Levelling Up, Housing and Communities Committee

Rt Hon Michael Gove MP
Secretary of State for Levelling Up, Housing and Communities
Department for Levelling Up, Housing and Communities
4th Floor, Fry Building
2 Marsham Street
London
SW1P 4DF

21 June 2022

Dear Michael,

Levelling-Up and Regeneration Bill

Thank you for attending the Committee on Monday 13 July and answering our questions on the Levelling-Up and Regeneration Bill and other matters within your Department's remit.

During our discussions I raised that there have been comments that the Bill contains provisions which amount to centralisation of the planning system. I also referred to a legal opinion, produced by Paul Brown Q.C. and Alex Shattock, Landmark Chambers, on the instruction of Rights: Community: Action. I said that I would write to you about this.

Therefore, it would be helpful to have the Department's comments on the key points summarised in the opinion as follows, and any other points in the opinion that you wish to clarify:

a) The Bill represents a significant change to the existing planning system. It undermines an important planning principle, the primacy of the development plan, by elevating national development management policies to the top of the planning hierarchy.

b) Unlike development plans, which are produced locally via a statutory process that involves considerable public participation, the Bill contains no obligation to allow the public to participate in the development of national development management policies.

c) The Bill also introduces two new development plan documents, spatial development strategies and supplementary plans. The Bill provides for very limited opportunities for public participation in the production of these documents.

d) The Bill introduces a new mechanism to allow the Secretary of State to grant planning permission for controversial developments, bypassing the planning system entirely. There is no right for the public to be consulted as part of this process.

e) Overall, in our view the Bill radically centralises planning decision-making and substantially erodes public participation in the planning system.

House of Commons
Palace of Westminster
Westminster
SW1A 0AA

luhccom@parliament.uk
+44 (0)20 7219 6930
Social: @CommonsLUHC
parliament.uk

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It would be helpful to receive a response by 4 July.

With best wishes,

Clive Betts MP
Chair, Levelling Up, Housing and Communities Committee

House of Commons
Palace of Westminster
Westminster
SW1A 0AA

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Briefing note on the provisions in the Levelling Up and Regeneration Bill concerning public participation in the planning system

Paul Brown Q.C. and Alex Shattock, Landmark Chambers

Summary

1. We are instructed by Rights: Community: Action to provide a briefing note on the provisions in the Levelling Up and Regeneration Bill ("the Bill") that affect public participation in the planning system.[1] The key points are as follows:

a) The Bill represents a significant change to the existing planning system. It undermines an important planning principle, the primacy of the development plan, by elevating national development management policies to the top of the planning hierarchy.

b) Unlike development plans, which are produced locally via a statutory process that involves considerable public participation, the Bill contains no obligation to allow the public to participate in the development of national development management policies.

c) The Bill also introduces two new development plan documents, spatial development strategies and supplementary plans. The Bill provides for very limited opportunities for public participation in the production of these documents.

d) The Bill introduces a new mechanism to allow the Secretary of State to grant planning permission for controversial developments, bypassing the planning system entirely. There is no right for the public to be consulted as part of this process.

e) Overall, in our view the Bill radically centralises planning decision-making and substantially erodes public participation in the planning system.

2. We address these issues below in more detail under the following broad themes: 1 centralising planning policy, 2 reducing public involvement in the development of planning policy, and 3 making it easier to grant permission for controversial development.

Theme 1: centralising planning policy (clauses 83, 84, Schedule 6)

3. The guiding principle that underpins the existing planning system is the primacy of the locally-produced development plan. Under the current system:

a) Development plans are produced in draft by local planning authorities. They are then consulted on extensively with local residents and other stakeholders.

[1] Available here: https://bills.parliament.uk/bills/3155.

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Palace of Westminster
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SW1A 0AA

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parliament.uk

b) Following consultation and further amendment, development plans are then submitted to the Planning Inspectorate for independent examination, allowing further representations to be made by interested parties.

c) Once a development plan has passed examination and is formally adopted by the local planning authority, the law requires that planning decision makers must make key planning decisions (such as the grant of planning permission) in accordance with that development plan, unless material considerations indicate otherwise.[2]

4. However, the Bill represents a dramatic departure from this principle. It turns the existing plan-led system into a "plan and national policy"-led system. It does this in five ways:

a) Firstly, whereas conformity with national policy is currently one of the criteria by which the "soundness" of a Local Plan is assessed, the Bill positively prohibits a local plan from being inconsistent with any national development management policy.[3]

b) Secondly, the Bill amends the existing law so that planning decisions must be made "*in accordance with the development plan and any national development management policies*."[4] The primacy of the development plan is therefore explicitly removed.

c) Thirdly, the Bill introduces a requirement that any conflict between the development plan and a national development management policy "*must be resolved in favour of the national development management policy*."[5] This provision means that the development plan will always be subservient to national policy.

d) Fourthly, the Bill reduces the circumstances in which planning decision makers can depart from the requirements of national policies (and, to the extent they are consistent with national policies, development plan policies).[6]

e) Fifthly, the only definition in the Bill of a national development management policy is "*a policy (however expressed) of the Secretary of State in relation to the development or use of land in England, or any part of England, which the Secretary of State by direction designates as a national development management policy*."[7] This gives the Secretary of State almost

[2] Planning and Compulsory Purchase Act 2004, s.38(6).
[3] See the proposed new s.15C(7)(b), Schedule 7.
[4] Clause 83(2), amending s.38(6) of the Planning and Compulsory Purchase Act 2004: see also Schedule 6.
[5] Clause 83(2).
[6] Clause 83(2): "the determination must be made in accordance with the development plan and any national development management policies, unless material considerations **strongly** indicate otherwise" (emphasis added).
[7] Clause 84

unlimited discretion in the policies which, once designated as national development management policies, will override the development plan and determine how planning decisions are made.

