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Planning Bill

Bill 11 of 2007-08

This Bill would establish an Infrastructure Planning Commission (IPC) to decide development consent for major infrastructure projects in England and Wales. This procedure would introduce a single consent regime for a wide range of infrastructure projects currently approved under separate pieces of legislation. It would replace the need for consent under the *Town and Country Planning Act 1990* and other legislation, such as the *Electricity Act 1989*, for parts of the same project. The IPC decisions would be based upon statements of national policy issued by the Government. The Bill would also introduce a new procedure for planning appeals for minor applications like householder development.

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Summary

The Planning Bill 2007-08 would introduce a new method of deciding whether to approve major infrastructure projects of national significance. Currently most of these projects are decided by a Secretary of State under eight different acts, separate from the town and country planning regime. There is a public inquiry and the inspector sends the Secretary of State a summary of the evidence along with a recommendation. The Secretary of State determines the application, sometimes rejecting the inspector's recommendation.

Under the new procedures, the Government would issue a national policy statement in the relevant policy area, after public consultation and Parliamentary scrutiny. The application for development consent would then be decided by the Infrastructure Planning Commission (IPC), a panel of experts who would hear the evidence as well as taking the final decision. There would be no right of appeal against the decision of the IPC, except by judicial review in the High Court. The procedures would cover projects in the fields of energy, transport, water, waste water and waste. The Secretary of State, rather than the IPC, would be able to decide on an application only in exceptional circumstances.

There would be a time limit of nine months from the end of the preliminary meeting, between the promoter and the IPC, to the decision by the IPC, unless the IPC specifically varied it and notified the Secretary of State. However, promoters would have to do more preparation on their applications in order to make them acceptable, including public consultation.

The Bill contains enabling powers to establish the Community Infrastructure Levy, in order to obtain financial support from developers for new infrastructure projects. This was previously called the "planning charge" and replaces the proposed "planning-gain supplement".

The Bill also contains changes to the planning procedure for minor applications such as householder development. Currently these applications go to the planning authority, although they are frequently delegated to officers, and can be appealed to a planning inspector. Under the new procedures, these applications would be determined by planning officers, but could then be reviewed by a local Member Review Body, made up of councillors from the planning authority. There would be no right of appeal to a planning inspector.

The Bill extends to England and Wales, except in the case of an oil or gas pipeline crossing into Scotland when it also applies to Scotland.

The Government's proposals on house extensions, including loft conversions, do not form part of the Bill, although they were announced when the Bill was published.

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I The Bill in brief

The Department for Communities and Local Government described the Bill as follows:

> The Planning Bill will reform the planning system for major infrastructure projects which is increasingly struggling to deal with the challenges of the 21st century - climate change, protecting the environment and the need for new homes. The Bill will establish a better system for dealing with those decisions with opportunities for public participation locked into each stage of the process. It will also strengthen accountability and ensure decision-making is transparent and fair with sustainable development at its heart.
>
> The changes are expected to bring the average time for decisions on major projects down to under a year ending years of unnecessary delays on the infrastructure the country needs to tackle challenges of a modern world and help tackle climate change. On average £300m a year will be saved, nearly £5bn by 2030.
>
> Communities too will have a far greater say - with the Bill including a package of measures that will strengthen public participation in the setting of national infrastructure policy, the development of individual projects and planning decisions themselves.
>
> The Bill will also simplify the local town and country planning system, improve the appeal process and puts a duty on councils in preparing their local plans to take action on climate change.
>
> Local councils will also be able to set charges on new developments in their areas to contribute to community infrastructure like roads, schools and hospitals…
>
> Under the Bill:
>
> - Ministers will set national priorities for infrastructure following public consultation and Parliamentary scrutiny.
> - In drawing up the national statements, Ministers will be under a duty to contribute to sustainable development and to carry out an appraisal of their policy's sustainability.
> - Developers will have a legal duty to consult the local community, local authorities and key stakeholders on their projects as they prepare them.
> - Planning inquiries will be made more accessible to the public, and public's rights to be heard will be protected. The Bill will make it clear that any person who registers an interest can give oral evidence at relevant stages of the inquiry.
> - Decisions on applications will be taken by an independent Commission consisting of leading experts from a range of fields within a clear framework of legal duties set by Parliament and policy set by Government…
>
> The Bill and other reforms being announced today will:
>
> - Make it easier for homeowners to extend their homes. Planning permission will not be required for minor developments such as

conservatories, small scale extensions where it is clear they have little or no impact on neighbouring properties.

- Allow householders to install small-scale renewable technologies - such as solar panels and wind turbines - without planning permission subject to safeguards and standards to ensure there is little or no impact on neighbours.
- Give local planners more flexibility when developing local plans and speed up plan-making by removing unnecessary bureaucracy.
- Enable local councils to apply a new charge to secure a contribution towards the costs of community infrastructure to deliver the development plan from landowners who benefit when planning permission is granted.
- Require local councils to take action on climate change when preparing their local plans.
- Provide more resources for local authorities through a greater contribution from users of planning services.[1]

II Background

A. Major infrastructure projects and the 2004 Act

The Government has accepted for several years that the planning procedure for major infrastructure has been too complex and slow. Currently these projects are called in by a Secretary of State. There is a public inquiry and the inspector sends the Secretary of State a summary of the evidence along with a recommendation. The Secretary of State determines the application, sometimes rejecting the inspector's recommendation.

The current proposals are the third to come from the Government within the space of seven years. One set of proposals was put forward in 2001 and dropped after consultation in 2002. A second set formed the basis of part of the *Planning and Compulsory Purchase Act 2004*.

The concerns that led to the *Planning and Compulsory Purchase Act 2004* were very similar to those leading to the present Bill. A consultation exercise at the end of 2001 had considered proposals to reform planning procedures for major infrastructure projects. The proposals aimed at speeding up major infrastructure projects, announced by Stephen Byers, Secretary of State for Local Government, Transport and the Regions, on 20 July 2001, included:

- Up-to-date statements of Government policy which would normally have involved public consultation, to be in place before major projects are considered in the planning system. An up-to-date policy statement, on for example airports, would reduce the inquiry time devoted to a debate on what Government policy was on a particular subject.

- An improved regional framework which will assist consideration of individual projects. New arrangements for regional planning guidance preparation have enhanced the openness and inclusiveness of the process, including improved

[1] DCLG Press Release, *New legislation for major planning reforms*, 27 November 2007

consultation and the chance for people to have their say, with a public examination before an independent panel.

- New Parliamentary procedures to enable the Secretary of State to put a project of national significance to Parliament for debate and agreement on the broad principles ahead of a more detailed inquiry. This would allow the issues to be debated in public. This will require primary legislation.

- Improved public inquiry procedures, including strengthening the powers of inspectors, stricter time-tabling and more clearly focused terms of reference.[2]

However, the idea of Parliament taking the broad decision proved difficult. The Procedure Select Committee investigated the issue and published a report in July 2002. It noted several problems and concluded that it would not be able to decide whether it was feasible in time for the Government to legislate for the 2002-03 session:

> …[T]he Government's proposals for new parliamentary procedures raise major issues. The fundamental question is whether the proposals, either in their original form or subject to modification, succeed in reconciling the following three principles:
>
> (i) the desirability of enabling decision-making to proceed expeditiously and not to be subject to undue delay;
> (ii) the need for fairness to all the parties concerned, i.e. not only the promoters of a project but those objecting to it or seeking its amendment, especially if their own interests are directly and specially affected; and
> (iii) the need for decisions to be based on informed and expert knowledge.[3]

The Transport Select Committee also investigated the proposals and rejected the idea of a new Parliamentary procedure. However, it recommended an alternative:

> 165. When it approves Major Infrastructure Projects, Parliament should do no more than it currently does under section 9 of the Transport and Works Act for schemes of national significance. We therefore recommend that the scope of the Transport & Works Act be extended so that certain Major Infrastructure Projects may be selected by the Secretary of State to fall within an appropriately amended section 9 of the Act.
>
> 166. Under our proposal, as with other Transport and Works projects, after completion of the Parliamentary stage the project would be scrutinised at public inquiry. At the inquiry the Inspector would be guided by a National Policy Statement and the approvals of both Houses of Parliament. These would be weighty material considerations for the Inspector to take into account. There would also be further guidance from the Secretary of State who will have issued a statement of the matters which should be considered at the inquiry. Nevertheless,

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2 DTLR, *Major infrastructure projects: delivering a fundamental change*, December 2001 Appendix A

3 Procedure Committee, *Major Infrastructure Projects: Proposed New Parliamentary Procedures*, 3 July 2002 HC 1031 2001-2

> the public inquiry would be the forum to consider all aspects of the proposed development.[4]

The proposal was dropped in the Deputy Prime Minister's Statement of 18 July 2002:

> I will speed up the planning of major infrastructure projects by setting out the Government's objectives in clear policy statements, and changing inquiry processes to make them more efficient. I have accepted the Select Committee's argument that the parliamentary procedures for major infrastructure projects are not the best way forward.[5]

The *Planning and Compulsory Purchase Act 2004* introduced a new procedure for major infrastructure projects called in by the Secretary of State. It would be possible to appoint two or more planning inspectors at the same time. They could hold inquiries simultaneously on the same topic. The idea was to reduce, perhaps halve, the time taken in the inquiry by dividing up the topics needing to be covered. The section (s.44) was brought into force in August 2005. This did not apply to other development consent regimes for energy, transport, water or waste but the *Energy Act 2004* s.182 provided for a similar regime to be applicable to electricity consents by order. This was brought into force by *The Energy Act 2004 (Commencement No. 8) Order 2007* (SI 1091).

The 2001 proposal to have up-to-date statements of Government policy was not really followed. In some cases, the new Planning Policy Statements might fulfil that function. In some other cases, such as aviation, the Government has issued a statement of policy in a White Paper.[6] However, there are cases in which the Government has not issued a statement of policy - for example ports. In many cases, the Planning Policy Statements would not in themselves provide an adequate background for a major infrastructure decision, partly because of their focus and partly because of their lack of detail.

B. The Barker and Eddington reports

The various reports by Kate Barker have proved enormously influential in the formulation of recent planning policy. The Treasury website notes that Kate Barker was appointed as an external member of the Monetary Policy Committee with effect from 1 June 2001. In June 2004, she was re-appointed for a further three years. Previously, she was Chief Economic Adviser at the CBI (1994-2001), and prior to that Chief European Economist at Ford of Europe (1985-1994). She was appointed (by Government) in April 2003 to conduct an independent Review of UK Housing Supply; leading to a final report in March 2004. The Government's full response to this Review was published in December 2005. In December 2005, she was asked to conduct an independent review of Land Use Planning, to report in late 2006.

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4 Transport, Local Government and the Regions Select Committee, *The Planning Green Paper*, July 2002, HC 476 2001-2

5 HC Deb 18 July 2002 c441

6 Department for Transport, *The Future of Air Transport*, December 2003

The two reports are related to this Bill through the concern to increase the level of house building. In addition they both relate to the problem of paying for the infrastructure needed to support increased house building.

The 2004 report on housing policy recommended, amongst other things, the introduction of Planning-gain supplement. This would be a tax on the increase in land value resulting from the grant of planning permission, to finance infrastructure. The Government initially accepted that recommendation, but after hostile responses to consultation eventually rejected it in October 2007.

The 2006 Barker report on land use criticised the delay in securing planning permission for major infrastructure projects and stressed the need for clear national policy so that public inquiries do not spend a long time discussing broad national issues such as the need for that sort of development. She suggested three options:

- Assessments of Need. This would involve the Government drawing up a set of assessments of need for major transport infrastructure developments as well as for sectors such as energy, strategic waste and water. These would provide a framework for decision-making on individual projects and indicate the principle of the need for each particular type of development. There would be no requirement for coordination between different types of infrastructure. An example here could be the statement made recently to the House of Commons by the Secretary of State for Trade and Industry on the need for additional gas supply infrastructure. This statement set out the context and economic case for the growing need for new gas supply infrastructure and was intended to provide assistance to planners making development management decisions on energy infrastructure;

- Statements of Strategic Objectives. An alternative model would be to have Statements of Strategic Objectives (Statements). These would be similar to assessments but would, where appropriate and possible, be spatially specific, and would provide a clearer spatial framework to aid decision-making for major infrastructure. They would also assess the environmental, social and economic impact of the different options needed to meet likely future requirements and so go beyond mere expressions of need. A possible model to follow is the Air Transport White Paper which looked at the future needs of the UK's air transport market to 2030 and identified new capacity requirements, setting out where these were likely to be needed. Statements would be drawn up following full public consultation and would have to be developed with regard to other Statements to ensure policies were consistent. These Statements would have to be kept up to date as necessary. The Government would also have the option to include geographically specific government priorities, similar to the approach taken in the Government's Sustainable Communities Plan. Statements of Strategic Objectives would have to be taken into account by the Regional Planning Bodies to ensure that policies contained within them were factored into the development of Regional Spatial Strategies; and

- A National Spatial Strategy. A third option would be a broader and fully integrated national spatial strategy. This would set out social and economic trends such as changing demographics and household structure, globalisation, increased mobility and technological change and the likely impact on the way in which land is used and needed. It would be at a local level, within and across regions, and in certain circumstances at a national level. The Strategy would have to include, in spatial form, the major centres of population within each region and a discussion about changing demographics within each area. It could include policy on the relationship between

> regional housing markets, labour markets, travel patterns and supporting infrastructure, such as the need for more house-building in the South and the need to revitalise areas of low demand in the Midlands and Northern Regions as set out in the Sustainable Communities Plan.[7]

In addition, Kate Barker called for a new independent Planning Commission to decide on major infrastructure projects. This would remove the need for Ministers to be involved at the end of the process:

> 3.15 For an independent Planning Commission to be effective, it would require a panel of well respected experts of considerable standing in their fields. Given the range of issues that are commonly at play in major infrastructure cases, this could include expertise in the fields of law, economics, engineering, environmental science and planning. Operating on a similar basis to other independent bodies such as the Competition Commission, Ministers would have no day-to-day involvement in the operations of the Commission. The role of Ministers would be limited to establishing the legal framework under which the new Commission would operate and they would also appoint members to it. Monitoring and auditing arrangements would also have to be established to ensure there was appropriate accountability and probity. Ministers would also need to establish clearly the relationship between the Planning Inspectorate, which currently manages inquiries on major infrastructure projects on behalf of the Secretaries of State and makes recommendations to them, and the new Commission.
>
> 3.16 The Commission would assess applications as they came forward, in the context of declared national policy. It could engage in pre-application discussions with developers, as local planning authorities do, to ensure that the range of consents needed had been applied for, and to ensure that developers had carried out the appropriate consultations with local communities as well as statutory consultees. It would be critical that the Commission took appropriate account of local interests in its decision-making. Even where national need was clearly established, local considerations would have to be taken into account and local communities given the opportunity to express their views and concerns. The European Convention on Human Rights, which is incorporated into UK law by the Human Rights Act 1998, has enshrined the principle that everyone should have the right to a fair hearing. In making decisions on planning, whether at a local or a national level, this means that the principles of natural justice must be applied, and that parties to planning applications should be treated fairly and even-handedly. It would also be important to ensure that the reasons for the final decisions were properly explained to those affected at the local level.
>
> 3.17 It would also clearly be the case that other principles that apply to making planning decisions would apply to an independent Planning Commission. In making decisions the Commission would also be acting in a quasi-judicial capacity and its decisions would be open to scrutiny and legal challenge. The Commission would have to act, and be seen to act, in a way that demonstrated that it had not prejudged the application it was considering. It would have to determine applications in full consideration of all the relevant issues, including all relevant environmental issues. Even where national need was clearly

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7 Kate Barker, *Barker Review of Land Use Planning Final Report*, 6 December 2006

> established, local circumstances might indicate that the costs of granting planning permission outweighed the benefits. In that case the Commission would have the powers to refuse the application it was determining.

