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Planning Appeals Commission

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Mr Sean McCann (**by e-mail**)
Assistant Clerk
Committee for the Environment
Northern Ireland Assembly
Room 247, Parliament Buildings
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Date: 14 March 2013

Dear Sir

THE PLANNING BILL

1. Thank you for your letter of 25th January 2013. I welcome the opportunity to set out the Planning Appeals Commission's views on the Planning Bill.

2. The Planning Appeals Commission is an independent statutory tribunal which adjudicates on a wide range of land-use planning, environmental and related issues. It determines appeals against planning decisions made by the Department of the Environment. It also conducts independent examinations, public inquiries and hearings into matters referred to it by the Department, including major planning applications and objections to development plans.

3. I understand that a principal purpose of the Planning Bill is to accelerate the implementation of reforms contained in the Planning Act (Northern Ireland) 2011, which are not expected to come into force until planning powers are transferred to local government in 2015. I note, however, that the Bill also contains some new provisions that are not in the Act. I wish to comment on key clauses of the Bill that relate directly to the Commission's tribunal work and to suggest some additional provisions which might usefully be included.

Clause 4

4. Article 21 of the Planning (Northern Ireland) Order 1991 requires the Department to advertise planning applications in the local press. Articles 32(6) and 69(7) apply the requirements of Article 21 to planning appeals and appeals against enforcement notices. Similar publicity requirements apply to appeals concerning

listed building consent and hazardous substances consent. Clause 4 of the Bill proposes to amend Article 21 so that the detailed publicity requirements for applications for planning permission and related consents would instead be set out in subordinate legislation.

5. The Commission queries whether it is necessary to re-advertise planning and similar proposals at appeal stage. When an appeal is lodged, the Department passes copies of any representations made at application stage to the Commission and the Commission writes to the people concerned offering them an opportunity to present written and/or oral evidence. The requirement to advertise could be construed as the Commission actively seeking new representations from parties who were not originally involved in the process. It appears to run counter to the proposal in Clause 12 to prohibit the introduction of new material at appeal stage that was not before the Department when it made its decision. The Commission recommends that consideration is given to adding a new paragraph to Clause 4 to delete the requirement to advertise appeals from the 1991 Order and the 2011 Act to ensure consistency with Clause 12.

Clause 10

6. Clause 10 would give the Department the option to appoint persons other than the Commission to conduct public inquiries and hearings in relation to major planning applications. While the Department is on record as saying that the Commission will and should remain the first port of call, there is nothing in the Bill that gives statutory force to this undertaking.

7. For nearly 40 years, this type of work has been done exclusively by the Commission and over that time a high level of public confidence in its independence has accrued. The need for independence is especially important where the hearing to be conducted arises from a notice of opinion issued by the Department in which the Department had already declared its views. The Commission does not believe that Departmental appointees would be generally perceived or accepted as being independent of the Department. For example, there could be a perception that the Department had appointed persons likely to sympathise with its views. Appointees might be influenced subconsciously by the thought that if they were to provide a report critical of the Department, they might not be appointed again.

8. It is not obvious that there is a readily available pool of people in Northern Ireland outside the Commission who have the combination of planning expertise and tribunal experience required to perform this specialist type of work. If the Commission's services were not being used, the substantial amount of administrative work involved in setting up and running a public inquiry would fall on the Department. In addition, there would be costs associated with such appointments by contrast with the current arrangements whereby the Commission does not charge the Department for public inquiry work.

9. There would inevitably be differences in the way inquiries and hearings would be conducted by the Commission and by Departmental appointees and in the degree of scrutiny to which the Department's case and that of other parties would be

subjected. This would be confusing for participants and could be considered unfair.

10. There is no necessity for Clause 10, even as a contingency measure. The backlog of planning appeals arising from the introduction by Direct Rule Ministers of a strict policy presumption against development in the countryside has been dealt with. The Commission's work on the present suite of development plan examinations is nearing completion. All current hear-and-report work is progressing as rapidly as it can be progressed. I can give a firm assurance that in the period to 2015 the Commission will continue to give top priority to inquiries and hearings into major planning applications.

11. The Commission recommends that Clause 10 is omitted from the Bill. Any residual concerns that the Commission might become overloaded with work could be addressed in a different way. Article 111(2)(b) of the 1991 Order makes provision for the Chief Commissioner to appoint an assessor to sit with members of the Commission. A new provision could extend this power to allow for the appointment of persons to conduct inquiries or hearings (unaccompanied) for a temporary period or for a specific task. Such arrangements would preserve the principle of independent adjudication so vital to public confidence in the planning system, and would ensure consistency of approach.

Clause 12

12. The Commission is aware that the submission of revised proposals at appeal stage may be perceived as unfair, particularly by third party objectors. The ability to amend a planning application is governed by case law which establishes that there must be no change to the substance of the proposal and that no one must be deprived of their right to be consulted on the changed proposal. The Commission carefully scrutinises all revisions to proposals against these principles and not infrequently declines to admit such revisions for consideration. Where revisions are found to be compliant with case law, the Commission ensures that the Department and any third parties have sufficient time to examine the new proposals.

