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Growth and Infrastructure Bill

Bill 75 of 2012-13

RESEARCH PAPER 12/61 25 October 2012

The *Growth and Infrastructure Bill* [Bill 75 of 2012-13] was introduced to the House of Commons on 18 October 2012. It seeks to reduce delays in the planning system through various means, and to make it easier for new developments to be built. To promote development, the Bill would allow for planning obligations (section 106 agreements) relating to affordable housing to be renegotiated to make a development economically viable again. To promote economic growth, it makes provision for a planned revaluation of business rates in England to be postponed and to create a new employment status of employee owner.

This briefing has been prepared to inform the Second Reading debate on the Bill. This was originally scheduled for 30 October 2012 but is now on Monday 5 November 2012.

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ISSN 1368-8456

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Summary

The Government has stated that the *Growth and Infrastructure Bill* will "help the country compete on the global stage by setting out a comprehensive series of practical reforms to reduce confusing and overlapping red tape that delays and discourages business investment, new infrastructure and job creation." It is largely an amending piece of legislation which covers several disparate areas.

One of the main aims of the Bill is to speed up the planning system. To this end, it provides for applications for planning permission to go direct to the Secretary of State (in practice the Planning Inspectorate) where the local planning authority has a record of very poor performance. It seeks to broaden the power of the Secretary of State to award an allocation of costs between parties in relation to planning proceedings and compulsory purchase inquiries. It would also introduce a limit on the information local planning authorities can require to be submitted with a planning application. Mineral planning authorities would be given greater discretion about whether and when to review minerals planning permissions.

The Bill seeks to facilitate new development. It would allow for planning obligations (section 106 agreements) containing affordable housing requirements to be renegotiated to make a development economically viable. The system of approval for local authorities to dispose of surplus land held for planning purposes (i.e. to control development) would be amended, to help get more brownfield land back into productive use. Certain commercial and business projects would be decided by the Planning Inspectorate and Secretary of State within a 12 month timetable, rather than by local planning authorities. Provision is made to modify the Special Parliamentary Procedure for authorisation of development on "special land". Another provision would amend the regulations that restrict where telecommunications equipment can be installed, to make it easier for approved operators to install equipment in National Parks and Areas of Outstanding Natural Beauty.

The Bill seeks to make it quicker to stop up or divert rights of way when development is taking place, by allowing diversion or stopping up orders to be made at the same time as the planning application, rather than only after that has been granted. The orders would still be subject to approval after the granting of planning permission. The Bill also seeks to reduce the administrative burden for landowners who wish to declare that they have no intention of allowing their land to become subject to a public right of way through long use.

The Bill would make changes to the registration system for town and village greens so that land owners could block registration, by others, of their land as a town or village green. It would also prevent town and village green registration from occurring once a number of "trigger events" happen, such as an application for planning permission on such land being publicised, or where the land is identified for potential development.

On energy, the Bill repeals some obsolete provisions relating to giving notice about the fuel to be used in oil or gas fired power stations. It allows Ofgem to change the conditions on gas licences, allowing gas transporters to make payments not only to other gas shippers and suppliers but to companies who are successful under Ofgem's proposed Network Innovation Competition, launched under Ofgem's new price control regime. It allows so called 'section 36 consents', which the Secretary of State grants for the development of certain power stations, to be varied after being made, whereas currently this cannot be done.

The Bill also contains two "economic measures". One postpones the revaluation of business rates in England due to come into effect on 1 April 2015, until 1 April 2017. The other seeks to amend the *Employment Rights Act 1996* to create a new employment status, that of 'employee owner'. Employee owners would have fewer employment rights than employees, but in return would receive shares in the company.

1 Introduction

The *Growth and Infrastructure Bill* was introduced to the House of Commons on 18 October 2012 and its Second Reading is due to take place on 5 November 2012 (having been originally scheduled to take place on 30 October 2012). The Bill and its Explanatory Notes are available on the Parliament website, and the Department for Communities and Local Government (DCLG) has published a background note on the Bill.[1]

The Bill was not announced in the Queen's Speech, but stems from concern by the Government that various aspects of the planning system are burdened by "unnecessary bureaucracy that can hinder sustainable growth."[2] The Bill also implements a number of recommendations from the *Penfold Review of non-planning consents*, undertaken by planning expert Adrian Penfold in 2010, into consents which have to be obtained alongside or after, and separate from, planning permission, to complete and operate a development. Finally, the Bill also contains two clauses under the heading "economic measures" which relate to business rates and the creation of a new employment status of "employee-owner". It is largely an amending piece of legislation.

Most of the provisions in the Bill apply to England only. There are some exceptions:

- Clause 7 on telecommunications infrastructure in protected landscapes, contains provisions which would also apply to Wales, Scotland and Northern Ireland;

- Clauses 15, 17, 19 and 23 on energy infrastructure, special parliamentary procedure and employee owners contain provisions which would also apply to Wales and Scotland; and

- Clause 18 makes amendments to the *Town and Country Planning (Scotland) Act 1997*, which would apply only to Scotland.

Reaction to the Bill has been mixed. A number of organisations have commented on specific clauses, and these are outlined in the relevant sections below. Overall, the CBI welcomed the Bill and said that it should help to streamline and speed up the planning process, unblock development and allow companies to invest, grow and create jobs.[3] Similarly, the Institute of Directors supported the Bill and said it would help attract more investment in construction:

> Measures such as allowing developers to improve their plans mid-way through the process without having to start from scratch, making sure those putting forward plans only need to fill out the relevant paperwork, and removing unaffordable extra obligations could all help to bring forward stalled development and attract more investment into construction.[4]

The Local Government Association (LGA) was critical of both what was in the Bill and of what was not in it. It said that the Bill missed the real barriers to growth and that further changes to the planning system would not address the key issues stalling development and would lead to delay and uncertainty. It called for the Government to:

> ... use this bill to lift restrictions on local authority borrowing, freeing councils to build new affordable homes and kick-start job-creating infrastructure projects. Councils have a proven track record of prudent borrowing. Their credit rating is excellent and interest rates would be low. The Government must let British councils take advantage of these

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1 DCLG, *Growth and Infrastructure Bill Background Paper*, 18 October 2012
2 HC Deb 6 September 2012 c31WS
3 CBI, *CBI responds to publication of Growth and Infrastructure Bill*, 18 October 2012
4 "Planning laws reformed in quest to boost growth" *City AM*, 19 October 2012

conditions in the same way as municipalities in competing countries, like Germany, already are.[5]

2 Promoting growth and facilitating provision of infrastructure

2.1 Option to make planning application directly to Secretary of State

The "Planning Guarantee"

Following concern about the time it took for planning applications to be determined, as part of the *Plan for Growth* in March 2011, the Government committed to a "Planning Guarantee" that "no planning application should take longer than one year to reach a decision."[6] Further details about the guarantee were announced in July 2011.[7]

The guarantee sets a clear time limit within which all planning applications should be decided, including where an appeal has been made. It does not replace the existing statutory time limits within which planning authorities should decide on applications (13 weeks for 'major' applications, 8 weeks for 'others' and 'minor' applications). To contribute to the overall guarantee being met, Local Planning Authorities (LPAs) and the Planning Inspectorate (where an appeal is made), are given a timeframe of 26 weeks to determine applications. This therefore includes time as well for an appeal to be determined if the initial application is refused by the LPA.

The latest statistics on the planning guarantee, published in September 2012 showed that three LPAs (1%) determined all of their planning applications within 26 weeks. 278 LPAs (88%) decided more than 95 per cent of cases within 26 weeks.[8] Further statistics on planning applications are given below.

Clearly unhappy with progress by some LPAs in meeting the guarantee, the Secretary of State for Communities and Local Government, Eric Pickles, announced in a Written Ministerial Statement of 6 September 2012 his intention to allow the Planning Inspectorate (PINS) to determine planning applications instead of LPAs where the LPA has a track record of "consistently poor performance in the speed or quality of its decisions."[9] He explained that it was "unfair" to all parties for LPAs to fail to make timely decisions on planning applications and said it created uncertainty both for applicants and local residents. The provisions in the Bill reflect the intentions in this statement.

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5 LGA, *LGA response to the Growth and Infrastructure Bill*, 18 October 2012

6 HM Treasury, *Plan for Growth*, March 2011, para 2.24

7 Department for Communities and Local Government, *The Planning Guarantee and information requirements*, 29 July 2011

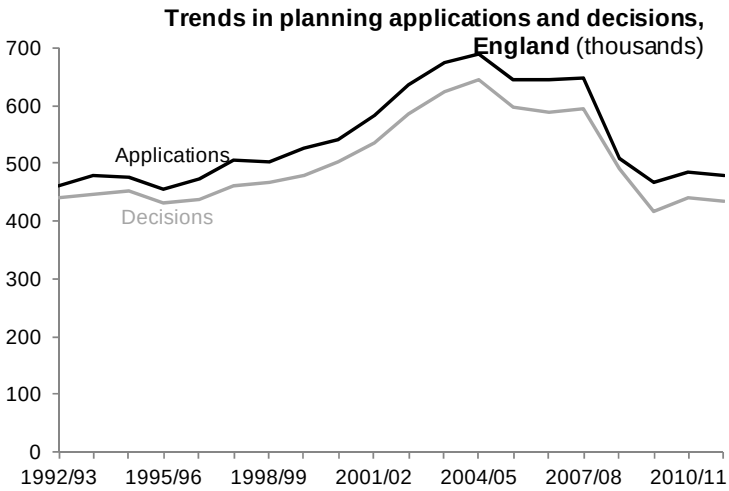
8 Department for Communities and Local Government, *Planning Guarantee Monitoring Report*, September 2012

9 HC Deb 6 September 2012 c32WS

Planning application statistics

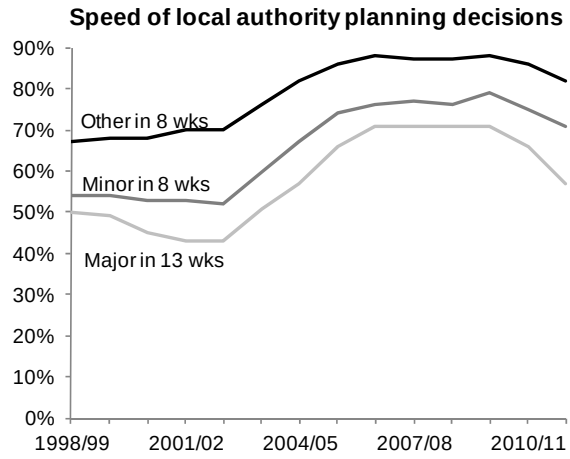
National trends

In 2011/12 district planning authorities received 478,000 planning applications, made decisions on 435,000 and granted 354,000 (87%).[10] The chart opposite summarises trends in applications and decisions. The total number of applications was at or just below 500,000 per year for most of the 1990s. They started to increase in 1999/2000 and reached 675,000 four years later. Applications remained at around this level for much of the last decade, before falling by almost 30% in the two years to 2009/10. Trends in the number of decisions made have been very similar. The approval rate has increased from 82% in 2005/06 to 87% in 2011/12.



The next chart looks at the speed of decisions by broad type of application; 'major', 'minor' and 'other'. In 2011/12 major developments made up 3% of all planning decisions made, minor developments 28%, and other developments[11] 69%.[12]

Performance against these standards improved steadily between 2002/03 and 2006/07 (while application numbers remained relatively high). Performance was held broadly steady across the following three years (while application numbers fell) and has declined in 2010/11 and 2011/12 despite the relatively low number of applications.



The information in these charts is also summarised in the table below.

[10] District Planning Authorities include all lower and single tier local authorities, National Park Authorities and urban development corporations

[11] Mainly householder developments

[12] DCLG live tables -Table P124

Summary of planning applications and decisions, England

	Applications 000s	Decisions 000s	% granted	Speed (% of decisions within) Major within 13wks	Minor within 8wks	Other within 8 wks
1992/93	462	439	85	..	..	..
1995/96	456	431	88	..	..	..
2000/01	542	503	87	45	53	68
2001/02	583	534	87	43	53	70
2002/03	635	586	86	43	52	70
2003/04	675	625	84	51	60	76
2004/05	689	645	83	57	67	82
2005/06	644	599	82	66	74	86
2006/07	645	588	82	71	76	88
2007/08	648	596	82	71	77	87
2008/09	507	489	83	71	76	87
2009/10	466	418	85	71	79	88
2010/11	483	440	86	66	75	86
2011/12	478	435	87	57	71	82

Note: Data covers district planning authorities and National Park authorities and excludes 'county matters'

Sources: Development control statistics 2007/08 (and earlier), DCLG; DCLG live tables -Table P120

Regional and local snapshots

The table below summarises the latest annual data on applications, decisions and speed by region of planning authority. The size of the regions varies greatly as does the number of applications. The approval rate was highest in the North East at 94% (which also had the fewest number of applications) and lowest in London at 80%. London had the lowest proportion of decisions made within the standards in each broad type of development. The gap was greatest in major developments where 45% were made within 13 weeks, compared to a national average of 57%. The North East and Yorkshire & the Humber had the highest proportions meeting these standards. These comparisons take no account of the workload of the local authorities in each region or any differences in the type of applications received.

