



HOUSE OF LORDS

Delegated Powers and Regulatory Reform  
Committee

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28th Report of Session 2015–16

# Housing and Planning Bill: Further Government Amendments

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Ordered to be printed 18 April 2016 and published 19 April 2016

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Published by the Authority of the House of Lords

HL Paper 134

### *The Delegated Powers and Regulatory Reform Committee*

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
  - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
  - (b) section 7(2) or section 19 of the Localism Act 2011, or
  - (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
  - (a) section 85 of the Northern Ireland Act 1998,
  - (b) section 17 of the Local Government Act 1999,
  - (c) section 9 of the Local Government Act 2000,
  - (d) section 98 of the Local Government Act 2003, or
  - (e) section 102 of the Local Transport Act 2008.

### *Membership*

The members of the Delegated Powers and Regulatory Reform Committee are:

Baroness Drake	Lord Lisvane
Baroness Fookes ( <i>Chairman</i> )	Countess of Mar
Lord Flight	Lord Moynihan
Baroness Gould of Potternewton	Lord Thomas of Gresford
Lord Jones	Lord Tyler

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### *Contacts for the Delegated Powers and Regulatory Reform Committee*

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee's email address is [hldellegatedpowers@parliament.uk](mailto:hldellegatedpowers@parliament.uk).

### *Historical Note*

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

# Twenty Eighth Report

## HOUSING AND PLANNING BILL: FURTHER GOVERNMENT AMENDMENTS

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### Introduction

1. We reported on this Bill in our 20th and 21st Reports of this Session,<sup>1</sup> and considered in our 27th Report the previous Government amendments tabled for Report Stage.<sup>2</sup> The Government tabled further amendments for Report Stage on 13 April, and submitted a supplementary memorandum about them on 15 April. As the amendments will be considered by the House on 20 and 25 April, we have met urgently to consider them, so that we could report in time. There are a number of amendments to which we wish to draw the attention of the House.

### Clause 136—permission in principle for development

2. Clause 136 provides for a new planning consent model called “permission in principle” to be granted for development in England. Under these provisions, the Secretary of State would have power by “development order” (to which the negative procedure would apply):
  - himself to grant permission in principle for the development of land that is allocated in a “qualifying document” described in the order; or
  - to provide for a local authority to grant permission in principle for development of a “prescribed description”.

(See new section 59A the Town and Country Planning Act 1990 (“the 1990 Act”) inserted by clause 136(2).)

3. In our 21st Report, we made a recommendation in connection with the power to prescribe the documents that were to be “qualifying documents”,<sup>3</sup> and we welcome the Government’s earlier Amendments 104 to 106 that would now describe these in new section 59A itself. However, the Government now propose further changes.
4. **Amendment 106A**<sup>4</sup> would confer additional powers on the Secretary of State, when legislating in a development order, for the new regime of permission in principle. In particular, new section 59A(8), inserted by the amendment, enables a development order to provide for permission in principle to cease to have effect:
  - (a) at the end of a prescribed period (i.e. a period to be specified in the order); or
  - (b) at the end of “such other period (whether longer or shorter) as the local authority may direct”.

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1 20th Report, Session 2015–16, HL Paper 90; and 21st Report, Session 2015–16, HL Paper 98.

2 27th Report, Session 2015–16, HL Paper 132.

3 Para 17.

4 Amendment 106A substitutes new subsections (4) to (10) for subsections (4) to (8) of new section 59A.

5. New subsection (8) appears to have been included in response to an issue raised at Committee Stage about the duration of permission in principle. The Minister said:

“We have no intention of allowing permission in principle to exist in perpetuity; we are consulting on what the length of time would be and on the option of setting the limit at five years, which would indeed be set out in secondary legislation”.<sup>5</sup>

6. The supplementary memorandum seeks to justify the delegation in new subsection (8) on the ground that “the ability to provide for the duration of a permission in principle in a development order ... will give flexibility to set out differing timeframes as they apply in different contexts” (paragraph 10).
7. We consider that the duration of permission in principle should be specified in primary legislation, as is the case with section 91 of the 1990 Act which provides for conventional planning permissions to last for three years (in England) and five years (in Wales), although with power for a local authority to specify a different duration where justified in a particular case.
8. We regard the duration of permission in principle as an important issue. The fact that the Government have not finished consulting on their policy is, in our view, a wholly unsatisfactory reason for leaving the matter to secondary legislation. That only the negative procedure would apply makes this even more unattractive.
9. **Inadequate and incomplete provisions of proposed primary legislation cannot be excused on the basis that consultation has not taken place or that the Government wish to retain “flexibility to set out differing timeframes as they apply in different contexts”. The policy should have been finalised following appropriate consultation before, not after, the Bill was introduced.**
10. **We therefore consider that the delegation of power in the proposed new section 59A(8) inserted by Amendment 106A is inappropriate, and that the duration of permission in principle should instead be specified on the face of the Bill. An alternative approach, although we think that this is a less satisfactory option, would be to specify the maximum duration on the face of the Bill, coupled with an affirmative procedure power to provide for a shorter period.**

#### **Clauses 145 to 148—processing of planning applications**

11. Clauses 145 to 148 confer powers on the Secretary of State to establish pilot schemes by regulations under which planning applications will be processed, but not decided, by “designated persons” instead of by local planning authorities for the period of the pilot. In our 21st Report, we commented that the powers are drafted very widely; and we made a number of recommendations to the House, in particular that the affirmative procedure should apply to every exercise of the powers conferred by the clauses.<sup>6</sup> In response, the Government tabled several amendments for Report Stage in relation to clauses 145 to 148, and in our 27th Report we welcomed those

<sup>5</sup> HL Deb, 22 March 2016, col 2292.

