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Anna Lo MLA
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Northern Ireland Assembly Committee for the Environment,
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Dear Ms. Lo,

**Northern Ireland Planning Bill 2013**

Thank you very much for the opportunity to respond to the 2013 Northern Ireland Planning Bill. We are a group of planning academics based in the School of Planning, Architecture and Civil Engineering at Queen's University, the leading centre for planning research and education in Northern Ireland and we feel compelled to express our view on a number of provisions currently proposed in the Bill.

We recognize that main purposes of the Bill are to further legislatively prepare the planning system for a transfer of major planning responsibilities to local authorities in 2015 and to continue the trajectory of planning reform. In this context, many of its provisions are sensible and reflect legislative developments in other parts of the UK. However, the Bill also contains four exceptionally weak clauses that need to be removed from the Bill, for reasons explained below. These clauses are:

- **Clause 2: Amendment of the general functions of the Department of the Environment and the Planning Appeals Commission**, to include "promoting economic development" in addition to the existing duties of "furthering sustainable development" and "promoting or improving well-being";
- **Clause 6: Amending the issues to be taken into account (i.e. the "material considerations") when determining planning applications** by ensuring that this should now include the "economic advantages or disadvantages likely to result from the granting of or, as the case may be, the refusal of planning permission".
- **Clause 10: Public inquiries: major planning applications** allows the appointment of people other than the Planning Appeals Commission (PAC) to oversee planning inquiries.
- **Clause 20: Fixed Penalties,** allowing the Department of the Environment to issue a fixed penalty notice for the offences of failing to comply with an enforcement action.

The last two clauses are inappropriate because they threaten to further weaken the credibility of the Northern Ireland planning system, which has already been seen to be very low amongst the public[1].

**Clause 10** is simply not needed – the independence, and the perception of independence, of those overseeing public inquiries plays a paramount role in maintaining the credibility of the planning system and any direct appointments by the DoE would inevitably cast doubt on this, given that the PAC has been established for precisely this role. Indeed, this clause is not required – a simple solution would be to facilitate the PAC to appoint temporary Commissioners if they did not have the in house capacity to oversee an inquiry at any particular time.

[1] http://www.foe.co.uk/resource/reports/public_and_stakeholder_opi.pdf

**Clause 20** also threatens to undermine credibility by limiting the opportunities for enforcement action, already seen as a weak part of the Northern Ireland planning system. While on the one hand Fixed Penalty Notice promises to allow swift action against those who fail to comply with enforcement, the Bill also suggests that they then be immune from any further prosecution once a fine has been paid. The danger with this provision is that it could be used as a shelter from prosecution by those guilty of abusing the planning system. While a Fixed Penalty Notice may be a useful initiative, this should not be accompanied by immunity from prosecution.

However, it is the first two clauses mentioned above (Clauses 2 and 6) which are the most dangerous and inadequately constructed parts of the Bill. These potentially introduce very fundamental changes to the Northern Ireland planning system.

The dominant aim of planning reform in Northern Ireland has been to streamline and speed up the process for making planning decisions. Members of the Northern Ireland Executive also regularly state that they wish to see the planning system to do more to assist economic recovery. Although there appears to be a number of major misconceptions of how the planning system relates to economic growth (which will not be discussed here), if we assume that these clauses have been introduced with the aim of supporting such objectives, it is against these that they should be evaluated. However, these new clauses are actually *counter*productive to such objectives and have the potential to build in a number of very significant problems for the Northern Ireland planning system, including many enhanced, yet unnecessary, opportunities for legal challenge.

There are at least ten reasons why these clauses are unworkable:

1. The Bill **undermines the key principle of planning that it should only consider issues related to the use and development of land[2].** Clause 6 seeks to expand the issues that planners need to take into account and as consequence, the Northern Ireland 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. As a result of this, the materiality of certain issues will have to be redefined through a series of legal challenges to establish case law. This is likely to introduce a great deal of instability and delay into the Northern Ireland planning system – we infer that this is not the intent of the Department and its legislators.

2. Clause 6 appears to be **attempting to use the planning system for a purpose for which it is not legally designed to do**. Because planning is strictly about the use and development of land, to try and use it for a purpose that is not strictly related to this – such as reviving the broader regional economy, could be judged as being ultra vires[3] and of course, will provide additional opportunities for challenges in the courts.

