Briefing note on the provisions in the Levelling Up and Regeneration Bill concerning public participation in the planning system

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Summary

1. We are instructed by Rights: Community: Action to provide a briefing note on the provisions in the Levelling Up and Regeneration Bill ("the Bill") that affect public participation in the planning system.[1] We have been instructed to update our previous briefing note dated 30 May 2022, with particular reference to (1) the oral evidence provided to the Levelling Up, Housing and Communities Committee ("the Committee") on 20 June 2022, (2) the Secretary of State's response letter to the Committee dated 5 July 2022,[2] and (3) the new amendments tabled to the Bill regarding the power to shorten deadlines for examinations of applications for development consent orders (i.e. large infrastructure projects) under the Planning Act 2008.[3]

2. The key points are as follows:

   a) The Bill represents a significant change to the existing planning system. It undermines an important planning principle, the primacy of the development plan, by elevating national development management policies to the top of the planning hierarchy.

   b) Unlike development plans, which are produced locally via a statutory process that involves considerable public participation, the Bill contains no obligation to allow the public to participate in the development of national development management policies.

   c) The Bill also introduces two new development plan documents, spatial development strategies and supplementary plans. The Bill provides for very limited opportunities for public participation in the production of these documents.

[1] Available here: https://bills.parliament.uk/bills/3155. The version we have seen is as amended in the Public Bill Committee.

[2] Available here: https://www.gov.uk/government/publications/letter-to-the-chair-of-the-luhc-select-committee-about-the-levelling-up-and-regeneration-bill

[3] This updated briefing note was originally produced on 20.11.22. We have since updated the clause numbering.

d) The Bill introduces a new mechanism to allow the Secretary of State to grant planning permission for controversial developments, bypassing the planning system entirely. There is no right for the public to be consulted as part of this process.

e) The Bill allows the Secretary of State to shorten the time periods for examining applications for large infrastructure projects. This creates a risk that the UK will be in breach of its international obligations to ensure effective public participation in these kinds of decisions.

f) Overall, we maintain the position set out in our previous briefing note that the Bill radically centralises planning decision-making and substantially erodes public participation in the planning system. The oral evidence provided to the Committee on 20 June 2022 does not cause us to change or revise that position in any way, nor does the response letter to the Committee from the Secretary of State, dated 5 July 2022.[4] Notably, the Secretary of State's letter does not appear to contradict our legal analysis at all, but instead suggests that – despite the changes to the legal position – he considers that there are unlikely to be any issues in practice.

3. We address the issues identified above in more detail under the following broad themes: 1 centralising planning policy, 2 reducing public involvement in the development of planning policy, 3 making it easier to grant permission for controversial development, and 4 shortening time limits for public participation in decisions concerning large infrastructure projects.

Theme 1: centralising planning policy (clauses 86, 87, Schedule 7)

4. The guiding principle that underpins the existing planning system is the primacy of the locally-produced development plan. Under the current system:

a) Development plans are produced in draft by local planning authorities. They are then consulted on extensively with local residents and other stakeholders.

[4] Available here: https://www.gov.uk/government/publications/letter-to-the-chair-of-the-luhc-select-committee-about-the-levelling-up-and-regeneration-bill

b) Following consultation and further amendment, development plans are then submitted to the Planning Inspectorate for independent examination, allowing further representations to be made by interested parties.

c) Once a development plan has passed examination and is formally adopted by the local planning authority, the law requires that planning decision makers must make key planning decisions (such as the grant of planning permission) in accordance with that development plan, unless material considerations indicate otherwise.[5] In that context, national policy is a "material consideration" which is capable of indicating otherwise, but whether it does so will be a matter of judgment for the decision-maker.

d) Although the NPPF sets out circumstances in which decision-makers should assess applications by reference to the policies in the NPPF, rather than the development plan, these are essentially limited to cases in which there are no relevant development plan policies, or where the development plan is out of date.[6] Moreover, even where a development plan is deemed to be "out of date", the law is clear that the NPPF does not override s. 38(6), with the result that policies may still be given weight. Where development plans are up to date, the NPPF confirms that decisions should be made in accordance with them.[7]

5. The Bill represents a dramatic departure from this principle. It turns the existing plan-led system into a "plan and national policy"-led system. It does this in five ways:

a) Firstly, whereas conformity with national policy is currently one of the criteria by which the "soundness" of a Local Plan is assessed, the Bill positively prohibits a local plan from being inconsistent with any national development management policy.[8]

b) Secondly, the Bill amends the existing law so that planning decisions must be made "*in accordance with the development plan and any national development*

[5] Planning and Compulsory Purchase Act 2004, s.38(6).