The remit of the independent Planning Commission would extend to major energy consents such as power stations.[8]

Sir Rod Eddington had published a review of transport policy in December 2006, calling for increased investment in transport infrastructure. He co-ordinated with Kate Barker on the question of the appropriate procedure for approval of major infrastructure. Amongst his recommendations on the transport infrastructure, he recommended:

> 5. Government needs to ensure the delivery system is ready to meet future challenges, including through reform of sub-national governance arrangements and reforming the planning process for major transport projects by introducing a new Independent Planning Commission to take decisions on projects of strategic importance. [9]

C. The Planning White Paper 2007

The Planning White Paper set out detailed proposals for reform of the planning system, building on Kate Barker's recommendations for improving the speed, responsiveness and efficiency in land use planning, and taking forward Kate Barker's and Sir Rod Eddington's proposals for reform of major infrastructure planning.[10] Legislation would follow to unify the various consent regimes, including those for energy developments. For example, an applicant for a power station would not have to apply for consents under the *Electricity Act 1989* and separately for planning permission for overhead electric lines, as is currently the case. The Government would issue national policy statements subject to parliamentary scrutiny. Major infrastructure applications would be determined by the Infrastructure Planning Commission (IPC).

Chapter 3 explains that national policy statements would be the primary consideration for the IPC in determining applications for development consent for nationally significant projects. However, it also stressed that it would be possible for the IPC to reject an application which was consistent with the national policy statement in certain circumstances:

> [T]he commission would approve any application for development consent for a nationally significant infrastructure project which had main aims consistent with the relevant national policy statement, unless adverse local consequences outweighed the benefits, including national benefits identified in the national policy statement. Adverse local consequences, for these purposes, would be those incompatible with relevant EC and domestic law, including human rights

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8 then handled by the Secretary of State for Trade and Industry under energy legislation, now the Secretary of State for Business, Enterprise and Regulatory Reform

9 Sir Rod Eddington, *The Eddington Transport Study The case for action: Sir Rod Eddington's advice to Government*, December 2006 Key findings and Recommendations 15(5)

10 DCLG etc, *Planning for a Sustainable Future*, 21 May 2007, Cm 7120

legislation. Relevant domestic law for infrastructure sectors would be identified in the planning reform legislation;[11]

National policy statements would:

- Set out the Government's objectives for the development of nationally significant infrastructure in a particular sector and how this could be achieved in a way which integrated economic, environmental and social objectives to deliver sustainable development.
- Indicate how the Government's objectives for development in a particular infrastructure sector had been integrated with specific government policies.
- Show how actual and projected capacity and demand are to be taken into account.
- Consider relevant issues in relation to safety or technology. Indicate any circumstances where it was particularly important to address adverse impacts of development.
- Be as locationally specific as appropriate.
- Include any other particular policies or circumstances that ministers consider shuould be taken into account [12]

Chapter 5 explained how the IPC might operate:

> We propose that the board of the commission would appoint a panel of members (usually three to five) to examine and determine the major applications. Each panel would be constructed to ensure that it had an appropriate mix of expertise and experience for the case, including, if necessary, specialist technical expertise related to the particular sector. Each panel would also be able to draw on the expertise of other commissioners and the commission secretariat as necessary, in a way that ensures transparency.
>
> The panel would be responsible for all aspects of the examination of an application, including considering its merits, managing any oral hearings, deciding whether to grant development consent, and determining any conditions that might be attached to the development consent.
>
> The panel would take a hands-on role in each stage of this process, considering submissions, identifying issues that need to be tested further, and managing any hearings. In deciding whether to grant the application and grant the project permission to proceed, the panel would operate collectively, to reflect the equal role of members and the skills they brought to the table.
>
> However, some of the projects that the commission might deal with, and particularly the smaller works related to the integrity of national networks, are likely to be considerably less complex. As such, commissioners might not need to be involved in all stages in as much detail.
>
> We propose that, where it did not feel that a full panel would be required, the board of the commission should have discretion to delegate the examination of smaller and less complex cases to a single commissioner with the commission's

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11 DCLG etc, *Planning for a Sustainable Future*, 21 May 2007, Cm 7120 p42
12 DCLG etc, *Planning for a Sustainable Future*, 21 May 2007, Cm 7120 p45-47

> secretariat. In such cases, the commissioner would make a recommendation to the board of the commission, which would take the final decision as to whether the project should be given permission to proceed.
>
> Giving the commission the ability to delegate the examination ot applications to a single commissioner with the secretariat while retaining the decision with a board of commisioners will ensure that the commission can design a mode of consideration proportionate to the complexity and demands of the case, while ensuring that an appropriate range of specialist expertise is brought to bear on the final decision.[13]

D. The Bill in the context of Government policy

During the Debate on the Address in the House of Lords on 13 November 2007, Baroness Andrews, Under Secretary of State, Department for Communities and Local Government, explained the purpose of the Bill:

> I turn to planning reform. Since 1947, our Town and Country Planning Acts have stood the test of time, ensuring that we have had the right growth in the right places. In recent years, we have built on that through a reformed planning system which has put sustainable development in pride of place at the heart of planning. More houses have been built, our town centres have been revitalised and our green belt has been protected, while commercial growth has been unprecedented.
>
> The second Barker report made it clear that given the impact of, for example, globalisation and technological and climate change, we need now to do things differently to ensure that we can plan properly for economic growth and prosperity as well as sustainable development. In particular, we have to acknowledge that our planning system simply cannot cope with the problems of planning for major infrastructure. Decisions, in some cases, have taken years to close. Noble Lords will be familiar with the problem. For example, Heathrow terminal 5 took seven years to decide, the north Yorkshire grid took over six years, and Dibden Bay took more than four years. That sort of delay is bad for the country.
>
> Local authorities, the planning inspectorate, developers, investors and the community as a whole will benefit from further change to our planning system. We intend now to create a planning system which is more responsive, timely, transparent and predictable. That is why we are bringing forward a Planning Reform Bill which will create the opportunity, through the national policy statements, for there to be—for the first time—national, public and democratic debate on the future use of scarce resources and on difficult national choices such as those on energy, transport, water and waste needs. By increasing the speed and predictability of applications to construct cleaner energy projects, for example, our proposals will help the transition to a low-carbon economy.
>
> Instead of the confusion and delay that has been caused by overlapping consent regimes, the Bill will introduce a single consents regime for nationally significant infrastructure projects. It will establish an independent infrastructure planning commission which will enable the planning system itself to focus on the impact of

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[13] DCLG etc, *Planning for a Sustainable Future*, 21 May 2007, Cm 7120 p82

> development. It will streamline planning and make it more accountable. The Planning Reform Bill will also in due course make provision for the new planning charge which will enable local authorities to raise additional resources needed to support infrastructure for housing growth. But I want to make it clear that this is not just a Bill about planning processes and the need to improve them; it is a Bill about better and more transparent, effective and robust democratic decision-making. At its heart is a commitment to greater public consultation and parliamentary scrutiny to ensure that planning tackles climate change and supports sustainable development. It will increase opportunities for more public participation in planning and introduce measures at the town and county planning level to enable more effective local plan making and a more efficient appeals process.
>
> The Planning Reform Bill, the Energy Bill and the Climate Change Bill are the three legislative pillars of the Government's strategy to secure quality of life through delivering on our twin objectives of maintaining economic prosperity and tackling climate change. In different ways, each of the Bills I have described so far, and the national, economic and social imperatives which lie behind them, illustrate the need for sustainability in all we do…[14]

III Energy policy and planning needs

The two long-term energy challenges faced by the UK that drove the latest review of energy policy and culminated in the Energy White Paper 2007 are:[15]

> tackling climate change by reducing carbon dioxide emissions both within the UK and abroad; and
>
> ensuring secure, clean and affordable energy as we become increasingly dependent on imported fuel.[16]

To address these, the UK will have to move towards more renewable and low-carbon energy sources, and improve energy infrastructure such as gas storage facilities, liquefied natural gas terminals, and gas and electricity transmission and distribution networks. Many of the developments required could be delayed considerably by the current planning system.

A. Renewables

The UK has to satisfy two sets of renewable targets, and both are going to be challenging. The first is the UK's own target of 10% of *electricity* generation to be met from renewable sources by 2010, and an 'aspiration' of 20% by 2020. The second is the EU's binding target, that Tony Blair signed up to at the spring European Council meeting in March 2007, of 20% of the *overall European energy* mix to be generated from renewables by 2020. The EU's target, which encompasses all forms of energy, will clearly be more difficult to meet than the UK's electricity target. For example, electricity

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14 HL Deb 13 November 2007 cc367-8
15 *Meeting the Energy Challenge, A White Paper on Energy*, DTI, 23 May 2007, CM 7124,
16 HC Deb 23 May 2007 cc1279-96

accounted for only 18.5% of the energy used in the UK in 2006, the latest year for which figures are available.[17] Nuclear power, as a low-carbon source, is to count towards the EU target, and there is to be 'burden sharing' to allow countries to make different contributions to the overall target. Future negotiations about this will be contentious and, if the UK cannot meet its obligation, it may have to pay into a buy-out fund with negative implications for the economy and business.

In 2006, 4.55% of the UK's electricity was generated from renewables. This was up from 1.82% in 1990.[18] This is often presented as a 250% increase, nevertheless, it is from a very low base and electricity from renewables currently accounts for only a small proportion of total need. Many other EU member states generate a much higher percentage, as illustrated in answer to the following parliamentary question:[19]

> **Mr. Meacher:** To ask the Secretary of State for Business, Enterprise and Regulatory Reform what information his Department holds on the percentage of electricity generated from renewable sources of energy in each of the EU member states *(a)* in 1997 and *(b)* at the most recent date for which information is available. [163343]
>
> **Malcolm Wicks:** Electricity from renewable energy as a percentage of gross electricity consumption is published by Eurostat. The information for 1997 and 2005 is as follows. 2005 is the latest year for which such information is available for all member states:

Percentage		
	1997	*2005*
Cyprus	—	—
Malta	—	—
Estonia	0.1	1.1
Belgium	1.0	2.8
Poland	1.8	2.9
Luxembourg	2.0	3.2
Lithuania	2.6	3.9
United Kingdom	1.9	4.3
Czech Republic	3.5	4.5
Hungary	0.6	4.6
Ireland	3.8	6.8
Netherlands	3.5	7.5
Greece	8.6	10.0
Germany	4.3	10.5
France	15.2	11.3

[17] HC Deb 27 November 2007 c291W
[18] UK Energy in Brief, BERR, July 2007, p29
[19] HC Deb 21 November 2007 cc 937-8W

Bulgaria	7.0	11.8
Italy	16.0	14.1
Spain	19.7	15.0
Portugal	38.3	16.0
Slovakia	14.5	16.5
Slovenia	26.9	24.2
Finland	25.3	26.9
Denmark	8.8	28.2
Romania	30.5	35.8
Latvia	46.7	48.4
Sweden	49.1	54.3
Austria	67.2	57.9
EU (27 countries)	13.1	14.0
Source: Euros tat http://epp.eurostat.ec.europa.eu		

The Bill contains provisions that will facilitate new renewable developments. Hazel Blears, the Secretary of State for Communities and Local Government, is reported to believe that:

> … the new legislation would allow even highly contentious projects such as a long-mooted Severn Barrage to speed through the planning system. "The total period we expect would be about 48-49 weeks," she said. About 75 wind farms are held up in the planning stage, and in the worst case approval could take between seven and 10 years, the government says.[20]

B. Nuclear

The possibility of new nuclear build is also on the agenda. Along with renewables, this is the most substantial source of low-carbon generation available, although it has the drawback that highly polluting radioactive waste is a by-product. In 2006, nuclear stations produced 18% of the UK's electricity.[21] Many of these are already operating well beyond their expected lives, subject to stringent safety requirements. Their operation cannot be extended indefinitely, and they are due for closure within the foreseeable future. To replace nearly a fifth of the country's electricity generation, the most significant current alternative to new nuclear build is gas-fired power stations. These, however, emit more polluting gases than nuclear, and as North Sea reserves dwindle might require importation of gas from countries considered less stable that the UK. A Government consultation on new nuclear build has recently closed and a decision on its advisability is expected in the New Year.[22] In a speech to the CBI on 26 November

[20] "Planning changes will aid green energy, says Blears", *Financial Times,* 27 November 2007, p4
[21] UK Energy in Brief, BERR, July 2007, p24
[22] HC Deb 22 November 2007 c1320

2007, Gordon Brown is reported to have reiterated "that new nuclear power stations potentially have a role to play in tackling climate change and improving energy security".[23] The Government's Chief Scientist, Sir David King, in his valedictory speech to the Royal Society is reported to have said that "we need to look at nuclear energy as part of a low carbon economy".[24] The *Financial Times* comments:

> The new planning laws - which aim to halve average approval times for big projects - could also accelerate the construction of nuclear power stations should the government approve their development next year.[25]

A waste repository for legacy nuclear waste will also have to be considered whatever the decision on new nuclear build. This could also be facilitated by a streamlined planning system.

Together, this Bill, the *Climate Change Bill*[26] [HL], Bill 9 2007-08, and the forthcoming *Energy Bill*[27] contain the necessary provisions to take UK energy policy forwards.

IV Comment on the White Paper

The Government has published its response to the Planning White Paper Consultation on the DCLG website,[28] along with two more detailed reports on the responses to the Consultation.[29,30] The Executive Summary has the following overview of the response on some of the main issues:

> **Analysis of the general responses**
> There were around 31,050 general responses, that is, letters that do not address the questions in the Planning White Paper. They represent the greatest volume of responses.
>
> The main weight of the views expressed in these letters concerned two key issues regarding nationally significant infrastructure projects. The issues were:
>
> • concerns about local democracy, public participation, and accountability, which respondents thought should be addressed by
> – ensuring national policy statements properly involve local people
> – preserving people's right to be heard in public inquiries
> – decisions being made by democratically accountable politicians, not an unelected Infrastructure Planning Commission

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23 Rt Hon Gordon Brown's speech to the CBI, 26 November 2007,
24 Department for Innovation, Universities and Skills press notice, *King calls for UK to stand on the shoulders of science,* 27 November 2007
25 "Planning changes will aid green energy, says Blears", *Financial Times,* 27 November 2007, p4
26 DEFRA Climate Change Bill page [on 6 December 2007]
27 Brief details of Energy Bill at BERR Energy Bill page [on 6 December 2007]
28 DCLG, Planning White Paper Consultation: Government response to consultation replies, November 2007
29 Arup for DCLG, *Planning for a Sustainable Future - Analysis of Consultation Responses Background Report A*, November 2007
30 DCLG, *Planning for a Sustainable Future - Analysis of Consultation Responses Background Report B*, November 2007

• adverse impact on the environment and other planning considerations, with a need to
– avoid economic considerations being given undue weight, by considering alternatives to specific nationally significant infrastructure projects and need in the preparation of national policy statements
– protect natural and historic resources for future generations, through robust environmental assessment and stronger, not streamlined, biodiversity policy
– impose a duty on all decision makers to promote sustainable development, and thus
– avoid major carbon intensive developments (such as airports, roads, incinerators and non-renewable energy projects)

In addition, concerns were expressed about certain issues relating to the town and country planning system, in particular:
• removal of the need test in England in relation to town centre development
• removal of initial consultation stages of local plan-making in England.

Analysis of the more detailed responses
More detailed responses are ones that address some or all of the questions in the PWP, either expressly or in a way that could be clearly linked to a question.

Question 1: the proposed package of reforms. A large majority of those who answered the question thought there was a case for reform, although a third of these had comments of varying degrees of seriousness. A majority of those who answered the question considered that the proposed reforms would meet the objectives set for them, but almost as many considered they would not do so, with some making specific suggestions. Business, government bodies and professionals and academics gave greatest support to the proposals. Among those who supported the need for reform and/or the specific set of proposals but had reservations, and those who opposed, there was a consistent set of priority concerns (particularly expressed by the general public, government bodies and environment and community groups):

• the reforms were likely to result in reduced public involvement
• there would be a lack of democratic accountability in decision making
• local and regional government would not have clear roles in the process
• environmental and social aspects of sustainability were likely to have less weight in decision making than economic and business concerns

These key themes were similar to those expressed in the general responses. As an alternative, the same range of respondents said that that the current system could be improved to meet some of the objectives; or that the proposals could be altered to improve performance against the objectives.

National policy statements
Question 2: national policy statements. A large majority of those who answered the question welcomed the principle of national policy statements, although over half had comments about implementation or content. A minority of those who answered the question rejected the proposal. Support was strong among all groups except the public.