3. The Bill also appears to introduce the potentially **dangerous precedent of having to routinely consider personal circumstances when deciding planning decisions**. This also arises from Clause 6 which suggests that economic dis/advantages need to be taken into account. An economic advantage cannot belong to a piece of land and must belong to a real person or organisation as only they can realise the fruits of an advantage (or suffer the consequences of a disadvantage). Indeed any economic dis/advantage will vary according to whom it belongs – something that may be inconsequential to a multi-national could be a critical economic advantage to a small local firm, thus raising the necessity of considering the personal circumstances of the applicant or owner when deciding a planning application. This is again unprecedented and could also prove to be a fertile area for legal challenge.

4. A further consequence of this is it that **it provides opportunities for objections on "non-planning" grounds**. Clause 6 broadens the issues that planners have to take into account when deciding planning applications and this will be open to exploitation from both applicants *and* objectors. In particular Clause 6 notes that the planners should take into account economic *dis*advantage as a result of a planning decision – suggesting that any person who thinks they

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[2]For example, Stringer -v- Minister of Housing and Local Government [1971] 1 All ER 65; Westminster City Council -v- Great Portland Estates plc [1985] AC 6610

[3] Lord Denning established a long standing principle that the planning system could not be used for what he described as "ulterior objects" in an ulterior object, Pyx Granite C. Ltd. v. Minister of Housing and. Local Government [1958] 1 Q.B. 554, 572

may be disadvantaged as a result of a decision, for example a developer of a competing scheme, an existing business that may be threatened by a proposed activity (such as retail or manufacturing) and even someone suffering a loss of property value, may find some currently unavailable traction in making a valid objection to a planning application.

5. At present planners have additional flexibility to award planning permission because they can secure safeguards for the public interest through imposing planning conditions on a prospective development - these must be related to the use and development of land. As explained above, Clause 6 suggests that planners should now take economic dis/advantages into account – yet for the reasons explained above, this may well include issues that **cannot be enforced through the planning system.** For example, if it is claimed that a development will result in 100 jobs, this could become a key criteria for awarding planning permission. However, there is no legal mechanism to ensure the claimed benefits actually occur as such issues cannot be secured through planning conditions because they lie beyond the scope of the planning system. The consequence of this is that developers are likely to exaggerate economic development impacts, knowing they cannot be held to account on their claims. This provides a very shaky basis for land use regulation.

6. The Bill **introduces a circular argument that undermines effective regulation.** Any planning approval inevitably results in an 'unearned' increase to the value of a property. If a planner has to consider the economic dis/advantages of refusing or awarding planning permission, this will always result in an argument *for* planning permission as otherwise the increase in property value would be lost. This may even be the case if the development would be judged otherwise unsuitable on normal planning grounds. This could therefore create *a fait accompli* for approving planning applications, thus fundamentally eroding the basis of effective planning regulation and actually challenging the very reasons for having a planning system.

7. This legislation introduces the **ambiguity over the concept of economic development** into the consideration of planning applications. It does not define what it means by economic development and indeed, there is no single definition that is accepted by economists, thus reducing the clarity of the existing planning legislation. Economic development is generally *not* considered to be as simple as promoting growth through job creation, as it implies a longer term perspective which would therefore have to take into account issues such as job displacement, impact on the balance of payments, multiplier effects and the evaluation of alternative development options. It also implies that indirect impacts on economic development need to be considered, such as the potential cost to public services, health impacts or the economic consequences of traditional planning considerations, such as local increases in traffic congestion. This clause will need extensive and detailed guidance to become operable.

8. Following from the above, the Bill will **increase the paperwork** for planning applicants and the bureaucracy of making decisions. Far from streamlining the planning process, in adding economic advantage/disadvantage as a material consideration (Clause 6), it will require planning applicants to provide additional information in order to be able to determine a planning application. This will also require further training and guidance for planners and potentially the employment of specialist economists in the Department of the Environment. It is not clear what sort of economic assessment will be required, although across Government the most commonly accepted is a *Green Book Assessment*[4] and it is difficult to see how anything less than this could provide the complete picture of the economic impact of a development. The Green Book covers issues such as competition impacts, distributional impacts, small firm impacts, additionally, consequences for labour supply and how to adjust for risk and optimism bias. A full economic assessment also requires the evaluation of non-market impacts such as those arising from pollution or any time-savings arising from infrastructure investment or improvements in accessibility. A *Green Book Assessment* is a sophisticated process requiring expert input and potentially original research for every development – this clearly is not in the spirit of other measures taken to speed up the planning system;