<sup>6</sup> Paras 44 and 45.

that went some way to meeting our earlier recommendations, while noting<sup>7</sup> three aspects that continued to concern us.

12. The Government have now tabled further amendments. These give rise to three additional issues that we wish to draw to the attention of the House.

*“Connected applications”*

13. **Amendment 120A**<sup>8</sup> and related amendments<sup>9</sup> would extend the piloting powers so that they apply not just to planning applications, but also to any “connected application” which is defined as:

- (a) “an application for approval of a matter reserved under an outline planning application within the meaning of section 92 of the Town and Country Planning Act 1990 (where the main application resulted in the grant of such permission), or
- (b) *an application of a specified description*<sup>10</sup>, *made under or by virtue of an enactment about planning, that relates to some or all of the land to which the main application relates.*” (emphasis added)

(See clause 145(6A) which would be inserted by **Amendment 121F**.)

14. New subsection (6A)(b) confers a wide power on the Secretary of State to provide in regulations for applications other than simply for planning permission to be included in a pilot scheme. The affirmative procedure would apply to the exercise of this power.
15. The supplementary memorandum explains and seeks to justify this power in the following terms:

“There are numerous types of applications which may be made to local planning authorities which are connected to the development of land, including orders for works to preserved trees, footpath diversion orders, advertisement consents etc. The Government needs to consult with the sector before setting which types of connected applications this clause will apply to, and will do so as part of the duty placed on the Secretary of State to consult on the detailed design of the pilot scheme, prior to secondary legislation being brought forward. This approach to delegation of these powers to the Secretary of State goes further than the Secretary of State’s existing powers in section 62A(3)(a)(ii) of the Town and Country Planning Act 1990 (the power to prescribe what amounts to connected applications for that provision is exercised through negative resolution procedure statutory instrument).” (paragraph 18)

16. As is the case with Amendment 106A, we are concerned that the Secretary of State is seeking to take a delegated power, conferring broad discretion on himself further to broaden the scope of already wide powers to establish pilot schemes, on the ground that he has not yet finalised his policy and needs to consult before doing so. This Bill was introduced many months ago, and there has been more than sufficient time to devise a list of the types of

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7 Para 27.

8 Amendment 120A, which replaces withdrawn Amendment 120, proposes a revised version of the three new subsections that are to be substituted in clause 145 for subsections (1) and (2).

9 See Amendments 121A to 121C, 121F, 122B, 122C and 123A.

10 “Specified” is defined in clause 145(8) as “specified in regulations under this section”.

“connected application” that the Government consider should be included in piloting schemes.

17. We are also not persuaded by the comparison with section 62A of the 1990 Act. That allows for applications for planning permission, in certain circumstances, to be made directly to the Secretary of State. The person making the application may also choose to make connected applications of the kind prescribed in negative procedure regulations. In our view, this is quite different in nature from the power proposed here which will enable the Secretary of State to determine what types of “connected application” can be included in pilot schemes for the transfer of local authority planning functions to “designated persons”.
18. **We therefore consider that new clause 145(6A) inserted by Amendment 121F contains an inappropriately wide delegation of power. We recommend that this be replaced with a provision which gives a much fuller list of the types of application that constitute a “connected application” for the purpose of the clause, coupled with a delegated power to add to the list by affirmative procedure regulations.**

### *Consultation*

19. In our 21st Report, we recommended that the Secretary of State should be required to consult local authorities before making regulations under clause 145.<sup>11</sup> In her preliminary response, the Minister rejected this recommendation on the following grounds:

“The Government is already consulting on how these pilot schemes might operate as part of the *Technical consultation on implementation of planning changes*. In parallel, we are also extensively engaging local authorities, professional bodies and the private sector in a discussion about how the pilots might operate. In the last six weeks we have met over 75 local authorities through a range of events. We will also consider establishing a working group including the Local Government Association, the Royal Town Planning Institute and the Planning Officers Society, among others, to advise on the design of the pilots and comment on draft regulations. I therefore do not consider that an amendment to the Bill is needed in respect of consultation.”<sup>12</sup>

20. However, there has been a partial change of mind on the part of the Government because **Amendment 121C** includes the following provision:

“Before making the first regulations under this section the Secretary of State must consult such representatives of the local planning authorities, and such other persons, as the Secretary of State thinks fit”.