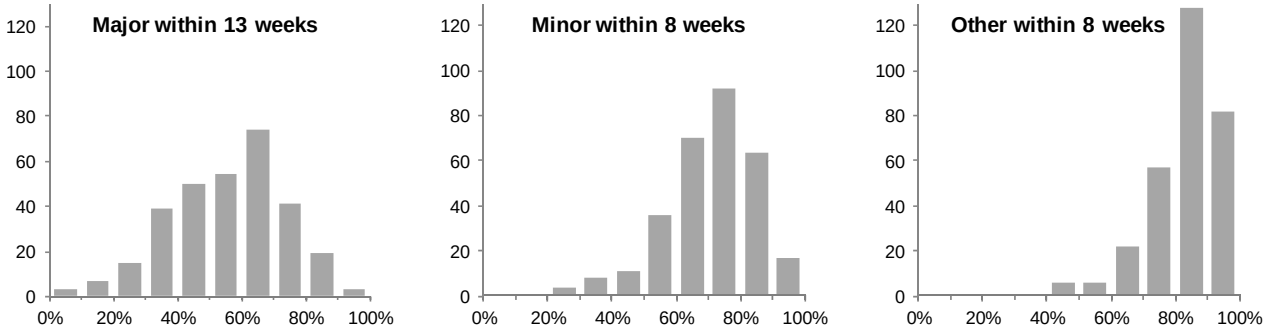
Summary of planning decisions by region, 2011/12

	Decisions 000s	% granted	Speed (% of decisions within) Major within 13wks	Minor within 8wks	Other within 8 wks
North East	14.4	94	64	73	85
North West	39.9	90	56	69	78
Yorkshire & the Humber	33.7	87	64	74	85
East Midlands	31.0	89	54	74	85
West Midlands	35.3	89	62	70	80
East of England	53.9	86	61	72	85
London	76.7	80	45	68	79
South East	88.2	86	58	71	84
South West	56.8	89	58	70	82
England	**434.9**	**87**	**57**	**71**	**82**

Note: Regional data covers district planning authorities, England total includes National Park authorities. All figures exclude'county matters'

Source: DCLG live tables -Table P122

The series of charts below looks at the distribution of local authority performance across each development type in 2011/12. There was much less variation in decision times for 'other' developments; more than 70% achieved 80-100%. Performance was most varied against the major development standard of 13 weeks.



The final table below lists the top and bottom ten local authorities based on their performance against these standards in 2011/12. Again it is important to realise that these comparisons take no account of differences in workload or variations in type of applications.

Planning decision speeds in 2011/12, highest and lowest districts by % in set periods

Major within 13wks		Minor within 8wks		Other within 8 wks	
Ten highest					
Coventry	95%	Coventry	98%	Coventry	100%
Three Rivers	94%	Worcester	97%	Watford	99%
Copeland	92%	St. Helens	95%	East Staffordshire	98%
Thurrock	88%	West Somerset	95%	Hinckley and Bosworth	98%
Guildford	87%	Watford	94%	South Bucks	98%
Rushmoor	87%	South Bucks	94%	Thurrock	98%
Stockton-on-Tees	86%	Hinckley and Bosworth	93%	Waveney	97%
Harrogate	86%	Waveney	93%	Three Rivers	97%
Elmbridge	85%	Newcastle-under-Lyme	92%	Elmbridge	97%
Southend-on-Sea	85%	Rossendale	92%	St. Helens	97%
10 lowest					
Southampton	20%	Redbridge	39%	Barrow-in-Furness	53%
Hounslow	17%	Nuneaton and Bedworth	38%	Cheshire East	51%
Barking and Dagenham	17%	Eastleigh	37%	Gosport	50%
West Northamptonshire	17%	Cheshire West and Chester	35%	Mendip	50%
Cambridge	16%	Barrow-in-Furness	31%	Cheshire West and Chester	48%
Torbay	14%	Warwick	30%	Stratford-on-Avon	45%
Blaby	11%	Mendip	29%	Nuneaton and Bedworth	44%
Haringey	10%	Gosport	27%	Halton	42%
Kensington and Chelsea	8%	Halton	25%	Warwick	35%
Havant	7%	West Berkshire	16%	West Berkshire	24%

Source: DCLG live tables -Table P132

Planning Inspectorate

In 2011/12 the Planning Inspectorate (PINS) determined 91% of householder planning appeals within 8 weeks of the start date. This was slightly lower than in the previous year (93%), but above its 80% target on this measure. It also exceeded its target on timeliness of decisions/reports for remaining planning appeals.[13] In the same year the Planning Inspectorate decided 97% of appeals within 26 weeks (the Government's "Planning Guarantee" for all planning decisions and appeals). In the minority of cases (30%) this was because the Inspectorate did not determine the case in time.[14]

The Bill's provisions on 'designated' planning authorities

Clause 1 of the Bill would insert a new section 62A into the *Town and Country Planning Act 1990 (TCPA)*, to allow (but not require) planning applications to be made direct to the

13 *Annual Report and Accounts 2011/12*, Planning Inspectorate
14 *Planning Guarantee Monitoring Report*, DCLG

Secretary of State if an LPA had been "designated". Schedule 1, para 5, of the Bill would insert a new section 76D into the *TCPA* which would allow the Secretary of State to delegate to a person (in practice this will be the Planning Inspectorate) those applications that have been submitted to him direct. This Clause would apply to England only.

The Bill does not set out the circumstances in which an LPA would be "designated". Clause 1(8) would require the Secretary of State to publish (in such a manner as the Secretary of State thinks fit) the criteria that are to be applied in designating an LPA. The Government's 6 September 2012 statement suggests that it will be LPAs which have a track record of "consistently poor performance in the speed or quality of its decisions" but it has not yet been defined how this will be measured.

In evidence to the Communities and Local Government Select Committee on 15 October 2012, the Planning Minister, Nick Boles, said the test for designation would be an objective one which could be measured against: 1.) the number of applications the LPA dealt with within the planning guarantee period; and 2.) the number of decisions overturned at appeal.[15] He also said the test would be able, eventually, to take into account where a LPA and a developer had agreed upfront to a certain timetable, which might be longer than the planning guarantee period.[16] The Minister explained that the intention was that the definition would catch only a few LPAs and that any designation would be temporary and last only for one year.[17]

The Minister emphasised that local communities would still be consulted on planning applications. He explained that even if an application was sent for determination to the Planning Inspectorate PINS, the LPA would still have a role to play in the administrative process of a planning application, such as notifying local residents that an application had been made.[18] Clause 1(6) of the Bill would allow the Secretary of State to direct the LPA to "do things in relation to an application."

Schedule 1, paras 6 and 7 would allow the Secretary of State (or in practice, PINS) to decline to determine a planning application where similar applications have been refused in the previous two years, or where a similar application is currently being considered. This mirrors powers currently available to LPAs under section 70A of the *Town and Country Planning Act 1990.* This provision aims to prevent developers from submitting multiple applications about the same development in an attempt to wear down any local opposition.

The normal route of appeal against a LPA planning application refusal is to the PINS, in the name of the Secretary of State. The Minister highlighted that when the PINS takes the decision on a planning application in the name of the Secretary of State, this route of appeal will therefore be lost, although judicial review would remain.[19] The explanatory notes to the Bill state: "it would clearly not be proper for the Secretary of State to consider appeals against his own decisions and consequently we have excluded the right to a statutory appeal where a person makes a planning application directly to the Secretary of State."[20]

Reaction to the Bill

In response to publication of the Bill, the Royal Town Planning Institute highlighted that good planning relied on adequately resourced planning departments, well written policies,

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15 Oral evidence taken before the Communities and Local Government select committee, Monday 15 October 2012, HC 626-i, Q71
16 Ibid, Q72
17 Ibid, Q85
18 Ibid, Q77-8
19 Ibid, Q84
20 *Growth and Infrastructure Bill*, Bill 75-EN, p 26

knowledgeable councillors and timely responses from third parties over which the LPA often had no control. It expressed a desire to see any council judged as under-performing, given "targeted and appropriate support" which enables "A return of decision-making to local democratic control as quickly as possible."[21]

An article in the specialist publication *Planning*, reported similar concerns from a planning official, that enforcement of the planning guarantee could prompt a rise in applications being refused and lead to poorer outcomes if LPAs have to rush through complex applications. [22] Another article highlighted unease by planning professionals that the proposal to allow the PINS to determine applications instead of poorly performing LPAs contradicted the Government's "localism" agenda.[23]

The LGA noted that approval was in place for 400,000 new homes and that councils were approving planning applications at the fastest rate in a decade. It argued that the real problem was that developers could not borrow to build and first-time buyers could not get mortgages, it stated: "Taking planning decisions away from local communities and placing them in the hands of an unelected quango isn't going to fix that."[24]

2.2 Planning proceedings: costs

In its statement on 6 September 2012 the Government announced that it intended to give the PINS more power to initiate an award of costs in planning appeal proceedings, where "it is clear that an application has not been handled as it should have been with due process."[25]

Clause 2 of the Bill would provide the Secretary of State with increased powers to award costs between the parties' planning appeals and certain other proceedings, and to recover the Secretary of State's own costs from the parties. In practice, these powers are normally exercised by the PINS. Specifically:

- Clause 2(1) would enable the Secretary of State to recover a portion of the costs incurred at a local planning appeal inquiry, not just the whole costs as the current legislation implies.

- Clause 2(2) would enable the Secretary of State to recover costs where a planning appeal is not conducted as an inquiry, but by way of written representations.

- Clause 2(3) would enable the Secretary of State to recover his own costs when an inquiry or hearing has been arranged, but does not take place. The explanatory notes to the Bill give the example that this power could be used to recover costs from a party which cancels an inquiry or a hearing at short notice.[26]

- Clause 2(4) would enable the Secretary of State to recover a portion (not just the whole) of his own costs incurred at a local inquiry in London.

- Clause 2(5) would amend section 323 of the *Town and Country Planning Act 1990* to enable regulations to be made setting out the procedure for circumstances relating to when costs may be awarded between parties or recovered from the Secretary of State at planning appeals conducted by written representations. The explanatory notes to the Bill

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21 Royal Town Planning Institute, *RTPI response to the publication of the Growth and Infrastructure Bill*, 18 October 2012

22 "Work to judge councils starts", *Planning*, 5 October 2012, p12

23 "Inspectorate ruling plan 'at odds with localism agenda" *Planning*, 21 September 2012

24 Local Government Association, "*LGA response to the Growth and Infrastructure Bill*" 18 October 2012

25 HC Deb 6 September 2012 c32WS

26 *Growth and Infrastructure Bill,* Bill 75-EN, p9

give the example that this power could be used to make provision about what behaviour or actions by parties might result in costs being awarded or recovered.[27]

- Clause 2(6) would amend section 9 of the *Tribunals and Inquiries Act 1992* to enable rules to be made setting out the procedure for circumstances relating to when costs may be awarded between parties for planning appeals conducted as an inquiry or hearing.

- Clause 2(7) would enable the Secretary of State, where he has appointed another person to determine a planning appeal (normally the PINS), to deal with matters, (such as costs), directly himself, rather than the appointed person.

2.3 Compulsory purchase inquiries: costs

Clause 3 would broaden the powers of the Secretary of State to award costs between the parties at compulsory purchase order inquiries. Such inquiries are normally conducted by the PINS on behalf of the Secretary of State. Under the Clause costs could be awarded where an inquiry is cancelled, or where a party does not appear at an inquiry.

2.4 Limits on power to require information with planning applications

Clause 4 would introduce a new provision into section 62 of the *Town and Country Planning Act 1990*, which would limit the LPA's power to require information with planning applications. These limits would require that the information:

- must be reasonable having regard, in particular, to the nature and scale of the proposed development; and

- may require particulars of, or evidence about, a matter only if it is reasonable to think that the matter will be a material consideration in the determination of the application.

