



Northern Ireland
Assembly

Committee for the Environment

OFFICIAL REPORT (Hansard)

Planning Bill: Departmental Response

16 May 2013

The Chairperson: Earlier I mentioned clause 2, on sustainable development, but the DOE's Planning Policy Statement 1 (PPS 1) explaining sustainable development states in the first couple of lines:

"Sustainable development seeks to deliver the objective of achieving, now and in the future, economic development to secure higher living standards while protecting and enhancing the environment."

That is precisely the point that the stakeholders made. Sustainable development already includes economic development, so why do we have to put in "promoting economic development"? Are you not then giving it double points?

Ms I Kennedy: PPS 1 does explain sustainable development. We believe that you need to read the objective under clause 2. It is threefold, but it is one objective, with those elements of furthering sustainable development, promoting economic development and improving and promoting well-being. There is certainly no intention for the wording to elevate the promotion of economic development above furthering sustainable development.

The Chairperson: Are you going to rewrite PPS 1 to give sustainable development a different definition?

Ms I Kennedy: Yes, we intend to elaborate on what sustainable development means for planning through the single strategic planning policy statement and the other key principles and concepts of the planning system, particularly the reform system, including the reforms in the Bill, the reforms in the Planning Act (Northern Ireland) 2011 and the transfer of powers.

The Chairperson: What are you going to say sustainable development is in your guidance?

Ms I Kennedy: At this point, it is too early to say, but we want to set out clearly what the principles and key planks of sustainable development are. This relates to the second query. Sustainable development is an evolving concept. The Office of the First Minister and deputy First Minister (OFMDFM) sustainable development strategy acknowledges that it does change and can evolve over time. It may be more appropriate to set that out in a policy document rather than in legislation.

The Chairperson: It is going to be in legislation as the promotion of economic development and well-being.

Ms I Kennedy: That is certainly the proposal now, but it does not go beyond trying to define what sustainable development is.

The Chairperson: With the new clause, are you saying that the three things are different and carry the same weight? In PPS 1, you say that sustainable development is economic development.

Ms I Kennedy: It does embrace that. Sustainable development embraces economic, environmental and social issues and concepts.

The Chairperson: You see the argument for the stakeholders: already you are saying that sustainable development is economic development, while protecting and enhancing the environment?

Mr Weir: Chair, to be fair, there is a consistent danger of putting words in mouths. They have said that it "contains", while you have been saying that it "is" economic development. There is a difference between containing and being the same as economic development.

The Chairperson: That is what is on the DOE website under what is sustainable development.

Mr Weir: The website indicates in PPS 1 that it "contains" economic development, which means that it is one element of sustainable development. It is not saying that it "is" economic development. They are not one and the same.

The Chairperson: I have the full text here. There are several paragraphs, but the first few lines state:

"Sustainable development seeks to deliver the objective of achieving, now and in the future, economic development to secure higher living standards while protecting and enhancing the environment."

It goes on to say that the Department will:

"plan for the region's needs for commercial and industrial development, food production, minerals extraction, new homes and other buildings, while respecting environmental objectives."

It talks a lot about economic development in there. I think that that is the crux of the objection from the stakeholders, because sustainable development has a very strong statement included about economic development already.

Ms I Kennedy: I think that it also recognises that there are environmental, social and other considerations as well.

Lord Morrow: Do they get the same weight?

The Chairperson: Yes, it talks about economic development while also paying attention to environmental issues. If we are saying sustainable development, we are promoting economic development on another line, and that is why people are arguing that you are saying it twice.

Mrs D Kelly: Chair, the departmental response in our briefing pack, which we have had the opportunity only to have limited sight of, is helpful. It suggests that sustainable development as a concept is evolving and will continue to evolve over time, and that the provisions in the clause suggest an integrated approach rather than any one trumping the other in seniority or a hierarchical approach. That clarification is very helpful for me for my understanding of the clause. The departmental response to the suggested clause from Community Places highlights the difficulties in the fact that sustainable development as a concept is one that is evolving. I think that that was a very helpful explanation. It may go some way to providing clarification for the Chair. It certainly helped my understanding of it.

The Chairperson: From reading PPS 1, sustainable development has a strong emphasis on economic development.

