Northern Ireland Assembly

Research and Library Service Bill Paper

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Planning Bill (2):

Development Management, Planning Control and Enforcement

NIAR 12-11

This paper is the second of four papers produced in support of the Committee stage of the Planning Reform Bill

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Key Points

- Many of the provisions contained in the Bill consolidate those in existing legislation but have been re-crafted to facilitate the role of district councils.

- While the Bill reaffirms that the functions related to development plans should contribute to the achievement of sustainable development the development management functions are not covered by such a duty.

- The Department or district council must have regard to the local development plan and any other material considerations in determining planning applications through the development management process.

- New classifications for development have been established – major and local. The former will be dealt with by the Department and the latter, normally, by the council.

- On major applications there is a responsibility for developers to consult with the community in advance of lodging an application and prepare a report which must be submitted with the application.

- There is no provision for performance agreements between the Department and the applicant.

- Powers will be delegated to individual planning officers to make decisions on specific types of application, though district councils have powers to make such decisions where considered appropriate.

- The time limitation for appeal to the Planning Appeals Commission (PAC) has been reduced from 6 months to 4 months.

- The PAC will not be able to select the appeal type to be used in any given case.

- There is no provision for third party appeals.

- There is no provision for the PAC to award costs for vexatious planning refusals.

- It will be an offence to carry out unauthorised partial demolition of non-listed buildings in conservation areas.

- The Department has decided not to introduce criminalisation for breaches of planning control but, in this context, a number of other areas of investigation may be worthy of scrutiny.

- The Department will not proceed with notification of initiation of development and completion of development certificates.

- The Department has provided legislation for Fixed Penalty Notices which might encourage offenders to comply with regulations, avoid the necessity of a court appearance and save on cost to the public purse.

- Multiple planning application fees can be charged for development begun before the application was made.

Contents

1.0 Introduction

This briefing paper is the second of a set of four prepared for the Committee Stage providing analysis of the provisions in the Planning Bill which sets out the draft legislative framework for new and revised planning procedures in Northern Ireland. The proposals in the Bill substantively replicate the instruments contained in the Planning and Compulsory Purchase Act 2004 which applies to England and Wales and the Planning (Scotland) Act 2006. These Acts effectively placed the new concept of 'spatial planning' on a statutory basis in these parts of the UK. Reform of the planning system in the Republic of Ireland is also underway, which will also place spatial planning as a core principle in its planning system.

Spatial planning moved the emphasis away from planning as simply regulatory practice narrowly focused on land use to planning as an activity that is both integrated with other local government services and is focused on delivery. In this context the development plan becomes, what the Department of Communities and Local Government's Planning Green Paper 2001[i] described as, 'the land-use and development delivery mechanism for the objectives and policies set out in the Community Strategy'. This has been accompanied in other parts of the UK by reforming the way in which communities can engage with the planning system.

This Bill makes the initial statutory provision for spatial planning to be adopted in Northern Ireland, in the context of district councils taking over some of the planning responsibilities currently handled by the DoE (NI). The basic provisions of the proposed NI legislation will, it is assumed, be supported by a new Planning Policy Statement (PPS) which would explain the broad arrangements for spatial planning, including how local communities can become involved. Additional written guidance and support should also be forthcoming.

The shift to a new form of planning, primarily located within reformed local government structures in Northern Ireland will present significant challenges for all stakeholders including professionals, officials, politicians and communities. Arguably though, the benefits of these changes potentially far outweigh the costs of major changes in culture and practice.

This paper is the second of four papers produced in support of the Committee stage of the Planning Bill, which are:

- Paper 1: Departmental Functions and Local Development Plans
- Paper 2: Development Management
- Paper 3: Community Involvement
- Paper 4: Capacity, Delivery and Quality

In this paper:

- **Section1: identifies the key issues arising from the Bill in respect to**
- **community engagement;**
- **Section 2: provides an analysis of the key themes;**
- **Section 3: reviews equivalent arrangements in comparable jurisdictions; and,**
- **Section 4: identifies contentious issues which may require further scrutiny.**

Members of the Assembly may find it useful to refer to the following documents in conjunction with this paper:

- The full Planning Bill (2010): http://www.planningni.gov.uk/index/about/planning_bill.pdf
- Draft Explanatory and Financial Memorandum: http://www.planningni.gov.uk/index/about/planning_bill_efm_-_as_introduced.pdf
- Government Response to the Planning Reform Public Consultation July - October 2009: http://www.planningni.gov.uk/index/about/government_response_final.pdf
- Final EQIA at a strategic level: http://www.planningni.gov.uk/index/about/final_eqia_at_strategic_level-2.pdf
- Independent Report from the Planning Reform Consultation Events 2009 Equality Statement: http://www.planningni.gov.uk/index/about/independent_report_from_the_plannng_reform_consultation_events_2009__f_.pdf
- England and Wales Planning and Compensations Act (2004): http://www.legislation.gov.uk/ukpga/2004/5/contents
- Republic of Ireland Planning and Development Act 2000: http://www.irishstatutebook.ie/2000/en/act/pub/0030/index.html
- Republic of Ireland Planning and Development (Amendment) Act 2010: http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2009/3409/b34d09d.pdf
- Planning (Scotland) Act (2006): http://www.legislation.gov.uk/asp/2006/17/contents
- England Localism and Decentralisation Bill (2010): http://services.parliament.uk/bills/2010-11/localism/documents.html

2.0 Overview of themes

The reform of the planning system in Northern Ireland has seen a shift from development control, which focused upon merely controlling undesirable forms of development, to development management, which is more about facilitating appropriate development in ways that are proportionate to the significance of each application. The overall aim is to improve the quality of built environment, increasing

the efficiency of the planning process and provide greater certainty about timescales, particularly for the applicant and third parties, in the context of achieving the Programme for Government Public Service Agreement targets. Development management can only operate successfully if the Department/district councils:

- responds positively to requests for pre application advice;
- ensures that all stages of the development management process are completed within stated timescales;
- promotes meaningful public consultation and takes account of representations received;
- actively manages consultations regarding the need to consult and the assessment of responses;
- requests amendments/additional information as early as possible to avoid unnecessary delay;
- provides an initial planning view as early as possible in the application process particularly when a proposal is considered to be fundamentally unacceptable;
- assesses applications to form corporate opinion for consultation with district council at the earliest possible opportunity; and,
- issues decisions promptly following completion of council consultation.

The development management process will take place within a plan-led system. This means that the Department or district council must determine planning applications in accordance with the statutory development plan, unless material considerations indicate otherwise. If the development plan contains material policies or proposals and there are no other material considerations, the application should be determined in accordance with the development plan (s.6 (4)). Where there are other material considerations, the development plan should be the starting point, and other material considerations should be taken into account in reaching a decision.

The following section considers the key issues contained in the Bill and where appropriate draws attention to significant changes to the existing system. In the first instance attention turns to development management and subsequently listed buildings, conservation areas, and enforcement.

2.1 Development management

The Bill reaffirms that it must be an objective of those exercising functions in relations to local development plans to contribute to the achievement of sustainable development (s.5) but does not make the same provision in the context of planning control. While this has proved to be a useful objective for development plans, there is a case for this to be an objective of the entire planning system (as is the case in England, Wales, Scotland and the Republic of Ireland) and therefore there is a case that this

should apply to the functions under other parts of the Bill, particularly development management.

Under the new legislation development will be identified as **major** or **local** (s.25) and regulations will be made to identify which class each type of scheme will fall into. The Department can, however, require a specific application which would normally be a local development to be dealt with as if it is a major development. Regulations will be made to differentiate between major and local classifications and provision has been made so that developers must approach the Department if proposed development falls above prescribed thresholds. The Department will also decide if an application is regionally significant or involves a substantial departure from the development plan, and is to be dealt with by it instead of the district council (s.26). An exception is made for urgent development by the Crown where an application can be made directly to the Department. Applications under this clause provide the **option** for a public inquiry to be held by the PAC or a person appointed by the Department. If an application raises national security or security of premises issues, a public local inquiry route **must** be followed. Provision has been made so that developers who propose to apply for permission for major development must consult with the Department if a proposed development is of regional significance. The Department will make regulations prescribing the procedure to be followed in relation to this consultation process, though it is not apparent if this is to include regulations regarding the achievement of performance targets agreed between the Department and the applicant, an issue raised in the Consultation Paper (see section 5.1 below). On receipt of the inquiry report the Department must take into account the findings of the PAC or appointee but **the report is not binding**.

There have been changes to the existing procedure regarding **community consultation** with a requirement placed on developers to consult the community in **advance** of submitting an application if the proposal falls within the major development category (s.27). This consultation period should not last for less than 12 weeks and a report of the findings must be produced and submitted with the planning application. Regulations have to be produced regarding provision of notice, identifying consultees and the process to be followed. In this context lessons might be learnt by examining similar procedures recently implemented for the major infrastructure planning process in England. Whilst the process is embryonic preliminary investigations conducted by Queen's University have indicated that potentially there are major benefits for all stakeholders. In particular the initial evidence suggests that applicants develop a much more penetrative understanding of key issues at an early stage in the process which, in turn, assists in crafting remedies.