The information requirements for planning applications are laid down in the *Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2184)* (the "2010 Order"). In addition to this, Section 62(3) of the *Town and Country Planning Act 1990* gives LPAs a broad power to require that applications for planning permission in their area must include:

- such particulars as they think necessary; and

- such evidence in support of anything in, or relating to, the application as they think necessary.

There is little opportunity for an applicant to challenge the right of their LPA to ask for any particular piece of information to be provided in support of any particular planning application.

There are however, already, some provisions which seek to encourage proportionate use of the LPA's power to request information. These include article 29(4) of the 2010 Order which states that in order for a local information requirement to have a bearing on validation, the local planning authority must have published a list of their local information requirements on their website – and the evidence and particulars regarding what is required. Similarly, national policy set out in the document *Development Management Policy Annex: Information requirements and validation for planning applications* states that LPAs should only request supporting information that is relevant, necessary and material to the application in question.

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[27] *Growth and Infrastructure Bill,* Bill 75-EN, p9

Clause 4 follows a consultation by the Government in July 2012, *Streamlining information requirements for planning applications*. The Government was concerned that many information requests were still "disproportionate". Its aim in the Bill is to ensure a swifter planning system by making sure that information requests from LPAs are "proportionate to the scale and nature of the development proposed" and relate only to matters likely to be a material consideration in taking the planning application decision.[28]

Responding to this Clause the LGA said that "it is common sense not to seek information from applicants without good reason."[29] The Campaign to Protect Rural England (CPRE) however, believes that the Clause would reduce the quality of planning control; that developers would seek permissions on limited or poor quality information and contest information requests in the courts due to the "vague generalised wording of the clause."[30]

2.5 Modification or discharge of affordable housing requirement

Planning for housing

Under the Labour Government, housing requirements were calculated at a national level and targets were set for each regional planning authority. The regional planning authority would then divide that target between each local planning authority. Each local planning authority would then have to set aside enough land to satisfy that target. The current Government is currently in the process of abolishing Regional Spatial Strategies and their associated targets. It has not set any overall targets for housing supply.

The Government has replaced most of the previous planning guidance with the *National Planning Policy Framework (NPPF)*, published in March 2012. Planning policies and applications have to be determined in accordance with the NPPF "unless material considerations indicate otherwise".[31] The NPPF gives some broad guidance to local authorities about supply of housing. It states that local planning authorities should set out their policy on local standards in the Local Plan, including requirements for affordable housing.

The steps taken by the Government to stimulate housing supply, including those announced on 6 September 2012, are summarised in House of Commons Library note *Stimulating housing supply - Government initiatives, SN06416,* 7 September 2012. In addition to changes to planning legislation, the Housing Stimulus Package involves:

- new legislation for Government guarantees of up to £40 billion worth of major infrastructure projects and up to £10 billion of new homes. The Infrastructure (Financial Assistance) Bill involves guaranteeing the debt of Housing Associations and private sector developers;
- up to 15,000 affordable homes and bringing 5,000 empty homes back into use using new capital funding of £300m and the infrastructure guarantee;
- an additional 5,000 homes built for rent at market rates in line with proposals outlined in Sir Adrian Montague's report to Government on boosting the private rented sector;

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28 DCLG, *Growth and Infrastructure Bill Background Paper*, 18 October 2012

29 "DCLG seeks to cut application paperwork" *Planning*, 19 October 2012

30 Campaign to Protect Rural England, *New Bill will deliver neither lasting growth nor infrastructure*, 19 October 2012

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

- 16,500 first-time buyers helped with a £280m extension of the successful 'FirstBuy' scheme, which offers aspiring homeowners a much-needed deposit and a crucial first step on the housing ladder.[32]

The Prime Minister described the package as "a comprehensive plan to unleash one of the biggest homebuilding programmes this country has seen in a generation."[33]

Grania Long, chief executive of the Chartered Institute of Housing (CIH) welcomed the stimulus package:

> The package of financial guarantees is very welcome. We are particularly pleased that they will support investment in both private and affordable rented housing. However, we will measure the success of this announcement by whether it delivers the homes we need. We know that we need to build 240,000 new homes a year. These measures will contribute towards that target but there is still is a mountain to climb.[34]

She made particular reference to the importance of retaining affordable housing supply through the use of planning obligations (section 106 requirements):

> We recognise the government's decision not to drop section 106 requirements altogether - this would have had unacceptable consequences for new affordable housing. The detail of how the planning inspectorate administers this scheme will be very important in ensuring we strike the right balance between bringing housing supply forward and maintaining delivery of new affordable homes.[35]

Other housing commentators, while giving the stimulus package a "cautious welcome" identified tensions between different measures; for example:

> Mark Washer, finance director at 57,000-home Affinity Sutton, said: 'Anything that we can gain from underwriting [bonds] would be taken away by removal of section 106 obligations because we don't know where the land would come from.[36]
>
> The thing that could make a big difference is making land available,' says Rod Cahill, chief executive of 21,000-home Catalyst Housing. 'There needs to be a central programme on this to release land into the system across all tenures.'[37]

The lack of any increase in grant funding or clarity on the future of grant funding beyond the current spending review period was viewed as a significant omission to the stimulus package.[38]

Housing building statistics

The table below shows that in 2011/12 a total of 118,190 new build dwellings were completed in England, which was an increase of 9% on the previous year, but a 31% decrease on the peak of 170,610 in 2007/08.

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32 10 Downing Street Press Release, 6 September 2012
33 Ibid
34 CIH, *Housing to gain from Cabinet's first announcement,* 6 September 2012
35 Ibid
36 *Inside Housing,* "Bond investors deterred by £10bn guarantees plan," 7 September 2012
37 *Inside Housing,* "Emergency drop," 7 September 2012
38 Ibid

Housing completions by tenure, England 1990/91 to 2011/12

	Local authority	Housing associations	Private	Total
1990/91	12,960	14,580	132,500	160,030
1991/92	7,110	15,970	132,050	155,130
1992/93	2,580	23,970	115,910	142,460
1993/94	1,450	30,210	116,050	147,710
1994/95	850	31,380	125,740	157,970
1995/96	760	30,230	123,620	154,600
1996/97	450	24,630	121,170	146,250
1997/98	320	21,400	127,840	149,560
1998/99	180	18,890	121,190	140,260
1999/00	60	17,270	124,470	141,800
2000/01	180	16,430	116,640	133,260
2001/02	60	14,100	115,700	129,870
2002/03	200	13,080	124,460	137,740
2003/04	190	13,670	130,100	143,960
2004/05	100	16,660	139,130	155,890
2005/06	300	18,160	144,940	163,400
2006/07	250	21,750	145,680	167,680
2007/08	220	23,220	147,170	170,610
2008/09	490	26,690	113,800	140,990
2009/10	370	26,520	93,030	119,910
2010/11	1,140	23,550	83,200	107,890
2011/12	1,890	27,180	89,130	118,190

Source: DCLG Housing Live Table 209

Affordable homes

Over the course of the 2011-15 spending review period, the Homes and Communities Agency (HCA) have been allocated a £6.8bn capital spending budget for housing and housing-related programmes, broken down as:[39]

£4.5bn for building up to 150,000 affordable new homes (including existing commitments under the previous National Affordable Housing Programme). This is split as follows:

- £2.3bn will be used to pay for existing commitments to build 60,000 affordable homes
- £2.2bn will be used to pay for new commitments

Within this total of £4.5bn is:

- £100m for bringing empty homes back into use
- £200m for the continuation of the Mortgage Rescue scheme
- Continuing provision for Homelessness Change and Traveller Pitch Funding

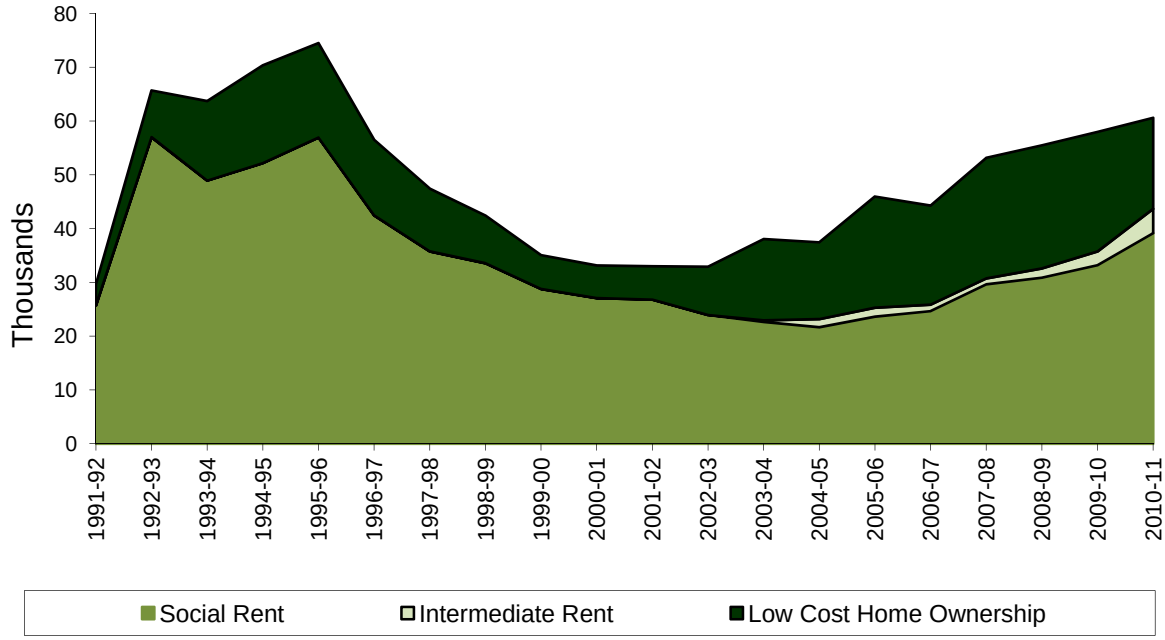
In addition, HCA funding includes:

- £2.1bn for the Decent Homes Programme to halve the backlog of disrepair in social housing stock. The HCA announced £1.6bn of allocations for this in February 2011.
- £200m for the new FirstBuy affordable home ownership scheme

[39] Source: HCA website, *Our funding* [on 24 October 2012]

The chart below shows additional affordable homes provided in England between 1991/92 and 2010/11 (the most recent data available).

Additional affordable homes provided by type of scheme, England



Source: DCLG Housing Live Table 1004

Housing supply and population growth

In terms of projected demand for housing, the most recent estimate was published by the previous Government within the 2007 Housing Green Paper. Section II of paper explained how the Labour Government's plans for housing growth (including eco-towns) fitted in with existing Regional Spatial Strategies:

> Delivering 2 million homes by 2016 and 3 million homes by 2020: Our proposals assume that housing supply will rise over time towards the 240,000 per year target in 2016, delivering approximately two million new homes by 2016 and continuing at around 240,000 homes per annum over the next four years to deliver an extra million new homes by 2020.[40]

The target of 3 million homes by 2020 was based upon an analysis of the 2006-based principal population projections produced by the Government Actuary's Department (now produced by the Office for National Statistics). The population projections predict the change in the population of England based on assumptions about likely fertility, death and immigration rates.

DCLG use the population projections to create household projections. They do this by applying projected household representative rates based on trends observed in Census and Labour Force Survey data to the population projections. This gives an estimate of the likely number of households in England each year. From this is it possible to assess the increase in the number of households over a given period and also to work out the average annual increase in households.

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[40] DCLG, 2007 Housing Green Paper - *Homes for the future: more affordable, more sustainable* Cm 7191

The aim of providing 3 million new homes by 2020 was based on the projected increase in the number of households in England.

More recent housing projections up to 2033 were published in November 2010. If targets were reset based upon these projections then around 232,000 new homes would be required each year.[41]

However, the current Government has decided to adopt a completely different approach by abolishing housing targets and all regional planning. House building is to be encouraged by allowing local authorities to retain council tax revenue from new properties for six years.

