HOUSE OF LORDS

Select Committee on the Constitution

10th Report of Session 2012–13

Growth and Infrastructure Bill

Report

Ordered to be printed 16 January 2013 and published 18 January 2013

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£3.50

HL Paper 104

Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session with the following terms of reference:
To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

Current membership

Lord Crickhowell
Baroness Falkner of Margravine
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Baroness Jay of Paddington (chairman)
Lord Lang of Monkton
Lord Lexden
Lord Macdonald of River Glaven
Lord Pannick
Lord Powell of Bayswater
Baroness Wheatcroft

Declarations of interests

A full list of members' interests can be found in the Register of Lords' Interests:
http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests

Publications

All publications of the committee are available at: http://www.parliament.uk/hlconstitution

Parliament Live

Live coverage of debates and public sessions of the committee's meetings are available at:
http://www.parliamentlive.tv

General information

General information about the House of Lords and its committees, including guidance to witnesses, details of current inquiries and forthcoming meetings, is available at:
http://www.parliament.uk/business/lords

Committee staff and legal advisers

The current staff of the committee are Nicolas Besly (clerk), Luke Wilcox (policy analyst) and Hadia Garwell (committee assistant). Professor Richard Rawlings and Professor Adam Tomkins are legal advisers to the committee.

Contact details

All correspondence should be addressed to the clerk of the Select Committee on the Constitution, Committee Office, House of Lords, London, SW1A 0PW.
The telephone number for general enquiries is 020 7219 5960.
The committee's email address is constitution@parliament.uk

Growth and Infrastructure Bill

1. The Growth and Infrastructure Bill was brought from the House of Commons on 18 December 2012 and had its second reading in the House of Lords on 8 January 2013.[1] Committee stage is scheduled to commence on 22 January.

2. Designed to facilitate infrastructure development and promote economic growth, the bill is a flagship bill for the coalition Government in difficult economic climes. It amends a raft of legislation across diverse areas. The measures range from changes to planning procedures at local and national levels to the modification or discharge of affordable housing requirements in building schemes, and from the postponement of revaluation for business rates to the creation of a new status of "employee shareholders" with fewer employment rights. A number of the provisions have proved controversial, especially those relating to planning procedures, affordable housing and "employee shareholders": Her Majesty's Opposition divided the Commons at third reading.[2]

3. From a constitutional standpoint, clause 1—on planning applications—commands attention, involving as it does (a) the allocation of decision-making functions between the central and local levels; and (b) executive power to change that allocation. The Secretary of State will be able to curtail the jurisdiction of local planning authorities by designating them, with the effect of allowing applications for planning permission to be made direct to him if the would-be developer so chooses. Clause1(1) thus amends[3] the existing legislation as follows:

> "A relevant application that would otherwise have to be made to the local planning authority may (if the applicant so chooses) be made instead to the Secretary of State if the following conditions are met at the time it is made—
>
> (a) the local planning authority concerned is designated by the Secretary of State for the purposes of this section; and
>
> (b) the development to which the application relates … is of a description prescribed by the Secretary of State."[4]

4. This alternative procedure will commonly involve front-line decision-making by the Planning Inspectorate through delegation by the Secretary of State.[5] There will be no appeal from the Planning Inspectorate's decisions[6]—only

---

1 HL Deb, 8 January 2013, cols 26–110.

2 HC Deb, 17 December 2012, cols 661–677.

3 By inserting a new section 62A in the Town and Country Planning Act 1990.

4 The Government have proposed that the choice of procedures should be made available to those seeking permission for "major development", a term defined in the Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI No 2184) as amended. Examples include housing schemes of 10 or more houses and development involving minerals or waste. See Department for Communities and Local Government, *Planning Performance and the Planning Guarantee* (November 2012), para 8.

5 Para 5 of Schedule 1 inserts a new section 76D in the Town and Country Planning Act 1990 for this purpose: see explanatory notes, para 22.

6 Para 9 of Schedule 1; and see explanatory notes, para 22.

judicial review. It is envisaged that designation would apply on a yearly basis.[7]

5. Clause 1 is a novel provision in the context of town and country planning. To a considerable extent, the existing system reflects and reinforces a commitment to local accountability and responsiveness in the planning process. Whereas the Secretary of State has substantial reserve powers to call in applications and issue directions, the local planning authority will typically be involved in the first instance. Conversely, to the extent that the new ministerial power of designation is exercised, a centralised form of front-line decision-making will be created at the expense of localism. Wider effects on local decision-making in the shadow of potential ministerial designation may also be envisaged.

6. As currently drafted, the minister's power so to designate a local planning authority is unqualified. Instead, clause 1(8) provides:

> "The Secretary of State must publish (in such manner as the Secretary of State thinks fit)—
>
> (a) the criteria that are to be applied in deciding whether to designate an authority for the purposes of this section;
>
> (b) the criteria that are to be applied in deciding whether to revoke such a designation …"

7. The Government have put out to public consultation the issues of when and how to designate local planning authorities under clause 1.[8] The consultation paper explains that ministers want to take action "where there is clear evidence that particular planning authorities are performing very badly".[9] It is envisaged that the department will monitor and assess performance on the basis of "two key measures: the speed and quality of decisions on planning applications".[10] As regards the vexed issue of how to assess the "quality" of local decision-making, the Government believe that the proportion of major decisions overturned on appeal is an appropriate measure.[11] The consultation paper states that the Government "intend to set out the criteria for assessing performance, and the thresholds for designating any authorities under this measure, in a policy statement that will be published in response to this consultation once the Growth and Infrastructure Bill gains Royal Assent."[12]

8. Since the deadline for responses to the consultation is 17 January, the House will not have sight of them ahead of the detailed consideration of clause 1 at committee stage. **The House will no doubt wish to see the results of the consultation made publicly available prior to the report stage of the bill.**

9. The Government have repeatedly stated their policy intention only to designate planning authorities in exceptional cases. The explanatory notes speak of "the intention being to make such designations where an authority

---

7 *Planning Performance and the Planning Guarantee, op. cit.*, para 46.

8 *Planning Performance and the Planning Guarantee, op. cit.*

9 *ibid.*, para 19.

10 *ibid.*, para 22.

11 *ibid.*, paras 32–35 .

12 *ibid.*, para 20.

has a record of very poor performance",[13] while the consultation paper envisages the power being exercised "very sparingly".[14] Likewise, the minister, Nick Boles MP, spoke in the Public Bill Committee in the House of Commons of "a very small number" of planning authorities being designated: "fewer than 20".[15] At second reading in the House of Lords, the minister, Baroness Hanham, stated that "we would be delighted if it were not necessary for any local authority to be designated under this clause".[16]

10. We have consistently expressed the view that executive assurances about how statutory powers will be exercised are no firm basis on which to legislate.[17] Constitutionally speaking, they are no proper substitute for clarity in the statutory provision. **In our view, the Government's own policy intention of designation under clause 1 only in exceptional cases should be made clear on the face of the bill. The House may also wish to consider whether the criteria and procedures for making or revoking a designation should be set out in secondary legislation.**

---

13 Para 4.

14 *Planning Performance and the Planning Guarantee, op. cit.*, para 19.

15 Public Bill Committee, 1st sitting, 13 November 2012, col 10.

16 HL Deb, 8 January 2013, col 27.

17 See for example, Constitution Committee, 20th report (2010–12): *Protection of Freedoms Bill* (HL Paper 215), para 10.

APPENDIX 1: DECLARATION OF INTEREST

The following interest was declared in respect of this report—

Lord Hart of Chilton

Non-practising solicitor (previous practice included planning control and administrative law)