Remember, remember, the localism agenda?

Oliver Wright reports on the Bill as it currently stands

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On 5 November, the Growth and Infrastructure Bill had its second reading in the House of Commons.

'The planning system is at times Kafkaesque', according to the Secretary of State.

Scratching beneath the veneer of hyperbole, though, can the Bill really 'help the country compete on the global stage'; does it comprise a 'comprehensive series of practical reforms'; or will it cut 'excessive red tape'? The answer is: unfortunately not.

The Bill (expected on the statute books by April 2013) does, however, have a few measures that are actually quite helpful; or, at least, interesting and controversial. There really are only a few though; 23 substantive clauses in all.

The Bill is designed to address the 6 September statements rushed out by DCLG on return from the summer recess. Not surprisingly, missing in action is the proposal that seems to have stuck in everyone's throat – 8 metre conservatories.

There follows an appraisal of the key reforms that the Bill as currently drafted will enact.

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Planning applications direct to the Secretary of State

Perhaps most controversially, applicants for planning permission in 'underperforming' local authority areas will have the option of submitting their application direct to the Secretary of State, rather than having to run the gauntlet of a chaotic local planning office, and await an appeal process.

What 'underperforming' looks like has yet to be prescribed. The Bill does require the Secretary of State to specify criteria, though, and also to keep a list of those authorities that stand to be bypassed.

Some ideas for what the criteria might be include:

- persistent failure to meet statutory time-periods;
- statistical tendency to refuse major applications;
- refusals which are consistently overturned on appeal;
- councils which regularly have costs awards made against them; and
- councils with local plans that are anachronistic.

All are possible, but none are ideal yardsticks. Eric Pickles has already suggested that a 'consistently poor performance in the speed or quality of [a local authority's] decisions' will be enough (6 September Written Ministerial Statement); or, perhaps, 'a very poor record in deciding applications. Unreasonable delay are unfair' ('Growth and Infrastructure Bill - Background'). We shall see.

Also to be prescribed is the type of developments for which bypass (or 'direct') applications can be made. 'Major' is the word used thus far, but it is not clear at the moment how that will be quantified. Will it be an application of 'national or regional importance' (as in s76A of the 1990 Act)? Will it include applications that exceed quantum thresholds to be prescribed (as in applications which become Mayor of London referable)?

A real political issue is its apparent disharmony with localism, taking power directly out of local people's hands and into the hands of central government. Hillary Benn made hay with this in the Second Reading, describing it:

> ... a concept much loved by communist parties the world over. It is called democratic centralism – telling other people what to think and do... In no time at all, [Eric Pickles] has gone from claiming to be the friend of localism to taking a hammer and sickle to local democratic decision making'.

The government is unabashed. The line is that with new local powers, comes new responsibilities. (The same goes (of course) with the 'transitional' para 215 of the NPPF, and keeping up to date local plans.) Councils can only get the benefit of local decision making if they show they can perform; or, simply, just approve more major planning applications?

What is certain is that Planning Performance Agreements will proliferate. Councils will want clear and present evidence, disclosable to government, that, despite not meeting statutory time-periods, they nevertheless should retain the right to determine planning applications in their area.

A key issue in practice will be whether the Planning Inspectorate (who will shoulder the burden of the new regime) is given the resources it needs to deliver its new local planning authority functions.

Three legal quirks arise:

- The Mayor of London will (as currently drafted) retain the right to recover the application if it meets the relevant thresholds. Think of the scenario: a major application being made direct to the Secretary of State rather than an underperforming London Borough, only for the Mayor to take over further down the line. There may be trouble ahead.

- PINS will in mainly deal with direct applications, but the Secretary of State's 'call-in' powers remain applicable (which leads to the rather awkwardly drafted proposed new s76E(1):

  '[t]he Secretary of State may direct that an application made to the Secretary of State... is to be determined by the Secretary of State...').

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- Any determination by the Secretary of State is only susceptible to challenge under s288; so, only one step, rather than two, into the High Court. Could it be that there will be even more Administrative Court work?

Bureaucracy

When standardised lists were issued at national and local levels for application documents, the system met with little resistance. This was a way for local authorities to ensure the quality of application submission; it would enable them to consider the application fully and fairly, and it would give them a fighting chance of making a determination in the prescribed time-period.

As with all checklists, however, there have in practice been issues.

A proven abuse of the system is the strenuous refusal by some local authorities to validate applications, which do not comply with the letter of those lists, however unreasonably required in the particular circumstances of an application.

The new s62(4A) (inserted into the 1990 Act) will introduce two

new concepts into this closely fought pre-application wrangling. Namely, that:

- the application documents required must be 'reasonable having regard, in particular, to the nature and scale of the proposed development'; and
- application documents need only address a matter 'if it is reasonable to think that the matter will be a material consideration'.

While these seem common sense provisions, the question remains whether they really will alter Local Authorities' thinking at pre-application stage. The usual route to correct the old abuse is to threaten appeal to the Inspectorate. That threat may only have been carried out in a handful of cases. Crucially, more often than not the cost of launching an appeal will far exceed the cost in producing one more report for the checklist.

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Village greens: redressing the balance

The controversial system enabling local groups to stop development on land by registering it as a town or village green has two significant new hurdles to face.

Currently, a local community showing that they have used land as of right for 20 years for lawful sports and pastimes can have such land registered. After registration, there is an absolute bar on new development, regardless of the planning landscape.

In 2011, DEFRA issued a new consultation looking at ways to amend the regime. As the consultation recognised:

> [a]round 185 applications were made in 2009 to register new greens. The volume of applications to register new greens, the character of application sites, the controversy which such applications often attract, the cost of the determination process on the parties affected, and the impact of a successful registration on the landowner, are all giving rise to increasing concern.