[6] See the "presumption in favour of sustainable development" in para 11(d) of the NPPF

[7] Para 11(c).

[8] See the proposed new s.15C(7)(b), Schedule 7.

management policies."[9] In other words, national policy is no longer simply a "material consideration".

c) Thirdly, the Bill introduces a requirement that any conflict between the development plan and a national development management policy "*must be resolved in favour of the national development management policy*."[10] This provision means that the development plan will always be subservient to national policy. The primacy of the development plan is therefore explicitly removed.

d) Fourthly, the Bill reduces the circumstances in which planning decision makers can depart from the requirements of national policies (and, to the extent they are consistent with national policies, development plan policies).[11]

e) Fifthly, the only definition in the Bill of a national development management policy is "*a policy (however expressed) of the Secretary of State in relation to the development or use of land in England, or any part of England, which the Secretary of State by direction designates as a national development management policy*."[12] This gives the Secretary of State almost unlimited discretion in the policies which, once designated as national development management policies, will override the development plan and determine how planning decisions are made.

6. It is therefore clear that the Bill will significantly centralise development management in England. Under the new regime, locally-produced development plan policies will only be permissible and/or relevant insofar as they do not conflict with central government policies. The scope for granting permission for proposals which do not accord with the development plan or national development management policies will also be reduced.

7. This is a stark change from the current system. While the National Planning Policy Framework ("NPPF") is currently an important material consideration for plan-makers, it only "*provides a framework within which locally-prepared plans for housing and other*

[9] Clause 86(2), amending s.38(6) of the Planning and Compulsory Purchase Act 2004: see also Schedule 6.

[10] Clause 86(2).

[11] Clause 86(2): "*the determination must be made in accordance with the development plan and any national development management policies, unless material considerations* ***strongly*** *indicate otherwise*" (emphasis added).

[12] Clause 87.

development can be produced".[13] Under the Bill, local authorities would be positively precluded from incorporating many policies which are currently typically found in a local plan, if these would "*(in substance) repeat*" any national development management policy.[14]

8. The view expressed to the Committee on 20 June 2022, and the view expressed by the Secretary of State, is that national policy currently has effective primacy over the local plan. This view is incorrect for four reasons:

   a) Firstly, that is not the position set out in the NPPF itself:

      i. Paragraph 1 of the NPPF itself states that "*Planning law requires that applications for planning permission be determined in accordance with the development plan,*" whereas the NPPF is only "*a material consideration in planning decisions*."

      ii. Paragraph 12 of the NPPF provides that "*The presumption in favour of sustainable development [in the NPPF] does not change the statutory status of the development plan as the starting point for decision-making. Where a planning application conflicts with an up-to-date development plan… permission should not usually be granted*."

      iii. Paragraph 15 of the NPPF provides that "*The planning system should be genuinely plan led*."

   b) Secondly, that is not the position described in case law. In *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 W.L.R. 1865, a case referred to in the oral evidence to the Committee, the Supreme Court considered this issue directly. Lord Carnwath discussed the fact that the Secretary of State has an implied power under the Planning Acts to make national planning policy [20] and that Planning Inspectors exercise their judgment within the framework of that policy [21]. However, Lord Carnwath then went on to say:

[13] National Planning Policy Framework (2021), paragraph 1.

[14] See proposed new s.15C(7)(b), Schedule 7.