There is provision for **call in** by the Department whereby it can direct that applications be referred to it instead of being dealt with by the district council (s.29). In such cases a public local inquiry **may** be held, though an inquiry route **must** be followed on called in applications relating to national security.

Prior to issuing a determination on a planning application there is provision whereby the Department can require the district council to provide the opportunity for the applicant to have a hearing before the district council (s.30). The procedures for hearings and who can be heard are left to the discretion of the district councils.

There will be a responsibility for each district council to prepare a scheme of **officer delegation**, stating the application types where they will allow the decision to be taken by one planning officer rather than the council (s.31). In any specific case, however, the district council will be able to decide that an application which would normally fall within this scheme should be determined by the council.

Provision has been made for creating and modifying simplified planning zones which are designed to facilitate economic development by granting permission for specified types of development (s.33-38). There is, perhaps, a necessity to take on board further advice from nature conservation experts as some designations seem to be omitted from protection, for example, Special Protection Areas, Special Areas of Conservation and Ramsar Sites do not always fall within the areas protected by the regions identified in the Bill.

The legislation regarding the submission of planning applications, particularly in relation to form and content remains substantively unchanged though powers to specify publicity requirements will be provided (mirroring the G.B situation) (s.41). **This is an area which might benefit from research based upon experiences in other jurisdictions**, for example, in the Republic of Ireland prior to the submission of an application, the *onus is upon the applicant* to publish a public notice of proposals before making an application. This must be done by placing a notice in a locally circulating newspaper and putting up a site notice that can be clearly read. The application must be received by the local authority within 2 weeks of the notice appearing in the local newspaper and the erection of the site notice and the site notice must remain in place for at least 5 weeks from the date of receipt of the planning application.

The Department or district council must have regard to the local development plan and any other material considerations in the process of determining planning applications, though the authorities can refuse to determine applications in specified circumstances (s.46-50). Grounds for refusing to determine applications are similar to the existing position, for example, a similar application has been refused on the same site less than two years previously or where a similar application is currently being determined on the same site (twin tracking). Is there a need to ask whether two years is long enough or could this perhaps be **a discretionary process** where the decision to refuse to determine is based upon the fact that there have been no significant changes in planning circumstances since the previous application?

Provision to appeal to the PAC remains, though the time limitation period has been reduced to 4 months from 6 (s.58). Significantly, despite support in the consultation

process, there is no provision for third party appeals though it was stated in the consultation response that this is to be subject to further scrutiny (**Paper 3 will provide further analysis of this issue**).

Time limitations on the duration of planning permissions remain unchanged and completion notice (s.63) legislation has been consolidated. A completion notice requires a development which has a time bound planning permission, and which has been begun, to be completed. Effectively, development which has technically commenced does not remain lawful once the notice comes into effect. The district council must give at least one year for the completion and these must be confirmed by the Department before they take effect. The person on whom it is served can request a hearing before the PAC, as can the district council.

The district council can issue an order requiring a particular land use to stop or require buildings to be removed or altered (s.72). The NIHE has a duty to house anyone whose place of residence is displaced if there is no reasonable alternative.

Finally, under development management, new powers are to be introduced setting out the procedure for dealing with district councils' own applications for planning permission (s.78). The powers ensure district councils do not face a conflict of interest in dealing with their own proposals for development. The principle remains that district councils will have to make planning applications in the same way as other applicants for planning permission. Provisions are introduced for district councils to grant planning permission for their own development or for development carried out jointly with another person and for development to be carried out on land owned by district councils. The Department will make regulations which will deal with governance arrangements and ensure that conflicts of interest are avoided.

The Bill deals with the prescribed requirement of an authority to consult with persons or authorities which exercises functions for the purposes of any statutory provision and there will be time limitations for responses. There is also authority for the Department to request reports on consultee compliance with specified response time periods (s.224).

2.2 Conservation

Turning to conservation, the legislation remains largely unchanged though it remedies the problems which emerged as a result of the landmark **Shimizu ruling** in the courts, which meant that partial demolition of non-listed buildings in conservation areas did not require consent. It will in future be an offence to carry out unauthorised partial demolition of non-listed buildings in conservation areas, thereby lending greater support to built heritage protection (s.104).

2.3 Enforcement

Under the new enforcement provisions the Department has provided legislation for Fixed Penalty Notices (s.152-154) which aim to encourage offenders to comply with regulations, avoid the necessity of a court appearance and save on cost to the public purse. These have been introduced into Scotland but it is premature to assess effectiveness.