Addressing 'character' alone, recent applications (the consultation noted) concern: a disused railway line, a beach, a churchyard, part of a golf course, former council offices, and seafront public gardens. Hardly the traditional concept of the village green with maypoles, Sunday cricket, etc.

A key concern of a government striving for growth, is unmeritorious applications for registration stalling or even stymying development altogether. Currently there is no express legal connection between the village green legislation and the planning regime. By fusing the two, however, there may be ways in which to tip the balance back towards the developer.

The Bill therefore proposes two new measures (both foreshadowed by the consultation):

- Landowners can issue formal statements specifying once and for all that the land in question is not to be taken as being a village green. That statement would be effective against all prospective applications to register it, although there will remain a window of two years (under the Commons Act 2006) for the land to be registered.
- Taking forward the fusing of the planning and village green regimes, no-one can apply to

Infrastructure

Some useful tweaks are made to the infrastructure regime:

- Notice to the Secretary of State is no longer required to be submitted when power stations are proposed to be converted to or established as petrol or gas power stations.
- Consents for electricity generating stations can be varied by a new procedure, which is quicker and more straightforward than obtaining an entirely new consent.

Amendments are proposed to the availability of Special Parliamentary Procedure in relation to development consents to be granted under the Planning Act 2008. Special Parliamentary Procedure is often a lengthy investigation usually involving the convening of a further public inquiry. The amendments are as follows:

- An extant local authority or statutory undertaker objection to the compulsory acquisition of their own land now no longer engages special parliamentary procedure at all;
- Where a development consent proposes the acquisition of open space (although not a common) and it 'is strongly in the public interest for the development… to be capable of being begun sooner than is likely to be possible if the order were… subject… to special parliamentary procedure' (draft new s131(4A) of the 2008 Act), then there need not be a special parliamentary procedure convened, even if there is no replacement open space available; and
- Even if special parliamentary procedure were engaged, it can only investigate the specific compulsory acquisition in question – not the entire development consent afresh.

Business or commercial projects of sufficient size (thresholds to be prescribed) may be treated as development to which the 2008 Act development consent regime may apply. Residential development under this amended provision can never be subject to the development consent procedure – even if it is part of a development which includes other elements which may be so treated.

register the land in question as a village green if, for example, a planning application has been made for the land in question (and indeed subsequently granted), or a draft, or to be adopted, or already adopted policy allocates the land for development.

These two provisions are significant, and do have the potential to be effective. If, in particular, the latter provision is enacted, the number of applications for registration is likely to drop dramatically. But they are controversial. Local groups will need to muster applications with some speed if registration is to be entertained. Landowners and prospective developers will be readying a sigh of relief (and indeed their statements or planning applications) for when the Bill passes.

Amending affordable housing commitments

The government has been making much play of unviable section 106 agreements, and their role in holding development up.

They have already initiated a process of mediation in certain local authorities to agree variations to unviable section 106s so that development can start.

Now, as promised on 6 September, legislation is proposed to focus minds on renegotiation of affordable housing obligations. Not without justification did Simon Hughes MP intervene during the Second Reading to ask whether 'the government are absolutely committed to having more affordable homes in England'.

Under the existing s106A, a developer can amend a section 106 either by agreement with the authority concerned, or, after a certain period (currently five years), make an application to that authority to amend it.

Under the new s106BA there are proposed new specific tests and processes for such applications where the section 106 agreement in question secures affordable housing. Most notable of these is the introduction of an 'economic viability' test: where an agreement is proven to be economically unviable it stands to be varied to make sure development can commence.

The real threat for the authority in question is that an appeal is available for a refusal of such an application. The mere possibility of the Secretary of State becoming involved, and setting new levels of financial benefits and affordable housing, may be enough for some councils to look seriously at applications to amend.

Two timing points arise:

- an application to amend an affordable housing section 106 agreement under the new s106BA can be made immediately. There is no five-year wait for applications to amend under s106A.

- If the Secretary of State does amend a section 106 agreement on appeal, the modified s106 can only last for three years. After that point, the agreement is to be renegotiated (yet again) with the local authority.

These provisions are undoubtedly helpful. They enable applications to amend to be made immediately. They give primacy to viability as the key determinant in any decision. Ultimately, they put powers in the hands of the Secretary of State to kick-start growth for a limited period.

How realistic in practice will an appeal be, however? A developer who has an unviable section 106 generally has no development, and no resources to spend. Certainly, there will be a debate on viability, with disclosure of appraisals, and at least specialist consultants being instructed. There may also remain cases where authorities want to insist on the existing obligations as being necessary and sufficient to meet the Regulation 122 tests.

Stopping up and diversion orders

Implementing one recommendation from the Adrian Penfold Review (2010), draft Orders for stopping up or the diversion of highways or footpaths et al (under the planning regime) can now be drawn up as soon as a planning application has been received. Under the old regime the process was clumsier – you generally had to obtain planning permission first.

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Costs

There are new provisions that enable the Secretary of State to recover some of his own costs whether at inquiry, hearing or written representations, even if the appeal was withdrawn before a decision was made. The same applies to CPO inquiries.

No business rate revaluation until 2017

There is a two-year stay on revaluations.

And finally…

Readers will recall much reported comments in the Chancellor's recent party conference speech about making more employees 'owners' of their business. This has been tagged on the end of the Bill.

Conclusion

So there you have it. A smorgasbord of different targeted measures with very specific purposes.

They may well be effective measures. In the case of direct Secretary of State applications, and amendments to village green legislation, the proposed package is controversial and significant.

But the impact of the Bill as a whole surely cannot meet the grand aspirations trumpeted.

The Bill now goes to Committee. When it returns to the House on 6 December, be sure to look carefully for clauses that have been hidden in the cellars of the Palace of Westminster. ■