21. While we welcome the inclusion of this consultation requirement so far as it goes, we do not understand the logic of limiting it to the first regulations. Such regulations could set up a limited pilot scheme in relation to a single local planning authority. Subsequent schemes could then apply to several authorities, for example all those in Greater London. The regulations establishing those further schemes might be radically different from the first set, in particular there could be a different person designated to carry out the processing of applications.

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<sup>11</sup> Para 44.

<sup>12</sup> 26th Report, Session 2015–16, HL Paper 125, Appendix 2, para 51.



22. The supplementary memorandum does not explain why it is considered impractical for local authorities and others affected to be consulted before the *subsequent* regulations are made. Indeed the implication of Amendment 121C is that there would be *no* duty to consult before making further regulations under clause 145.
23. **We consider it highly desirable that there should be a duty to consult before making any regulations under these clauses. We therefore re-iterate the recommendation in this respect made in our 21st Report.**

*Parliamentary procedure*

24. In our 21st Report, we recommended that the affirmative procedure should apply to every exercise of the powers conferred by clauses 145 to 148.<sup>13</sup> The Government rejected this recommendation too. In her response to the Committee, the Minister said:

“I recognise that the pilots represent a significant change to the planning system and that there are understandable concerns about the potential impact on communities and local planning authorities of introducing alternative providers. *Therefore, I agree that the affirmative procedure provides the appropriate level of scrutiny for the first exercise of these important powers.*

However, I suggest that the affirmative procedure is not appropriate for every exercise of the powers. The Government may need to make procedural changes to the pilot scheme or act quickly to address a part of the processing of planning applications that is not working as effectively as it should in the pilots, so that applicants, communities and providers are not adversely affected for too long. There are circumstances where I think that the negative procedure is more appropriate.

Therefore, I propose to bring forward an amendment to the Bill which will set out when the affirmative procedure should apply, *such as the first exercise of the powers* and changes to fee setting, with the negative procedure applying in all other circumstances. This approach is not without precedent. It also effectively means that there will be Parliamentary debate on our regulations before pilot schemes are commenced.”<sup>14</sup> (emphasis added)

25. Government **Amendment 135A**<sup>15</sup> deals with the Parliamentary procedure for regulations made under clauses 145 to 148. It specifies that the affirmative procedure should apply to:

“regulations under section 145 that make provision of the kind referred to in section 145(2), (3), (4), (6A)(b), section 147 or section 148”.

26. **As we observed in our 27th Report, it is unclear which particular provisions of clauses 145 (as revised by other amendments) would attract the affirmative procedure and which would not.**<sup>16</sup> **We draw this lack of clarity again to the attention of the House.**

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13 Para 44.

14 26th Report, Session 2015–16, HL Paper 125, Appendix 2, paras 47 to 49.

15 In substitution for Amendment 134 which is withdrawn.

16 Para 27.

27. However, we have deduced from Amendment 135A that:
- it does not give effect to the Government’s commitment that the first exercise of the powers in clauses 145 to 148 would in all circumstances be affirmative (see the italicised extracts above from the Minister’s letter);
  - clause 145(1), which contains the key power allowing for the establishment of pilot schemes, would always be negative; and
  - so far as we can ascertain, the negative procedure would also apply to clause 145(6) and (7) and clause 146.
28. The supplementary memorandum seeks to justify the negative procedure for certain of the powers on the following grounds:
- “We consider that in order to ensure the effective administration of the new regime for these pilots, including enabling the Secretary of State to react quickly to amend the procedures for pilots, it is appropriate for the regulations to be subject to negative resolution procedure in Parliament. Use of the negative procedure for certain aspects of the scheme design is consistent with the current statutory frameworks—for example, the existing regime for processing of applications for advertisement consents by local planning authorities is subject to the negative resolution procedure”. (paragraph 19)
29. We are not at all persuaded by those arguments. Clauses 145 to 148 provide for novel and highly significant powers for which there is no parallel in current planning legislation. The fact that the Secretary of State may desire at some future point “to react quickly to amend the procedures for pilots” cannot justify minimising the ability of Parliament effectively to scrutinise exercise of the powers.
30. **We remain firmly of the view expressed in our 21st Report that, having regard to the significance and breadth of the proposed delegations, the affirmative procedure should apply to every exercise of all the powers contained in these clauses.**
31. **We also draw to the attention of the House:**
- **the failure of the supplementary memorandum to spell out clearly which powers are intended to attract the negative and affirmative procedure respectively; and**
  - **the apparent failure to give effect to the commitment given in the Minister’s initial response to the Committee that the affirmative procedure should apply to the first exercise of the powers.**



## **APPENDIX 1: MEMBERS AND DECLARATIONS OF INTERESTS**

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Committee Members' registered interests may be examined in the online Register of Lords' Interests at [www.publications.parliament.uk/pa/ld/ldreg.htm](http://www.publications.parliament.uk/pa/ld/ldreg.htm). The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 18 April 2016 Members declared no interests.

### **Attendance:**

The meeting on the 18 April 2016 was attended by Baroness Drake, Baroness Fookes, Baroness Gould of Potternewton, Lord Lisvane, Lord Moynihan and Lord Tyler.