

Growth and Infrastructure Bill

Memorandum submitted by the Law Society of England and Wales

The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 160,000 members, promoting the highest professional standards and the rule of law

Introduction

1. The Law Society welcomes the opportunity to submit evidence on the Growth and Infrastructure Bill. This submission has been prepared by members of the Society's specialist committees: part one by the Planning and Environmental Law Committee, and part two by the Employment Law Committee, the Company Law Committee and the Tax Law Committee. The submission therefore reflects the expertise of solicitors with daily experience of the law in these areas.
2. In relation to both parts of the Bill the Society's concern is to ensure good law making, ensure legal clarity and certainty and avoid possible unintended consequences.

Part One: Changes to planning law

Clause 1: Option to make planning application directly to the Secretary of State

3. The Society welcomes the provision in Clause 1 for a facility whereby a planning application can be submitted directly to the Secretary of State for determination if a Local Planning Authority (LPA) has been "designated", thereby circumventing delays.
4. The effectiveness of this provision in practice will depend on both the detail of the secondary legislation to be made under the Bill and the Planning Inspectorate having the resources and capacity to assume the new role of determining not only appeals but also the first decisions on major application.
5. The Clause does not state the criterion which will justify an application being submitted directly to the Secretary of State, for example, what period of negotiation between a developer and the planning authority needs to elapse before the application can be submitted to the Secretary of State?
6. The Society is also concerned that the "designation criteria" (which will be target driven) set out in the impact assessment accompanying the Bill could prove counter productive. There is a risk that, in order to avoid being "designated" some LPAs resort to producing ill considered and poor decisions simply in order to meet their targets.
7. There is also a risk that the right to apply directly to the Secretary of State could act as a disincentive for developers to negotiate with the LPA in the knowledge that in due course they will be able to apply directly to the Secretary of State.
8. It should also be noted that a developer will lose the right of appeal if they resort to applying directly to the Secretary of State (new section 62A(5)). The Society agrees that there should be a price for using this route but notes that it could dissuade some developers from using this option in order to expedite a decision
9. Another factor that may dissuade developers from utilising this option is the fundamental problem that the appeals system is not functioning perfectly at present,

with the result that the majority of applicants decide not pursue an appeal because of the likely time that an appeal will involve as well as the cost. The Planning Inspectorate is, for example, currently meeting its target of determining non-householder planning appeals within 26 weeks in only 20% of cases¹. There is the additional question of whether the Planning Inspectorate, which will determine these applications on behalf of the Secretary of State, will be equipped to undertake negotiations between the parties on the major developments which are likely to form the bulk of the applications submitted directly to the Secretary of State. The Society queries the role that the Secretary of State will play: will he step into the shoes of the LPA and effectively negotiate the application with the developer?

Clause 2: Planning proceedings: costs etc

10. The Bill's proposed amendments to the *Town and Country Planning Act* do not change the parties eligible to claim costs from other parties nor the grounds. The award of costs remains at the discretion of the Planning Inspector. In future the Inspector will be able to make an award of costs on his own initiative and not just on the application of one of the parties. It would be helpful to have an understanding of how inspectors will exercise this discretionary power. In addition, the new provisions do enable the Planning Inspectorate itself to pursue costs to recover the Secretary of State's expenses from one or both of the parties in the event of, for example, unnecessary delay to proceedings.
11. These provisions may have a number of unintended consequences, for example:
 - 11.1. They may distort the way in which the Inspector conducts proceedings at an inquiry, for example, in deciding whether or not to allow local opponents of a scheme to be heard.
 - 11.2. The greater risk of an award of costs or an award of the Inspectorate's costs, for example for the cancellation of an inquiry, could act as a disincentive to the parties to negotiate with a view to settling differences on a development so as to avoid the inquiry.
 - 11.3. The greater likelihood of an award of costs could increase the number of inquiries on the basis that an inquiry is (argued to be) necessary in the interests of fairness to permit evidence to be examined and thereby issues, which might otherwise lead to a costs award, to be clarified.

Clause 4: Limits on power to require information with planning applications

12. The Society agrees in principle that LPAs should be discouraged from requiring applicants to submit unnecessary information. Clearly the LPA must have sufficient information to make a proper determination. Unfortunately, however, there are circumstances in which some authorities will use insufficient information as the grounds for being unable to determine an application in order to avoid overshooting performance targets. This then leads the developer to appeal on the grounds of non determination when, in many cases, it would be more satisfactory for a proposal to be determined locally rather than by the Planning Inspectorate.
13. The new provision requires that the information to be submitted with an application should be "reasonable". This should to some extent curb the unrestrained power of local planning authorities to require particular types of information. However, it does

¹ DCLG, (2012), *Planning Guarantee Monitoring Document*, London: DCLG (online: <https://www.gov.uk/government/publications/planning-guarantee-monitoring-report>)

not relieve developers from complying with any local list of information which an individual planning authority may chose to impose.