5. It is therefore clear that the Bill will significantly centralise development management in England. Under the new regime, locally-produced development plan policies will only be permissible and/or relevant insofar as they do not conflict with central government policies. The scope for granting permission for proposals which do not accord with the development plan or national development management policies will also be reduced.

6. This is a stark change from the current system.

a) While the National Planning Policy Framework ("NPPF") is currently an important material consideration for plan-makers, it only "*provides a framework within which locally-prepared plans for housing and other development can be produced*".[8] Under the Bill, local authorities would be positively precluded from incorporating many policies which are currently typically found in a local plan, if these would "*(in substance) repeat*" any national development management policy.[9]

b) Notwithstanding the indication in the 'presumption in favour of sustainable development'[10] that, where local plans are out of date, planning decisions should be made by reference to the policies of the NPPF, the NPPF explicitly recognises that the presumption does not change the statutory status of the development plan.[11] Case law makes it clear that this applies even to local plans that are 'out of date.' The Bill would change that statutory status, expressly making the local plan subservient to national policy.

Theme 2: Reducing public involvement in the development of planning policy (clause 82, 84 and Schedule 7)

7. As we note above, there is a significant degree of public participation in the production of the development plan and the development management policies contained within it. However, the proposals in the Bill will remove an entire tier of policies from the scope of local plans, to be replaced by development management policies produced in Whitehall. Despite the fact that these policies will affect many more people than a locally-produced development plan, the process for producing these policies involves very limited rights of public participation.

8. Clause 84(3) of the Bill provides that a national development management policy can only be introduced or amended following "*such consultation with, and participation by, the public or any*

[8] National Planning Policy Framework (2021), paragraph 1.
[9] See proposed new s. 15C(7)(b), Schedule 7.
[10] NPPF para 11.
[11] NPPF para 12.

bodies or persons (if any) as the Secretary of State thinks appropriate". This is a very weak obligation that offers maximum discretion to the Secretary of State regarding who to consult (if anyone).

9. Clause 82 introduces two new documents that can be considered part of the development plan, spatial development strategies and supplementary plans:

a) Schedule 7, paragraph 15AC of the Bill provides that a spatial development strategy must involve an examination in public "*unless the Secretary of State directs otherwise*": in other words, the Secretary of State may decide not to hold an examination. Paragraph 15AC also states that "*No person is to have a right to be heard at an examination in public*." This is in stark contrast to the examination of development plans, for which there is an explicit right to be heard at examination.[12]

b) Under the existing law, supplementary planning documents cannot contain development management policies, precisely because it is deemed important that such policies are subject to consultation and public examination.[13] In contrast, while the new supplementary documents will be subject to examination, Schedule 7, paragraph 15DB states that "*the general rule is that the independent examination is to take the form of written representations*." This is alleviated in part by the fact that the examiner must cause a hearing for the purposes of receiving oral representations if the examiner considers that necessary to ensure adequate examination of an issue, or for a person to be given a fair chance to put a cas:, but even so, the discretion here is broad.

Theme 3: making it easier to grant permission for controversial development (clause 97)

10. The Bill also introduces a new mechanism for "Urgent Crown development" in clause 97. This provision is likely to be used by the government to build controversial national projects, such as the asylum processing centres that have recently been the subject of legal challenge when introduced under existing planning powers.

[12] Planning and Compulsory Purchase Act 2004, s.20(6).

[13] [13] See reg 2(1) and 5 of the Town and Country Planning (Local Planning) (England) Regulations 2012; considered in *William Davis Ltd v Charnwood Borough Council* [2017] EWHC 3006 (Admin) and *R (Skipton Properties Ltd) v Craven DC* [2017] EWHC 534. In *William Davis* the judge noted at [61] the underlying principle that "*the development plan is the place in which to address policies regulating development*." The judge also referred, at [63] to the principle of the Planning Code (emphasis added): "*It is in that context that I refer to the concept of the Planning Code, and within it to the role of the development plan, and* ***to the importance given by the code to proper examination of the development plan, and to the fair consideration by an independent person of objections and representations made. From the point of view of all types of participant in the planning process, the process of development plan approval and adoption is important***."

11. The only bodies that the Secretary of State must consult before granting permission under this provision are the local planning authority and "*such other persons as the Secretary of State considers appropriate*." There is therefore no obligation to consult local people before granting planning permission for a controversial national development using these new powers.

12. At present, there are a limited number of ways that the Secretary of State can build controversial projects outside of the existing planning system. The default position is that a planning application must be made to the local planning authority, following changes in 2004 that brought Crown development within the planning system.[14]

Conclusion

13. In our view, the provisions of the Bill we have highlighted will substantially erode public participation in the planning system. These provisions reduce the primacy of the development plan in favour of national policy, without introducing comparable public participation mechanisms to the production of national policy. The Bill also allows local planning authorities to amend their own development management policies without the need for public examination, and moreover allows the Secretary of State to swiftly grant permission for controversial proposals without first consulting the local population.

14. As a final concluding point, we note that much of the detail of how these changes will be implemented in practice is still unknown. This is because the Bill grants a very large range of powers to the Secretary of State to implement the changes via secondary legislation. We have counted over 100 new powers to make secondary legislation in the Bill. This means that applying scrutiny to the detail of the changes, when they are eventually finalised, will be a difficult task.

PAUL BROWN Q.C.
ALEX SHATTOCK
Landmark Chambers
30.5.22

[14] Section 79, Planning and Compulsory Purchase Act 2004.