Some concern has been expressed that this has resulted in a reduction in planned house building. In October 2010 the National Housing Federation published research showing that housing projects were cancelled as a result of the abolition of housing targets:

> The Government's decision to scrap the nation's planning infrastructure, without putting an alternative system in place, will lead to 300,000 planned homes being ditched by local authorities across the country, according to a campaign group.
>
> The National Housing Federation said that the decision to axe regional housebuilding targets and other parts of the planning infrastructure has prompted councils across England to substantially reduce their plans for building new homes. Ministers have pledged to build more homes than the previous administration, but with the equivalent of 1,300 planned homes being scrapped every day since May, the coalition already faces a tough challenge to meet its stated goal. (…)
>
> New research commissioned by the Federation, carried out by Tetlow King Planning, shows that the Government's decision to allow councils to ignore the regional targets has already resulted directly or indirectly in plans for around 160,000 homes being dropped. Tetlow King expects that figure to increase to at least 280,000-300,000 homes by this time next year. [42]

The Bill and Section 106 agreements

Clause 5 of the Bill would allow for the modification or discharge of affordable housing elements of section 106 agreements in order to make a development viable. [43]

Section 106 agreements, sometimes known as "planning obligations" or "planning gain" stem from agreements made under section 106 of the *Town and Country Planning Act 1990* (TCPA), as amended. They are agreements made between the developer and the LPA to meet concerns that an LPA may have about meeting the cost of providing new infrastructure. New developments may bring with them wider impacts on the local area, for example, more people using local facilities such as parks, roads and leisure centres. New facilities may therefore need to be built or upgraded, or the council may be keen for some of the housing in particular development to be affordable. Section 106 allows developers to enter into "planning obligations" with a local authority in order secure planning permission for a development. Section 106(1) permits obligations for:

> (a) restricting the development or use of the land in any specified way;
>
> (b) requiring specified operations or activities to be carried out in, on, under or over the land;

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41 DCLG, *Household Projections, 2008 to 2033, England*, 26 November 2010

42 National Housing Federation Press Release, Government policies killing off 1,300 planned new homes every day, 4 October 2010

43 DCLG, *Growth and Infrastructure Bill Background Paper*, 18 October 2012

(c) requiring the land to be used in any specified way; or

(d) requiring a sum or sums to be paid to the authority [(or, in a case where section 2E applies, to the Greater London Authority)] on a specified date or dates or periodically.

Section 106 agreements are legally binding, and the obligations may be either in cash or kind, to undertake works, provide affordable housing or provide additional funding for services.

Planning obligations to support new development must help meet the objectives of the local plans and neighbourhood plans for a particular area. Many councils issue their own Planning Obligations Supplementary Planning Document (SPD). These documents explain a council's approach to planning obligations and its aims for the types of planning obligations that may be sought.

The *Plan for Growth*, accompanying the Budget 2011 said that where developments were stalled due to extensive planning obligations, negotiated in more buoyant property market conditions, local authorities would be asked to reconsider these in light of new circumstances and planning policy tests, and, where possible, to modify obligations to allow development to proceed.[44] The *HM Treasury Autumn Statement* in November 2011 announced the Government's intention to consult on a proposal to allow the reconsideration of those planning obligations agreed prior to April 2010 where development was stalled.[45]

In August 2012 the Government published a consultation, *Renegotiation of Section 106 planning obligations*. The Government set out its concern about a "high number" of stalled schemes and the lost economic benefit they represented. It explained that some planning obligations negotiated in different economic conditions now make sites economically unfeasible – resulting in no development, no regeneration and no community benefits. The Consultation proposed a legislative change, by regulations, to allow for section 106 agreements, agreed on or prior to 6 April 2010, to be renegotiated for a period of five years.

On 6 September 2012 the Government announced that it would introduce legislation which would allow any developer of sites which are unviable because of the number of affordable homes required through section 106 agreements, to appeal. Under this proposal the Planning Inspectorate would be instructed to assess how many affordable homes would need to be removed from the Section 106 agreement for the site to be viable. The Planning Inspectorate would then, as necessary, set aside the agreement for a three year period, in favour of a new agreement with fewer affordable homes.[46]

Clause 5 of the Bill differs from the proposals in the August consultation: it would apply to all section 106 agreements which have an affordable housing requirement, not just those agreed prior to April 2010. An "affordable housing requirement" is defined as "a requirement relating to the provision of housing that is or is to be made available for people whose needs are not adequately served by the commercial housing market (and it is immaterial for this purpose where or by whom the housing is or is to be provided)."[47]

The Clause would allow a developer with an affordable housing requirement (part of its section 106 agreement) to apply to the appropriate authority (in practice this will normally be the relevant LPA):

(a) for the requirement to have effect subject to modifications,

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44 HM Treasury, *Plan for Growth*, March 2011, p44
45 HM Treasury, *Autumn Statement 2011*, November 2011, p34
46 HC Deb 6 September 2012 cc29WS
47 *Growth and Infrastructure Bill*, Bill 75 2012-13, page 7, para 5

(b) for the requirement to be replaced with a different affordable housing requirement,

(c) for the requirement to be removed from the planning obligation, or

(d) in a case where the planning obligation consists solely of one or more affordable housing requirements, for the planning obligation to be discharged.

If the affordable housing requirement means that the associated development is "not economically viable" then the LPA may:

(a) determine that the requirement is to have effect subject to modifications,

(b) determine that the requirement is to be replaced with a different affordable housing requirement,

(c) determine that the planning obligation is to be modified to remove the requirement, or

(d) where the planning obligation consists solely of one or more affordable housing requirements, determine that the planning obligation is to be discharged.

The term "not economically viable" is not defined in the Clause. The Clause makes clear that where a first application is made for an obligation to be modified, the LPA may not amend the requirement so as to make the revised obligation more onerous than the original obligation. It may do this in relation to subsequent applications, but the LPA must not amend the requirement in a way that would make the development economically unviable.

The second half of Clause 5 introduces provision for appeal to the Secretary of State in respect of applications made to modify affordable housing requirements. Schedule 2, para 8 would allow for the appeal to be handled by an appointed person. In practice this would be the Planning Inspectorate. A developer may appeal if the LPA does not modify the planning obligation as requested, or fails to make a determination within a specified time. If a development is not completed within 3 years of an appeal being determined, the developer must enter into further agreement with the appropriate authority (normally the LPA) about affordable housing requirements.

Clause 5 makes these changes by inserting new sections 106BA and 106BB into the *Town and Country Planning Act 1990*. The Clause would allow the Secretary of State to repeal these new sections, by order, at any time.

The Government has said that this change will "help unlock some of the 75,000 homes already with planning permission that are currently stalled due to lack of commercial viability."[48]

Reaction to the Bill

In response to this Clause the National Housing Federation said that, while some renegotiation of section 106 agreements could lead to speedier development of both affordable and market housing, there were usually other, more significant issues holding up development. That in many cases it was the constraints and costs of development finance and mortgage availability, as well as sales risk, that were "more fundamental stumbling blocks."[49] The Local Government Association said that allowing affordable housing agreements to be renegotiated would undermine local communities' confidence in the

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[48] DCLG, *Growth and Infrastructure Bill Background Paper*, 18 October 2012

[49] National Housing Federation, *Response to the announcement of the Growth and Infrastructure Bill*, 18 October 2012

planning system and lead to increased resistance to future developments.[50] The CBI, in contrast, welcomed the provisions in the Bill and said they would help to unblock development.[51]

2.6 Disposals of land held for planning purposes

Clause 6 of the Bill would make it easier for local authorities to dispose of surplus land held for planning purposes; the aim is help get more brownfield land back into productive use.[52]

Land is sometimes held by local authorities, for planning purposes, so that they can control development on that land. Section 233 of the *Town and Country Planning Act 1990* enables a local authority to dispose of land held for planning purposes. Consent of the Secretary of State is required on every occasion where the disposal is for a lower price than could reasonably be obtained.

Clause 6 would allow the Secretary of State to grant consent to local authorities to dispose of land held for planning purposes for categories of disposals, so that consent did not have to be sought on each separate occasion.

An article in *Planning* speculated how this Clause might be used for practical effect:

> Angus Walker, partner at law firm Bircham Dyson Bell, said the clause would allow the government to decide that "a whole category of land" held by local authorities can be disposed of for less than best price, rather than having to decide each case individually.
>
> He said: "I expect the DCLG gets quite bogged down by a lot of these individual applications so this should speed things up. For example, the government could decide that all land of a particular type and price threshold could be disposed of.[53]

2.7 Electronic communications code: the need to promote growth

On 7 September 2012 the Government announced a range of measures to 'fast-track' the roll-out of superfast broadband.[54] The announcement included a proposal that broadband street cabinets could be installed in any location other than a site of special scientific interest without the need for prior approval from the local council and without any conditions being placed upon the construction or design by local authorities except in exceptional circumstances. Broadband Delivery UK (BDUK), a unit within the Department for Culture, Media and Sport (DCMS), has an ambition to provide superfast broadband to at least 90 per cent of premises in the UK and to provide universal access to standard broadband with a speed of at least 2Mbps.[55]

Clause 7 of the Bill is designed to 'facilitate the provision of communications infrastructure'.[56] It would do this be amending the *Communications Act 2003* which gives the Secretary of State power to make regulations on the application of the 'electronic communications code' to telecommunications network operators.

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50 Local Government Association, "*LGA response to the Growth and Infrastructure Bill*" 18 October 2012
51 CBI, *CBI responds to publication of Growth and Infrastructure Bill*, 18 October 2012
52 Department for Communities and Local Government, *Growth and Infrastructure Bill Background Paper*, 18 October 2012
53 "Rules requiring councils to maximise land sale value relaxed" *Planning*, 19 October 2012
54 DCMS, *Fastest broadband in Europe: delivering infrastructure to boost UK businesses*, 7 September 2012
55 DCMS website, *Broadband* [on 24 September 2012]
56 *Growth and Infrastructure Bill*, Bill 75-EN

The Electronic Communications Code was established by Schedule 2 to the *Telecommunications Act 1984*. It enables certain communications network providers to install and maintain infrastructure on public or private land, either with or without the agreement of landowners (through application to the courts if required) and provides that certain forms of infrastructure and equipment can be installed or constructed without planning permission, through permitted development rights. The Law Commission is currently inquiring into the Electronic Communications Code.[57] Its consultation paper notes that the "communication needs of society depend upon the use of land" and the Communications Code aims to strike "a balance between the rights and interests of landowners and network operators".[58] Ofcom, the telecommunications regulator, is responsible for applying the Code to operators.

Section 109(1) of the *Communications Act 2003* gives the Secretary of State power to make regulations restricting the application of the electronic communications code. Section 109(2) provides a list of considerations that the Secretary of State must have regard to in creating these regulations. This includes, for example, the need to protect the environment and preserve the natural beauty of a landscape and the need to ensure that highways and traffic are not obstructed or interfered with by equipment. Clause 7(1) of the Bill adds to that list the need to promote economic growth.

Clause 7(2)-(7) would remove the making of regulations under section 109 of the *Communications Act 2003* from the scope of duties set out under national parks legislation and areas of outstanding natural beauty legislation. These duties would otherwise require that Ministers must have regard to conserving and enhancing natural beauty in making regulations, under Section 109 of the *Communications Act 2003,* affecting these areas.

Reaction to the Bill

The Campaign to Protect Rural England (CPRE) have been critical of the Government's proposals which they fear could cause 'serious damage to designated landscapes'. They go on to note that the powers could potentially be used to undermine the Government's consultation from November 2011 on relaxing the restrictions on the deployment of overhead telecommunications lines.[59] This consultation noted that in National Parks, Areas of Outstanding Natural Beauty (AONB), conservation areas, areas of special scientific interest (SSI's), the Broads and World Heritage Sites planning permission would continue be required for overhead equipment.[60] Though the original DCMS policy announcement indicated that measures would be introduced to provide for broadband street cabinets, it appears that some groups are concerned that Regulations arising from the Bill could relax the rules on installing any telecommunications equipment.

2.8 Periodic Review of mineral planning permissions

Clause 8 and **Schedule 3** of the Bill would change the current regime of reviews of minerals planning permissions, to allow for greater discretion about whether and when to hold a review.

At present, schedule 14 of the *Environment Act 1995* requires mineral planning authorities (MPAs) to have periodic reviews, every 15 years, of the mineral permissions relating to mining sites in their areas. The Government is concerned that this requirement for a review, regardless of the effectiveness of the current planning conditions, is a disproportionate burden on mineral operators and MPAs. Its aim is to give MPAs greater flexibility and reduce

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57 The Law Commission website, *Electronic Communications Code* [on 24 October 2012]
58 Law Commission, Electronic Communications Code: consultation, June 2012
59 CPRE, Press notice*: New Bill will deliver neither lasting growth nor infrastructure*, 19 October 2012
60 DCMS, Relaxing the restrictions on the deployment of overhead telecommunications lines, November 2011

the economic burden on mineral operators, which is hoped will bring benefits for the mineral industry and wider economy.[61]

Clause 8 and Schedule 3 would give MPAs in England discretion about whether to require a periodic review and to set a future review date. The review date may not be any earlier than every 15 years.