The main points were:

• support for a national focus for infrastructure provision and the separation of policy and decision making in respect of nationally significant infrastructure projects
• concern that they might not address local issues adequately, take proper account of local views expressed in the consultation process, or put weight on environmental or amenity issues
• a wide range of suggestions about
– further classes of infrastructure that might be the subject of a national policy statement and
– integration of national policy statements with other policy in terms of content and timing of production, to ensure that nationally significant infrastructure projects were not delayed by conflicting policy

Question 3: content of national policy statements. A large majority of those who answered the question agreed in principle with the proposed content of national policy statements. Support was very strong from all groups except the public. The main points were:
• concern that economic factors might be given undue weight over environmental/sustainability and local issues
• a difference of opinion over the merits and impacts of locational specificity in national policy statements
• comprehensive suggestions on national policy statements' content, some specific to particular statements
• suggestions about how to address environment and sustainability concerns

Questions 4 and 29: status of national policy statements and decisions made on them. The primary status of the national policy statement in policy and decision making was accepted by a majority of those who answered the questions, although half of them had comments particularly government bodies, and professionals and academics. The security of a clear policy lead on infrastructure development was welcomed by the business community. Opposition was strongest from the public and environment and community groups.

The main points were:
• concerns that the definition of 'adverse local consequences' was too narrow, and
• respondents suggested
– the national policy statement should be one of many material considerations, with appropriate weight on environmental and social factors and on other relevant planning policy
– other means of clarifying the factors that decision makers should consider when determining specific proposal.[31]

The following individual comment complements that acount. Mike Ash, Chief Planner at ODPM until 2006, criticised the proposals for having the IPC determine major infrastructure planning applications:

[31] Arup for DCLG, *Planning for a Sustainable Future - Analysis of Consultation Responses Background Report A*, November 2007 p7

> Despite delegation to officers or inspectors, judgement has until now been exercised by or in the name of accountable ministers and councillors. While this accountability may be at several removes, it is still vital. Accountability for underlying policy is not enough. Major infrastructure projects affect many and deciding between conflicting interests is rarely just a technical exercise. We should only give up on the principle of democratic accountability if there is overwhelming evidence of the need to do so. Despite the Eddington and Barker reviews, the evidence for the proposed changes is weak…
>
> In my experience, delay is not usually a result of ministerial dithering. The key factors are:
>
> - Procedural flaws earlier in the process that mean a decision would be at significant risk of legal challenge
> - Absence of sufficient evidence on key points
> - The emergence of new national policy
> - The absence of dedicated resources for related public infrastructure improvements.

He argued that the proposed statements of strategic objectives would need to include commitments to fund related public infrastructure. He agreed with the White Paper's criticisms of the way that promoters have prepared their applications:

> This is a key issue. The White Paper proposes improving promoters' engagement with agencies, urges proper consultation and promises guidance from the IPC. However, direct involvement will be limited by the need to maintain the commission's position as an independent tribunal under the European Convention on Human Rights. In addition, the IPC may refuse to consider an inadequate application, although this is hardly likely to speed up delivery.[32]

V Comment on Planning Bill

The Bill followed the White Paper closely. This section contains mostly general comments, while some detailed comments appear later in this paper.

The Conservative Party has said of the Bill:

> While the Conservatives said they supported reform of the planning system, they opposed plans to take powers away from local communities and put them in the hands of a "quango". Shadow Communities and Local Government Secretary Eric Pickles said; "Predictably, Ministers' response to the failings they produced in the planning system is to set up another quango and take more central control.
>
> This Bill will see powers taken away from local communities to unaccountable and unsackable bureaucrats. Any fool can see the planning system needs reform – but the voice of local communities must be preserved and a democratic, accountable process must be maintained. We will strongly oppose plans for a new central planning quango and the proposals for more out-of-town retail sprawl. [33]

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32 "Called to account", *Planning*, 3 August 2007

33 Press Association, *Planning Reform Bill aims to cut delays*, 27 November 2007

Liberal Democrat Local Government Spokesman, Tom Brake MP said:

> There's a real risk that this Bill, in its search for faster planning decisions, will allow local residents' concerns to be bulldozed out of the way. We need to guard against a planning Commission whose decisions will be less democratic, less transparent and less representative of local communities' views.[34]

Tom Brake amplified the position:

> The Liberal Democrats recognise that there is a need to improve the way large planning applications are dealt with. The present system is not satisfactory. However, we are very concerned that the Planning Bill, as it applies to large infrastructure projects, will reduce the scope for local communities to challenge major projects. The way "campaign" responses to the White Paper have been largely discounted is a worrying indicator of how the Independent Planning Commission (IPC) might deal with local communities' concerns. We will assess carefully whether the proposed IPC will be sufficiently accountable and whether it will have the powers to reject applications.
>
> We will also want to consider very carefully how the parliamentary scrutiny of the national policy statements (NPS) is to be conducted, the extent to which the NPS will be subject to a full environmental assessment and the circumstances in which the Secretary of State will be able to intervene. We will watch very carefully for any moves to water down any existing planning policies or guidelines as they apply to the Green Belt or playing fields for instance.
>
> We will want to ensure that the level of financial support given to Planning Aid which is tasked with providing free advice to communities on planning matters is sufficient to enable them to support any communities struggling to make their voices heard in with the IPC and developers.[35]

The Royal Town Planning Institute (RTPI) broadly welcomed the Bill and added specific comments on key areas:

> **• There will be a right to be heard by any group that registers with the IPC on a development. But there will be no right of cross-examination.**
>
> RTPI Position: The RTPI support these measures as it provides a chance for stakeholders to have their say but keeps the process manageable. However, the IPC must demonstrate to the public that it will provide a robust and credible quality control over the technical evidence justifying development options that is put before it.
>
> **• Govt will stress the IPC is autonomous and independent – except where the minister thinks the National Policy Statement is flawed (i.e. new evidence has come to light which undermines the NPS) or where the issue of urgency is involved. In that case the Minister will make the decision.**

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[34] Liberal Democrats News, *New Planning Bill must not bulldoze views of communities – Brake*, 27 November 2007

[35] Source: Personal communication

> RTPI Position: It is fundamentally important the IPC is independent and seen to be independent. The IPC can only be a success if it is not perceived to be a rubber stamp
>
> • **All NPS's will be subject to parliamentary scrutiny.**
> RTPI Position: We believe this is key to the process being fair and democratic. All the big issues of the day should rightly be heard and debated in Parliament.
>
> • **Climate Change**
> RTPI Position: Para 147 of the Bill says climate change must be taken into account when drawing up development plan documents. The RTPI is wholly supportive of this measure as mitigating and adapting to climate change is a central tenet of RTPI policy. Including it within the Bill is a very positive move forward in tackling climate change.
>
> • **There will be a change to the Town and Country Planning Act to speed up appeals**
> RTPI Position: Speeding up the planning appeals process is of interest to all, however the system needs to be properly resourced in order to afford real change.
>
> • **Local Member Review Bodies**
> RTPI Position: The RTPI has no confidence in these bodies and will wait to be convinced by Government once they have laid down the details of how they will work.
>
> • **Plan-based tariff called a 'Community Infrastructure Levy**
> RTPI Position: At long last it appears that the Government has taken the advice which the RTPI has offered for years. It is a means of securing necessary local infrastructure based on an appreciation of local need clearly expressed in the local development framework.[36]

The British Property Federation (BPF) believes the measures will lead to a more streamlined and responsive planning system, bringing a new focus on major developments and freeing up planners' time to concentrate on the issues that matter. However, the trade body has warned that some of the proposed minor changes, outside of the proposals for major infrastructure projects, will have a negative effect on the property industry:

> BPF chief executive Liz Peace said: "We are pleased that the bill takes on board the views expressed by the property industry on the Planning White Paper.
>
> "The proposals have the potential to significantly streamline the current overly bureaucratic planning system with regard to major infrastructure projects, making it much more efficient. However, the benefits will only be achieved if the new Infrastructure Planning Commission has the skills and resources needed to make it work."

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[36] RTPI Press Notice 39, *Professional town planning body welcomes planning reform bill but warns: key tests must be met*, 27 November 2007

> Commenting on the Community Infrastructure Levy Peace added: "The property industry has been working closely with the Government on the design of the new levy. We welcome its introduction as a sensible mechanism by which developers can make a contribution towards the infrastructure requirements of a local area. We will continue to advise the Government on this issue." [37]

David Porter, Chief Executive of the Association of Electricity Producers said;

> "We are risking our security of supply if we continue to allow planning inquiries to drag on, sometimes for years. Companies simply cannot afford to wait that long to get the go-ahead for a new development. Consenting has to be streamlined and new power station projects need to be considered in a more efficient way, but without damaging the democratic process at local level. Companies may not get the green light every time, but it helps if even a negative decision is made in a timely way. The Planning Bill is crucial to our members.[38]

The Town and Country Planning Association (TCPA) Chief Executive Gideon Amos said:

> "A joined-up approach to planning and investment in infrastructure could and should be put to use to at last tackle the north south divide head on and to create new energy infrastructure served from renewable sources… Government must now ensure that these national planning statements are the result of robust public debate and proper scrutiny if they are to deliver a more sustainable pattern of much needed public transport and related infrastructure."[39]

On the Community Infrastructure Levy (CIL), the TCPA said, in addition:

> The TCPA is also keen that the new Levy will ensure that more of the 93% of applications contributing nothing towards infrastructure begin to pay their fair share.[40]

The Local Government Association said on CIL:

> We support the Community Infrastructure Levy approach as a viable local alternative to a centrally collected Planning Gain Supplement. Councils can build on the successful experience of Section 106 and innovative approaches like the Milton Keynes tariff/roof tax. However, the framing of tariffs in primary legislation must not lead to inflexibility – it must allow for local definition and prioritisation of infrastructure requirements. It is vital for councils to own and drive sub-regional and regional infrastructure funding decisions.[41]

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37 British Property Federation, Press Release, *BPF Welcomes Streamlining of the Planning Process*, 28 November 2007.

38 Association of Electricity Producers Press Release, *Planning Reform Essential to Keep Britain's Lights On*, 27 November 2007

39 TCPA Press Release, *TCPA welcome expected 'Breakthrough Plan for Infrastructure* ,19 November 2007

40 TCPA Press Release, *TCPA welcome expected 'Breakthrough plan for infrastructure'"*, 19 November 2007

41 Planning Reform Bill:LGA response, 27 November 2007

Greenpeace said that the Bill would do nothing to facilitate the building of most wind farms, which were too small to qualify as major infrastructure projects.[42] Friends of the Earth argued that the new regime would damage the environment:

> Naomi Luhde-Thompson of Friends of the Earth said: "The Planning Bill will not tackle climate change as Hazel Blears would have us believe. It will fast track roads, airports and incinerators - substantially adding to the UKs carbon footprint.
>
> "While we welcome moves to simplify the planning system for major infrastructure projects the Government must ensure these projects reduce, not add to, carbon emissions. Planning commissioners, who will make decisions on major projects, must be accountable to Government and public inquiries must give people a real opportunity to have their views heard. "[43]

The Planning Disaster Coalition which comprises conservation, environmental and civic organisations have expressed their deep concerns about the Bill.

> "Despite 32,000 individual responses to its consultation on the Planning White Paper during the summer, the Government has, as anticipated, made few significant changes to its original proposals. The vast majority of these responses were from ordinary members of the public, expressing their concerns that the proposals threaten local democracy, communities and the environment, and calling on the Government to think again.
>
> Owen Espley, coalition co-ordinator, said: "The decision to press ahead despite these concerns suggests that the Government is not interested in being fully accountable for major decisions. We are also concerned that the right to be heard is limited - hardly encouraging when the planning process should be about listening to and taking account of the views of individuals and communities, and ensuring that all the evidence is fully examined."
>
> The coalition is calling on Ministers to revise their flawed proposals, maintaining credible and democratic decision-making in the process and ensuring that development is truly sustainable.
>
> Owen Espley said: "We hope that MPs will use the debates on the Bill to champion democracy, accountability and sustainable development, and reject proposals that sideline communities and the environment."[44]

Before publication of the Bill, some planning lawyers feared that the Bill might lead to a slower planning process because of the opportunity to challenge the procedure in the High Court at various stages.[45]

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42 "Planning charges will aid green energy says Blears" , *Financial Times,* 27 November 2007 p4

43 Friends of the Earth Press Release, *Government publishes Planning Bill*, 28 November 2007

44 Planning Disaster Coalition Press Release, *Gap remains between Government's rhetoric and reality on planning reform*, 27 November 2007.

45 "Lawyers concerned Bill will stall system," *Planning,* 9 November 2007, p1

VI National policy statements

A. Background

One of the conclusions of the 2006 Barker review[46] was the need for clearer national policy statements about national infrastructure projects. It stated that this would give more certainty in the planning system and allow for a more joined-up framework for the provision of infrastructure nationally. It set out the importance of having a clear national policy:

> A critical component of ensuring timely decision-making is that the strategic framework for decisions is clearly set out by central government. Among the principles that apply to decision making at either national or local level is that decisions should be made at the spatial level that best reflects the spillover effects. The vast majority of planning applications have only a local impact and should be determined at the local level by local planning authorities. But projects that are of national significance should be determined at the national level, while preserving the democratic mandate given to local authorities (and recently reinforced by the Local Government White Paper). These national decisions need to take account of wider factors. They must be made fairly and even-handedly and be taken following public consultation and full consideration of all the issues. This will allow local communities to express their views.[47]

The case for national policy statements was then set out by the Government in the May 2007 Planning White Paper,[48] which said that a lack of clear national policy on infrastructure projects was causing delays in the planning system:

> A key problem with the current system of planning for major infrastructure is that national policy and, in particular, the national need for infrastructure, is not in all cases clearly set out. This can cause significant delays at the public inquiry stage, because national policy has to be clarified and the need for the infrastructure has to be established through the inquiry process and for each individual application.
>
> […] As well as adding to the length of planning inquiries, the absence of a clear national policy framework can also:
>
> - make it more difficult for developers to make investment decisions which by their nature are often long term in nature and therefore depend on government policy and objectives being clear and reasonably stable;
> - make it more difficult for the public and other interested parties to have their say in what national policy should be in relation to infrastructure, since there is no clear forum for consultation or debate at the national level;
> - mean that inspectors running public inquiries have to make assumptions about national policy and need, often without clear guidance and on the basis of incomplete evidence; and

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46 Barker, K., *Barker Review of Land Use Planning Final Report – Recommendations*, December 2006
47 Barker, K., *Barker Review of Land Use Planning Final Report – Recommendations*, December 2006 p70
48 HM Government, *Planning for a Sustainable Future White Paper*, May 2007 CM 7120

- mean that decisions by ministers on individual cases may become the expression of government policy, rather than clear policy objectives framing such decisions.

A central element of the proposed new regime is therefore that the case for nationally significant infrastructure development should be set out by government in national policy statements.[49]

The current planning policy system is a hierarchical system of guidance and plans. These are: National Planning and Minerals Policy Statements and Guidance Notes; Regional Spatial Strategies; and Local Development Frameworks. The structure is detailed further in Government guidance:

NATIONAL LEVEL
The Government determines national policies on different aspects of planning and the rules that govern the operation of the system. National planning policies are set out in Planning Policy Statements (PPS) and Planning Policy Guidance Notes (PPG), Minerals Policy Statements (MPS) and Minerals Planning Guidance Notes (MPG), Circulars and Parliamentary Statements.

REGIONAL LEVEL
In England Regional Planning Bodies (in London, the Mayor) prepare and produce a Regional Spatial Strategy (RSS) (in London, the Spatial Development Strategy) reflecting the needs and aspirations for development and land use for a ten to fifteen year period. Each RSS should reflect, and build on, the policies set out at national level. The RSS can include policies relating to the area, or part of the area, of more than one local planning authority, allowing for sub-regional planning.

LOCAL LEVEL
Local planning authorities (other than county councils) must prepare a Local Development Framework (LDF). This will comprise a folder of documents for delivering the spatial or minerals planning strategy for the area. (The requirements for local minerals planning that apply to county councils are set out in MPS11, and the requirements for waste planning are in PPS102). An LDF will include a Local Development Scheme, Local Development Documents and a Statement of Community Involvement.