14. Nor does the provision relieve developers from meeting European standards, for example in relation to the information supporting schemes considered likely to have significant environmental impacts. The Society foresees that there could, in such cases, be difficulties for local authorities and developers to agree which information "will" be material to the determination of the application since the EIA process is forward-looking in its identification/assessment of material considerations and iterative in the sense that what is (subjectively to be considered to be) material can change over time.
15. It would be unfortunate if this well intentioned provision had this effect or were to become a new judicial review weapon for third parties to stall developments.

Clause 5: Modification or discharge of affordable housing requirements

16. The Society agrees that it is necessary to provide for the renegotiation of planning obligations entered into which, owing to the current economic climate, are no longer viable as this is undoubtedly posing an obstacle to development proceeding.
17. However the Society is unable to understand why the grounds for renegotiation are restricted to those planning obligations which provide for affordable housing, especially when it is considered that planning decisions are taken in the round with other relevant factors, meaning that there is an inter-relationship between the planning obligations for affordable housing and obligations addressing other matters. A development may now be unviable because of another type of provision rather than the affordable housing quota. For example, an authority may have placed the weight of an obligation on the provision of, or a financial contribution towards, an educational establishment and it is that element which now renders the project unviable. If the objective of this Clause is to stimulate stalled development projects it appears odd that the relief is restricted to affordable housing provision.
18. Similarly, particularly in light of the current economic situation, the Society questions the proposal to limit the scope for the renegotiation of planning obligations by imposing a requirement that the development must be completed within three years of notification of the decision of the LPA's agreement to the revision of a planning obligation. Many developments are phased and take longer than three years to complete.
19. The Society believes that the efficacy of the scope for the renegotiation of planning obligations will be undermined unless there is clarity as to the measurement of financial viability. The Society would hope that this can be provided either in secondary legislation or guidance from the Secretary of State, as provided for by new section 106BA(8). An alternative course would be for the Government to endorse, for example, the guidance note *Financial Viability in Planning* published earlier this year by the RICS after wide consultation within the development industry².
20. The Society has, for several years, been pressing the Department for Communities and Local Government (DCLG) to make some necessary changes to section 106 which limit the scope to which planning obligations can apply. The Society is therefore disappointed that the opportunity of a Bill which addresses other aspects

² RICS, (2012), *Financial Viability in Planning: RICS Guidance Note*, London: RICS.

of section 106 has not been seized to make other desirable changes.. The Law Society's recommendations are set out in annex 1.

Clause 8: Periodic review of mineral planning permissions

19. The Society supports relieving minerals planning authorities from the need to undertake unnecessary reviews.

Clause 9: Stopping up and diversion of highways

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Clause 10: Stopping up and diversion of public paths

20. The Society supports enabling applications for stopping up orders to be submitted and determined in parallel with applications for planning permission.

Clause 12: Registration of town or village greens: statement by owner

21. The Society welcomes the provision enabling landowners to make a statement to the effect that their land cannot be registered as a town or village green. The registration of an owner's statement does not preclude local communities from continuing to use the land for recreational purposes: it clarifies that that use is with the consent of the owner and is not "as of right" which could be the basis of an application from local residents for registration in the future.

Clause 13: Restrictions on right to register land as a town or village green

22. The Society supports placing restrictions on the circumstances in which applications for the registration of land as town or village green can be made. The Society also endorses new section 15C(2) which lifts the restrictions should the "trigger event" no longer pertain.

Clause 19: Special parliamentary procedure in cases under the Planning Act 2008

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Clause 20: Modifications of special parliamentary procedure in certain cases

23. The Society agrees that the overlap between development consent for infrastructure projects and the Statutory Orders (Special Procedure) Act 1945 needs to be clarified in order to prevent unnecessary delay. The Society particularly welcomes the fact the Government has responded to its previous representations on the matter and is restricting the right to petition and parliamentary scrutiny under the special procedure to those provisions in a development consent order or a compulsory purchase order which relate to the compulsory acquisition of certain types of land.

Clause 21: Bringing business and commercial projects within Planning Act 2008 regime

24. The Society recognises the rationale behind the bringing of additional projects within the major infrastructure regime but would question how this squares with the Government's localism agenda. The advantages will be undermined if the Planning Inspectorate is unable to process these projects expeditiously. It would be helpful to have a statement of the types of project which the Government anticipates will come within the development consent regime.

25. The Society would also question the need for the provision in new section 35(5) which excludes any project which includes one or more dwellings. The exclusion runs counter to the Government's wish to encourage mixed use development which it has encouraged to promote properly integrated development. Many large regeneration projects include an element of residential development to aid social and economic integration and also to provide a revenue stream to cross fund other aspects of the development. An obvious example is the redevelopment of the King's Cross area, which would seem to be an obvious candidate for the Planning Act 2008 regime, but which would be excluded by this provision.