Ms I Kennedy: We will be revisiting PPS 1 and those general principles as part of the review of the single planning policy statement. Things will have moved on.

The Chairperson: When will that guidance come out?

Ms I Kennedy: The intention is to consult on it before the end of the year.

The Chairperson: Therefore, when will the Planning Bill receive Royal Assent? In the autumn?

Ms I Kennedy: We would hope so, or it will be towards the end of the year. It should be around the same time.

The Chairperson: Will there be a gap between the Bill being enacted and the guidance being issued?

Ms I Kennedy: We would not propose to commence those clauses until we had consulted on the single planning policy statement.

The Chairperson: Do you see what I mean?

Lord Morrow: Yes, Chair, I see what you mean. However, I also see something else. It clearly states here:

"Sustainable development seeks to deliver the objective of achieving, now and in the future, economic development to secure higher living standards while protecting and enhancing the environment."

That is all in one sentence. What you are telling us today is that you feel that the greater emphasis is given to economic development, but, by the same token, the paper talks about protection and enhancement of the environment, promotion of economic development, promotion of social development and promotion or improvement of well-being — all in the one breath.

Mr Weir: Similarly, on the definition of the aims, even though the reference to commercial and industrial development is qualified, in that it is one of only six bullet points. If you like, it is qualified within one bullet point, and then there are five others. I do not know whether there are other bullet points, because the page ends.

The Chairperson: How many points are there on PPS 1?

Ms I Kennedy: There are six bullet points. There is also a further paragraph that indicates:

"In formulating policies and plans and in determining planning applications the Department will be guided by the precautionary principle that, where there are significant risks of damage to the environment, its protection will generally be paramount, unless there are imperative reasons of overriding public interest."

The Chairperson: OK. We will move on.

Ms I Kennedy: Committee query 95 (CQ/95/2013) raises three issues. The first is the suggested amendment from Community Places to clause 2. It states:

"Where the Department or the Planning Appeals Commission exercises any function under Part 2 or 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; promotion of economic development; promotion of social development; and promotion or improving well-being; and which balances current needs with those that may arise in the future."

As background, and as we have already touched on and Committee members have noted, clause 2 as drafted takes forward a formula from the 2011 Act and treats the concept of furthering sustainable development, promoting or improving well-being and promoting economic development as a threefold objective when the Department or the Planning Appeals Commission (PAC) is delivering those functions. The three should be read together as an integrated approach rather than as a selective approach with a hierarchy in it. The suggested amendment to clause 2 puts four elements — the protection and enhancement of the environment; promotion of economic development; promotion of social development; and promotion or improving of well-being — under the one umbrella of furthering sustainable development. It impliedly attempts to define "sustainable development", which has not been defined in planning legislation or, as far as we are aware, other Northern Ireland legislation.

Sustainable development, as we have mentioned, is a concept that has evolved and is likely to continue to evolve over time. The Department is of the view that, although it is well-intentioned, the amendment could have the unintended consequence of limiting or reducing the scope of the concept that it actually wishes to promote. The Department, in line with other jurisdictions, considered it more appropriate to provide a fuller explanation of what sustainable development means in the planning context through policy and guidance. That approach allows greater flexibility to respond as the concept of sustainable development develops and evolves. The Department intends to do so and to elaborate further through the single planning policy statement.

The Chairperson: OK. What about the criticism that the Department is using different words, such as "promoting", "furthering" and "improving"?

Ms I Kennedy: Yes, we have done that. It is a reflection of the discussions that took place at the previous Committee, when the previous Planning Bill was coming through. "Furthering", "promoting" and "improving" were words that were brought forward in amendments.

Look at the dictionary definition, and you will see that there is an overlap. When we talk about "furthering", the dictionary talks about "promoting", and if you look at the definition of "to promote", the dictionary talks about "to further". "Improving" seems to mean "to add value" or "to achieve a desired effect". Therefore, there are similarities in those words. At this point, they reflect the wordings that

were brought forward as Committee amendments and adopted by the Assembly in the 2011 Act. If you wish, we can take a look to see whether there is a way of rationalising them or taking a consistent approach. There seem to be overlaps in meaning, although others may argue that different words mean different things. Certainly, if you look at the dictionary definitions of "furthering" and "promoting", they are interchangeable. Each mentions the other.