2.4 Financial provisions

Finally, multiple planning application fees may be charged for development begun before the application was made (s.219). The relevant amount will be determined at a later stage and will be included in subordinate legislation. This will be a deterrent to those who flagrantly flout regulations and advice but **there is a risk that unwitting offenders could be unreasonably penalised**.

3.0 Consultation responses

3.1 Award of costs

The consultation paper explained that, in GB, parties who appeal proceedings can apply for costs to be awarded against another party in the appeal, if they believe that they have been left out of pocket by that other party's unreasonable behaviour. This could result in a hearing being adjourned, unnecessarily prolonged, or cancelled, wasting resources and causing unnecessary expense to the aggrieved party. The consultation proposed introducing a power that would allow the PAC to award costs where a party has been put to unnecessary expense and where the PAC has established that the other party has acted unreasonably. There was overwhelming support of 90 per cent (out of 142 who responded) for this proposal. Some of the concerns expressed can be addressed by taking a closer look at the costs system as currently operated in GB. The systems in England and Scotland are accompanied by extensive separate guidance which provide examples of unreasonable behaviour which can extend to the planning authority as well as to appellants (see under Section 4 for further explanation).

3.2 Third party appeals

Though this will be considered in detail in **Paper 3**, on a point of information, the Department stated that it did not intend to bring this forward in the Bill. Given, however,

that the majority of respondents supported introduction, the Department has considered that further consideration of third party appeals should be deferred until the extensive changes to the planning system under planning reform and implementation of the RPA have settled down and are working effectively. In its consultation response it stated that this approach would ensure that third party appeals would not present an opportunity to hinder the recovery and delivery of a productive and growing economy in Northern Ireland. It was indicated that third party rights at this stage could well be a competitive economic disadvantage to Northern Ireland, given that they have not been introduced in England, Scotland or Wales and there is a suggested significant risk of potential adverse impact upon investment in the Northern Ireland economy if they were to be introduced.

3.3 Notification of initiation of development and completion of development

The consultation paper explained that provisions were introduced into Scottish legislation requiring developers to submit a start notice to the planning authority notifying it of their intention to commence development and that they have met any pre-conditions. The developer is further required to notify the planning authority when certain agreed stages of the development are completed, and again when the entire development is complete. Though 69% were in support the Department declined to bring this forward in the Bill. The Department stated that it considered that the practicalities and outcomes of the Scottish experience would need to be examined carefully before reaching conclusions as to the appropriateness of similar provisions for Northern Ireland. In particular, the Department stated that it wished to consider the resource implications and to explore the potential for closer links with the building control notification system, and any benefits that might come from this, particularly as both functions (not just building) will be the responsibility of district councils, following the transfer of planning functions. While there is some doubt over the usefulness and effectiveness of stage inspections there is evidence to suggest that **notices of initiation** provide security for land owners who could be assured that they have commenced development prior to expiration of their permission. There is evidence that this remains an area of confusion and concern. Such notices would alleviate uncertainty and ensure consistent agreement on the definition of commencement. Furthermore, notices of completion would ensure that development is completed in accordance with the permission granted thereby reducing levels of non-compliance and the need for enforcement action.

4.0 Comparisons and lessons from elsewhere

Other comparable jurisdictions that share the features of the Northern Ireland Planning System (i.e. England, Wales, Scotland and the Republic of Ireland) have all been active in reforming their planning systems during the last seven years. Many of these reforms have featured initiatives related to planning control. Some of these are noted below:

4.1 Decision making

There is a higher degree of autonomy in decision making for local government in the planning systems of GB. Specifically, the powers of the Department are more intrusive in Northern Ireland as it will deal with **all** applications classified as major.

4.2 Enforcement

In the Republic of Ireland the enforcement system has legislated for criminalization and there is no evidence of emerging problems as a result of this strategy. Importantly, the Department has decided to retain an enforcement system based upon discretionary principles and a test of evidence based upon the balance of probability. This means that the decision by the **planning authority** to take enforcement action is **discretionary** and **not mandatory**, only occurring where it has been decided that it is **expedient** to do so. In effect, there is **discretion for the planning authority to take action or let matters rest as they are**. The effect of the test imposed by the balance of probability means that the recipient of the enforcement notice does not have to prove innocence beyond all reasonable doubt (as per criminal law), but obtain, as far as possible, best evidence to demonstrate that it is not unreasonable to assume that there has been no breach of regulations. Even if objective evidence cannot be provided self-serving evidence cannot just be rejected because it is uncorroborated or unchallenged – if it is to be set aside, there must be good and sufficient reasons for rejecting it. Thus the test of evidence is much lower than in criminal law.