Part two: provisions relating to employee owner status

Clause 23: Employee owners

General remarks

26. The idea of employee owners exchanging rights for shares was announced by the Chancellor of the Exchequer on 8 October 2012. The Department of Business, Innovation and Skills announced a public consultation on 18 October 2012, with a closing date of 9 November 2012, four days after the publication of the proposals in the Bill³.
27. An underlying assumption of the proposals is that businesses do not take on more employees because they are worried about the risk of employees bringing claims against them in the Employment Tribunal. Whether or not that assumption is correct – and the Society does not believe that it is a major inhibitor on business expansion – it is difficult to see how the creation of a new 'employee owner' status will incentivise employers to create more jobs, or be attractive to employees who are being asked to forego employment rights.
28. The reality is that this is not a new 'status' at all. Employees will remain employees - they will simply have a right to some shares, the price of which is giving up certain statutory employment rights. Employees can of course be given shares in a company as a reward or incentive without the requirement to give up their statutory employment protection rights.
29. The Society expects that small businesses, who are the prime target audience for this proposal, will be unlikely to take up a proposal which brings with it more, rather than less, 'red tape' in the form of complex tax and company law requirements. To the extent that the aim is to protect businesses against unfair dismissal claims, the proposal seems unnecessary given the recent increase in the unfair dismissal qualification period to two years. Removing statutory employment rights will not ease the regulatory burden on employers, because the proposal creates new and complex requirements on employers.
30. One of the stated aims of the proposal is to 'give employers and employees more flexibility to reach agreements that suit both parties'. The more flexibility given to an employer in relation to determining the rights attached to the shares, logically, the less valuable the share could be to an employee. It is unlikely to be attractive to employees to surrender the certainty of established rights in return for uncertain capital gains tax benefits in the future and, so far as the Society can tell, the certainty of an upfront income tax charge. The removal of statutory rights will not place an employee in a stronger position unless the safeguards are so restrictive (in

³ The Law Society response to the BIS consultation can be found here: Law Society, (2012), *Implementing Employee Owner Status: Response to the Department for Business, Innovation and Skills Consultation*, London: Law Society (online: [Read our full response to the consultation](#))

terms of valuing their shares at exit) that the employer will not adopt the scheme, as it would amount to a pre-contractual negotiation of the value of a dismissal.

31. Acting logically, employees ought to put more value on their employment protection rights. However, the relative bargaining power of an employer and prospective employee needs to be recognised. In most cases, it is the employer who dictates the contractual terms in the employment relationship - for the vast majority of employees there is no 'negotiation' about terms. In our members' experience, even senior employees have little opportunity to influence the overall terms of the contractual offer.
32. A key feature of UK employment law is the restriction on the contracting out of statutory employment rights. There needs to be appropriate safeguards for employees in a vulnerable position - for example, those without union or collective representation - who might relinquish their statutory employment protection rights without fully realising the consequences of their actions.
33. It is also likely that this new status will cause confusion for employers at the outset, but particularly on termination of the employee's contract. There is potential for satellite litigation on a range of complex issues which are likely to arise on termination, which runs counter to the aim of supporting small and medium sized companies through simpler regulation.

Comments on specific proposals

34. Clause 23 provides that the option to become an employee owner could be offered to both existing employees and newly recruited individuals. Sub-Clause 23(2) details the rights that employee owners would not have:
 - 34.1. **The right to undertake study or training** – The Bill proposes that employee owners would not have, as employees currently do, the right to apply to attend study or training of any description, so long as they explain how it would benefit the employer's business.
 - 34.2. **The right to make an application for flexible working** – This approach to maternity rights and flexible working appears inconsistent with the Government's commitment to family-friendly policies outlined in the 2011 *Modern Workplaces* consultation. The proposals are likely to have a discriminatory impact as female workers will still be able to make such requests outside this statutory amended scheme. Employers would have to take this into consideration to avoid allegations of indirect sex discrimination.
 - 34.3. **The right not to be unfairly dismissed** – In light of the recent increase in the unfair dismissal qualification period to two years, the Society doubts that this proposal will offer any additional incentive to employers to recruit.
 - 34.4. **The right to a redundancy payment** – The Society notes that the value of statutory redundancy payments is relatively small; most employers do not have difficulty in making those payments where they are properly due. The value of the shares being proposed in the Bill seems to be much higher than the level of redundancy payments that are commonly made. So for many employers the prospect of saving redundancy costs should not be a driver for taking up the scheme.
35. Sub-Clause 23(3) requires employee owners to give 16 weeks' notice, rather than the normal eight, before returning early from maternity or adoption leave. In the Society's view the rationale behind restricting this proposal to employee owners is

unclear. If, as suggested, planning for maternity leave returners is difficult for employers at only 8 weeks' notice, then it would seem sensible for this proposal to be implemented across the board. Law Society members' experience suggests that most employees know if they are intending to return to work 16 weeks before the expiry of their maternity leave, so it is unlikely that such a change would be prejudicial to employees in planning for return.