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Planning confusion

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Assessing local authorities' planning performance under the proposed Growth and Infrastructure Bill will lead to political resentment as much as legal confusion, says **Oliver Wright**

Planning performance: towards a redefinition of localism

A new consultation by the Department for Communities and Local Government (DCLG) – "Planning Performance and the Planning Guarantee" – will most likely not engender as much judicial review applications as airport capacity, gay marriage or HS2, or indeed government revolts, but it will have a significant impact on the way planning applications are decided at the local level.

The proposal in the Growth and Infrastructure Bill to allow planning applications to be made 'direct' to the Secretary of State, avoiding the bona fide underperformance of certain local authorities has received extended coverage. Clause 1 of the bill, however, was light on detail. What would 'underperforming' look like? What sort of applications could be made directly? How many authorities would be at risk of being bypassed?

The new consultation document answers all. It is a confident, clear and robust document. It remains unabashed at the proposed new power. Localism works, the line goes, so long as local administrations perform. Where there are local failings, "justice delayed is justice denied". And the consultation is successful in ratcheting up pressure on local authorities who thought they were far from the department's gaze. No longer.

Defining 'underperformance'

'Underperforming' will be assessed either on the speed or the quality of decision making:

(1) where 30 per cent or fewer of determinations are made within the statutory period over a two year period; or
(2) where 20 per cent or more of decisions (including non-determination – deemed refusal) are overturned on appeal over a two-year period.

These are significant new hurdles. They are fixed rates, so in theory the number of local authorities falling within them could fluctuate from time to time. In relation to the speed of decision making, there is an additional proposal that the rate should be increased in time to ensure improving performance.

Only so-called 'major' applications can take advantage of these proposals, and it is only statistics relating to these applications against which local authorities will be judged. 'Major' is proposed to have the same meaning as in the Town and Country Planning (Development Management Procedure) (England) Order 2010 (DMPO), that is: (i) development on a site area of 1 hectare or more, (ii) housing development where 10 or more houses are proposed, or where the actual number is not known where the site area is 0.5 hectares, (iii) the provision of a building or buildings where the floorspace to be created is 1,000 square metres or more, or (iv) minerals or waste proposals.

The proposal also scrutinises two potential loop-holes. Planning Performance Agreements (PPA) have been encouraged by the government, and are currently treated as being distinct from the statutory time-limit regime. The consultation proposes an extension of their usefulness, by recognising they can be used both pre- and post-application, and that, in the latter instance, there may be a case for reducing the formality with which they are documented. An exchange of letters may be enough. Given the significance of failing to meet the 'speed' criterion, we can expect a proliferation of formal PPAs, and, now, less formal letters documenting an agreed new time limit.

The second, more devious, loophole was the withholding of data from DCLG. All DCLG's statistics, and therefore their ability to form a view as to designation of underperformance, are reliant on statistics provided by local authorities. A new threat for non-disclosure is therefore proposed: a deemed reduction in performance, and ultimately, if there have been no returns for a year, automatic designation.

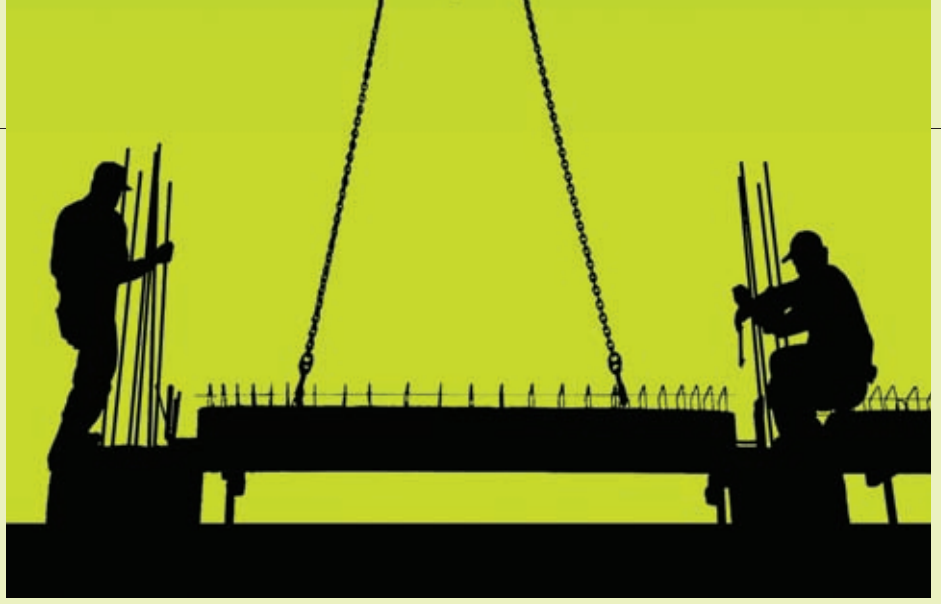
A word further on statistics. Within the consultation document, there is a remarkable admission by DCLG on the way they have assessed decision making within statutory time limits. As is well known, 'major applications', by operation of the DMPO, are to be determined within 13 weeks, unless they are for EIA development (within the meaning of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011), in which case the time limit is 16 weeks. However, until now, there has been no 16-week gauge in the information returns provided to DCLG, only a 13-week. All major applications determined later than 13 weeks have therefore been late, even in the case of 16-week EIA applications. This is a fairly hapless mistake to reflect on; but it also has significance going forward. Statistics published in the last few months making suggestions about which local authorities are not determining major applications on time may be subject to significant revision.