The Chairperson: Yes. I looked at the thesaurus, and they are all the same but with slight differences in meaning.

Lord Morrow: We could fall into the danger of being pedantic.

Mrs D Kelly: Perish the thought.

The Chairperson: It is legislation. One of the things that many of the stakeholders mentioned is whether there is a difference between those words. It is confusing for them. Why can we not use one word?

Mr Weir: I disagree with Lord Morrow. We may not be falling into the danger of being pedantic; we are collapsing into it. *[Laughter.]*

The Chairperson: Yes, words can be argued over in court for hours and days.

Can you come back with a suggestion for a word that covers most of the meanings of "furthering", "improving" and "promoting"? One word that I thought of when I looked at the thesaurus was "advancing". Would "advancing" cover all of them?

Mr McElduff: A word that I was conscious of was "enabling". That word was always used in the context of economic development. You "enable" economic development.

The Chairperson: Members, would you be content for Irene to go back and look for different words that she can bring back to us? "Enabling" is a good word. "Advancing" and "enabling" are both good.

Mr McElduff: Do you remember that, prior to the restoration of the institutions, there was a subgroup on economic challenges? David Simpson represented the Democratic Unionist Party on it, and the word "enabling" was deliberately written into it for planning and economic development.

The Chairperson: So that would read "enabling sustainable development", "enabling economic development" and "enabling well-being"?

Mrs D Kelly: I think that you run your own risks with those words.

Mr Boylan: Did we not agree this in the 2011 Act?

Mr Weir: Angels on the head of a pin.

Mrs D Kelly: You could lose the will to live here very quickly, Chair.

Mr Boylan: We went through all this for months when we worked on the previous Bill in 2011. A lot of the members were content with the meanings at that time, but now we are going to rewrite it because of the economic aspect.

Mr Weir: A possible route around this was suggested. To be honest, there is a nice flow of language here, and there is an advantage to that from a stylistic point of view. One route might be that, at Consideration Stage, the Chair could comment on these interpretations in her remarks on behalf of the Committee. The courts will look at what is said in the debate and, in particular, at what the Minister says in the debate, as a form of interpretation. For example, you could seek clarification from the Minister that the three terms used are intended to mean the same thing. If the Minister responded positively, that would officially be in the Hansard report. That might be one way of doing it without getting too bogged down in whether there should be a specific word to encompass all three meanings.

The Chairperson: We could do that, but, according to the legal advice, what is said in the debate would not count in a court case.

Mr Weir: With the best will in the world, it is one of the things that the court will look to if there is an issue in that regard. However, because we are talking, quite frankly, about definitions and whether there is any difference between "promoting" or "furthering", which seem to match each other very similarly in a thesaurus, I think that we are dealing with a relatively semantic point as is. That might be a better way than trying to search the highways and byways to find a word that is acceptable for all three. I offer that as a suggestion before we entirely sink in the mire on this point.

The Chairperson: What do you feel?

Mr Boylan: I am happy enough with that, Chair. You can bring in the Oxford dictionary if you wish, but I am happy enough.

Mr Weir: You boys would want the translation into Irish as well. That is the only problem.

Mrs D Kelly: It is a far more beautiful language.

Mr Boylan: Put it in Irish as well.

Mr Weir: I am sure that Barry can think of an Irish word that would cover all three.

Mr McElduff: I give way to Cathal; he is my leader.

Mr Boylan: We are happy enough with that.

The Chairperson: You are happy enough with the three words as they are at the moment. We will ask the Minister during the debates to make clear the difference between the three words.

Mrs D Kelly: Yes. That would be helpful.

Mr Weir: It will give the Minister the chance to say a few more words; he is always very succinct.

Mrs D Kelly: I am sure that he will not be found wanting.

The Chairperson: It could be an extra half an hour. OK, Irene. Continue, please.