Reaction to the Bill

The Mineral Products Association welcomed the change to the reviews:

> Ken Hobden, the association's director of planning, said it had been campaigning to ease the current requirements, and welcomed the measures included in the bill.
>
> He said: "Industry isn't against the idea of doing reviews if they are necessary. But the review introduces flexibility. It says mineral planning authorities have the right to call for a review but they can't call for a review more frequently than every 15 years. We believe that the overall effect of it is to say a planning authority still has the power to call for a review as long as they don't do it more frequently than every 15 years."
>
> Hobden said the existing regime had become "a lot more expensive and a lot more onerous" than originally envisaged when it was introduced in the 1990s and changes would be welcomed by local planning authorities as well as the mineral industry.[62]

2.9 Highways and footpaths

The Penfold review, published in 2010, considered consents which need to be obtained alongside or after, and separate from, planning permission for developments (so called 'non-planning consents'). Highway extinguishment, diversion and stopping up orders were among the consents identified as high priority regimes as 'causing difficulties' by respondents to the review.[63]

Rights of way, and their creation, diversion, maintenance and alteration are covered by several different pieces of legislation, and by common law. There are however specific provisions under the *Town and Country Planning Act 1990* (TCPA) under which public rights of way can be stopped up and/or diverted to allow development to take place.

In short, the Bill seeks to amend the TCPA and change the process, so that stopping up or diversion orders can be made at the same time as planning permission is sought, rather than waiting until after this is granted.

Normally, permitted development rights apply to the construction of a means of access to a development, but not if this is to be constructed along a public footpath/right of way.[64] Also, the granting of outline or detailed planning permission for a development does not constitute permission to close or divert a public right of way affected by it. The closure or diversion has to be granted by an order under the TCPA.

Planning authorities (or the Secretary of State) can make such orders to stop up or divert footpaths, bridleways or restricted highways affected by development *for which planning*

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61 *Growth and Infrastructure Bill*, Bill 75-EN, p30

62 "Minerals body welcomes potential for less frequent permissions reviews" *Planning*, 19 October 2012

63 Figure 2, page 4 in *Penfold review of non-planning consents Final report* July 2010

64 Riddall and Trevelyan, *Rights of Way A Guide to Law and Practice* (2007 edition), p196

permission has been granted. The authority must also be satisfied that without the stopping up or diversion order the development could not be carried out.[65]

Planning guidance says that planning authorities should at this stage seek opportunities to provide better facilities for walkers, cyclists and horse-riders, and such opportunities might arise through planning obligations entered into with, or by, developers. These might be used to offset through substitution or replacement the loss of or damage to a right of way. A right of way might be legally diverted, for example. However, this is not *necessary* for an order, which may provide for the stopping-up of a path or way without replacement.[66]

For development currently to take place then, if a right of way is affected, first of all planning permission needs to be granted. Then, an order must be made by the Secretary of State or other applicant. The normal rights of appeal within planning procedures will apply if there are objections to the development.

Clause 9 seeks to amend section 253 of the TCPA, which deals with 'procedure in anticipation of planning permission'. It removes some existing conditions, so making it possible for draft orders allowing for stopping up or diversion to be published in all cases in draft *at the planning application stage*. This is instead of waiting for planning permission to be granted before applying for the stopping up or diversion order. The Explanatory Notes say that this does not apply to Wales but to England only.

Clause 10 seeks to amend section 257 of the TCPA, which allows for the stopping up of footpaths, bridleways and restricted byways affected by other development. As it stands, a 'competent authority' can do this if satisfied it is necessary to do so to allow development to be carried out, *in accordance with planning permission granted* under the TCPA or by a government department.

The TCPA is amended so that this can also be done if an *application* for planning permission in respect of the development has been made.

While the order can therefore be made in anticipation of the planning permission, there are some safeguards. Section 259 of the TCPA is also amended so that the Secretary of State cannot confirm the stopping up or diversion order until planning permission has actually been granted. Also, the competent authority must be satisfied that if planning permission was granted, the stopping up or diversion would be needed to let the development be carried out. Again, this applies to England only.

The new procedure then will be orders being made at the same time as the application for planning permission, and being confirmed once planning permission has been granted.

Clause 11 seeks to amend the *Highways Act 1980*. Section 31 of this Act says that where a way over any land has been enjoyed by the public as of right and without interruption for 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

Under subsection 31(6) of this, the landowner can at any time deposit a map with the highways authority showing what rights of way there are over the land, along with a statutory declaration that there is no intention to allow any other part of the land to become subject to a right of way.

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65 Ibid. p.199

66 Ibid, pp198, 200

Clause 11 allows the Secretary of State to prescribe by regulation the form of such statements, maps and declarations to reduce the administrative burden on landowners. Declarations lodged in the prescribed form will be taken as valid by the council concerned, who can also determine the fees payable, and will have to take steps prescribed by the Secretary of State.

The period for renewing these declarations is extended from 10 to 20 years in England, but remains at 10 years for Wales.

2.10 Town and village greens

Town and village greens originate in customary law, where long-standing recreational use of land by the local inhabitants came to be recognised and protected by the courts. A green can be in private ownership but many greens are owned or maintained by town and parish councils. Most greens were registered in the late 1960s under the *Commons Registration Act 1965*. Today, under section 15 of the *Commons Act 2006*, land can be now registered as a green if it has been used by local people for recreation "as of right" (i.e. without permission, force or secrecy) for at least 20 years.

The 2010 *Penfold Review of non-planning consents* identified that applications were sometimes made to register land as town or village greens solely as a means to frustrate developments that have already received planning permission.[67] In response to this review, in July 2011 the Department for Environment, Food and Rural Affairs (Defra) consulted on proposals to reform the system for registering new town or village greens under section 15 of the *Commons Act 2006*.[68] The Government was concerned about the volume of applications to register new greens, the character of application sites, the controversy which such applications often attracted, the cost of the determination process on the parties affected, and the impact of a successful registration on the landowner.

The consultation proposed to introduce a "Local Green Spaces" designation through the planning system, to reform the registration system so as to "achieve an improved regulatory balance between protecting high quality green space valued by local communities and enabling the right development to occur in the right place at the right time."[69] The Government has since introduced a Local Green Spaces designation as part of its *National Planning Policy Framework*, which runs separately to the registration system set out in the *Commons Act 2006*. The Local Green Spaces Designation is a system whereby local communities, through making a neighbourhood plan, are able to designate land as a Local Green Space, which in turn restricts further development.[70]

The Government is still concerned that the current system allows for misuse of town and village green applications that undermine planned development.[71] Through the following Clauses in the Bill on town and village green registration the Government aims to protect local communities' ability to decide on development in their area through local and neighbourhood plan making. It also wants to reduce the financial burden on local authorities in determining applications and on land owners affected by applications.[72]

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67 Department for Business, Innovation and Skills, *Penfold Review of non- planning consents*, July 2010, section 4.25

68 Defra, *Consultation on the registration of new town or village greens,* July 2011

69 Defra website, *The registration of new town or village greens* [on 10 October 2012]

70 For further information see Department for Communities and Local Government, *National Planning Policy Framework*, March 2012, paras 74-78

71 DCLG, *Growth and Infrastructure Bill Background Paper*, 18 October 2012

72 *Growth and Infrastructure Bill*, Bill 75-EN 2012-13, p32

Statement by owner

Clause 12 would amend the *Commons Act 2006* to allow a land owner to deposit a map and statement, with the commons registration authority, which would protect their land from registration as a town or village green by someone else. The effect of this would bring to an end any period of use as of right for lawful sports and pastimes on the land.

The Clause would also allow the Secretary of State to make regulations which could provide that a statement made to protect land from registration as a town or village green, could be combined with a statement made to counter rights of way claims under section 31(6) *Highways Act 1980*. The Government's aim is to reduce the administrative burden on landowners who want to make statements for both purposes at the same time.[73]

Restrictions on right to register land as town or village green

Clause 13 would insert a new section 15C into the *Commons Act 2006*, which would exclude the right to apply for town or village green registration if any of the "trigger events" specified in new schedule 1A (schedule 4 of this Bill) occur.

Trigger events relate to events concerning the development of land. They include: where an application for planning permission is first publicised; where a draft or a final development plan document identifies the land for potential development; and where a draft or a final neighbourhood development plan identifies the land for potential development.

Trigger events are listed in a table alongside associated "terminating events" which set out when the trigger events cease to have effect and the right to apply for town or village green registration is resumed. These include where planning applications and development plans are withdrawn.

The Clause gives the Secretary of State the power to add, amend or remove any of the trigger or terminating events.

Applications to amend registers – modification of power to provide for fees

Clause 14 would amend the existing powers in section 24 of the *Commons Act 2006* in relation to fees for registration of town or village greens. The Clause would allow the Secretary of State to make regulations about fees payable in relation to an application, and in particular, for a fee to be payable to and determined by the person to whom an application is made. According to the Bill's explanatory notes, the aim is to allow greater flexibility and targeting of fees – subject to secondary legislation and Parliamentary scrutiny.[74]

Reaction to the Bill

The CPRE called the provisions relating to town and village greens "a sledgehammer to crack a very small nut." It also expressed concern that the Government saw town and village greens as a barrier to growth rather than as spaces that were "highly valued" by communities across the country.[75] In a similar vein, the Open Spaces Society said that the measures were "far too oppressive and heavy-handed." The Society was particularly concerned that registration of town and village greens would be suspended even if it was only a draft development document that had identified the space for potential development, without any public consultation. It called for the provisions to be better targeted for "the small minority of vexatious applications."[76]

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73 Ibid, p14
74 Ibid, p16
75 CPRE press notice, *New Bill will deliver neither lasting growth nor infrastructure*, 19 October 2012
76 Open Spaces Society, *Government rides roughshod over rights of local people*, 18 October 2012

The National Housing Federation welcomed the changes and said that registration of new town and village greens had long been an impediment to development in both rural and rural areas. It saw the changes as a "significant shift in favour of sustainable development."[77] A planning lawyer from law firm Pinsent Masons also welcomed the change and said it would provide more certainty for developers by providing a safeguard that once a site is identified in a development document that there is no longer a risk or delay or increased expense as a result of a town or village green registration.[78]

3 Other infrastructure provisions

3.1 Power

Repeal of requirement to give notice

Section 14 of the *Energy Act 1976* required developers to notify the Secretary of State about the fuel to be used in any new or converted power station to be powered by oil or gas. It implemented Directives that have themselves been repealed and reflected the market conditions in the 1970s. Following exemptions introduced by the Planning Act 2008, it applied only to stations below 50 megawatts (MW). **Clause 15** repeals this requirement.

Gas distribution payments under licence

Clause 16 deals with licences and charges for gas transportation. Operating licences are issued by Ofgem, the energy regulator, under the *Gas Act 1986* to energy companies who transport gas. Through these licences Ofgem can set and vary general conditions.

Ofgem also sets how much energy companies are allowed to raise their prices to pay for investment in infrastructure under a series of 'price controls', much as in the water industry. The licence conditions therefore allow Ofgem to require energy companies to raise their prices for transporting gas, and to pay the amounts raised to other licence holders who are gas shippers or suppliers under the Gas Act.

The regulated utilities' price controls have typically been set by an RPI (retail prices index) minus X factor, limiting changes in price to general inflation less a specified 'X'. (Energy transmission and distribution are still subject to price control regulation because electricity and gas are both transported via national transmission systems which are run as monopoly businesses and distribution is also still largely a regional monopoly activity.)

After 20 years of using RPI-X, Ofgem conducted an RPI-X@20 review. In October 2010 Ofgem published its 'RIIO' decision document, announcing that it was moving to an outputs-led framework called RIIO which stands for Revenue = Incentives + Innovation + Outputs. The next transmission and gas distribution price controls are due to be implemented in April 2013 under the new RIIO regime, and to last to 2021. [79]

Under Ofgem's latest gas distribution (low pressure transport) price control proposals, the regulator will introduce Network Innovation Competitions (NIC). Under these annual competitions network companies will compete for funding for research, development and trialling for new technology, operating and commercial arrangements.[80] This means that gas licence holders need to be able to pay licensees other than just other gas shippers or suppliers. The Bill clarifies the existing situation, and allows for these changes. In the Government's view:

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77 National Housing Federation, *Response to the announcement of the Growth and Infrastructure Bill*, 18 October 2012

78 Planning, *Live Blog – Growth and Infrastructure Bill* [on 23 October 2012]

79 Ofgem 4 October 2010 *RIIO: A new way to regulate energy networks*

80 Ofgem, Network Innovation Competition home page, accessed 24 October 2012

> Government will remove an ambiguity to the Gas Act which has prevented Ofgem from launching an innovation competition that could attract £160 million of additional investment into the gas network to make it more efficient. [81]

Variation of consents under Electricity Act 1989

So-called 'section 36 consents' are required from the Secretary of State under the *Electricity Act 1989* for the construction, operation or extension of power generating stations over 50MW onshore in England and Wales. The Department for Energy and Climate Change set out planning policy for energy infrastructure during 2011, in a series of National Policy Statements for Energy.[82]

Under the *Planning Act 2008* the Infrastructure Planning Commission (IPC) became responsible for processing applications, but under the new national planning regime this has now reverted to the Planning Inspectorate and, ultimately, the Secretary of State. Please see section 3.3 below.