4.3 Planning appeals

An applicant currently has six months in which to appeal to the PAC if an application is refused. In Scotland, the appeal period has been reduced to three months since 2008. It was also reduced to three months in England in 2003 but was returned to six months in 2004 following an increase in appeal numbers. England has since reduced the appeal period for householder appeals to 12 weeks from April 2009. Of the 160 respondents who commented on this issue, 65 per cent supported a reduction in the time limit, including the Northern Ireland Human Rights Commission. Majority support came from most of the respondent groupings, with only the business and development

group and the agents / architects / professional and legal bodies group expressing opposition. Many of those opposed (including the PAC) quoted the experience in England where it was returned to six months.

4.4 Third party appeals

Third party appeals are operating in the Republic of Ireland but not in the planning jurisdictions of Great Britain (**see Paper 3**).

4.5 Cost awards

Costs guidance in GB considers awards against planning authorities for the unreasonable refusal of planning permission. In any appeal proceedings the planning authority is expected to produce evidence to substantiate each reason for refusal by reference to the development plan and all other material considerations costs may be awarded against them. Similarly, while authorities are not bound to adopt, or include as part of their case, the advice given by their own officers they are expected to show that they had reasonable grounds for talking a decision contrary to such advice. If they fail to do so costs may be awarded against the authority. This makes provision for the same matters as raised in the consultation process.

5.0 Contentious areas

The following section of the paper will highlight some of the areas that raised most interest in terms of responses from the consultation, and will consider the areas that are likely to raise further questions

5.1 Performance agreements and assessment of the Department

The Department indicated in the consultation process that it would bring forward performance agreements (PAs) and that these should be made available to developers proposing regionally significant development. It was suggested that PAs would be a voluntary agreement between the developer and the Department which would provide a project management framework for processing applications by identifying what should be done, when and by whom, to reduce problems and speed up the handling of these large and complex applications. Although there is provision in PART 10 of the Bill for assessment of the council's performance, there is no mention of the PA. Furthermore, there is no legislative provision for the assessment of the Department's performance.

5.2 Appointment of independent examiners

In the consultation process there was a mixed response when respondents were asked if they agreed with the proposal giving the Department the option to appoint independent examiners (27% for and 25% against). Those respondents who were not in favour of the proposal held the view that the PAC plays an important role in ensuring consistency in planning decision-making. A key view expressed in common by these respondents was that, as the final decision on a regionally significant application is taken by the Department, an independent examiner appointed by the Department would not be considered truly independent.

5.3 Appeal type selection process

The Department does not intend to proceed with legislation to allow the PAC to determine the most appropriate appeal method. There are currently four types of process, written representation, attended site visit, informal hearing and formal hearing. In the Republic of Ireland the overwhelming majority of appeals are dealt with via written representation. There are issues on both sides here. In the case of minor forms of development, where matters are straight forward, all evidence should be in the mandatory statement provided by the appellant to the PAC. New issues can only be introduced in extenuating circumstances, hence in such cases there is no need for a more time consuming form of determination. If these were used more frequently it would speed up the process significantly for all appeals, yet in extenuating circumstances additional information could still be submitted. Where complex matters need to be scrutinised the PAC would be able to assess from the case notes provided to it by the planning authority at the outset whether a more inquisitorial process could be applied. On the other hand appellants would not be entitled to an oral hearing if this was their preferred option.

5.4 Criminalisation

This is an issue which does not seem to have been thoroughly examined in the consultation process. While the matter was considered and 180 respondents commented on the issue, 52% indicated that the Department should not give further consideration to making it an immediate criminal offence to commence any development without planning permission. Some of those opposed commented that this would be an unwarranted draconian step and there were comments that some breaches of planning control are a result of an innocent error. The prosecution of unwitting offenders is, however, an unlikely scenario as non-compliance can frequently be remedied quickly through dialogue and prosecution normally only takes place when an offender has refused to comply. The arguments against criminalisation relate mainly to the onus of proof and the test of evidence, whereby the responsibility is on the

prosecution to prove an offence beyond all reasonable doubt. This would undoubtedly put pressure on the Department's resources as the requirement to meet such a test is high. This problem might, however, be easily remedied by mirroring practice in the Republic of Ireland and introducing **reverse onus** (section 156 (6)) of the Planning and Development Act 2000), whereby t**he recipient of the enforcement notice**, not the planning authority, must prove beyond all reasonable doubt that an offence has not occurred.

[i] Department of Communities and Local Government, (2001) Planning: Delivering a Fundamental Change.