13. Clause 12 as currently worded is contradictory. On the one hand it seeks to restrict the matters which may be raised at an appeal but on the other maintains the requirement to have regard to material considerations. Where new matters are raised that are material they could not be ruled out. The Commission foresees significant difficulty in interpreting and applying these provisions, especially in the current litigious climate.

Clause 21

14. The Commission welcomes Clause 21, which would empower it to award costs in circumstances where the unreasonable behaviour of one party has left another out of pocket. The Commission believes that this provision would provide an important restraining influence on parties' behaviour and encourage all concerned to approach appeals in a responsible, cost-conscious manner.

15. I now turn to some additional provisions which the Commission suggests could usefully be included in the Bill.

Submission Notices

16. Article 24(2) of the 1991 Order and Section 44(2) of the 2011 Act provide for notices requiring planning applications to be made. Such notices are often referred to as "submission notices". The Department's Planning Policy Statement 9 - The Enforcement of Planning Control lists submission notices among the main enforcement powers available to the Department. It indicates that the Department uses a submission notice in preference to an enforcement notice where its objective is to bring unauthorised but acceptable development under planning control.

17. Article 24(2) of the 1991 Order and Section 44(2) of the 2011 Act set out in identical terms the grounds of appeal against a submission notice. These grounds are much narrower than those available to the recipient of an enforcement notice under Article 69(3) of the Order and Section 143(3) of the Act. It seems perverse that there is a more restricted right to appeal against a submission notice where the development is considered to be acceptable than against an enforcement notice where it is considered unacceptable.

18. A person who appeals against a submission notice is debarred from arguing that planning permission has already been granted for the development; that the development has already been permitted by a development order or that he or she is not the owner or occupier of the land. As things stand at present, the recipient of a submission notice wishing to make those arguments would be put to the trouble and expense of having to challenge the notice through the Courts. The Commission, as a technical tribunal, is better placed than the courts to assess issues such as these and can do so at much less cost.

19. The Commission recommends, therefore, that a new clause is inserted in the Bill to amend the grounds of appeal against a submission notice in the 1991 Order and the 2011 Act to the following:-

    (a) that the matters alleged in the notice have not occurred;

    (b) that at the time when the notice was issued those matters did not constitute development;

    (c) that the development alleged in the notice was not carried out without planning permission, if such permission was required in accordance with this Part, or without any approval of the Department/council, if such approval was required under a development order;

    (d) that the period of five years referred to in Article 23(2)/section 43(2) had elapsed at the date when the notice was issued;

    (e) that at the time when a copy of the notice was served on him, the appellant was neither the owner nor the occupier of the land to which the notice relates.

Independent Examination

19. Article 7 of the 1991 Order was amended in 2006 to provide for an independent examination to be carried out by the Commission to consider objections to a development plan. Previously Article 7 had provided for a public inquiry. This change has been carried forward into Sections 10 and 16 of the 2011 Act. A public examination enables the Commissioner to lead the questioning, whereas a public inquiry involves cross-examination and can therefore become unnecessarily dominated by lawyers and unduly protracted.

20. Article 123 of the 1991 Order and Section 231 of the 2011 Act empower the Department to cause a public local inquiry to be held for the purpose of the exercise of any of its planning functions. The Commission can be, and has been, called upon to carry out such inquiries. The provision is broad in scope and caters for a wide variety of contingencies. It seems to the Commission that there would be merit in broadening it further by providing the additional option of holding an independent examination. The Commission recommends that a new clause is inserted in the Bill to amend the 1991 Order and the 2011 Act to that effect.

Conclusion

21. I trust the Committee will find this response of assistance in its deliberations. I attach a one-page summary for ease of reference. If the Committee would like me to elaborate on particular points in the response or to comment on anything else, please let me know.

Yours faithfully

ELAINE KINGHAN
Chief Commissioner

THE PLANNING BILL:
SUMMARY OF THE PLANNING APPEALS COMMISSION'S VIEWS

The Planning Appeals Commission is an independent statutory tribunal which, among other things, determines appeals against planning decisions made by the Department of the Environment and conducts independent examinations, public inquiries and hearings into matters referred to it by the Department.

The Commission recommends that consideration is given to adding a **new paragraph** to **Clause 4** to delete the requirement to advertise planning appeals.

The Commission recommends that **Clause 10** is omitted from the Bill because it does not believe that persons appointed by the Departmental to conduct public inquiries and hearings in relation to major planning applications would be generally accepted as being independent of the Department.

The Commission foresees significant difficulty in interpreting and applying the provisions of **Clause 12**, which seeks to restrict the matters which may be raised at an appeal unless they are material considerations.

The Commission welcomes **Clause 21**, which would empower it to award costs in circumstances where the unreasonable behaviour of one party has left another out of pocket.

The Commission recommends that a **new clause** is inserted in the Bill to broaden the grounds on which an appeal may be brought against a **submission notice**.

The Commission recommends that a **new clause** is inserted in the Bill to give the Department the option to cause an **independent examination** to be held rather than a public inquiry.