Rather than the Secretary of State, the marine management organisation (MMO) determines section 36 applications offshore adjacent to England and Wales or in a Renewable Energy Zone, unless Scottish Ministers have functions in an area.[83]

The Explanatory Notes to the Bill say that at present it is not possible to vary section 36 consents, so if a developer's plans changed and have been referenced in their section 36 consent, the terms of the consent can prevent the construction from proceeding. This can happen even where the changes have been made in the interests of efficiency or the environment.[84]

Clause 17 inserts a new section 36C into the 1989 Act. It provides the power to vary section 36 consents on application. It allows for regulations to be made stipulating how this is to be done, including the holding of public inquiries and publicity and consultation arrangements. The authority deciding the application (i.e. the Secretary of State, MMO or Scottish Ministers as appropriate) must have regard to the applicant's reasons but also any objections, the views of consultees and the outcome of any public inquiry. The Government has given some more details about the likely period of consultation to be required:

> Currently, developers can be held back from improving their plans because they have no way to vary consents. So, for instance, if a developer wants to incorporate the most recent technology and design to increase energy efficiency, they may be prevented from doing so. This can prevent developers from being as ambitious and innovative as they would like. An amend [sic] to the Electricity Act will mean that if developers want to apply to change their projects, they will in most cases only need to undertake a three month consultation, rather than going through the whole process of applying for consent again. This could unlock investment decisions across a range of technologies, bringing thousands of new jobs and billions of pounds of investment to the UK economy. [85]

While consent for power stations is granted under section 36 of the 1989 Act, consent for overhead power lines is dealt with by section 37 of the same Act. These consents can already be varied,[86] but clause 17 also seeks to allow the Secretary of State to make

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81 Number 10 press release 18 October 2012 *New laws to support growth through investment and infrastructure*
82 DECC website *National Policy Statements for Energy Infrastructure* accessed 24 October 2012
83 DECC *Overarching National Policy Statement for Energy* (EN-1) July 2011
84 *Growth and Infrastructure Bill* Bill 75-EN, para 79
85 Number 10 press release 18 October 2012 *New laws to support growth through investment and infrastructure*
86 *Growth and Infrastructure Bill* Bill 75-EN, para 83

regulations allowing an application for a variation of a section 37 consent to be treated as being made when the original application for consent was made.

Deemed planning permission

Alongside issuing section 36 and section 37 consents, the Secretary of State has powers to issue deemed planning permission for power station and overhead lines under section 90 of the TCPA 1990. After a section 36 or section 37 consent has been granted, the Secretary of State can direct that planning permission is 'deemed to have been granted', removing the need for the developer to make a separate planning application to the local planning authority.

These powers were transferred to the Infrastructure Planning Commission (IPC) from 1 March 2008 by the Planning Act 2008, but under the 2012 planning regime changes they have reverted to the Planning Inspectorate and ultimately to the Secretary of State (see section 3.3 below).

Clause 18 allows for the necessary changes to the deemed planning consent processes which arise from the new ability to vary section 36 (or section 37) consents. The Secretary of State will be able to make directions to either vary an existing deemed planning permission or deem a new planning permission to be granted. An approval under an existing deemed planning permission may also, by direction, be treated as being under a new or varied planning permission.

The same clause amends the *Town and Country Planning (Scotland) Act 1997* to give Scottish Ministers similar powers.

3.2 Compulsory purchase and special parliamentary procedure

Clauses 19 and 20 of the Bill would make technical changes to the Special Parliamentary Procedure which certain developments have to go through, in addition to the process of getting planning permission.

Special Parliamentary procedure in cases under the Planning Act 2008

Where land is compulsory acquired, in certain circumstances the instrument authorising the acquisition of land is subject to a special parliamentary procedure (SPP). In summary, this provides for people to petition Parliament against the making of an order. If such petitions are brought and are certified as being "proper to be received" by the Lord Chairman of the Committees and the Chairman of the Ways and Means, then they will be considered by a joint committee of both Houses. The joint committee then acts in a manner similar to a committee on a private bill. The procedure is governed by the *Statutory Orders (Special Procedure) Act 1945* (the 1945 Act).[87]

The *Planning Act 2008* (2008 Act) provides a development consent process for major infrastructure projects. Where development consent is granted under this Act it gives the applicant consent for a range of matters, including planning permission. A development consent order (DCO) can also authorise the compulsory acquisition of land. Currently, SPP is required where a DCO authorises the acquisition of land, against the wishes of the land owner, falling into one number of special categories of land ("special land"): local authority or statutory undertaker land,[88] National Trust land, common land, public open space, or land

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87 *Growth and Infrastructure Bill* Bill 75-EN, p35

88 Statutory undertakers are certain companies and agencies, such as utilities and telecoms companies that have been given legal rights to carry out certain developments on land

which is a fuel or field garden allotment. The procedure was introduced so that Parliament could take a view on how the competing public interests in the land could be weighed.[89]

The use of SPP is normally rare. The *Rookery South (Resource Recovery Facility) Order 2011* was laid before Parliament on 29 November 2011 and, after a petitioning process, was referred to a joint committee of both Houses for consideration, which began on 24 October 2012. This is the first time this has happened since 1999.[90] The *Borough of Stevenage (Ferrier Road) Compulsory Purchase Order 2009* was laid in both Houses on 16 October 2012 and the petitioning window is open until 5 November 2012.

Clause 19 would remove the requirement for a SPP where a DCO granting development consent authorises the compulsory purchase of local authority and statutory undertaker land. It repeals section 128 of the 2008 Act. As a related measure, Clause 19 would also repeal section 129 of the 2008 Act, which disapplies section 128 in certain circumstances. The requirement for a SPP for compulsory acquisition of National Trust land, common land, public open space, or land which is a fuel or field garden allotment remains.

Clause 19 would also amend the 2008 Act to widen the circumstances in which the Secretary of State could issue a certificate to state that a DCO authorising compulsory purchase of open space land or a right over land should not to be subject to SPP. The Secretary of State would be able to issue such a certificate in two addition circumstances. First, if there was no suitable land to be given in exchange for the land acquired, or where any land available is only available at a prohibitive cost, and it is strongly in the public interest for development to begin sooner than it would if the relevant order were subject to SPP. Second, a certificate may be issued if the open space land in question is being acquired only for a temporary purpose, even if this purpose is long-lived.[91]

Neither the explanatory notes to the Bill nor the background paper to the Bill prepared by the DCLG set out explicitly why the Government has chosen to make these changes. The Royal Town Planning Institute said that the SPP had proved to be bureaucratic, and welcomed this reform.[92]

Modifications of special parliamentary procedure in certain cases

In a special report on the *Rookery South (Resource Recovery Facility) Order 2011: report on petitions against the order*, the Lord Chairman of the Committees and the Chairman of the Ways and Means identified anomalies in the statutory framework for the SPP. The report called for the Government to "rectify these anomalies as a matter of priority".[93]

The report identified an incompatibility between the 2008 Act and the 1945 Act. The 1945 Act makes provision for Parliament to consider the whole of an Order, and neither House has procedures in place which would allow them to annul only some elements of the Order. In contrast, the 2008 Act in its "natural interpretation" says that only the provisions of the DCO authorising the compulsory acquisition of special land are subject to the SPP. The Chairmen's special report summarises how these anomalies have caused problems for Parliamentary procedure; the whole of an Order could be rejected by Parliament, even though some parts of it were not intended (under the 2008 Act) to be subject to SPP:

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89 *Growth and Infrastructure Bill*, Bill 75-EN, p36

90 Reference: Clerk of Delegated Legislation, 22 October 2012

91 Ibid, p19

92 RTPI, *RTPI response to the publication of the Growth and Infrastructure Bill*, 18 October 2012

93 *The Rookery South (Resource Recovery Facility) Order 2011: Report on petitions against the Order - Chairman of Committees*, House of Lords and Chairman of Ways and Means, House of Commons, 28 May 2012

> 25. This incompatibility between the 1945 and the 2008 Acts is particularly critical for the two remaining stages in the Special Parliamentary Procedure process. Firstly, the 1945 Act provides only for consideration and decision of the whole Order, and the Standing Orders of both Houses simply mirror the framework provided by the Act. Neither House has any procedural instrument by which debate on a resolution to annul the Order, tabled within the 21 day resolution period, could be limited to certain elements of the Order only, nor does either House have any means of annulling only some elements of the Order. It must therefore be the incontrovertible right of each House to debate any aspect of a Development Consent Order subject to Special Parliamentary Procedure and, if it so chooses, to reject the Order in its entirety on the basis of opposition to elements which, according to the intention of the 2008 Act, ought not to be subject to any part of Special Parliamentary Procedure.
>
> 26. The other stage at which the discrepancy between the provisions of the 1945 Act and the intentions of the 2008 Act become critically important is in the scope of consideration of petitions by a joint committee. The Agents for the unitary councils argued forcefully at our hearing that, once a petition has been certified as proper to be received and referred to a joint committee, all aspects of that petition, whether or not they relate to the compulsory purchase of special land, should be considered by the committee.[94]

The explanatory notes to the Bill identify that a similar inconsistency also arises in relation to the *Acquisition of Land Act 1981* (the 1981 Act), which makes provision for procedural matters in respect of powers authorising the compulsory purchase of land.

With the aim of rectifying these inconsistencies, Clause 20 of the Bill would amend the 1945 Act so that when a DCO under the 2008 Act or a compulsory purchase order under the 1981 Act are subject to SPP, only those provisions which authorise the compulsory acquisition of special land could be the subject of petitions and be considered by Parliament.

3.3 Bringing business and commercial projects within Planning Act 2008 regime

Nationally Significant Infrastructure Projects (NSIPs) are usually large scale developments (relating to energy, transport, water, waste water or waste) which require a type of consent known as "development consent" under procedures governed by the *Planning Act 2008* (the 2008 Act) and amended by the *Localism Act 2011*. Any developer wishing to construct a NSIP must first apply for consent to do so. For such projects, the Planning Inspectorate examines the application and will make a recommendation to the relevant Secretary of State, who will make the decision on whether to grant or to refuse development consent. The process is timetabled to take 12 months from start to finish.

The 2008 Act sets out thresholds above which certain types of infrastructure development are considered to be nationally significant and require development consent.[95] The Government, in its written ministerial statement on 6 September 2012, announced proposals to allow planning applications for commercial and business developments of sufficient significance to be taken at a national level through the national infrastructure planning system. The aim is to allow these applications to proceed faster than they currently do:

> Getting the infrastructure projects that the country's economic success relies upon underway as swiftly as possible is also a top priority. The planning regime for Major Infrastructure which deals with many of these cases is bedding in well and is bringing benefits through its streamlined and more certain processes. We want to ensure that

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94 *The Rookery South (Resource Recovery Facility) Order 2011: Report on petitions against the Order - Chairman of Committees*, House of Lords and Chairman of Ways and Means, House of Commons, May 2012

95 National Infrastructure Planning website, *Planning Inspectorate role* [on 18 September 2012]

> this planning regime rightly focuses on the most important schemes whilst also extending the benefits of it to other forms of development which are of national importance.
>
> To achieve this we now intend to review the thresholds for some of the existing categories in the regime, and also to bring new categories of commercial and business development into the regime - making it possible for such schemes, where they are of sufficient significance, to be considered and determined at a national level.[96]

Clause 21 of the Bill would replace section 35 of the 2008 Act with new section 35 and insert new section 35ZA. New section 35 would enable the Secretary of State to direct that certain commercial and business developments could require consent under the 2008 Act. Section 35(2) would also allow the Secretary of State to make regulations which set out the prescribed projects, relating to business and commercial development, which would fall under this section. The Bill makes clear in new section 35(5) that the regulations may not prescribe for projects which involve the construction of one or more dwellings. This would exclude new housing developments from this provision. A draft of the regulations made must be laid before, and approved by, each House of Parliament.