Ms I Kennedy: The Committee asked departmental officials to provide a response to the query about the provision for a person or body other than DOE — for example, the Office of the First Minister and deputy First Minister — to have the power to appoint a person other than the Planning Appeals Commission to conduct a public inquiry. The policy of providing an option to appoint independent examiners other than the Planning Appeals Commission to conduct public inquiries or hearings into article 31 or major applications was developed during the peak of the property boom when there was an unprecedented rise in the number of planning applications and appeals to the Planning Appeals Commission. That naturally led to resourcing issues for the Department and the commission. The Department argues that OFMDFM already has the power under article 110 of the 1991 order to appoint commissioners to the commission and to appoint persons to assist the commission in performing its functions. Should the PAC experience an increase in casework, OFMDFM can appoint additional commissioners or persons to address any resourcing implications that might arise, and, as a consequence, curtail any need for independent examiners to be appointed by the Department.

Should the Department decide that a public inquiry should be held, the Department will first approach the Planning Appeals Commission to ask it to conduct the inquiry. If, and only if, the commission cannot conduct the inquiry within a reasonable time frame would the Department consider appointing a person other than the Planning Appeals Commission to conduct the inquiry. The provision is in no way intended to bypass the commission — the commission will be the first port of call — or to permit the Department arbitrarily to appoint independent examiners without first consulting the commission. The option of appointing independent examiners, however, allows DOE to respond proactively to potential future workload pressures to ensure that decisions on major applications are processed as expeditiously as possible.

In assessing time frames, the Department will consider what is reasonable, based on consideration of the facts of each case, including the nature, scale and location of the proposed development. A proposal that could lead to significant environmental or economic benefits or job creation may, in the view of the Department, merit a quicker inquiry than perhaps a proposed development that does not have significant environmental or economic benefits but which may be a departure from a development plan.

The Department has studied how the Department for Regional Development (DRD) appoints examiners to carry out public inquiries for proposed road schemes, and those principles will be used to assist in the development of a protocol for the appointment of independent examiners. DRD has a retained list of suitable persons who are qualified to conduct public inquiries. That list is used as needed.

The Chairperson: I think that the response from people is to ask how you will give them confidence that there is not a conflict of interest when it is DOE appointing the person to conduct the inquiry. How do you get transparency and independence?

Ms I Kennedy: I think that it is through transparent processes of appointment and making sure that suitably qualified people without conflicts of interest are appointed to the panel.

The Chairperson: That is the last resort really, when you cannot get people from PAC?

Ms I Kennedy: The intention is that the Planning Appeals Commission will be the first port of call, but this is an option to be used if there are workload pressures and the commission cannot respond within a reasonable time frame.

Mr Weir: We had a debate in the Assembly on that some years ago. Obviously, given current circumstances, there is not that pressure because of the downturn in the market, but it was not that many years ago that there were major concerns from across the Chamber and parts of Northern Ireland that the message coming out from the PAC was that it only had so many staff and effectively could only do one major inquiry at any one time. There were very major things and people, irrespective of what their views on the things were, wanted a decision, but getting a decision was a long way down the pipeline because of that level of restrictions. It seems to be a common sense fallback position.

The Chairperson: Should the current system not be improved to get more resources and to get it working rather than creating another system whereby the Department can appoint people?

Mr Weir: Again, it depends on your opinion of that. It might be regarded as an improvement on the current system.

Mr Boylan: Now that I have had some clarification, I think that the PAC should be the first port of call. When we discussed it, as Peter outlined, we were under severe pressure, but we should look at the decision-making process and the policy itself. A number of single applications for houses in the countryside actually went to the PAC. We should restrict its definition to major applications; it is the major ones that we are talking about.

Ms I Kennedy: This provision relates to article 31 applications.

Mr Boylan: OK. I am happy with that, as long as the PAC is the first port of call, because there are concerns about the independence of appointments.

The Chairperson: As you know, Irene, the PAC was also represented at the stakeholder event. Perhaps there should be better communication with it. We need to give it some assurance.

Ms I Kennedy: Certainly, and it will be the first port of call.

The Chairperson: OK, we will move on.

Ms I Kennedy: The final query raised by the Committee was whether there could be a minimum fine for a range of offences and whether provision could be made to ensure that that fine was proportionate to the value of the development.