Local planning authorities (except county councils) must prepare a Local Development Scheme (LDS) which sets out a programme for the production of Local Development Documents (LDDs); what documents are to be prepared as LDDs; the timetables for producing them; and whether they are to be prepared jointly with other local authorities. LDDs, which can either be Development Plan Documents (DPDs) or Supplementary Planning Documents (SPDs), should reflect and build upon national and regional policies, taking into account local needs and variations. The Planning and Compulsory Purchase Act 2004 requires LDDs to have regard to national policies and guidance issued by the Secretary of State, the local authority's Community Strategy, and also to be in general

[49] HM Government, *Planning for a Sustainable Future White Paper*, May 2007 CM 7120 p42-43

> conformity with the RSS or, for London Boroughs, the Spatial Development Strategy.[50]

The White Paper sets out how national policy statements would operate:

> National policy statements would set the policy framework for the infrastructure planning commission's decisions and identify any special considerations which the commission should take into account. They would integrate the Government's objectives for infrastructure capacity and development with its wider economic, environmental and social policy objectives, including climate change goals and targets, in order to deliver sustainable development.[51]

The White Paper also proposed that national policy statements would sit at the top of the hierarchy as the primary consideration for the new infrastructure planning commission (IPC) in determining applications for development consent. It proposed that they should have more weight than any other statement of national, regional or local policy.[52]

The Government response to the Planning White Paper Consultation replies reported that the majority of respondents to the consultation welcomed the principle of national policy statements. It summarised the main points:

> The main points were:
>
> - support for clarifying national policy in relation to infrastructure provision and the separation of policy and decision making in respect of nationally significant infrastructure projects;
> - concern that national policy statements might not address local issues adequately, take proper account of local views expressed in the consultation process, or put sufficient weight on environmental or amenity issues;
> - a wide range of suggestions about the form and content of national policy statements;
>   - further classes of infrastructure that might be the subject of a national policy statement; and:
>   - integration of national policy statements with other policy in terms of content and timing of production to ensure that nationally significant infrastructure projects were not delayed by conflicting policy.[53]

B. The Bill

Part 2 of the *Planning Bill* sets out a statutory framework for the national policy statements. The definition of a statement which may be designated as a national policy statement is given in Clause 5 (1). This states very broadly that:

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50 Office of the Deputy Prime Minister, *The Planning System: General Principles*, 2005 p1
51 HM Government, *Planning for a Sustainable Future White Paper*, May 2007 CM 7120 p43
52 HM Government, *Planning for a Sustainable Future White Paper*, May 2007 CM 7120 p49
53 Communities and Local Government, *Planning White Paper Consultation Government response to consultation replies*, November 2007 p15

> (1) The Secretary of State may designate a statement as a national policy statement for the purposes of this Act if the statement—
>
> (a) is issued by the Secretary of State, and
>
> (b) sets out national policy in relation to one or more specified descriptions of development.

The meaning of the term "development" in the Bill is defined in Clause 28 as having the same meaning as it has in the *Town and Country Planning Act 1990*. Clause 5(5) sets out the sorts of things that a national policy statement *may* do:

> (5) The policy set out in a national policy statement may in particular—
>
> (a) set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area;
>
> (b) set out criteria to be applied in deciding whether a location is suitable (or potentially suitable) for a specified description of development;
>
> (c) set out the relative weight to be given to specified criteria;
>
> (d) identify one or more locations as suitable (or potentially suitable) or unsuitable for a specified description of development;
>
> (e) identify one or more statutory undertakers as appropriate persons to carry out a specified description of development;
>
> (f) set out circumstances in which it is appropriate for a specified type of action to be taken to mitigate the impact of a specified description of development.

This essentially means that the level of detail provided in a national policy statement is left to the discretion of the Secretary of State. It would mean that the Government would be able to give a general outline of a policy: for example by explaining that in order to meet energy needs they would like to see development for X number of power stations; or it could be much more specific and explain that a power station may be required in a particular location.

The Bill also sets out consultation and publicity requirements for a national policy statement in Clauses 7 and 8. Clause 7, subsection 2 states that:

> The Secretary of State must carry out such consultation, and arrange for such publicity, as the Secretary of State thinks appropriate in relation to the proposal. This is subject to subsections (4) and (5).

Subsection 5 details further that, if the proposed national policy statement does identify a specific location as suitable or potentially suitable for development, the Secretary of State "must ensure that appropriate steps are taken to publicise the proposal." Who should be consulted is defined further in Clause 8.

Clause 12 of the Bill defines when legal challenges can be made in connection with national policy statements. It sets out that these must be brought by judicial review and within a six week period of the date of publication of the national policy statement or revised national policy statement or the decision not to review it.

The Freight Transport Association welcomed the introduction of national policy statements in the Bill:

> The national policy statements will, for the first time, give developers of infrastructure a clear basis from which to plan investment. The Infrastructure Planning Commission should be an effective body for deciding on the appropriateness of individual developments. It will give a proper balance to local interests and the wider economic needs of the country."[54]

However, the Royal Institute of Chartered Surveyors was disappointed that national policy statements were introduced without a national spatial framework, which they believe would have led to better integration of policy:

> "The government's failure to include a national spatial framework for the proposed infrastructure plans is extremely disappointing. A framework would supply a link into the regional spatial strategies and provide the bedrock for national policy statements. Without this map, government policy could ignore regional inequalities, leaving many regions neglected. In planning terms, this policy is like a map without reference points."[55]

This was similar to a point made by Sir Peter Hall, the eminent town planning academic, before the Bill was published who wondered how the different national policy statements would fit together:

> Doubts deepen when it emerges that they would refer to individual pieces of infrastructure: airports, railways or ports, rather than transport as a whole. So the Department for Transport could produce a statement on airports without considering the case for a new high-speed rail line. To an extent this has already happened. The white paper stresses more than once that pre-existing statements, notably the 2003 airports white paper, should be automatically incorporated into the new national statements, with only cursory revision to deal with developments such as the rise in the profile of the climate change debate and the case for limiting air traffic growth…[56]

In an annex to a Written Ministerial Statement on 27 November 2007 announcing the publication of the Bill, Secretary of State for Communities and Local Government, Hazel Blears MP, set out further details about the proposed national policy statements:

> **Annex on National Policy Statements**
> *Energy*
> The Government will publish an overarching national policy statement covering key elements of energy policy relevant to infrastructure provision, such as climate change, security of supply and the energy market, and including information relevant to likely future demand and measures to secure energy efficiency.
>
> Energy national policy statements will also be expected to encompass different forms of energy generation such as fossil fuels, renewable energy, electricity networks and gas infrastructure

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54 epolitics.com, *Freight Transport Association stakeholder response to the planning bill*, 28 November 2007 [on 3 December 2007]

55 epolitics.com, *Royal Institute of Chartered Surveyors stakeholder response to the planning bill*, 28 November 2007 [on 3 December 2007]

56 "Planning requires a coherent system", *Regeneration & Renewal*, 1 June 2007

Transport
The Government's aim is to establish a suite of national policy statements that will comprise:

- a statement for aviation incorporating the 2003 Air Transport White Paper in a way which meets our proposed policy and statutory requirements for National Policy Statements; we are already committed to produce a further progress report between 2009 and 2011, which would provide a good opportunity to designate the ATWP in conjunction with that report;
- a statement for ports, possibly incorporating international freight, based on the work already undertaken as part of the ports policy review;
- a statement for the strategic national highway and rail networks focusing primarily on the highway network, given that comprehensive plans for the rail network were published earlier this year in the HLOS and supporting rail White Paper.

These statements will over time be aligned with the overarching transport strategy now under development, reflecting the cross-modal approach recommended by Rod Eddington, in order to ensure a consistent analytical and policy framework. The recent discussion document *Towards a Sustainable Transport System* sets out how the Department proposes to develop this strategy, working with transport users and other stakeholders over the period to 2012.

Water infrastructure
The Government will set out updated policies for water supply and water quality in a new Water Strategy, *Future Water,* which is due to be published early in 2008. This will inform development of a new national policy statement on infrastructure development for water supply and waste water treatment for the period from 2010 to 2035. The national policy statement will also be informed by parallel to planning and price review processes such as the Water Resource Management Plans which water companies will produce and the quinquennial reviews of water company sewerage charges.

Waste disposal
A national policy statement on waste will set out the Government's objectives for the development of waste infrastructure for the period to 2020 and will be based substantially on the Waste Strategy for England which was published in May 2007 after extensive consultation and engagement. We expect to prepare a waste national policy statement which will draw out and, if necessary, strengthen material in the Waste Strategy to enable the IPC to make decisions on projects coming forward.

Offshore renewables
The IPC and the Marine Management Organisation proposed under the Marine Bill White Paper will have responsibilities for consents to offshore renewables projects of specific generating capacities. Both will operate in accordance with consistent Government policy in this area whether set out in the relevant NPS or in the Marine Policy Statement.[57]

[57] HC Deb 27 November 2007 cc15-6WS

C. National policy statements and climate change

The 2007 Planning White Paper[58] examined how national policy statements might address climate change. It said:

> National policy statements would need to address the vital issues of mitigation and adaptation to climate change. The potential impact of infrastructure on carbon dioxide emissions, and how to minimise this impact as far as possible, would have to be considered in developing national policy statements. For example, we would expect them to address the impact of the construction and operation of the infrastructure itself, as distinct from its use, through principles of, for example, design or energy efficiency that would minimise the carbon impact.
>
> National policy statements would also need to reflect the physical impacts of climate change on nationally significant projects and the need for resilience throughout their lifespan to factors such as increased risk of flood, subsidence or coastal realignment.[59]

In the Bill itself, Clause 5(3) sets a requirement for the Secretary of State to "appraise" the "sustainability" of a proposed national policy statement before designating it so. No further definition is offered of what will constitute an appraisal or as to the level of detail that an appraisal would need.

Clause 9(2) sets out that the Secretary of State in exercising powers to designate and review national policy statements must "do so with the objective of contributing to the achievement of sustainable development", but again no further statutory definition is given. It seems likely that, as indicated in the Planning White Paper the intention of this would be economic, environmental and social sustainable development objectives, including climate change goals.[60] This has been confirmed as the intention of the Bill by the Department for Communities and Local Government.[61] They explained that this would leave flexibility for all the different sustainability factors to be weighed up as appropriate for different sorts of policy. This point was set out again in the Government response to the Planning White Paper Consultation:

> National policy statements will need to consider the range of relevant government policies and set out clearly how the Government's objectives for the class of infrastructure in question are to be integrated with other policy objectives. This will ensure that they integrate economic, environmental and social objectives with the aim of contributing to sustainable development. In particular national policy statements will need to set out how proposals for major infrastructure take into account any obligations and targets flowing from the Climate Change Bill.[62]

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58 HM Government, *Planning for a Sustainable Future White Paper*, May 2007 CM 7120
59 HM Government, *Planning for a Sustainable Future White Paper*, May 2007 CM 7120 box 3.2
60 HM Government, *Planning for a Sustainable Future White Paper*, May 2007 CM 7120 para 3.4
61 Telephone conversation with head of Planning Bill Team, Department for Communities and Local Government, 03.12.07.
62 Communities and Local Government, *Planning White Paper Consultation Government response to consultation replies*, November 2007 p16

However, given that these objectives can often sit in conflict with each other it is unclear how these would be weighed up and prioritised in any appraisal. For example, in setting transport policy, a new airport may help to achieve economic and social sustainability in a given location, but may be damaging to environmental sustainability. The potential for ambiguity here may leave scope for different Secretaries of State to use different measures of sustainability.

Indeed, one of the concerns raised in response to the Planning White Paper Consultation was that economic factors might be given undue weight over environmental/ sustainability and local issues.[63] In response to this, the Government said that the Bill will require that the sustainability of each national policy statement is "appropriately" assessed before it is approved.[64] However, the definition of "appropriate" is not given or explained any further.

The issue of sustainability was one which the RSPB expressed concern about in a press notice:

> Simon Marsh, Head of Planning at the RSPB, said: 'The bill is weak on sustainability which is very disappointing given the threat of climate change and the pressures on wildlife and wildlife habitats. As well as fast tracking planning applications, it could also hasten environmental damage.[65]

The Campaign to Protect Rural England was also worried that already published Government policy, such as the Air Transport White Paper, which under the Bill could be turned into a national policy statement, may not meet the sustainability requirement:

> "Ministers have given a commitment to pursuing sustainable development in national policy statements, but there is a big discrepancy between this and their commitment to incorporate the 2003 air transport white paper into the policy on transport."[66]

1. Strategic Environmental Assessment (SEA) Directive

One of the points made in the Planning White Paper is that *European Directive 2001/42/EC,*[67] known as the Strategic Environmental Assessment or SEA Directive, will be applicable to national policy statements in some cases:

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63 Communities and Local Government, *Planning White Paper Consultation Government response to consultation replies*, November 2007 p17

64 Communities and Local Government, *Planning White Paper Consultation Government response to consultation replies*, November 2007 p17

65 RSPB, *Planning bill could fast track environmental harm*, 27 November 2007

66 epolitics.com, *CPRE stakeholder response to the planning bill*, 28 November 2007 [on 3 December 2007]

67 Transposed into UK law by: *The Environmental Assessment of Plans and Programmes Regulations 2004* (Statutory Instrument 2004 No.1633); *The Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004* (Statutory Rule 2004 No. 280); *The Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004* (Scottish Statutory Instrument 2004 No. 258); and *The Environmental Assessment of Plans and Programmes (Wales) Regulations 2004* (Welsh Statutory Instrument 2004 No. 1656 (W.170))

> Strategic Environmental Assessment (SEA) is a procedure for assessing the effects of certain plans and programmes on the environment and will be an important tool in some cases for ensuring the impacts of development on the environment are fully understood and taken into account in national policy statements. National policy statements would be subject to an appraisal of their sustainability to ensure that the potential impacts of the policies they contain have been properly considered. Wherever appropriate we would expect this to be in the form of an SEA.