Potential effects of designation

Three significant effects of designation are perceivable.

Firstly, this is a 'name and shame approach'. A list of underperforming local authorities will be published every year. The stigma attached to such a designation is obvious, and the fear of that political kick in the teeth can be gauged by the many local authorities who already have come out publicly in staunch defence of their performance.

Secondly, it may well be harder for a local authority to prove a remedying of ways once designated than it would in anticipation of designation. By definition, most major applications will no longer be determined by them. A designation lasts for a year, and then performance is reassessed. It may well



"The fear of that political kick in the teeth can be gauged by the many local authorities who already have come out publicly in staunch defence of their performance"

be therefore that designations tend to run on well beyond the first year.

Thirdly, there will plainly be a local reaction against the intervention of central government. Local councils may well try and spin bona fide underperformance into 'anti localism'; this effect will be particularly noticeable where it is a 'blue on blue' situation – a Conservative-led government designating a Conservative-led council as underperforming.

Direct application

The practical effect of designation is that applicants have the option to apply direct to the secretary of state. It must be anticipated that this option will be taken up in the majority of cases.

As with appeals, the Planning Inspectorate (PINS) is to shoulder the burden of the additional responsibility. This will create a raft of practical wrinkles in practice, however.

Pre-application discussions where the applicant is proposing to exercise his option to bypass the local authority may be held with PINS. This raises the possibility of a 'twin-track' pre-application procedure, with the applicant playing off the local authority against PINS for the best pre-application advice and reassurance. Perhaps also a local authority lobbying hard to keep major applications determined locally. Would local authorities consider a reduction in pre-application fees as a bargaining tool?

It is also obviously beyond the abilities of PINS to perform certain statutory application requirements: site notices and neighbourhood notifications will all rest with the local authority, as will the provision to PINS of the planning history of the site, and a determination as to schemes likely to have a cumulative environmental effect taken together with the subject application. There will remain a cost to the local authority, therefore; but the application fee is, in these circumstances, to go in its entirety to PINS. At a time of ailing planning department resources, this makes improved performance all the more difficult.

Perhaps the most significant power to remain with the local authority under the proposals is the determination of section 106 Agreements. PINS will expect to see a relevant agreement, or an obligation advanced by the applicant. This, presumably, will entail in practice Unilateral Undertakings: an applicant bypassing a local authority may not be inclined (as traditionally on appeal) to enter into a bilateral agreement in these circumstances. In any event, it may be nigh on impossible to engage a nil-funded authority in negotiations about the acceptability of proposed section 106 obligations. Undertakings submitted may be as much about guesswork as about local accountability.

To put that last issue into some relief, the Mayor of London's existing powers to become the local planning authority for certain applications within London include the ability to enter into section 106 Agreements with the applicant. Although it is preferable in those circumstances for the local authority to remain involved (it eases the distribution of financial contributions, for instance), the ultimate sanction is to cut out the local authority altogether. The direct application proposals may be missing a trick.

Finally, the determination procedure itself, of course, creates difficulty. How will PINS overcome the lack of a committee meeting to discuss and vote on the proposals? The proposal is to presume that written representations will be sufficient, with in some cases perhaps a short hearing to determine limited issues. This relies again, however, on the resources of PINS being able to provide inspectors to deliver within strict timescales. The consultation anticipates that PINS will deliver 80 per cent of applications within the statutory time-limits.

The planning guarantee

The consultation ends in intriguing fashion. A further stick to beat slow performance is proposed: the application fee is returned to an applicant if an application has not been determined within 26 weeks. The problem plainly will be how this is addressed in practice: it can be anticipated that an applicant will be faced with either the threat of a refusal at the end of 25 weeks (if not determined by then) regardless of where discussions have got to; or a skeletal local authority service thereafter; or a PPA. How these three are balanced in negotiations will be interesting to watch.

The Growth and Infrastructure Bill is currently in committee stage and will be heard by the House of Lords on 22 January. No amendments to clause 1 (which secures the powers for direct applications) are currently proposed.

The consultation period ends on 17 January 2013. The response to the consultation will be published in April 2013, timed presumably to coincide with the bill achieving Royal Assent. That response will confirm the relevant thresholds for designation. In July 2013, performance data for 2012-13 will be available, indicating the identities of the first set of likely designated authorities. Secondary legislation effecting the first designations is expected to be in place by October 2013.

A slump in applications may follow the July data, with applicants awaiting the designations to come into force. At that time, many local authority planning departments will be heaving a sigh of relief – or sharpening political knives.

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