The development must be in England or adjacent waters. (Developments in Greater London will also require the Mayor of London's consent.) The Secretary of State may give a direction only if he thinks the project is of "national significance" either by itself or when considered together with another prescribed business or commercial project (but not with another type of NSIP).

Reaction to the Bill

The Campaign to Protect Rural England (CPRE) said it was pleased that proposals to include housing developments in the scope of the national infrastructure planning system had been "dropped". The organisation was concerned, however, that the new procedure would bypass local scrutiny:

> However, inclusion of major business or commercial projects as 'major infrastructure' is another blow to local decision-making. It could mean that big office, warehousing and retail schemes bypass local scrutiny and are decided by planning inspectors. The message given is that these schemes will get an easier ride from Government. Will Ministers commit to protect town centres and regeneration projects from competition from road and motorway based schemes, or will there be a flood of greenfield approvals that undermine urban areas? There is no guarantee that the schemes involved will reflect locally agreed plans. Will there be a new national policy statement to guide the planning inspectorate?[97]

The CBI welcomed this Clause and said it would "give confidence to business that the Government understands the need to fast track important infrastructure projects to boost growth."[98]

4 Economic measures

4.1 Postponement of compilation of rating lists for business rates

Clause 22 of the Bill amends the *Local Government Finance Act 1988*, the Act which set up the current system for setting and collecting the National Non-Domestic Rate (NNDR), normally known as the 'business rate'. Sub-sections 1-5 amend the provisions for the local

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96 HC Deb 6 September 2012 cc29WS
97 CPRE, *New Bill will deliver neither lasting growth nor infrastructure*, 19 October 2012
98 CBI, *CBI responds to publication of Growth and Infrastructure Bill*, 18 October 2012

ratings list, and sub-sections 6-10 make equivalent amendments for the central ratings list. Sub-sections 4 and 9 are consequential amendments, removing the requirement for ratings list to last exactly five years – as the current one will last for seven years if Clause 22 is passed.

The Valuation Office Agency (VOA) compiles local and national rating lists every five years under the *Local Government Finance Act 1988*. These lists contain the rateable value (RV) of all business properties in England and Wales. The next revaluation is to come into force on 1 April 2015. This revaluation would be based on property rental values on 1 April 2013. Clause 22 postpones this timetable by two years, requiring a finalised new list to be published on 1 April 2017, based on property values on 1 April 2015. It also provides that the five-yearly cycle should begin again from that point: hence the revaluation after that will be finalised on 1 April 2022.

Clause 22 applies specifically to England. Therefore, in Wales the original provisions of the 1988 Act will remain in place, and revaluation in Wales will be finalised by 1 April 2015. It will be for Welsh Ministers to decide if they want to change this date. Business rates in Scotland and Northern Ireland are governed by separate arrangements, and are not covered by the VOA.

Calculation of business rates

The RV of a property is the first element in the calculation of the rates bill. Rateable values are assessed by the Valuation Office Agency (VOA), which is an executive agency of HM Revenue and Customs. Normally the RV of a property reflects the annual rent that it could have been let for on the open market, subject to various assumptions (for example, that it is in a reasonable state of repair).

The second element in the rates bill is the national rate or **"**multiplier" which is normally expressed in pence per pound. This is set by the Government each year and moves in line with the movement in the Retail Price Index (RPI) as at the previous September. Prior to 1990, local authorities set the rate but the *Local Government Finance Act 1988* moved the power from local to central government. In Wales, the National Assembly sets the multiplier.

The basic rates bill is calculated by multiplying the RV of a property by the multiplier. In England, the standard multiplier for 2012-13 is 45.8 pence in the pound and the small business multiplier is 45.0 pence.

Separately from the provisions in this Bill, the British Retail Consortium has established a campaign, *Fair Rates for Retail*, urging the Government not to implement the planned increase of the multiplier by the Retail Price Index (RPI) on 1 April 2013. They are also requesting that future rises in the multiplier should be based on an annual average of the Consumer Price Index (CPI) instead of the RPI. There have also been demands, both now and in the past, for a shorter revaluation cycle than five years.[99]

Clause 22 seeks to ensure that the rateable value used for business rates will continue to be based on rental values as at 1 April 2008, until the new rating lists come into force on 1 April 2017. The Bill does not permit Ministers to postpone the revaluation further to a date of their choice: the dates are provided on the face of the Bill.

A Written Ministerial Statement on 19 October 2012 stated:

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[99] See for instance Errika Askeland, "Holyrood urged not to copy Westminster business rates plan", *The Scotsman*, 22 October 2012, p.21

> Business rates are the third biggest outgoing for local firms after rent and staff costs. This decision will avoid local firms and local shops facing unexpected hikes in their business rate bills over the next five years. As business rates are linked to inflation, there will be no real terms increase in rates over this period. This reform will provide certainty for business to plan and invest, supporting local economic growth.
>
> Since the last revaluation (based on 2008 valuations), the economy and property market have faced exceptional changes. A revaluation at this point would be likely to result in sharp changes to business rate bills in many parts of the country and in many sectors. Tax stability is vital to businesses looking to grow and help improve the economy.
>
> These measures complement the local retention of business rates being introduced through the Local Government Finance Bill which will give councils new incentives to support local firms and local shops, and also complements the new power to introduce local business rate discounts, the automation of small business rate relief and the abolition of the unfair "ports tax" all enacted through the Localism Act 2011. [100]

Reactions, and implications for business rate payers

Under the original timetable, the next revaluation would have caused a change in business rates from 2015-16, using rental values as at 1 April 2013. Many industry commentators believe that those rental values would have reduced considerably since 1 April 2008, because of the deterioration in the economy in the interim. The *Daily Telegraph* described the move as:

> A cynical tactic to maximise tax revenue when a review would lower rates for many businesses. [101]

Retail Week stated:

> The main effect of the cancellation of the revaluation is to condemn retailers to a further two years of excessive rates charges. Business rates are currently based on rental values in April 2008, a time which was pretty much the peak of the market. In today's very different economic climate, with rental values in the majority of locations much lower than five years ago, retailers find themselves paying the business rates of a boom during the trading conditions of a bust.[102]

Liz Peace, chief executive of the British Property Federation, said:

> The decision by Government to delay the revaluation until 2017 is a real shot in the foot for the retail industry.
>
> A revaluation should shift the burden from those who are suffering to those who are prospering. By postponing the Government is not allowing the downward adjustment that would otherwise take place for suffering retailers.
>
> The postponement embeds injustices in the current system, where businesses pay top of the market rates in a depressed climate, for an additional two years at the worst possible time. With technological and other advances arguably we should be valuing

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100 HC Deb 18 October 2012, c32-33WS

101 Damian Reece, "The damage politicians do to business: parts one, two and three", *Daily Telegraph [online]*, 19 October 2012

102 Jerry Schurder, "Postponement of rates revaluation piles further pain on retailers", *Retail Week [online],* 19 October 2012

> more frequently, not less. That way, businesses are paying rates that closer reflect their circumstances.[103]

However, each business rates revaluation must be revenue neutral overall. That is, the total amount raised by the Government through business rates cannot rise as a result of rateable values rising between valuations.[104] At previous revaluations, to offset the rise in rateable values, the multiplier has decreased by several pence in the pound (see Table 1 for the movements in the standard rate multiplier). This may have resulted in some businesses seeing an increase in their rateable value but paying lower business rates overall, due to the fall in the multiplier.[105]

This implies that, after the next revaluation, any reduction in the overall business rates revenue, resulting from a lowering in rateable values, would need to be compensated by an increase in the multiplier. It follows that any businesses which did experience a 25-30% reduction in their rateable values would not automatically see a 25-30% reduction in business rates on revaluation.

Brandon Lewis, the parliamentary under-secretary at DCLG, responded to these reactions on 22 October 2012:

> It is factually incorrect to assert that the Government's decision to postpone the 2015 business rates revaluation will increase tax revenues.
>
> It will have absolutely no effect on overall revenues, but it will stop massive tax hikes for many firms - who will lose out from the significant volatility that the revaluation would bring. For the next five years, business rates will simply be tied to inflation, providing stability and certainty for businesses to plan and invest.
>
> The Coalition Government recognises that business rates are a big burden for small firms in particular, which is why we extended small business rate relief, made it easier to claim that rate relief, and introduced new powers for councils to introduce local business rate discounts.[106]

The Local Government Association said:

> The move toward local retention of business rates is a significant step in the right direction. It is vitally important that the new system shares a fair balance of risk and reward between local authorities and the Treasury, and delivers a fair deal for all local areas with varying capacities to grow. We are aware that businesses are having a tough time and postponing the revaluation of rateable value will give them more certainty. However, we believe the information on which business rates are set should be kept up to date and we would not want to see the revaluation postponed beyond 2017.[107]

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103 "Business rate postponement a shot in the foot for retail", *British Property Federation,* 18 October 2012

104 *Local Government Finance Act 1988*, schedule 7

105 For further details see Valuation Office Agency website, *The Business Rate Multiplier* [on 24 October 2012]

106 DCLG, *Brandon Lewis responds to incorrect assertions on business rate revaluation*, 22 October 2012

107 LGA, *LGA response to the Growth and Infrastructure Bill*, 18 October 2012

Movements in the standard business rates multiplier at previous revaluations[108]

	England	Wales
1990/91	34.8	36.8
1991/92	38.6	40.8
1992/93	40.2	42.5
1993/94	41.6	44.0
1994/95	42.3	44.8
1995/96[(a)]	43.2	39.0
1996/97	44.9	40.5
1997/98	45.8	41.4
1998/99	47.4	42.9
1999/00	48.9	44.3
2000/01[(a)]	41.6	41.2
2001/02	43.0	42.6
2002/03	43.7	43.3
2003/04	44.4	44.0
2004/05	45.6	45.2
2005/06[(a)]	42.2	42.1
2006/07	43.3	43.2
2007/08	44.4	44.8
2008/09	46.2	46.6
2009/10	48.5	48.9
2010/11[(a)]	41.4	40.9
2011/12	43.3	42.8

Notes:

(a) Revaluations took place in these years

Some commentators speculated that the postponement would have different effects on different regions of England:

> Those in lucrative locations such as London and the South East, where rental values have increased, will benefit from the move while hard-hit retailers in Northern cities and elsewhere will continue to be suffocated by being charged business rates based on prerecession values.
>
> The object of a revaluation is to reassess properties, both upwards and downwards and not to just increase rates bills for all…..
>
> The reality is that the recovery of business, in particular high street retailers, has been and will continue to be hindered by business rates which are based on 2008's pre-recession valuation.[109]

[108] See Tom Dixon and Gordon Heath, *Business Rates: Your Guide 2010*, Institute of Revenues Rating and Valuation, 2010, p.16-17

[109] Richard Farr, *The (Newcastle) Journal*, 22 October 2012, p.32

Reliefs and transitional arrangements

Since 2005-06, England has used a slightly lower multiplier for small businesses. Companies occupying property with very low rateable value are now automatically entitled to rate relief (previously they had to apply to their local authority: see Library standard note Small Business Rate Relief, SN/PC/04998 for further details).

Additionally, a business rate deferral scheme was introduced for 2012-13 in view of the substantial increase in the multiplier on 1 April 2012 (see Library standard note Business Rates 2012/13, SN/PC/06247 for further details).

A transitional relief scheme is operating in England between 2010 and 2015, to limit the degree to which business rates can shift annually in the light of the last revaluation.[110] There is no indication yet whether any transitional arrangements will be put in place for the 2015-17 period.