Government guidance, *A Practical Guide to the Strategic Environmental Assessment Directive*, sets out when the SEA Directive must be used:

> Article 3(2) makes SEA mandatory for plans and programmes:
>
> > a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent for projects listed in Annexes I and II to the Environmental Impact Assessment (EIA) Directive (85/337/EEC); or
> >
> > b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of the Habitats Directive (92/43/EEC).
>
> The European Commission guidance (paragraph 3.23) states that plans and programmes which set the framework for future development consent of projects would normally contain 'criteria or conditions which guide the way a consenting authority decides an application for development consent'. Development consent is defined in the EIA Directive as "the decision of the competent authority or authorities which entitled the developer to proceed with the project" (Article 1(2) of the EIA Directive).[68]

The Planning White Paper explains what the SEA Directive requires:

> An authority preparing a plan or programme subject to the Directive must:
> - produce an environmental report on its likely significant effects on the environment, covering reasonable alternatives and mitigation measures;
> - consult the public and designated environmental authorities on the draft plan or programme and environmental report;
> - take the report and consultation responses into account when finalising the plan or programme, and produce a statement summarising how they did so;
> - monitor the significant environmental effects of implementing the plan/programme.[69]

The Planning White Paper also explains further that the strategic environmental assessment can be expanded into a Sustainability Appraisal (SA):

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[68] Office of the Deputy Prime Minister, *A Practical Guide to the Strategic Environmental Assessment Directive*, September 2005 p11

[69] HM Government, *Planning for a Sustainable Future White Paper*, May 2007 CM 7120 box 3.1

> The objectives of the SEA Directive include the promotion of sustainable development. An SEA can be expanded into a Sustainability Appraisal (SA) by covering the social and economic effects of plans and programmes in addition to the environmental objectives specified in the Directive, and by relating the assessment explicitly to objectives and indicators of sustainability. The Directive's requirements were built into a new SA procedure for the regional and local spatial plans introduced by the *Planning and Compulsory Purchase Act 2004* – for example, the Sustainability Appraisal Reports on plans cover the requirements of the Environmental Report under the Directive.[70]

When the SEA Directive was implemented into UK law in 2004 there was debate about how environmental, economic and social factors could all be balanced when it was expanded into an SA. *The Guardian* reported:

> There are potential pitfalls. In England, ministers have been keen to turn the directive into a sustainability appraisal that examines economic, social and environmental considerations together. The language of politicians is of "balance" between these priorities, which traditionally has meant that the environment almost always loses out. Witness the balancing act that allegedly preceded the publication of the air transport white paper last December. The [air transport] white paper, with its proposals to cater for massive forecast growth in air traffic, is now regarded by many as a major threat to the environment - but at the time the environment lost out in favour of unrestrained growth.
>
> Under the new directive, before a decision was taken for massive airport expansion, a properly undertaken SEA would have considered whether high speed rail links to short haul destinations in the UK and mainland Europe might be environmentally more sustainable and more economic, say, than building another runway at Stansted. Indeed, such a study might have rendered it unnecessary.
>
> Of course, ministers reverted to the outdated environment versus economy debate in which the environment came second. It is surprising and disappointing, then, to see this "balance" issue being raised again.[71]

The same story in the *Guardian* also reported that some Government Departments were able to seek exemption from the SEA Directive:

> There are other alarming signs. The Department of Transport and the Highways Agency could collectively seek to exempt the government's roads' programme from the SEA directive - each arguing that the other organisation is responsible for the inclusion of an SEA, or in fact does not require one at all.[72]

Another issue reported on has been that the Planning White Paper stated that only some (and therefore not all) national policy statements would need to meet the SEA Directive requirements. In October 2007, Friends of the Earth quoted an opinion by Matthew

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70 HM Government, *Planning for a Sustainable Future White Paper*, May 2007 CM 7120 box 3.1
71 "What's the damage?", *The Guardian*, 21 July 2004
72 "What's the damage?", *The Guardian*, 21 July 2004

Horton QC and Richard Harwood that parts of the Planning White Paper would be legally unworkable:

> The assessment of the White Paper highlighted legal problems in three key areas:
>
> European Law would require a strategic environmental assessment to be carried out on every National Policy Statement. The White Paper suggests that these assessments should only be undertaken in `unusual cases' rather than in every case.
>
> At present the law requires that anyone making decisions on new developments should consider all national and regional policies which relate to that development. However the Planning White Paper limits the issues which the IPC can consider when making a decision on major developments. This approach means the IPC would not be able to take into account other relevant areas of Government policy when making decisions on major infrastructure projects.
>
> Under UK common law and the European Convention on Human Rights anyone directly affected by a new development, for example where their home is subject to a compulsory purchase order, has the right to have their views properly heard before a project is approved. The Planning White Paper proposes to virtually eliminate this right by replacing the current system which allows people to present their case in person and to call witnesses and cross examine opposing witnesses with a short open floor session at the end of the examination… [73]

The Department for Communities and Local Government does not agree with the above comment, noting that paragraph 3.9 of the Planning White Paper states that "wherever appropriate, we would expect the appraisal to be in the form of a Strategic Environmental Assessment (SEA)." Their statement continued:

> In reality, "European Law", in this case the SEA Directive (European Directive 2001/42/EC "on the assessment of the effects of certain plans and programmes on the environment") does not require SEA to be undertaken on specified plans or programmes. Rather it outlines criteria for application of the Directive through Articles 2 and 3. In the UK we have taken an approach of specifying types of plans or programmes that might be caught by the Directive (outlined in an indicative list in UK SEA guidance[74]), and also on occasion adopt a case-by-case assessment, particularly for newly emerging plans. The National Policy Statement (NPS) fits the latter (i.e. case-by-case assessment is the most appropriate approach).
>
> The Planning Bill clarifies that an appraisal of sustainability of the policy set out in the statement (i.e. NPS) is required before the secretary of State designates the NPS (Clause 5(3)). This will include an environmental assessment to the standards of SEA as required by the Directive, although it should be noted that in some cases this may not actually be required by the Directive.[75]

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73 Friends of the Earth Press Release, *Planning White Paper Is Legally Unworkable*, 23 October 2007

74 ODPM, Scottish Executive, Welsh Assembly Government and Department of the Environment Northern Ireland, *A Practical Guide to the strategic Environmental Assessment Directive*, 2005

75 privately communicated by the Bill Team

2. Planning Policy Statement 1: Delivering Sustainable Development

The Planning White Paper also proposed that a national policy statement should demonstrate how it is integrated with other specific government policies, including Planning Policy Statement 1 (PPS1) which is concerned with delivering sustainable development.[76] PPS1 offers a definition of sustainable development:

> Sustainable development is the core principle underpinning planning. At the heart of sustainable development is the simple idea of ensuring a better quality of life for everyone, now and for future generations. A widely used definition was drawn up by the World Commission on Environment and Development in 1987: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[77]

PPS1 sets out how planning should "facilitate and promote" sustainable development by:

- making suitable land available for development in line with economic, social and environmental objectives to improve people's quality of life;
- contributing to sustainable economic development;
- protecting and enhancing the natural and historic environment, the quality and character of the countryside, and existing communities;
- ensuring high quality development through good and inclusive design, and the efficient use of resources; and,
- ensuring that development supports existing communities and contributes to the creation of safe, sustainable, liveable and mixed communities with good access to jobs and key services for all members of the community.[78]

In December 2006 the Department for Communities and Local Government published a consultation on a supplement to PPS1, *Planning and Climate Change*.[79] A final version has not yet been published. The consultation document formed part of a wider package published by the Department for Communities and Local Government in December 2006. It included the *Code for Sustainable Homes*[80] and a consultation document, *Building a Greener Future*,[81] which set out how planning, building regulations and the Code for Sustainable Homes might deliver change, innovation and improvements to the environment. The *Building a Greener Future Policy Statement* published in July 2007[82] confirmed the timetable to deliver zero-carbon new housing in ten years.

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76 HM Government, *Planning for a Sustainable Future White Paper*, May 2007 CM 7120 para 3.9

77 Office of the Deputy Prime Minister, *Planning Policy Statement 1: Delivering Sustainable Development*, 2005 p2

78 Office of the Deputy Prime Minister, *Planning Policy Statement 1: Delivering Sustainable Development*, 2005 p2

79 Department for Communities and Local Government, *Consultation Planning Policy Statement: Planning and Climate Change Supplement to Planning Policy Statement 1*, December 2006

80 Department for Communities and Local Government, *Code for Sustainable Homes A step-change in sustainable home building practice*, December 2006

81 Department for Communities and Local Government, *Building a Greener Future: Towards Zero Carbon Development*, December 2006

82 Department for Communities and Local Government, *Building a Greener Future: policy statement,* July 2007

The introduction to the draft supplement, P*lanning and Climate Change*, sets out what it is for:

> This PPS on climate change supplements PPS1 by setting out how planning should contribute to reducing emissions and stabilising climate change (mitigation) and take into account the unavoidable consequences (adaptation). It does not seek to assemble all national planning policy relevant or applicable to climate change and should be read alongside the national PPS/G series. Where there is any difference in emphasis on climate change between the policies in this PPS and others in the national series this is intentional and this PPS takes precedence.[83]

The draft supplement also states that climate change is the Government's principal concern for sustainable development:

> The Government believes that climate change is the greatest long-term challenge facing the world today. Addressing climate change is therefore the Government's principal concern for sustainable development.[84]

From this definition alone it could be interpreted that climate change and environmental sustainability would be prioritised over other sustainability concerns such as economic or social objectives. However, one of the consultation questions about the draft supplement was about how climate change should be addressed in conjunction with other factors:

> Q.3 It is proposed that climate considerations should be a key and integrating theme of the regional spatial strategy (RSS) and be addressed in conjunction with the economic, social and environmental concerns that together inform the overall spatial strategy and its components. Do you agree?[85]

The Department for Communities and Local Government *Analysis Report of Consultation Responses* shows that "55% of consultees agreed that climate considerations should be a key and integrating theme of the Regional Spatial Strategy (RSS), with only 2% disagreeing." It makes no further comment on the priority, if any, that climate change should be given in relation to the other objectives.[86]

The analysis of responses listed recurring issues and themes that respondents felt were not sufficiently considered by the draft statement on planning and climate change. They highlight the complexity that integrating planning and climate change can bring:

> Several issues and themes recur throughout the responses to the different questions. Listed here are those issues that respondents thought had not been sufficiently considered in the draft PPS. It is accepted that some may be outside

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83 Department for Communities and Local Government, *Consultation Planning Policy Statement: Planning and Climate Change Supplement to Planning Policy Statement 1*, December 2006 p10

84 Department for Communities and Local Government, *Consultation Planning Policy Statement: Planning and Climate Change Supplement to Planning Policy Statement 1*, December 2006 p12

85 Department for Communities and Local Government, *Consultation Planning Policy Statement: Planning and Climate Change Supplement to Planning Policy Statement 1*, December 2006 p83

86 Department for Communities and Local Government, *Planning Policy Statement: Planning and Climate Change Analysis Report of Consultation Responses*, July 2007 p15

the intended scope of the PPS, but they reflect the priorities of respondents to the general topic under discussion. They are not listed in any particular order, certainly not in order of importance attached to them by respondents:

- The need to address carbon emissions from existing houses
- The need to address carbon emissions from non-domestic buildings
- The importance of transport emissions when designating sites and assessing development proposals
- The autonomy of the local planning authorities to set their own energy standards
- The issue of adaptation to climate change, the need for guidance and monitoring
- The lack of resources and skills on energy use and renewable energy, particularly within local authority planning departments
- The additional costs of implementing the PPS, to both local authorities and developers of the proposals
- The feeling that the PPS dealt primarily with urban developments and less with rural
- The lack of emphasis on biodiversity, the fact that it was constantly being reduced and there was a very important role for biodiversity as a carbon sink and sustainability factor
- Similarly the need to include landscape assessment in all planning particularly for renewables
- The importance of using brownfield sites in preference to green field sites
- The role of waste particularly as a renewable energy source
- The need to increase the use of ESCos [energy service companies] to support the development of renewables and district heating and cooling
- The acceptability of off-site renewable sources to satisfy requirements and the benefits in terms of costs and effectiveness, linked to treating whole sites rather than individual buildings
- The need for caution and guidance on the use of district heating networks, and whether use should be mandatory
- The definition of zero carbon developments and the inclusion of appliances and embodied energy
- The incorporation of the Code for Sustainable Homes in building regulations
- The need to revise recently published RSSs to incorporate the new guidance
- The option of raising the energy standards for both energy use and renewable generation in building regulations, to reduce carbon emissions
- The importance of minimising energy demand before using renewable energy sources
- The use of renewable heat targets in addition to renewable electricity targets
- A focus on integrating information technology into new developments to reduce transport demand
- The need to use “carbon emissions” rather than “energy demand” in wording regulations
- The need to improve behavioural habits and use of buildings, to really reduce carbon emissions.

> Potential conflicts with other documents, reports and policies was raised in answers to several questions. This included affordable housing, rural development, waste planning, other PPSs, etc.[87]

The Bill does not make any reference to PPS1 as being a benchmark for sustainability, either on its face or in the accompanying explanatory notes.

3. Status of national policy statements

The Planning White Paper said that national policy statements should be the primary consideration of the new infrastructure planning commission (IPC):

> We therefore propose that they should be the primary consideration for the commission in determining applications for development consent, ie that they should have more weight than any other statement of national, regional or local policy.[88]

The Government response to this consultation summarised that this proposal was welcomed by the majority of respondents, particularly the business community. However, it went on to state that were some concerns about the proposal:

> However there was some opposition to this proposal including among the public and environment and community groups who argued that national policy statement should be one of many material considerations, with appropriate weight on environmental and social factors and on other relevant planning policy.[89]

Alongside their response to the consultation the Government also published a more detailed analysis of consultation responses. This shows a more detailed breakdown of which groups preferred national policy statements to be the primary consideration, and which did not. Environmental groups appear not to favour national policy statements as the principle consideration:[90]

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87 Department for Communities and Local Government, *Planning Policy Statement: Planning and Climate Change Analysis Report of Consultation Responses*, July 2007 p70-71

88 HM Government, *Planning for a Sustainable Future White Paper*, May 2007 CM 7120 para 3.12

89 Communities and Local Government, *Planning White Paper Consultation Government response to consultation replies*, November 2007 p18

90 Department for Communities and Local Government, *Planning for a Sustainable Future, Analysis of Consultation Responses, Background Report A*, November 2007 p46

Question 4 asked: Do you agree, in principle, that national policy statements should be the primary consideration for the Infrastructure Planning Commission in determining individual applications? If not, what alternative status would you propose?

Question 4

	Answered	Yes	Yes, but	No
Government bodies	135	17%	41%	42%
Public	67	15%	21%	64%
Environment and community groups	159	23%	25%	52%
Business	81	59%	28%	12%
Professionals and academics	25	32%	36%	32%
All	**467**	**27%**	**30%**	**43%**

In response to the concern, the Government explained that it felt that national policy statements would integrate environment concerns sufficiently:

> However we also note concerns that appropriate weight should be given to environmental and social factors and to other relevant planning policy. Our intention is that national policy statements will integrate all relevant environmental, social and economic policy to provide a single policy framework for decision making. This is necessary to provide certainty for applicants and clarity for decision makers. We therefore consider it appropriate for them to be the primary consideration in the determination of applications.[91]

The Government did however, go on to say that that the IPC would be able to take other matters into account if it felt them to be important and relevant:

> The Planning Bill will therefore make clear that the IPC should have discretion, when deciding applications, to take into account any other matters not specified in legislation or the relevant national policy statement, that it considers to be important and relevant to its decision.[92]

Clause 94(2) of the Bill reflects the above statement and sets out what the IPC must take regard of in deciding an application:

> (2) In deciding the application the Panel or Council must have regard to—
>
> (a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),
>
> (b) any matters prescribed in relation to development of that description, and
>
> (c) any other matters which the Panel or Council thinks are both important and relevant to its decision.

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91 Communities and Local Government, *Planning White Paper Consultation Government response to consultation replies*, November 2007 p18

92 Communities and Local Government, *Planning White Paper Consultation Government response to consultation replies*, November 2007 p18

Clause 94(3) provides that the IPC must decide the application in accordance with any relevant national policy statement, except to the extent that one of the exceptions in sub-sections (4) to (8) applies. Sub-section (4) states that:

> (4) This subsection applies if the Panel or Council is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.

Given this clause it would appear in theory that, if the IPC felt that applying the national policy statement would lead to a breach of the UK Kyoto targets[93] (an international obligation), then it would be entitled not to act in accordance with the statement. However, the annex to the written ministerial statement sets out that there would be individual national policy statements for things such as energy, transport and waste disposal.[94] It would be unlikely therefore that each individual policy statement by itself would be seen as a possible breach under a UK-wide target.

It may be worth comparing this procedure with that for planning permission. A planning application must be determined in accordance with the development plan, "unless material considerations indicate otherwise".[95] A Government description of the basic principles of the planning system explains what this can mean:

> 11. *"In principle...any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances"* (Stringer v MHLG 1971). Material considerations must be genuine planning considerations, i.e. they must be related to the development and use of land in the public interest. The considerations must also fairly and reasonably relate to the application concerned (*R v Westminster CC ex-parte Monahan 1989*).
>
> 12. The Courts are the arbiters of what constitutes a material consideration. All the fundamental factors involved in land-use planning are included, such as the number, size, layout, siting, design and external appearance of buildings and the proposed means of access, together with landscaping, impact on the neighbourhood and the availability of infrastructure.
>
> 13. The Courts have also held that the Government's statements of planning policy are material considerations which must be taken into account, where relevant, in decisions on planning applications. These statements cannot make irrelevant any matter which is a material consideration in a particular case. But where such statements indicate the weight that should be given to relevant considerations, decision-makers must have proper regard to them. If they elect not to follow relevant statements of the Government's planning policy, they must give clear and convincing reasons (E C Grandsen and Co Ltd v SSE and Gillingham BC 1985)…[96]

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93 For more details on the UK Kyoto targets see the Department for Environment, Food and Rural Affairs website. [on 3 December 2007]

94 HC Deb 27 November 2007 cc15-6WS

95 *Planning and Compulsory Purchase Act 2004* s.38(6)

96 ODPM, The Planning System: General Principles, 2005

4. Development Plan Documents and Climate Change

Local planning authorities prepare development plan documents as part of a Local Development Framework, which is a spatial planning strategy for a particular area.[97] Clause 147 of the Bill places a duty on local planning authorities, when preparing these documents, to include policies which are:

> designed to secure that the development and use of land in the local planning authority's area contributes to the mitigation of, and adaptation to, climate change.

