Draft NILGA response to the Consultation on Planning Reform &Transfer to Local Government: Proposals for Subordinate Legislation Phase 2

DOE Planning Service has issued a consultation document as the second phase of a two phase exercise to bring forward the subordinate legislation necessary to exercise the powers contained in the Planning Act (NI) 2011.

This response was drafted in liaison with a number of council planning officers and highlights key issues for councils arising from the consultation. The NILGA Planning Working Group discussed the consultation, prior to consideration of this response by the NILGA Executive Committee. A response is expected by the Department by 31st December 2014.

Derek McCallan **1 December 2014**

1.0 INTRODUCTION

NILGA, the Northern Ireland Local Government Association, is the representative body for district councils in Northern Ireland. NILGA represents and promotes the interests of local authorities and is supported by all the main political parties. Planning is a key issue for local government due to the huge impact it has on the shaping of local communities, the economy and sustainability. NILGA is pleased to be able to have an opportunity to comment on the proposed subordinate legislation to enable the Planning Act (NI) to be fully exercised and we trust that our comments will be taken into account when developing the final legislation and guidance.

The proposals in this consultation reform the current system and transfer responsibility for the majority of planning functions to the new district councils in April 2015, and this second phase focuses on three key issues:

- Simplified planning zones
- Fixed penalties
- Modification and discharge of planning agreements

A number of pieces of subordinate legislation are linked to but not contained within the consultation document. These have been considered, and no major concerns raised further to the issues outlined below.

2.0 KEY ISSUES

2.1 Simplified Planning Zones (SPZs)

Background Information

Simplified Planning Zone Schemes (SPZs) have the effect of granting planning permission within an identified geographic area for particular development or any class of development specified in the scheme. Relevant development can then proceed without the need to apply for permission provided it meets the requirements set out in the scheme.

The proposed subordinate legislation will give effect to the powers in the 2011 Act, enabling councils to take forward SPZs - to make, adopt or alter.

The proposed process for making and altering an SPZ is clearly outlined and is relatively simple;

Consultation and notification before finalising initial proposals– councils must consult statutory consultees when relevant.

Procedure for publicising finalised proposals– when a council has then finalised its proposals it must:-

- advertise the proposals for two weeks in at least one newspaper circulating in the council area inviting written objections or representations (including any additions to the proposed scheme) within 8 weeks of the first notice;
- publish notice on its website for a period of at least 8 weeks after the first newspaper advertisement;
- make copies available in the council's offices and in any other places it considers appropriate; and
- advise any statutory consultees with whom it had previously engaged.

Managing objections and representations – in the newspaper and website notifications a council must advise that objections or representations can be made within 8 weeks of the newspaper advertisement and how these can be made. The council can then either consider any submissions made or cause a public independent examination to be held to consider them. Any independent examination must be advertised in the local press in the same manner as required for proposals and the details of the independent examination provided to every person who has made a valid objection or representation. On the basis of the nature of objections made the council may modify its initial proposals.

Adoption of proposals- whether objections are considered by the council or are the subject of independent examination the council must prepare a statement on the decisions it has reached in relation to each objection and the reasons for those decisions. The council must then publicise its intention to adopt proposals, with or without modifications, by local newspaper advertisement and make its statement on decisions, and any examination report, available for inspection, along with any modifications to the proposed scheme. If a council decides not to proceed with a scheme or alterations it shall newspaper advertise in the same manner and advise those who have made valid objections or representations and not withdrawn them.

Role of the Department– The 2011 Act provides for the Department to have an oversight role, and if necessary an intervention role, which is intended to ensure that the provisions of an SPZ scheme are consistent with policy and would not subvert other planning control. To that

end the proposed regulations require a council to provide the Department with copies of all newspaper notices and documents made available for inspection and provide details on the mechanisms by which the Department may issue directions to a council where it feels this may be necessary.

NILGA Comments

NILGA would be keen to see the introduction of the ability for councils to use what we believe will be an important tool for supporting local economic development, although it is noted that this power has never been used by the Department.

The potential benefits are welcomed, i.e.:

a. Greater certainty of outcome for a developer whose development meets the criteria set out in the SPZ scheme;

b. The removal of the financial and administrative burden of submitting an application; and

c. Lightening the burden on the development management system by reducing the number of applications coming into the system

Advice would be welcomed in relation to the link between SPZs and the Development Planning Process, particularly in relation to consultation.

It would potentially be useful to consult with the statutory consultees for development plans, as well as consultees in relation to planning applications.

It might be useful to mention the process in the Statement of Community Involvement and to establish key points of contact within the community, given the short (8 week) public notification period for an SPZ.

2.2 Fixed Penalties

Background Information

The Department has considered the introduction of fixed penalties for certain breaches of planning control as an alternative to prosecution through the courts. **NILGA** responded to the consultation on the Planning Bill in 2009, expressing the following views:

> *"There should be a proportional approach to the enforcement of planning regulations and this should be reflected in fines imposed.*
>
> *Local government is very sensitive to the issue of people ending up with a criminal record, and NILGA believes that that…..further consideration [is needed], potentially with the introduction of a 'penalty points' system for offences.*
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> *Proposals for fixed penalty notices are supported, but on a tiered basis. ….The rationale for these needs to be clear, and fines should be set to ensure a deterrent effect. The potential for the creation of other offences was also considered, e.g. to protect bio-diversity, or in the case of destruction of heritage and environment*
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> *There is great potential for joined-up working with Building Control on enforcement activity, and this could be delegated to Building Control."*

After consideration of the issues involved, the Department has provided councils with the discretionary option of issuing a FPN for two offences. These are where a person has committed an offence by being in breach of an Enforcement Notice or a Breach of Conditions Notice.