4.2 Employee owners

Background

Successive governments have tried to promote employee engagement and share ownership schemes. There are currently four schemes in operation, all with tax advantages:

- Company share option plans, first introduced in 1984. These give employees the option to buy up to £30,000 of shares at a fixed price without paying income tax or national insurance on the difference between what they pay for the shares and what they are worth.[111]

- A savings related option, first introduced in 1980, where employees can save up to £250 per month with which to buy shares, and do not pay income tax or national insurance on the difference between what they pay for the shares and what they are worth.[112]

- Share Incentive Plans, first introduced in 2000, under which employers can give employees up to £3,000 of free shares or employees can buy up to £1500 of shares out of their salary before tax.[113]

- Enterprise Management Incentives, first introduced in 2000, under which employees can buy shares of up to £250,000 without paying income tax or national insurance on the difference between what they pay for the shares and what they are worth.[114]

The idea of employee owners exchanging employment rights for shares was announced by the Chancellor of the Exchequer on 8 October 2012.[115] The proposal comes about as part of the Coalition Government's Employment Law Review, which set out to ensure employment laws "maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive".[116] The Executive Summary of the *Consultation on implementing employee owner status* states that:

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110 See the Valuation Office Agency's website for further details.
111 Sections 521-526 and Schedule 4 of the *Income Tax (Earnings and Pensions) Act 2003*
112 Ibid, sections 516-520 and Schedule 3
113 Ibid, sections 488-515 and Schedule 2
114 Ibid, sections 527-541 and Schedule 5
115 *No capital gains tax on employee share ownership for new employee-owners*, 8 October 2012, HM Treasury website (accessed 18 October 2012)
116 *The Coalition: our programme for government*, May 2010, p10

> The UK has one of the most lightly regulated labour markets in the developed world, and is performing well. The Government is mindful, however, that businesses – particularly smaller businesses – need flexibility and freedom to allow them to grow and take on staff. In particular, the Government wants to remove the perceived barriers around the fear of being taken to employment tribunal which are deterring businesses from hiring.[117]

The Business Minister, Jo Swinson, has said:

> We know that engaged employees are more productive and motivated. This scheme increases the options for business and brings greater flexibility to companies and employees in determining their employment relationship.
>
> By responding to the flexible needs of fast growing companies, it will help them take people on, providing a real incentive for employers and employees.[118]

The proposal is informed by the July 2012 Nuttall review of employee ownership, which found that employee ownership led to improved business performance, increased economic resilience, greater employee commitment and engagement, greater innovation, reduced absenteeism and enhanced employee wellbeing.[119] This latest suggested change to UK employment law follows the increase in the qualifying period for bringing an unfair dismissal claim from one to two years of continuous employment,[120] and the measures contained in the *Enterprise and Regulatory Reform Bill,* which aims to facilitate out of court settlement of employment disputes.

The Bill's provisions on employee owners

UK employment law provides for two types of employment status, defined by the *Employment Rights Act 1996:* 'employee' and 'worker'. The distinction between the two has led to considerable litigation and uncertainty for business. Clause 23 would amend the *Employment Rights Act 1996* to introduce a new type of employment status, that of employee owner.

The leading practitioner's text on employment law has stated "a satisfactory definition of 'employee' has proved elusive".[121] However, broadly, an employee is one who serves another under a contract of employment in return for remuneration, over whom the employer exercises a degree of control.[122] 'Worker' is a wider term and includes employees. A worker is an individual who works under a contract of employment or has undertaken to perform personally work for a party who is not a client or customer.[123] For example, temporary agency workers are usually considered to be workers.

Employees enjoy greater statutory protections than workers, including the right not to be unfairly dismissed. Employee owners would have fewer employment rights than employees

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117 Department for Business Innovation and Skills, *Consultation on implementing employee owner status,* October 2012, p4, para 1

118 *Employee owner plans to boost growth*, Department for Business Innovation and Skills website (accessed 18 October 2012)

119 *Sharing success: the Nuttall review of employee ownership*, 4 July 2012, Department for Business Innovation and Skills website (accessed 18 October 2012)

120 *The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012*

121 *Harvey on Industrial Relations and Employment Law*, AI-2, para B[5]

122 *Employment Rights Act 1996*, section 230

123 Ibid

but more than workers. The Government's consultation on employee owners illustrates the differences:[124]

	Employment Law			Outside of Employment Law
	Current Situation			
Right	**Employee** (inc. Full-time, Part-time, Fixed-term contracts)	**Worker** (inc. Agency workers, contractors)	**New employee owner**	**Self Employed** (inc. freelancers, consultants, contractors)
Unfair dismissal (gained after 2 years in continuous employment)	**Y**	**N**	**N**	**N**
Unfair dismissal (automatically unfair	**Y**	**N**	**Y**	
Minimum notice	**Y**	**N**	**Y**	**N**
Statutory redundancy pay	**Y**	**N**	**N**	**N**
Collective redundancy consultation	**Y**	**N**	**Y**	**N**
TUPE	**Y**	**N**	**Y**	**N**
Maternity/Paternity/Adoption leave and pay	**Y**	**N**	**Y**	**N**
Flexible working requests	**Y**	**N**	**N**	**N**
Fixed-term status (less favourable treatment)	**Y**	**N**	**Y**	**N**
National minimum wage	**Y**	**Y**	**Y**	**N**
Unlawful deductions from wages	**Y**	**Y**	**Y**	**N**
Paid annual leave	**Y**	**Y**	**Y**	**N**
Rest breaks	**Y**	**Y**	**Y**	**N**
Discrimination	**Y**	**Y**	**Y**	**Y**
Part-time status (less favourable treatment)	**Y**	**Y**	**Y**	**N**
Training requests (in companies larger than 250)	**Y**	**N**	**N**	**N**

Either existing employees or newly hired individuals can opt to become employee owners. In return for employee owners forgoing certain rights, an employing company would be required to allot or issue to them shares in the company having a value of between £2,000 and £50,000. It is proposed that these shares will be exempt from capital gains tax, although Clause 23 does not provide for this.[125] The Government's consultation states that legislation on this will be included in the *Finance Bill 2013*.[126]

The Bill provides that the option to become an employee owner could be offered to both existing employees and to newly recruited individuals. Clause 23 details the rights that employee owners would not have:

- The right to request to undertake study or training. Employees have the right to apply to attend study or training of any description provided they explain how it would benefit the employer's business. The employer can only refuse this request if one of the permissible grounds for refusal apply;[127]

- The right to make an application for flexible working. Employees have the right to apply to change their hours, times and place of work as between home and business, where the purpose in applying is to fulfil caring responsibilities. The employer can only refuse this request if one of the permissible grounds for refusal apply;[128]

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[124] Department for Business Innovation and Skills, *Consultation on implementing employee owner status*, October 2012, p8
[125] Ibid, p3
[126] Ibid, p4, para 7
[127] *Employment Rights Act 1996*, section 63F(7)
[128] Ibid, section 80G(1)(b)

- The right not to be unfairly dismissed. An employee with two or more years of continuous employment may bring a claim for unfair dismissal if that employment was terminated without good reason or if the procedure for dismissing him was unfair.

- The right to a redundancy payment. An employee with two or more years of continuous employment is entitled to a redundancy payment if dismissed by reason of redundancy.

Clause 23(3) requires employee owners to give 16 weeks' notice, rather than the normal eight, before returning early from maternity leave or adoption leave.

There are a number of reasons for dismissing an individual that are deemed by statute as automatically unfair. For example, dismissal for being a member of a trade union, for asserting statutory rights or for reasons relating to pregnancy or maternity.[129] Clause 23(4) provides that employee owners have the same right as employees not to be dismissed for a reason which is automatically unfair. Further, employee owners have the same rights under the *Equality Act 2010*, namely the right not to be discriminated against, harassed or victimised due to having a protected characteristic, such as sex, race or disability.

Clause 23(5) provides that the removal of the right not to be unfairly dismissed as regards employee owners does not include cases where an employee is dismissed on medical grounds in compliance with any law, regulation or code of practice.[130] These provisions apply to England, Wales and Scotland.[131]

Reaction to the Bill

Comment has focused on two main themes: the employment consequences and the tax incentives.

On employment, the proposal has received a mixed response. Ann Francke, chief executive of the Chartered Management Institute, said of the Chancellor's announcement:

> I believe it's a good positive message he's sending out. You've got to remember that employee engagement is an extremely powerful motivator and employee ownership can be behind this.
>
> Through this scheme we could see an inherent shift in employee engagement culture and that can only be a good thing.[132]

John Cridland, CBI director-general, said:

> In some of Britain's cutting-edge entrepreneurial companies, the option of share ownership may be attractive to workers, rather than some of their employment rights. But I think this is a niche idea and not relevant to all businesses.[133]

The entrepreneur Dr Herman Hauser CBE has said that the provisions could benefit both employers and employees, and involvement will be voluntary.[134] The trades union Unite has

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129 See: Department for Business Innovation and Skills, *Consultation on implementing employee owner status*, October 2012, pp12-13, para 26

130 See: *Employment Rights Act 1996* sections 108(2) and 64(2)

131 Explanatory Notes, para 13 and 22

132 *Osborne's 'employee-owner' scheme gets mixed reviews*, 9 October 2012, HR Magazine website (accessed 19 October 2012)

133 *CBI responds to George Osborne's speech to Conservative Party Conference*, CBI website (accessed 19 October 2012)

criticised the ideas, claiming the Bill will "Create more red tape for employers rather than reduce it and will do nothing to boost the economy".[135] The Chartered Institute of Personnel and Development has said:

> The UK has one of the least regulated labour markets in the world and there is little evidence to suggest that employment regulation is preventing small businesses from taking people on. In fact, according to the Government's own research, unfair dismissal doesn't even figure in the list of top ten regulations discouraging them from recruiting staff. Employees have little to gain by substituting their fundamental rights for uncertain financial gain and employers have little to gain by creating a two tier labour market.
>
> It is far from clear how attractive the offer to give up employment rights in return for shares will be to prospective employees of small firms. More important, it is highly doubtful whether inviting employees to sign away basic employment rights will deliver the motivated, driven, high performing workforce that small firms need. Existing, highly successful mutually owned firms do not thrive on employee ownership alone, but on the high trust, high engagement, all-pulling-in-the-same-direction cultures they have. Employee ownership works best where it is accompanied by great management, rather than enhanced job insecurity.[136]

On tax, the existing threshold for capital gains tax is set at £10,600 for 2012-13. Below that an individual's net chargeable gains are already exempt. Therefore, to benefit from the capital gains tax exemption would require a significant increase in the value of the allotted shares. Notwithstanding this, it is estimated that the cost to the Treasury in lost capital gains tax will be substantial. The *Financial Times* reports:

> Mr Osborne's aides expect hundreds of thousands of employees to take up the scheme, with the cost to the Treasury reaching about £100m in lost capital gains tax receipts by 2017-18.
>
> It will be open to all limited companies, but could be particularly attractive to high-tech start-ups, which are often unable to pay large salaries but can tempt staff with a share in equity.[137]

The Times reports that lawyers warn the plans could be exploited:

> ...employers could invoke flash legal legerdemain by creating separate companies for share schemes...So the business will be run through one company, and employees employed through another.[138]

Lawyers have also highlighted the possibility of legal disputes over the valuation of the shares.[139] The BIS consultation explains how the valuation would work:

> For the purposes of the limits on the shares that can be awarded under this status, shares will be valued according to their unrestricted market value at the time that they are awarded. This is the price that the shares might reasonably expect to fetch on the

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134 See: Dr Hermann Hauser CBE, Business Ambassador Profile, UK Trade and Investment website (accessed 23 October 2012)

135 *Growth and infrastructure bill a 'dog's breakfast' says Unite,* Unite website (accessed on 19 October 2012)

136 *Share ownership no substitute for employment rights and good people management,* Chartered Institute for Personnel and Development website (accessed 19 October 2012)

137 Osborne delights Tory right with speech, the *Financial Times* [online], 9 October 2012, (accessed on 22 October 2012)

138 Lawyers predict that litigation rather than liberty will result from Chancellor George Osborne's share proposal, the *Times* [online], 11 October 2012 (accessed 19 October 2012)

139 Ibid

> open market, disregarding any restrictions. The Government is aware that valuing company shares may present difficulties in certain cases, particularly for unquoted companies, and it is keen to ensure that this new employment status does not impose any valuation requirements beyond those that already exist when valuing companies for other tax purposes.[140]

The *Guardian* pointed out that the exemption could be used solely for the tax advantage.[141] Clause 23 is silent on the possibility of an employer inserting more generous conditions into an employee owner's contract. Therefore, an employee owner could have similar contractual rights to the statutory rights enjoyed by employees, yet still receive shares exempt from capital gains tax.

The *Financial Times* reported that the proposal may benefit new businesses but cautioned that there is a danger with the linking of employee share ownership with the removal of rights:

> Mr Osborne's aim may be to make life easier for start-ups. True, these companies yearn for greater flexibility because their future is more uncertain. But the Chancellor should not expect them to sign up en masse. Owners may be reluctant to dilute their equity by giving out shares to people they may then want to fire.
>
> ...
>
> There is also a danger in linking employee share ownership with the surrender of rights. Share ownership has played a positive role in increasing workers' engagement with their companies. The risk is that employees would begin to associate this with greater vulnerability rather than more responsibility.[142]

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[140] BIS, *Consultation on implementing employee owner status,* October 2012, p10, para 19

[141] George Osborne accused of opening tax loophole with 'shares for rights', the *Guardian* [online], 18 October 2012 (accessed 18 October 2012)

[142] Trading shares for workers' rights, *Financial Times*, 10 October 2012