Here, the explanatory notes to the Bill set out that the duty is set within the context of section 19(2) of the *Planning and Compulsory Purchase Act 2004* which states that, in preparing a local development document local planning authorities must have regard to national policies and advice contained in guidance issued by the Secretary of State.[98]

In contrast to the absence of detail given about the definition of "sustainability" for national policy statements, here the explanatory notes set out that in practice this guidance will be the Planning Policy Statement on Climate Change.[99]

D. Consultation and legal challenge

The 2007 Planning White Paper[100] sets out why it was important that national policy statements should be subject to consultation:

> National policy statements […] potentially have important and far reaching consequences, both nationally, and for the individuals and places likely to be most affected. It is therefore essential that national policy statements are authoritative, and are seen to be authoritative. In order for this to be possible, the Government is committed to ensuring thorough and effective consultation before policy statements are finalised and adopted.
>
> Such consultation would also help the Government to ensure that its proposals for national infrastructure have been properly debated and tested, and reflect the right balance of interests and objectives. Much national infrastructure is by its nature controversial and it is unlikely that complete agreement or consensus will be achieved through consultation; however stakeholders, communities and individual members of the public must have the opportunity to participate in and influence the policy process.[101]

The Government response to the Planning White Paper confirmed that the consultation process would not be set out in precise detail in the Bill:

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97 Office of the Deputy Prime Minister, *The Planning System: General Principles*, 2005 p1
98 Bill 11 EN 2007-08 p38
99 Bill 11 EN 2007-08 p38
100 HM Government, *Planning for a Sustainable Future White Paper*, May 2007 CM 7120
101 HM Government, *Planning for a Sustainable Future White Paper*, May 2007 CM 7120 p51

> We do not think it would be appropriate to set out detailed procedures and processes for national policy statement consultations in the Bill. National policy statements will vary significantly, reflecting the differences between types of infrastructure, and a one size fits all approach to consultation is unlikely to be effective. A less extensive process may be appropriate where an existing national policy statement has been reviewed and only changed in limited respects.[102]

Consultation and publicity requirements are dealt with by Clauses 7 and 8 of the Bill. Clause 7(2) gives a requirement for the Secretary of State to carry out consultation and arrange for such publicity as the Secretary thinks "appropriate" in relation to the proposed national policy statement. Clause 7(5) details that, if a specific location is proposed for a development in the national policy statement, "appropriate steps must be taken to publicise the proposal." Clause 8(1) details that this includes consulting the appropriate local authority.

Clause 11 of the Bill provides that a statement of policy may be designated as a national policy statement, even if it was issued before the Bill comes into force. The explanatory notes cite the Department for Transport, *The Future of Air Transport* December 2003 report[103] as a specific example of a statement which might be designated as a national policy statement once the Bill comes into force. Sub-section 3 states that the Secretary of State can take account of any consultation or publicity carried out previously in relation to such a statement for the purposes of complying with the consultation requirements of Clauses 7 and 8.

Although the Bill determines that the Secretary of State needs only to take steps to consult that the Secretary thinks "appropriate", a recent Queen's Bench Division ruling in February 2007 may have an impact on what "appropriate" may mean.[104]

The case in question concerned the Government's commitment to consult on whether to build new nuclear power stations in the UK. The 2003 Energy White Paper[105] had said that new nuclear build was not decided upon and that there would be the "fullest public consultation" before a decision was made.[106] The January 2006 report *Our Energy Challenge – securing clean, affordable energy for the long-term,*[107] was the Government's consultation on this matter. However, Greenpeace argued that this consultation was not full or informed enough. Greenpeace's criticisms of it were set out in the judgement in the case:

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[102] Communities and Local Government, *Planning White Paper Consultation Government response to consultation replies*, November 2007 p20

[103] Department for Transport, *The Future of Air Transport*, December 2003 CM 6046

[104] Greenpeace Ltd) v Secretary of State for Trade and Industry. Nuclear consultation was flawed; Law report; *The Times*, 20 February 2007

[105] DTI/ Defra, *The Energy White Paper-Our Energy Future-Creating a Low Carbon Economy*, February 2003

[106] DTI/ Defra, *The Energy White Paper-Our Energy Future-Creating a Low Carbon Economy*, February 2003

[107] Department for Trade and Industry, *Our Energy Challenge – securing clean, affordable energy for the long-term*, January 2006

> Two broad criticisms are made of the 2006 Consultation Document:
>
> (1) It either was or appeared to be in the nature of an issues paper, seeking consultees' views as to which issues should be examined by Government (and the manner in which they should be examined) when deciding whether or not the new nuclear build option, which had been left open, should now be taken up; rather than the consultation paper on the substantive issue itself: should the new nuclear build option be taken up? The decision in July 2006 "leapfrogged the stage of carrying out proper consultation on the substantive issue".
>
> (2) If it was not simply an issues paper, but was intended to be a consultation paper on the substantive issue, it was inadequate, and the overall consultation process was unfair because:
>
> > (a) consultees were not told in clear terms what the proposal was to which they were being invited to respond;
> >
> > (b) consultees were not provided with enough information to enable them to make an intelligent response; and
> >
> > (c) on many issues, including in particular the critical issues of the economics of new nuclear power and waste disposal, consultees were deprived of the opportunity to make any meaningful response because the relevant information on which the Government relied in making the decision that "nuclear has a role" was published after the consultation period had concluded.[108]

Greenpeace proceeded to claim, therefore, that when the Government announced, in the *Energy Challenge Energy Review Report* 2006, that it would support nuclear new build as part of the United Kingdom's future electricity generating mix[109], that consultation had not been adequate. The Government said in its defence that the promise of "the fullest consultation" had been met.

In deciding the case, Mr Justice Sullivan found that the Government's consultation exercise was "seriously flawed". He explained the reasons for this in his judgement:

> […] the consultation exercise was very seriously flawed. […] The purpose of the 2006 Consultation Document as part of the process of "the fullest public consultation" was unclear. It gave every appearance of being an issues paper, which was to be followed by a consultation paper containing proposals on which the public would be able to make informed comment. As an issues paper it was perfectly adequate. As the consultation paper on an issue of such importance and complexity it was manifestly inadequate. It contained no proposals as such, and even if it had, the information given to consultees was wholly insufficient to enable them to make "an intelligent response". The 2006 Consultation Document contained no information of any substance on the two issues which had been

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[108] R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry [2007] EWHC 311 (Admin) 15 February 2007

[109] Department for Trade and Industry, *The Energy Challenge*, CM 6887 July 2006 p113

> identified in the 2003 White Paper as being of critical importance: the economics of new nuclear build and the disposal of nuclear waste.[110]

The DTI responded in a press notice that it would "of course consult further". The judgement was about the process of consultation, not the principle of nuclear power:

> we continue to believe nuclear power has a role to play in cutting emissions and helping to give this country the energy security it needs. This is why we will press on with publication of the Energy White Paper and why we are confident in the strength of our arguments to engage in further consultation.[111]

Subsequently, the then Secretary of State for Trade and Industry, Alistair Darling, made a Written Ministerial Statement stating that the Government would accept the judgement and not appeal.[112] The subsequent Energy White Paper, *Meeting the Energy Challenge a White Paper on Energy* was published in May 2007.[113] Alongside it a consultation document was published, *The Role of Nuclear Power in a Low Carbon UK Economy.*[114]

Also in May 2007, the *Guardian* speculated on what effect the Greenpeace judgement might have on planning consultation issues for new nuclear build. It suggested that consultations would need to be clear, integrated, independent and conducted over a long enough timeframe; that failure to do this would leave the Government vulnerable to legal challenge:

> […] In other words, the consultation had totally failed. It was ill-conceived, carried out over too short a timescale, and did not involve the public in any meaningful way. Although the government had promised "the fullest public consultation", what it offered was a tick-box exercise that provided limited useful information, and did not allow for full and frank disclosure of all the important issues underpinning energy production and nuclear risk.
>
> The judge said that fresh discussions on the economics of new nuclear build, and how to store the resulting radioactive waste, were needed as "consultation was a right, not a privilege". So the government is now expanding these consultations to encompass the wider "principles" of whether more nuclear power is needed, and Gordon Brown is said to be keen to lead the debate over Britain's future energy policy, given that it will be one of the key decisions to be taken under a Brown premiership.
> […]
> Furthermore, on Monday this week, communities and local government minister Ruth Kelly published a planning white paper that limits public rights of opposition and fast-tracks major building projects, such as nuclear new-build. The Independent Planning Commission will have the final say in all but the most

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110 R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry [2007] EWHC 311 (Admin) 15 February 2007

111 DTI press notice P/2007/037, *Judicial review DTI statement,* 15 February 2007

112 HC Deb 22 February 2007 c63-4WS

113 Department for Trade and Industry, *Meeting the Energy Challenge A White Paper on Energy*, May 2007, CM 7124

114 Department for Trade and Industry, *The Role Of Nuclear Power In A Low Carbon UK Economy*, May 2007

> sensitive projects and the principle of "presumption in favour" of major projects as long as they conform to a declared national need.
>
> Such a streamlining of the process would take years off planning applications and clear away one of the major obstacles to private investment in new nuclear power stations. Meanwhile, industry is gearing up: British Energy and French utility company EDF are trying to interest Scottish gas-owner Centrica to join them in building a possible new nuclear plant in the UK.
>
> But although it looks sewn up, it is not over. The DTI must still get through the consultation. The question is how? An accumulating public sense of a lack of independence and a lack of transparency behind government initiatives in this area, and a hidden industry agenda belittling the problems and advancing preordained solutions seem to emit a strong whiff of mortgaging the long-term future to short-term interests.
> […]
> In order to access true public opinion about such a high-stakes issue, the consultation needs to be clear, integrated, independent and conducted over a long enough timeframe. Failure to do so would leave the government vulnerable to legal challenge and lead to hostility and mistrust of any future energy policy decision. It is not good enough to ask a few audiences in a few short meetings over a few short months to make complex judgments about how best to power our society - we may as well have a consultation worthy of the significance of the issue. We need open information, enough time to think the issues through, a fair hearing for all sides, and a consultation structure that "outs" all the what-if questions by setting the nuclear issue within the wider energy production, consumption and efficiency contexts.
>
> The key here is information provision, the first pillar of the EU Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters. This aims to ensure that the public is informed about its environment and that its role in decision-making is on an informed basis. On this basis, and to ensure an even playing field, it is critical that all sides of the debate are heard. This means that those consulted should hear evidence not only from the DTI and industry, but also from the Sustainable Development Commission, Greenpeace, Friends of the Earth and Green Alliance.
>
> A general rule of consultation processes is that those who define the scope, remit and function often achieve the outcome they desire. Get your ducks in a line, and a predetermined outcome emerges. In order to establish a framework that ensures that the consultation is conducted in a transparent and fair and involving manner, and in the light of the judicial review ruling, it is not too late for the government to exercise political will and get this right.[115]

It is too early to be able to tell what effect, if any, the Greenpeace case judgement will have on the planning consultation process. The judge's decision turned very much on the precise facts of the case: what was initially promised by the Government in terms of consultation; how this was carried out; and what the legitimate expectations were of the people involved in this process.

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[115] "Power trip: With concern that the government is already committed to new nuclear build, a transparent and inclusive consultation process is vital," *The Guardian*, 23 May 2007

The Government will be keen for its consultation process to be seen as credible and will need to be careful to show that matters being consulted on are not already decisions that have been taken. Campaign groups, encouraged by this judgement may be keen to use the judicial review procedure to hold up, even if they do not ultimately stop, proposed developments. The Greenpeace website shows that they have been following the nuclear consultation process in detail and have both challenged comments made by Prime Minister Gordon Brown on the nuclear issue in July 2007 as pre-empting consultation[116] and made complaints about the conduct of some of the consultation research.[117]

VII Major infrastructure and Development Consent

A. An overview

Currently major infrastructure projects may require consent under several pieces of legislation. They often require planning permission under the *Town and Country Planning Act 1990*, but they may require other consent in addition for another part of the project. For example, major electricity projects require consent under the *Electricity Act 1989* s.36. A proposal to build the world's largest wind farm in the Thames estuary received Electricity Act consent but was delayed for months when Swale Borough Council refused permission for an electricity substation. When the Planning Minister, Baroness Andrews, replied to a complaint about delays in the appeals for the Caythorpe gas storage proposal, she noted that there had been three separate appeals and three different consent regimes.[118]

The Bill would change that position by introducing a new form of consent called "development consent" (Clause 27). A wide range of major infrastructure projects will require development consent, which will be decided by the Infrastructure Planning Commission (IPC) provided there is a relevant National Policy Statement in existence. The possibility of intervention by the Secretary of State in exceptional circumstances is discussed in section VIIIA. Once they have that development consent, they will not need either planning permission or consent under certain other legislation (Clause 29).

It is worth noting that the procedure for major infrastructure projects introduced by the *Planning and Compulsory Purchase Act 2004* s.44 is not being repealed.[119] It will not be an option for those projects which are of national importance because they will require development consent. However, the definition of major infrastructure project in the 2004 Act is different from that in the Bill, and includes projects that the Secretary of State thinks are "of regional importance". Some of those projects might not require development consent and would use the procedure in the 2004 Act.

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[116] Greenpeace, *Brown lets the nuclear cat out of the bag*, 6 July 2007
[117] HC Deb 29 Oct 2007 c703W
[118] HL Deb 18 October 2007 cc783-4
[119] This introduced sections 76A and 76B of the *Town and Country Planning Act 1990*

The development consent regime has some features that are slightly different from planning permission. Clause 130 would make it an offence to undertake development, for which development consent is required, without development consent. Clause 131 makes it an offence to carry out development in breach of an order granting development consent.

By contrast, it is not an offence to undertake development without planning permission or to carry out development in breach of planning consent. It is an offence to fail to comply with an enforcement notice. Of course there is a world of difference between building too large a house on an estate and the construction of a power station or a dam. However, one might imagine a situation in which a major infrastructure project was built in a rather different way from what was approved in the consent. The Bill suggests that the new consent regime would not tolerate such unauthorised variation. In the Bill as it currently stands, there is no procedure for varying the consent at a later date – for example during the course of a long construction project. However, it is probable that that might be added at a later date.[120]

B. The position in Scotland

The current planning regime has important consequences in relation to devolution. Town and country planning is a devolved issue for Scotland but energy is a reserved one. A major electricity development in Scotland would normally require both Electricity Act consent and planning permission. The Electricity Act consent would be determined by the Secretary of State for Business, Enterprise and Regulatory Reform. The planning permission would be determined by the local planning authority and perhaps appealed to the Scottish Executive. In October 2007, the Scottish Executive rejected the UK Government's arguments for more nuclear power.[121] Scotland is not covered by the provisions to determine major infrastructure developments by the IPC except as required for the construction of a cross-country pipeline, one end of which is in England or Wales and the other end in Scotland.

VIII Major infrastructure procedures in the Planning Bill

A. Intervention by the Secretary of State

The Bill would mean that the vast majority of major infrastructure projects were determined by the IPC, not the Secretary of State as is the case at present. However, it would allow the Secretary of State to intervene either if intervention was in the interests of defence or national security or if there had been a significant change of circumstances since publication of the policy, satisfying further conditions (Clause 98). The procedure would apply before the IPC had decided whether or not to grant development consent for the application. The Secretary of State could not, then, wait for the IPC to reject an application before intervening to approve it.

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[120] According to the DCLG Bill Team

[121] Scottish Executive News Release, *Ministers today rejected new nuclear power stations as dangerous and unnecessary*, 9 October 2007

The “change of circumstances” condition is that—

> (a) since the time when the national policy statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any policy set out in the statement (“the relevant policy”) was decided,
> (b) the change was not anticipated at that time,
> (c) if the change had been anticipated at that time, the relevant policy would have been materially different,
> (d) if the relevant policy was materially different, it would be likely to have a material effect on the decision on the application, and
> (e) there is an urgent need in the national interest for the application to be decided before the national policy statement is reviewed.