Clause 16 increases the maximum level for a range of fines under the 1991 order in line with the 2011 Act. At Committee Stage of the 2011 Act, the then Committee expressed strong views that the level of fines relating to a range of planning offences should be significantly increased. It was argued that existing fines did not reflect the financial gain that could be achieved through intentional breaches of planning control. Subsequently, the 2011 Act increased the level of maximum fines available on summary conviction from £30,000 to £100,000 for a range of offences. That more than threefold increase provides the highest level of financial penalty for planning offences across the UK Administrations and the Republic of Ireland.

It is worth noting that the 1991 order also provides the option of unlimited fines for a number of offences where a person is convicted on indictment, as well as the option of imposing custodial sentences for certain offences and some reconviction or conviction on indictment — for example, an offence under article 44 on the control of works for demolition, alteration or extension of listed buildings. The Minister has maintained a consistent focus on the level of fines imposed by the courts and highlighted the need for fines to act as an effective deterrent. The level of fine to be imposed in a case is a matter for the courts. However, the increase in the maximum level of fines to be made available under the proposed changes provides additional latitude for the courts to exercise their discretion in sentencing. In addition, the Judicial Studies Board for Northern Ireland recently published sentencing guidelines for a wide range of offences, including certain planning offences. Those include guidance where an offence has been committed on a commercial basis and where financial gain might accrue as a consequence of the offence. An example of the guidance is provided as an attachment to the response. That is about a breach of a tree preservation notice.

The introduction of a set minimum level of fine, aside from those established by the standard scale, would limit the discretion of the courts in determining the level of fine to be imposed after considering the individual circumstances of the case. Compulsory minimum sentencing makes no allowance for the possibility that always exists of an exceptional case and could lead to unintended and unwelcome consequences. The Department believes that it would be prudent to assess the impact of the proposed increases in maximum fines, coupled with the new sentencing guidelines on planning offences, before considering the need for further strengthening the law in this case. Such proposals would require detailed discussions with the Department of Justice and the judiciary.

Lord Morrow: I see that we are talking about fines from £30,000 to £100,000. On how many occasions will the maximum fine be imposed?

Mr Gorman (Department of the Environment): One issue that has been raised is that that rarely happens and, when it does, it can sometimes be reduced. At the minute, we are looking to show that there are developments in a number of areas. The first is that there is latitude with a broad range of maxima, and it may also take some time for the sentencing guidelines from the Judicial Studies Board to work their way through. It will also take some time for enforcement cases under the new maximum fines to come through. We hope for informal resolution. I do not have the figures to hand, but I do not think that it is a normal occurrence, Lord Morrow. We are hopeful that the increased focus of the Minister in setting a deterrent and the new guidelines will, at least, lead to an increase in the level of fines so that there is a deterrent factor, particularly for deliberate breaches. That is spelt out clearly in the guidelines.

Lord Morrow: We are talking all the time about the deliberate breaches. The paper goes on to say that compulsory minimum sentences make no allowance for the possibility of an exceptional case. Is everything based on the exceptional case?

Mr Gorman: No. That is a cautionary note. If somebody is in breach of planning law, and the court is restricted to imposing what it may view as a minimum fine — it may be higher than the court wishes to apply — it may look at an alternative, which could be discharge. That is where you would have a minimum fine imposed on the court. That was the cautionary note about the discretion of the court, yet it provides a much broader range of fines for that discretion to be exercised.

Mr Anderson: Thank you for your presentation. You mentioned the guidance for financial gain. How do you judge whether a developer steps outside planning regulations and laws and carries out an

operation for financial gain? How do we get the legislation to say, "That is worth £1 million to you"? Who decides that?

Mr Gorman: It is done through the courts.

Mr Anderson: It is a difficult one.

Mr Gorman: Absolutely. However, the advice now through the sentencing guidelines makes that a very specific issue to be considered, and where that is determined by the court, it recommends, in certain cases, the introduction of a minimum fine. That is an issue for the court to decide on the merits of an individual case.

Mr Anderson: That case would have been presented to what that level would be. It is not an easy situation to see the end result in financial gain. There is so much involved in it.

Ms I Kennedy: You would need to carry out some work to estimate that.

The Chairperson: Do you need a quantity surveyor to find out?

Ms I Kennedy: You could, yes.

The Chairperson: Thank you very much. We will see you next week for the informal clause-by-clause scrutiny.