9. The Bill introduces a **lack of clarity in the role of the DoE and PAC.** Under the existing 2011 Act these planning authorities have the duty to deliver their planning responsibilities in order to promote sustainable development and well-being. The concept of sustainable development aims to secure a long-term balance between social, environment and economic issues. The fact that economic development becomes *an additional and separate* consideration means that planners

[4] http://www.hm-treasury.gov.uk/data_greenbook_index.htm

will have to, first balance economic considerations as part of their duty to deliver sustainable development, *and then* balance sustainable development with economic development. This appears to be an absurd and overly complex reasoning, providing unnecessary complexity to land use regulation.

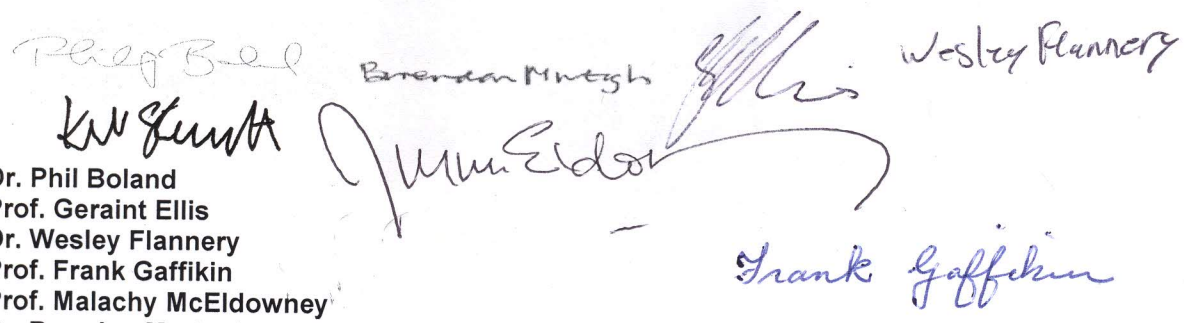
10. Finally, the Bill does not appear fix any current problem with the planning system, but introduces many more difficulties. At present, planning approval rates in Northern Ireland are the highest in the UK and there is no robust evidence that planning regulation itself is a barrier to economic development. These clauses appear to **offer a solution to a problem that actually does not exist**, while at the same time introducing many opportunities for snarling the planning system into an extended process of legal challenges and instability. These factors more than anything will deter potential investment.

This discussion not only highlights the many legal and procedural problems that may be encountered should this legislation be enacted, but it also highlights the **fundamental nature of the proposed changes**. It is therefore surprising to see that the Department has not highlighted the significance of such changes – for example it does not propose the normal process of public consultation that would be expected to accompany changes with such far reaching implications. **No Equality Impact Assessment** undertaken on these provisions and perhaps most remarkably given the comments above, **the Bill's "Partial Regulatory Assessment "overlooks the costs of the new provisions**. These could potentially include:

- Training of planning officers in how to evaluate economic development;
- Costs of changing planning application forms to include the required information;
- Costs to developers of including additional information with their planning applications to address the new definition of material considerations, particularly if the economic development criteria is to be based on a Green Book assessment which includes 118 pages of guidance, plus another 14 documents of supplementary guidance[5] amounting to a substantial increase in regulatory guidance to be included in a planning application;
- Potential employment of economists by the Department of the Environment;
- As noted above, because these clauses change some of the fundamental principles underlying the determination of planning applications and introduce a range of ambiguities into planning regulation, it is highly likely that its interpretation will be tested in the courts. This will inevitability lead to a range of costs, including delay to any planning decision subject to challenge and legal costs incurred by the Department.

Clauses 2 and 6 therefore raise a range of deeply significant issues for the Northern Ireland planning system, introducing substantial ambiguities, providing the potential for delay and unintended opportunities for legal challenge and an increase in the bureaucracy associated with planning control. These are clearly not the reasons for why the Planning Bill has been introduced. If we wish to reform the NI planning system into one which is effective, democratic and efficient, these proposals should be reconsidered and more time taken to assess what the planning system really needs. Inappropriate decisions hastily made now will potentially result in years of litigation and pressure on the public purse that every player in the planning and development arena can do without.

Yours sincerely,

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[5] http://www.hm-treasury.gov.uk/data_greenbook_supguidance.htm