalty can be such amount as may be prescribed. The level of fixed penalty will be prescribed by Regulations and is reduced by 25% if paid within 14 days.

Comment: NILGA has no objection in principle to this Clause, but would welcome an early conversation on fees, including fixed penalties, throught its Planning Working Group and related bodies.

Clause 21: Power of planning appeals commission to award costs

Clause 21 inserts Article 111A into the Planning (Northern Ireland) Order 1991. This power enables the Planning Appeals Commission to make an order requiring the costs of a party to an appeal to be paid. When the Commission makes an order, parties will normally come to an agreement amongst themselves, but in the event agreement cannot be reached between the parties, disputes can be referred to the Taxing Master of the High Court.
Article 111B applies the provisions relating to award of costs, to circumstances where a hearing has been cancelled.

Comment: NILGA has no objection to this Clause.

Clause 22: Grants

Clause 22 amends Article 120 of the Planning (Northern Ireland) Order 1991 to extend the Department's power to grant aid non-profit organisations whose objectives include furthering an understanding of planning policy. The Department of Finance and Personnel's approval to such grants is no longer required.

Comment: NILGA is supportive but seeks clarity as to responsibility for grants, post-transfer.

Clause 23: Duty to respond to consultation

Clause 23 inserts Article 126A which requires those persons or bodies which the Department is required to consult before determining certain applications for planning permission or consent, to respond to consultation requests within a prescribed period or such other period as is agreed in writing between the consultee and DoE. The section also gives DoE power to require reports on the performance of consultees in meeting their response deadlines.

Comment: The processing of planning applications is sometimes delayed due to the late response of statutory consultees. This clause therefore removes the uncertainty and delay associated with late responses. However, there is also a question over who will have the authority to enforce this in different Government Departments, and the resource implications they face in terms of their consultee responsibilities are not clear. NILGA notes the potential for deeming no received response by the agreed date as offering tacit non-objection, but would highlight the potential issues this may cause for public safety e.g. in relation to poorly designed roads access.

Clause 24: Fees and Charges

Clause 24 amends Article 127 of the 1991 Order to enable the DOE to charge multiple fees for retrospective planning applications.

Comment: NILGA welcomes this proposal.

Clause 25: Duration

This clause allows the Department to make subordinate legislation to repeal provisions in the Bill and to include transitional or transitory provisions and savings in connection with the coming into operation of any provisions. A draft of such an order must be laid before and be approved by resolution of the Assembly.

***Comment: NILGA has no objection to this Clause*.**

Clause 26: Interpretation

This clause contains interpretation provisions and defines a number of terms used throughout the Bill.

***Comment: NILGA has no objection to this Clause*.**

Clause 27: Commencement

This clause concerns the commencement of the Bill and enables the DOE to make commencement orders. Clauses 1,15, 16, 22, 26, 27 and 28 shall come into operation on Royal Assent.

***Comment: NILGA has no objection to this Clause*.**

Clause 28: Short title

This clause provides a short title for the Bill.

***Comment: NILGA has no objection to this Clause*.**

5.0 Other Considerations

Financial implications of the Bill:

NILGA would assert that crucially, in the Memorandum, the Department states that *'any potential increase in costs should be offset by the benefits of more efficient processes.'* These observations relate only to the costs of the Department and do not take into account the costs of others involved in the planning process and most specifically the consultees. No account has been taken of the additional resources that may be required to ensure that consultees respond within the new shorter time frame.

It is also noted that in the appeals process, the appellant may recover costs if a council had made a decision and loses the appeal. As the councils will be carrying out an entirely new function with no precedent locally, and possibly without robust area plans, policies or procedures in place, the councils could, conceivably, lose a significant number of appeals.

This in turn would have significant cost implications for councils and this would require robust, sector agreed, assessment.

Extent of the Consultation:

It is noted that this consultation exercise was not a public consultation. Whilst it is recognised that this may have extended the time frame in respect of introducing and completing the process, it was felt the nature of the changes proposed ought to have been subject to a public consultation.

Explanatory and financial memorandum:

The Planning Bill has been supported by an explanatory and financial memorandum. NILGA would highlight that this memorandum was very useful in assisting in the understanding of the intent of the legislation.