"It is important, however, in assessing the effect of the Framework, not to overstate the scope of this policy-making role. The Framework itself makes clear that as respects the determination of planning applications (by contrast with plan-making in which it has statutory recognition), it is no more than "guidance" and as such a "material consideration" for the purposes of section 70(2) of the 1990 Act… It cannot, and does not purport to, displace the primacy given by the statute and policy to the statutory development plan. It must be exercised consistently with, and not so as to displace or distort, the statutory scheme."

c) Thirdly, as we stated in our first briefing note, and as Lord Carnwath stated in *Hopkins Homes*, this is simply not the position under existing planning legislation. Section 38(6) of the Planning and Compulsory Purchase Act 2004 is clear that the development plan, not national policy, has primacy.[15]

d) Fourthly, it is possible under the existing system to bring forward a Local Plan which departs from the NPPF. Consistency with the NPPF is one of the tests of soundness, as was pointed out to the Committee. However, as long as a local planning authority can justify a departure from the NPPF, it remains open to them to do so (or otherwise tailor the NPPF to their own local circumstances). For example, in *DB Schenker Rail (UK) v Leeds City Council* [2013] EWHC 2865 (Admin) it was noted at [14] that "*The requirement to have regard to national planning policy in section 19(2) of the 2004 Act and the policy requirement in [the NPPF] does not mean that an Inspector has to adhere slavishly to national planning policy*." Under the Bill, however, this element of discretion will clearly be lost.

9. For these reasons, although national planning policy is undoubtedly a weighty consideration in most (if not all) planning decisions, it is clear to us that the NPPF currently does not – and cannot – trump the policies in an up-to-date local development plan. In other words, the national policies in the NPPF have an unequivocally lesser status in law than the local policies in the local plan. The current provisions in the Bill will amount to a radical departure from that position.

[15] Para 3(c) of our original briefing note.

Theme 2: Reducing public involvement in the development of planning policy (clause 85, 87 and Schedule 7)

10. As we note above, there is a significant degree of public participation in the production of the development plan and the development management policies contained within it. However, the proposals in the Bill will remove an entire tier of policies from the scope of local plans, to be replaced by development management policies produced in Whitehall. Despite the fact that these policies will affect many more people than a locally-produced development plan, the process for producing these policies involves very limited rights of public participation.

11. Clause 87 of the Bill provides that a national development management policy can only be introduced or amended following "*such consultation with, and participation by, the public or any bodies or persons (if any) as the Secretary of State thinks appropriate*". This is a very weak obligation that offers maximum discretion to the Secretary of State regarding who to consult (if anyone).

12. Clause 85 introduces two new documents that can be considered part of the development plan, spatial development strategies and supplementary plans:

    a) Schedule 7, paragraph 15AC of the Bill provides that a spatial development strategy must involve an examination in public "*unless the Secretary of State directs otherwise*": in other words, the Secretary of State may decide not to hold an examination. Paragraph 15AC also states that "*No person is to have a right to be heard at an examination in public*." This is in stark contrast to the examination of development plans, for which there is an explicit right to be heard at examination.[16]

    b) Under the existing law, supplementary planning documents cannot contain development management policies, precisely because it is deemed important that such policies are subject to consultation and public examination.[17] In contrast, while

[16] Planning and Compulsory Purchase Act 2004, s.20(6).

[17] See reg 2(1) and 5 of the Town and Country Planning (Local Planning) (England) Regulations 2012; considered in *William Davis Ltd v Charnwood Borough Council* [2017] EWHC 3006 (Admin) and *R (Skipton Properties Ltd) v Craven DC* [2017] EWHC 534. In *William Davis* the judge noted at [61] the underlying principle that "*the development plan is the place in which to address policies regulating development*." The judge also referred, at [63] to the principle of the Planning Code (emphasis added): "*It is in that context that I refer to the concept of the*

the new supplementary documents will be subject to examination, Schedule 7, paragraph 15DB states that "*the general rule is that the independent examination is to take the form of written representations*." This is alleviated in part by the fact that the examiner must cause a hearing for the purposes of receiving oral representations if the examiner considers that necessary to ensure adequate examination of an issue, or for a person to be given a fair chance to put a case: but even so, the discretion here is broad.