One can anticipate a situation in which those conditions might be considered very carefully in a judicial review of some future infrastructure planning decision. It is unclear what might be covered by those criteria. For example, would it be possible for “the interests of national security” to include the needs for energy security and thus to cover any energy project?

In relation to the second condition, some environmental changes might be anticipated by some experts but not by the Government. Would they be possible grounds for taking a decision away from the IPC? Would it be possible for a new Government after a General Election to use this power so as to intervene to decide major infrastructure applications before it had time to revise national policy statements?

When the Secretary of State intervenes, she may direct that an application is referred to her (Clause 99). Either a Panel or a single Commissioner would investigate the matter and send a report to the Secretary of State by the end of the period specified by the Secretary of State setting out their findings and conclusions. The Secretary of State must decide the application by the end of the period of 3 months beginning with the day after the day on which she receives that report (Clause 100). In some ways that is like the current procedure for calling in planning applications, but there are differences. The current position is that preliminary investigation is undertaken by the local planning authority, followed by a public inquiry that reports to the Secretary of State.

B. The European Convention on Human Rights

The European Convention does not explicitly mention planning, but Article 6(1), the right to a fair hearing, applies to civil, as well as criminal, cases:

> **Article 6 – Right to a fair trial**
> 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The House of Lords in *R (on the application of Alconbury Developments Ltd.) v Secretary of State* [2003] A.C. 295 found that the fact that the Secretary of State is not an independent tribunal, and applies his own policy in the course of his decisions on planning matters, is not objectionable under Art.6 given the supervision of the decision-making process by the courts through judicial review.[122]

C. Public consultation in the new regime

After publication of the Planning White Paper, some critics argued that the proposed IPC would reduce the public input into major infrastructure decisions. On 23 October 2007, Friends of the Earth quoted an opinion by Matthew Horton QC and Richard Harwood:

> Under UK common law and the European Convention on Human Rights anyone directly affected by a new development, for example where their home is subject to a compulsory purchase order, has the right to have their views properly heard before a project is approved. The Planning White Paper proposes to virtually eliminate this right by replacing the current system which allows people to present their case in person and to call witnesses and cross examine opposing witnesses with a short open floor session at the end of the examination… [123]

On 27 November 2007 the Government published the Government Response to the Planning White Paper Consultation. It noted among the key issues:

> Concerns about local democracy, public participation, and accountability. Views on how these should be addressed included:
>
> - ensuring production of national policy statements properly involved local people;
> - preserving people's right to be heard in public inquiries;
> - decisions being made by democratically elected politicians, not an independent Infrastructure Planning Commission.[124]

The Government stated that:

> The Bill will also put effective public consultation and participation at the heart of all three key stages in the regime:
>
> – By creating a clear duty to ensure effective public consultation on National Policy Statements. We intend that this consultation should include positive and proactive means of engaging citizens and communities. Where National Policy Statements identify locations or potential locations for development, there will be a duty to consult in those locations.

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[122] *Sweet & Maxwell Encyclopedia of Planning Law and Practice*, 2-3855

[123] Friends of the Earth Press Release, *Planning White Paper Is Legally Unworkable*, 23 October 2007

[124] DCLG. *The Planning White Paper Consultation: Government response to consultation replies*, November 2007

> – By placing clear legal obligations on developers to consult local communities before they submit a planning application, and ensure that this consultation is of high quality.
>
> – By making planning inquiries accessible and ensuring peoples' rights to be heard are protected. In particular the Bill will make it clear that any person who registers an interest can give oral evidence at relevant stages of the inquiry. In order to support more effective engagement with communities and hard to reach groups, we will be increasing the resources we provide to bodies that promote community engagement in planning. We also intend that local authorities should have an important role in ensuring the views of the communities they represent are fully reflected.[125]

The Bill deals with these issues in several clauses. Clauses 7 and 8 cover consultation requirements for national policy statements. Clause 42 places a duty upon an applicant for development consent to consult the local community. Clause 44 places a duty to take account of responses to consultation and publicity. Clauses 81 to 87 cover aspects of procedures when applications are considered by the IPC. The term "examining authority" means either a panel or a single commissioner, as appropriate (Clause 78). The Examining Authority will operate by considering written representations (Clause 82). The Lord Chancellor may make rules regulating the procedure for the examination of applications (Clause 88). Clause 79(3) specifies which representations may be disregarded. The Examining Authority will hold hearings to consider oral representations about a particular issue when it considers it necessary to ensure adequate examination of the issue, or that an interested party has a fair chance to put the party's case (Clause 83). The IPC must notify the interested parties of the deadline for notification of representations. If any interested party states that it wishes to be heard, an open-floor hearing must be held.

The current procedure for major infrastructure requiring either planning permission or Electricity Act consent comes in the *Planning and Compulsory Purchase Act 2004* s.44. It allows the Secretary of State to call in and determine an application following one or more public inquiries that can be conducted simultaneously. Under *The Town and Country Planning (Major Infrastructure Project Inquiries Procedure) (England) Rules 2005,* the inspector can lay down a strict timetable. Under Rule 11(7) "The Secretary of State may in writing require any other person who has notified him of an intention or wish to appear at the inquiry, to send to him 2 copies of their statement of case". Anyone who sends in their statement of case is entitled to appear at the inquiry (Rule 15). A person entitled to appear at an inquiry is entitled to call evidence and the applicant, the local planning authority and any major participant are entitled to cross-examine persons giving evidence. However, the inspector may refuse to hear evidence which is irrelevant or repetitious, but will then receive the evidence in writing (Rule 19).[126]

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[125] DCLG. *The Planning White Paper Consultation: Government response to consultation replies*, November 2007 p6

[126] *The Town and Country Planning (Major Infrastructure Project Inquiries Procedure) (England) Rules 2005* (SI 2115)

D. Timetabling

Among the most important changes to procedures for major infrastructure projects in the Bill is the introduction of specific timetabling provisions. The current position is that Rule 12 of the 2005 Rules requires an inspector to propose a timetable to the Secretary of State for approval. There are deadlines for sending in written evidence and so on. However, the Bill would impose stricter rules. The first two sub-clauses of Clause 89 impose timetabling requirements:

> (1) The Examining authority is under a duty to complete the Examining authority's examination of the application by the end of the period of six months beginning with the day after the start day.
> (2) The Examining authority is under a duty to decide the application…by the end of the period of 9 months beginning with the day after the start day.

The start day is the last day of the preliminary meeting between the promoter and the Examining Authority required under Clause 80. Sub-section 4 would allow the Chairman of the IPC to set a later date, but the basic target would imply a far faster handling of major infrastructure projects than has taken place in recent years.

Kate Barker's interim report on land use planning contained the following table for transport projects:

Table 2: Case studies of major transport decision timings (months taken)

Scheme	Years	Application to Inquiry	Length of Inquiry	Close of Inquiry to receipt of report	Receipt of report to decision	Total time
M6 Toll Road	1992-1997	28	16	17	4 (+20*)	65 (85)
Heathrow T5	1993-2001	27	46	21	11	86
London International Freight Exchange	1999-2002	13	7	6	15	41
Upgrade of West Coast main line	2000-2003	11	11	7	8	37
Dibden Bay Port	2000-2004	14	13	9	7	43
Camden Town tube rebuilding	2003-2005	11	5	5	6	27

* The additional time was the result of a legal challenge
Source: Department for Transport; Planning Inspectorate.[127]

The Barker Interim Land Use Report also had a paragraph on energy projects:

> **Energy** -in the energy utilities field, operating under a separate consent regime from Town and Country Planning, applications often take years rather than months to work themselves through the system. Section 36 power station applications since 1990 that have been subject to a public inquiry have averaged over 21⁄2 years from start to finish. In one instance – the 75 km North Yorkshire power line application took an exceptional 61⁄2 years from start to finish, though

[127] Kate Barker, *Barker Review of Land Use Planning Interim Report – Analysis*, July 2006 p11

> this was exceptional. Even without inquiries delays can be extensive, as with the Spalding power station that took over four years to process. The most recent energy utilities decisions about onshore windfarms at Scout Moor and Little Cheyne Court took almost two and three years respectively. Research by the British Wind Energy Association (BWEA) indicates that in England, between 2002 and 2005, local planning authorities took on average 10 months to determine wind farm applications including those which go to appeal, but not including the additional time for section 106 agreements that can typically take a further six months.[128]

The strict timetabling requirement clearly has implications for the degree of consultation.

The new system will require the promoter to do more preparatory work before submission. Clause 49 would allow the IPC to reject an application if the promoter has not completed the pre-application procedure. That includes a duty to consult the relevant local authorities and "such persons as may be prescribed". Clause 40 requires that those consulted are given at least 28 days in which to reply. In some cases, section 106 agreements may also be required, as explained in section IXA of this paper. For example, a major infrastructure project might result in more people moving into an area, and thereby increase the need for schools and health services. The promoter would be expected to negotiate directly with a local authority over a section 106 agreement, showing the IPC the heads of agreement, with an understanding that the details would be settled by a certain date. The Community Infrastructure Levy (see below) would not apply to these major infrastructure projects, since it is designed to finance just this type of major infrastructure project.

The new regime will not simply take 9 months from beginning to end for major infrastructure projects, because of the time taken before the preliminary hearing. However, the table above shows that under the current procedures, a considerable time already passes between submission of the application and start of the inquiry. It is unclear what effect the new procedures would have on the time before the start of the inquiry.

IX Community Infrastructure Levy (CIL)

A. Background

The problem of how to get developers to finance new infrastructure is an old and difficult one. Several attempts to legislate for this have been repealed or not brought into force. The current system - called section 106 agreements or planning obligations - has gradually evolved over time but still has important constraints that limit its ability to ensure that all development makes an appropriate contribution towards the new infrastructure needed. For instance, a link between the development and the contribution sought must be demonstrated, and each agreement is a legal contract which

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[128] Kate Barker, *Barker Review of Land Use Planning Interim Report – Analysis*, July 2006 pp63-4

can take some time to agree. Research shows that the majority of planning applications do not have a planning obligation attached.[129]

The Government has therefore rejected the option of leaving the law as it is, but extending the workings of such agreements by means of planning guidance. Section 106 of the *Town and Country Planning Act 1990* (as amended) allows local planning authorities to enter into planning obligations with persons with an interest in the land in question (i.e. developers) "to make acceptable development which would otherwise be unacceptable in planning terms".[130] Planning obligations must be so directly related to the proposed development that the development ought not to be permitted without them.

The Circular on Planning Obligations issued in July 2005 (replacing a 1997 Circular) stated the basic rule of the policy:

> B5. The Secretary of State's policy requires, amongst other factors, that planning obligations are only sought where they meet all of the following tests. The rest of the guidance in this Circular should be read in the context of these tests, which must be met by all local planning authorities in seeking planning obligations.
>
> A planning obligation must be:
> (i) relevant to planning;
> (ii) necessary to make the proposed development acceptable in planning terms;
> (iii) directly related to the proposed development;
> (iv) fairly and reasonably related in scale and kind to the proposed development; and
> (v) reasonable in all other respects.
>
> B6. The use of planning obligations must be governed by the fundamental principle that planning permission may not be bought or sold. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms (see B5 (ii)).
>
> B7. Similarly, planning obligations should never be used purely as a means of securing for the local community a share in the profits of development, i.e. as a means of securing a "betterment levy".[131]

The Government has been considering making changes to the system for some time. On 30 January 2004, the ODPM issued a Written Ministerial Statement on planning obligation policy. It noted that particular proposals for reform had not been popular but argued that change was still necessary:

> *Conclusion*
> 27. It is clear from the consultation process that consultees are almost unanimous in their criticism of the existing system of planning obligations. The summary of

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[129] University of Sheffield and the Halcrow Group, *Valuing Planning Obligations in England*, May 2006
[130] *ODPM Circular 05/2005, Planning Obligations*, July 2005
[131] *ODPM Circular 05/2005, Planning Obligations*, July 2005

> responses which the Government will publish makes this quite clear. The Government is not prepared to continue with a system variously described as opaque, slow, unfair, complex and reactive…[132]

The Government has been considering making a more radical change to the system. The *Planning and Compulsory Purchase Act 2004* s.46 and s.47 give the Secretary of State the power to make regulations to replace s.106, but the Secretary of State has not yet taken these powers.

B. Problems with section 106 agreements

The 2004 Barker report on housing supply noted the problems associated with the use of s.106 agreements:

> **3.32** As a condition for receiving planning permission, developers are usually required to pay an upfront contribution to fund infrastructure costs, under either Section 106 of the Town and Country Planning Act 1990, or Section 278 of the Highways Act 1980. This can help internalise some of the negative externalities associated with new housing development, such as increased congestion. However, this approach may create or exacerbate other market failures, and thereby serve as a barrier to new development. In particular:
>
> • Infrastructure required to service one development can also benefit future housing developments, or indeed the existing community. Any developer making the first move faces the risk of subsequent developments free-riding on its efforts. In other words, there are positive externalities associated with some infrastructure.
>
> • The costs of funding infrastructure can increase site-specific risk, by adding to negative cash flow early on in development. This prevents some sites from being developed, particularly if other risks and upfront costs are already a factor, as is often the case with brownfield sites.
>
> **Section 106 and local authority incentives**
> **3.45** Over time, Section 106 has evolved through case law, so that the scope of development contributions has, in practice, been extended beyond strict 'necessity'. For major housing developments, Section 106, as it currently stands, offers the local authority the prospect of obtaining planning contributions over and above those strictly required to mitigate the impact of development.
>
> **3.46** Section 106 has, therefore, come to offer a possible method of allowing local authorities to share in development gain – that is, access some of the windfall gains that accrue to landowners from selling land for residential development. By changing the relative costs and benefits of development, this can have the effect of addressing the externalities facing local authorities when deciding on housing growth.

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[132] ODPM, *Contributing To Sustainable Communities - A New Approach To Planning Obligations*, 30 January 2004

> **3.47** The proposition that Section 106 allows for development gain appropriation, is supported by evidence of the behaviour of land prices…
>
> **3.48** However, the Interim Report noted the problems surrounding the incentivising and value capture effects of Section 106 in practice:
>
> • the value of contributions achieved varies considerably between areas, and even between sites, in the same housing market locality;
> • Section 106 agreements are mostly attached to major housing schemes and many authorities will deal with applications of this scale relatively infrequently;
> • negotiations can take many months, occasionally years, and are costly in both local authority and developer time and resources;
> • there may be asymmetries in negotiating expertise between the two parties, leading to unsatisfactory outcomes;
> • local authorities are not always aware of the level of planning contributions that might reasonably be expected in a given development, due to the non-transparent nature of the system; and
> • some local authorities may misuse Section 106 to delay or discourage development, by asking for unreasonably onerous levels of developer contributions.
>
> **3.49** All these factors will combine to reduce the potential infrastructure and incentive effect of Section 106, by making it more difficult and costly for local authorities to secure appropriate developer contributions.