Theme 3: making it easier to grant permission for controversial development (clause 101)

13. The Bill introduces a new mechanism for "Urgent Crown development" in clause 101. This provision is likely to be used by the government to build controversial national projects, such as the asylum processing centres that have recently been the subject of legal challenge when introduced under existing planning powers.

14. The only bodies that the Secretary of State must consult before granting permission under this provision are the local planning authority and "*such other persons as the Secretary of State considers appropriate*." There is therefore no obligation to consult local people before granting planning permission for a controversial national development using these new powers.

15. At present, there are a limited number of ways that the Secretary of State can build controversial projects outside of the existing planning system. The default position is that a planning application must be made to the local planning authority, following changes in 2004 that brought Crown development within the planning system.[18]

Planning Code, and within it to the role of the development plan, and ***to the importance given by the code to proper examination of the development plan, and to the fair consideration by an independent person of objections and representations made. From the point of view of all types of participant in the planning process, the process of development plan approval and adoption is important***."

[18] Section 79, Planning and Compulsory Purchase Act 2004.

Theme 4: shortening time limits for public participation in large infrastructure decisions (clause 119)

16. The Bill also provides a new power under clause 119 to shorten the deadline for the examination of nationally significant infrastructure projects ("NSIPs") (a separate planning process created by the Planning Act 2008). The Examining Authority is currently under a duty to complete their examination within six months of the first preliminary meeting with the applicant and interested parties.[19]

17. No minimum time period is provided in the Bill for the examination of an NSIP.

18. The extent to which the government proposes to shorten the existing time limit using this new power is unclear. However, we note that the existing six-month period for examination of an NSIP is already a very short time window within which the public can participate in the process.

19. We also note that the UK is bound by the international law obligations in the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention").[20] Article 6 of the Aarhus Convention provides that:

> "3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public… and for the public to prepare and participate effectively during the environmental decision-making.
>
> 4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.
>
> …
>
> 7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity."

20. The list of activities to which these obligations apply include the kinds of large infrastructure projects which would typically go through the NSIP process.[21]

[19] Planning Act 2008, s.98 and s.88.

[20] Available here: https://unece.org/DAM/env/pp/documents/cep43e.pdf

[21] Aarhus Convention, Annex I.

21. Bearing in mind these obligations, there is a clear risk that, if the power in clause 119 is used to significantly reduce the time period for NSIP examinations, the UK will be in breach of its international law obligations to ensure the public have sufficient time to prepare and participate effectively in decisions regarding large infrastructure projects. It may be possible for a slightly shorter time period than six months to allow for effective public participation as required by the Aarhus Convention, bearing in mind the consultation requirements prior to the examination itself.[22] However, schemes that fall within the NSIP regime are large and technically complex, and the regime itself was intended to be a highly accelerated route to obtain consent. There does not appear to be much room to shorten the already abridged timetable any further while still complying with the UK's international obligations.

Conclusion

22. It follows from our position that the proposals in the Bill for National Development Management Policies would impose a radical, centralising change upon the current system. It is not the case that the Bill only places on a statutory footing that which is already happening today. The Secretary of State does not make such a claim in his letter. The NPPF, case law and planning legislation all state in various ways that we currently have a local plan-led system, not a national policy-led system.

23. The provisions of the Bill we have highlighted will substantially erode public participation in the planning system. These provisions reduce the primacy of the development plan in favour of national policy, without introducing comparable public participation mechanisms to the production of national policy. The Bill also allows local planning authorities to amend their own development management policies without the need for public examination, and moreover allows the Secretary of State to swiftly grant permission for controversial planning proposals.

24. As a final concluding point, we note that much of the detail of how these changes will be implemented in practice is still unknown. This is because the Bill grants a very large range of powers to the Secretary of State to implement the changes via secondary

[22] See e.g. s.47 of the 2008 Act, read with reg. 4(2) of the Infrastructure Planning (Applications: Prescribed Forms & Procedure) Regulations 2009 and reg.12 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017/572.

legislation. We have counted over 100 new powers to make secondary legislation in the Bill. This means that applying scrutiny to the detail of the changes, when they are eventually finalised, will be a difficult task.

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13.2.23