C. The new policy, October 2007

Kate Barker recommended a tax on the increase in land value resulting from the grant of planning permission as a partial replacement to the planning obligation regime. *The Planning-gain Supplement Preparations Act 2007* gave authority for money to be spent on preparation for this tax.[133] However, in the Pre-Budget Report of 9 October 2007, the Government deferred its proposals to introduce a Bill establishing Planning-gain supplement in this Parliamentary session:

> 6.16 Kate Barker's review of Housing Supply proposed the introduction of a Planning-gain Supplement (PGS), a new levy on development to raise additional resources to invest in the infrastructure needed to support housing growth. In its response the Government accepted that local communities should benefit more from the often significant increases in land values arising from planning permission. Following extensive consultation, the Prime Minister indicated in July 2007 that the Government would be prepared to defer legislation to introduce PGS if a better way could be found to ensure that local communities receive more of the benefits from planning gain, to invest in necessary infrastructure and transport. The Housing Green Paper sought views on PGS and possible alternatives.
>
> 6.17 Following discussions with key stakeholders, the Government will legislate in the Planning Reform Bill to empower Local Planning Authorities in England to apply new planning charges to new development, alongside negotiated

[133] *The Planning-gain Supplement (Preparations) Bill*, Library Research Paper 07/04, 10 January 2007

> contributions for site-specific matters. Charge income will be used entirely to fund the infrastructure identified through the development plan process. Charges should include contributions towards the costs of infrastructure of regional or sub-regional importance. Legislation implementing PGS will therefore not be introduced in the next Parliamentary session. Further details will be published shortly by CLG.[134]

In a Written Ministerial Statement of 9 October 2007, Yvette Cooper stated:

> The main features of the planning charge will be as follows:
>
> - Subject to low de minimis thresholds, residential and commercial development will be liable to pay the planning charge.
> - Where appropriate local authorities will be able to use planning charges to supplement a negotiated agreement. Negotiated agreements will still be necessary to secure affordable housing and to address costs related to the specific development site.
> - Planning charges should be based on a costed assessment of the infrastructure requirements arising specifically out of the development contemplated by the development plan for the area (which comprises the regional spatial strategy and the local development framework), taking account of land values.
> - Planning charges should include contributions towards the costs of infrastructure of sub-regional and regional importance identified in development plans.
> - Planning charge policies in development plans will be tested through the development plan process, in consultation with developers, stakeholders and the community to ensure they support the viability of new development and levels of new housing required.[135]

D. The Planning Bill and the CIL

Part 10 of the Bill would grant the power to the Secretary of State to make regulations to implement the Community Infrastructure Levy (CIL). However, the Clauses are enabling powers and do not provide much detail about CIL. What is clear, however, is that the clauses take the debate on developer contributions in a different direction to Planning-gain supplement (PGS). Charging authorities will be empowered to charge CIL (Clause 164(10) whereas PGS would have been a centrally levied tax collected by Her Majesty's Revenue and Customs. In addition, the level of CIL to be paid is to be based on the cost of infrastructure (Clause 163(2)) whereas the Government proposed that PGS would be a national uniform rate regardless of infrastructure need. PGS would have applied to the whole of the UK whereas the CIL clauses only make provision for England and Wales.

Clause 163(2) states the purpose of CIL:

> In making the regulations the Secretary of State shall aim to ensure that the overall purpose of CIL is to ensure that costs incurred in providing infrastructure

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[134] HMTreasury, *Pre-Budget Report 2007* Chapter 6
[135] HC Deb 9 October 2007 cc25-7WS

> to support the development of an area can be funded (wholly or partly) by owners of the land the value of which increases due to permission for development.

Clause 164 states that the regulations must specify which planning authority is empowered to charge CIL. Clause 165 states that the regulations must make provision about liability to pay CIL. Clause 166 states that the regulations must include provision for determining the amount of CIL and the regulations may permit or require charging authorities to adopt specified methods of calculation. Clause 166(4) contains a list of possibilities:

> In particular, the regulations may –
>
> a) permit or require calculation by reference to descriptions or purposes of development;
> b) permit or require calculation by reference to increase in value arising from permission for development (calculated in accordance with the regulations);
> c) refer to, or permit reference to, an index used for determining a rate of inflation;
> d) refer to, or permit reference to, values used for other statutory purposes;
> e) provide, or permit provision, for reductions.

Clause 167 requires that CIL is to be used to fund infrastructure and may require charging authorities to publish lists of the infrastructure to be supported through CIL, and the procedures through which such lists are drawn up.

In a Written Ministerial Statement of 4 December, Housing Minister Yvette Cooper said:

> Looking to the future we need to find new ways to increase the resources available to partners to fund local infrastructure. We have introduced legislation in the planning Bill for a new community infrastructure levy that will increase investment in the vital infrastructure that growing communities need. The levy has the potential to raise hundreds of millions of pounds of additional investment on top of current Government funding and negotiated agreements, and can be spent on a wide range of community infrastructure—this could be major transport improvements, schools, parks and health centres.
>
> All development creates some need for infrastructure, services and amenities and it is only fair that new developments pay their share. At present, infrastructure benefits for local communities are typically secured from major developments only.
>
> Councils will need to draw up long-term costed infrastructure plans in order to apply the new levy. Those plans will need to be consulted on and tested to ensure the levy supports growth. Detailed arrangements will be set out in secondary legislation. The Government will continue to work closely with the main developer and local government bodies during the passage of the Bill as we draft regulations. We want to build on the innovative arrangements that some authorities have introduced, learning from their experience and providing a clearer and firmer footing for best practice.[136]

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[136] HC Deb 4 December 2007 cc54-5WS

The Lawyer magazine, writing before publication of the Planning Bill, noted the campaign against PGS:

> The development industry has won a battle in a longer war. PGST has been shelved. But in its enthusiasm for standard tariffs the industry has conceded the principle that developer contributions to infrastructure should be based on need generated by individual developments.
>
> Also, the true detail of the new planning charge has yet to emerge. The October announcements are opaque on how the charge will be calculated, but it is clear it will take account of land values. They are similarly opaque as to who will receive the monies raised and who will collect them.
>
> Section 106 planning obligations will continue for the foreseeable future and will certainly be relevant to larger developments.
>
> For smaller developments there will be a planning charge alone. For larger developments, combinations of infrastructure-related Grampian Conditions (a planning condition saying development cannot proceed beyond a certain point before another event has occurred), planning charges and Section 106 planning obligations may still be the norm. The conundrum of how developers can ensure that infrastructure to which they contribute will be delivered to release Grampian Conditions still remains. The spectre of developers having to make payments as well as having themselves to deliver infrastructure to overcome Grampian Conditions still remains.
>
> If the charges are dependent on both emerging legislation and adopted development plan provisions before they come into play, they will be at least two years off in most areas.
>
> PGS has not been permanently ruled out. The development of statutory planning charges is to be kept under close review to make sure that the Government achieves its aim of increasing investment in infrastructure alongside supporting new development.
>
> The Treasury and HMRC are rumoured to have spent £40m on a computer system for collecting PGS. If this is so, they will be reluctant to see it disappear altogether.[137]

X Planning Appeals

A. The Proposed reform

Clause 150 of the Bill would require Local Planning Authorities to specify the descriptions of planning permission which, following determination by an officer, are to be reviewable by a Local Member Review Body, made up of councillors of the authority. Clause 151 would extend that procedure to certificates of lawful use or development. Clause 152 would mean that the only appeal from a review by the planning authority would be

[137] "Property : living expenses" ,*The Lawyer,* 26th November 2007 p 31

judicial review that would have to start within six weeks. There would be no option of appealing to the Secretary of State.

Local Planning Authorities are under pressure from the Government to determine applications within strict deadlines. In order to do so, they are expected to delegate the vast majority of planning applications to officers. Not all of those would necessarily be covered by the new appeal system. However, the Clause would represent a considerable change in the way that planning appeals have operated for householder development.

When the planning system was introduced with the *Town and Country Planning Act 1947*, land owners lost the right to build whatever they wanted on their own land. At the time it was considered only fair that they should be allowed a right of appeal against rejection of a planning application by the local planning authority. In theory this appeal was to the Secretary of State. However, normal appeals have always been delegated to a planning inspector. Only very large projects are recovered and determined by the Secretary of State. There is no further right of appeal from the decision of a planning inspector, except by a special sort of judicial review that has to start within six weeks of the decision being announced.

At the same time as the publication of the Planning White Paper, the Government also published a consultation paper on the appeals process.[138] It included a proposal for transferring responsibility for minor appeals from the Planning Inspectorate to a group of local councillors:

> **Local Member Review Bodies**
> 1.9 A fast tracked process would still, however, leave responsibility for determining minor appeals, say for house extensions or works to a protected tree, with the Planning Inspectorate on behalf of the Secretary of State. In line with the Government's wish to devolve decision making powers to the local level, there is a case for allowing some appeals to be determined locally. The Government is therefore considering allowing minor appeals to be determined within each local authority by a board of councillors, to be known as Local Member Review Bodies.
>
> 1.10 The applications that would be eligible for review by the Local Member Review Body would only be those which have been determined in the first place by officers acting under powers delegated to them by the local authority. The local authority would be required to have in place an effective system of delegation to officers. We would establish a right of review of the original decision for some minor appeals (e.g. householder development, new shop fronts, small change of use proposals, works to protected trees) by the Local Member Review Body whose councillors would have had no previous involvement in the case. Only the applicant would be able to request a review, and the right of appeal to the Secretary of State would be repealed.

[138] DCLG, *Improving the Appeal Process in the Planning System – Making it proportionate, customer focused, efficient and well resourced*, 21 May 2007

1.11 Each Local Member Review Body would comprise of, say, three or five elected councillors. These councillors would be expected to undertake training on planning and arboriculture matters to assist them in their decision making. In many cases, it is not envisaged that the Review Body would need to seek expert advice given that they will handle minor appeals which are unlikely to be overly complex. However, should the Review Body wish to seek professional advice, they would be able to do so from independent experts such as planners, solicitors or arboriculturalists. To ensure impartiality, these experts would be required to limit their involvement in work within the particular Council area to only act in an advisory role to the Review Body. Another option may be for local authorities to develop reciprocal arrangements for the provision of expert advice – so if one authority's Local Member Review Body wished to have expert advice say on technical planning matters, they could request that a suitably qualified and experienced planner from a neighbouring authority attend their meeting to provide such and vice versa.

1.12 The Review Body would have the power to uphold, reverse or vary any decision which is subject to their review. If someone considered the Review Body had not applied the law properly or had treated them unfairly, they would be able to use the local authority's formal complaints procedure and/or complain to the Local Government Ombudsman. They would also have the right to challenge in the High Court as now.

1.13 Fast tracked processes would apply. The Review Body would base its decisions on the information and evidence that was before the case officer at the time the decision was made on the planning application. Through the introduction of the standard application form, we are working to improve the quality of applications and ensure that all relevant information is provided from the outset. Therefore it should not normally be necessary for new material to be presented to the Review Body.

We propose, however, that they should have a reserve power to request additional information where they consider this necessary to enable them to make a fully informed decision. We propose that other procedural matters, such as whether to allow the public to attend Review Body meetings or whether to visit the site, should be determined locally.

B. Comment on the proposals

The Government noted that the response to the consultation on local member review bodies was largely negative, but explained why it had decided to go ahead with the idea:

Consultation response
This proposal received the highest response rate out of all the consultation questions. The majority of these responses disagreed with the proposal to create Local Member Review Bodies (LMRBs) and this is evident amongst all classes of respondents. 87% (39) of business respondents and 74% (95) of government respondents disagreed with this proposal.

There was considerable concern about the independence of LMRBs, not only actual but also as perceived by the appellant. Many commentators stated that LMRBs would not be perceived as independent by its users or the public, but would be perceived to be subject to political and internal bias. The replacement of planning inspectors with local councillors to make appeal decisions was

regarded negatively by many as it was seen as substituting professional and independent arbitrators with a body of councillors who might not be suitably qualified or experienced. It was felt that this would cause a reduction in the consistency and quality of appeal decisions.

The main positive points from local authorities were that the proposals would ensure decision making at a local level and therefore strengthen local accountability. Proposals were put forward to demonstrate how LMRBs could work while ensuring transparency within the process; among these was the suggestion that LMRBs could be conducted via reciprocal arrangements on a joint-authority basis. The Local Government Association (LGA), which was supportive of the proposal, was among those respondents that suggested this approach.

It was suggested that, to ensure that decisions made by LMRBs were transparent, there would need to be some method of recording how decisions had been made, the discussions that had taken place, what expert advice had been given and so on. If members of the public were allowed to attend LMRB meetings, then it would only be fair for a planning officer and the appellant also to be present. Several respondents thought it would be important to keep the right to appeal to the Secretary of State after decisions had been made by LMRBs.

A small number of respondents regarded the proposal as inconsistent with Article 6(1) of the European Convention on Human Rights concerning the right to a fair trial. It was considered that planning inspectors were wholly independent and could come to a dispassionate and balanced decision based on their professional experience. It was stated that the public's perception of an LMRB's bias could amount to an abuse of Human Rights.

Respondents commenting specifically on tree preservation order appeals opposed LMRBs for the reasons given above, and also on grounds that LMRB members may not have or have access to adequate arboricultural expertise to inform decision making in technical cases where such knowledge is needed.

Government response

The Government has had and is continuing to have detailed discussions with the LGA (who supported this proposal), local councillors and the planning profession about LMRBs. In these discussions, it has been recognised that this proposal presents an opportunity, in-line with the Government's wish to devolve decision making powers to the local level, to establish the principle that locally elected councillors can take responsibility for determining minor cases themselves. Review Body members would not be making decisions arbitrarily – they would have the necessary training to ensure they had the required skills base to support them. In some cases the LMRBs would need to seek independent expert advice (for example, arboricultural input in complex tree preservation order appeals). Furthermore, when reviewing decisions the LMRB would be acting in a "quasi-judicial" role. Councillors have already demonstrated an ability to take these kinds of decisions in matters such as school exclusions. Given the forecast that appeal numbers are likely to increase in the future, this proposal also presents an opportunity to reduce the Planning Inspectorate's caseload, freeing up resources for the more complex, contentious cases.

A suggestion put forward by a few respondents, including the LGA, was that LMRBs could be established on a joint or partnership basis, perhaps based on

existing working relationships. We see merit in this proposal – it could be a more efficient deployment of resources and help to mitigate any perception of internal bias – and have therefore modified our proposal.

Given the positive points outlined above, we intend to legislate in the forthcoming Planning Bill to enable LMRBs to be established. In the meantime, we want to discuss the idea further with local government and the planning profession to determine the best way to take this proposal forward and the most appropriate timing. Our aim is to have the necessary powers in place by April 2009 with a view to having LMRBs fully operational by 2010. This should allow time for necessary discussion about how this proposal would work in practice and for local authorities to make preparations for implementing the joint authority model.[139]

C. Government action programme

In its response to consultation on measures to speed up planning appeals, the Government published its Action Programme:

Summary of action
The Government has included in the Planning Bill measures to:
• enable the Planning Inspectorate (on behalf of the Secretary of State) to determine the appeal method;
• introduce an appeal fee;
• provide for the establishment of Local Member Review Bodies (LMRBs).

The Government is also considering introducing further measures to:
• enable the Secretary of State or her inspectors to correct minor errors in appeal decisions without obtaining the consent of the applicant/landowner(s); and
• progress the changes proposed in the consultation paper to improve the lawful development certificate and enforcement appeals processes.

Through secondary legislation the Government will seek to:
• fast track householder and tree preservation order appeals;
• prescribe in more detail the nature and content of appeal documents;
• strengthen the power of the Secretary of State and her inspectors to refuse to consider new material at appeal;
• strengthen the ability of the Planning Inspectorate to fix hearing and inquiry dates;
• shift the submission of the Statement of Common Ground to an earlier stage in the appeal process;
• remove the nine-week comment stage for hearings and inquiries; and
• reduce the time limit for appealing against a planning decision where there is an enforcement notice relating to the same development so that the appeals can be linked.

Secondary legislation will also be required to give full effect to those measures being pursued through primary legislation (with the exception of that concerning

[139] DCLG, *Government Response to Consultation Replies: Improving the Appeal Process in the Planning System – Making it proportionate, customer focused, efficient and well resourced*, November 2007

correction of minor errors in appeals decisions), assuming their successful passage in the Bill.

This secondary legislation will take the form of:
• revisions to the Town and Country Planning (General Development Procedure) Order 1995;
• revisions to existing rules and regulations (such as the inquiry/hearing procedure rules);
• new regulations for appeal fees, Local Member Review Bodies (LMRBs), fast tracking householder and tree preservation order appeals, and written representation procedures for lawful development certificates;
and
• a revised Award of Costs Circular.

With the exception of the secondary legislation for LMRBs and an appeal fee, our aim is to work towards implementation of all measures in October 2008. We will consult on the regulations for appeal fees and Local Member Review Bodies in late 2008, with a view to introducing an appeal fee and the secondary legislation required for LMRBs in April 2009. Under this timetable, we would like to see LMRBs established across the country by 2010.[140]

[140] DCLG, *Government Response to Consultation Replies: Improving the Appeal Process in the Planning System – Making it proportionate, customer focused, efficient and well resourced*, November 2007