While the enabling powers are contained in sections 153 and 154 of the 2011 Act the **level** of fixed penalty for the two offences mentioned above are to be prescribed in subordinate legislation.

It is the Department's intention that FPNs will complement existing enforcement tools which will be available to council enforcement staff from the point of transfer including Enforcement Notices (ENs), Breach of Condition Notices (BCNs), stop notices and the ability to take direct action to remedy a breach of planning control. Such powers are considered sufficient to allow the councils to exercise their enforcement functions - however Fixed Penalty Notices (FPNs) will provide an additional and discretionary power.

Where the council considers that a breach of planning control is significant or an offence has been committed to deliberately flout planning legislation then the option of a prosecution through the courts will remain the normal course of action.

In circumstances where a Fixed Penalty Notice has been served by a council and payment has been made, but the breach of planning control which gave rise to the Enforcement Notice has not been resolved, the council **MAY NOT** prosecute in respect of that particular breach of an Enforcement Notice.

The council can carry out the necessary works in default and reclaim the costs from the owner of the land.

There is no basis for viewing FPNs as a means of offenders buying their way out of compliance with the requirements of the planning system. They provide an additional, discretionary enforcement tool for councils in the exercise of their enforcement responsibilities. They do not prevent or restrict a council's decision-making process in terms of taking a court prosecution where this is considered the appropriate course of action.

Following transfer of planning functions, councils may wish to develop their own **Enforcement Strategy** in respect of planning enforcement, to manage this in a way that is appropriate to their area.

Examples of FPN based on the Scottish experience indicate the types of breaches of planning control where FPNs were deemed an appropriate course of action, e.g.:

- unauthorised change of use;
- unauthorised alterations to the elevations of a property; and
- unauthorised development within the curtilage of a residential property.

Reflecting the Scottish model the Department proposes fixed penalties of **£2,000** for being in breach of an EN and **£300** for being in breach of a BCN. In line with the Scottish, and indeed other FPN systems, provision is made for a reduction in these levels for prompt payment.

NILGA Comments

NILGA would be keen to see the Department actively working to overcoming the 'double jeopardy' issue. It is our understanding that a change in primary legislation is required to deal with this, and that it had been the Department's intention to effect this change through the now defunct Planning Bill. NILGA would encourage the Department to seek an amendment to the Primary legislation to close the current legal loophole and to ensure that enforcement by use of fixed penalties also achieves a resolution to the breach of planning legislation. Carrying out works in default and seeking recompense is likely to require court proceedings and therefore issuing an FPN is unlikely to achieve a satisfactory resolution.

NILGA would encourage the Department to provide advice in relation to the drafting of the new council enforcement strategies, particularly given the differing customs and practice in relation to anonymity.

It is anticipated that FPNs will be offered for what might be described as less significant offences as an alternative to potentially lengthy and costly court prosecutions, but it would be useful to have access to advice on identified levels and thresholds. This could take the form of departmental advice giving examples of potential use.

The examples given in para 4.12 of the consultation are problematic, for example:

'Unauthorised change of use' could refer to a very lucrative enterprise, such as a city centre car park; 'unauthorised development within the curtilage of a residential property' could mean another house.

The level proposed for fixed penalties seems very low, and it is suggested that 'sliding scale' is put in place, to correspond with the size of the development. The fines should be set to correspond with at least the cost of a planning application – perhaps double this cost.

It would be useful for the department to provide recent examples of fines levelled in court, to ensure relevant information is available to planning committees.

2.3 Modification and Discharge of Planning Agreements

A planning agreement is a voluntary, legally-binding agreement which can be utilised to overcome identified barriers to the granting of planning permission, normally for large-scale major planning applications, which cannot be suitably addressed by way of conditions attached to the permission. Such agreements, in widespread use across other jurisdictions, are negotiated at the pre-application stage and the planning agreement will take the form, when signed, of a legally binding contract. The planning agreement is a material consideration in the determination of an application for planning permission.

The proposed subordinate legislation will give councils the power to enter into planning agreements where they operate as the 'relevant authority' on planning matters, and will provide the necessary detail on the modification or discharge of planning agreements within the new two-tiered system.

The proposals will reproduce the provisions currently in place for the Department, but will reduce the appeal period from 6 months to 4 months, to bring this in line with other planning appeal periods in the reformed two-tier system.

For those agreements already in the system it is proposed that in line with the new hierarchy of development the Department will retain responsibility for any planning agreement made in relation to what would be considered regionally significant development and **all others will transfer (legally referred to as "novate") to the new councils.** This means that only the planning agreement related to the George Best Belfast City Airport will remain with the Department. All other planning agreements will become the responsibility of the new councils relevant to their respective council areas.

NILGA Comments

There is no centrally held information in relation to the number of planning agreements currently in place, and where they are (i.e. to which council areas they will transfer).

NILGA would strongly recommend that each new council cluster works closely with their Area Planning Manager to ensure that there is local knowledge of these agreements.

NILGA members are satisfied that a reduction in the appeal time period from 6 months to 4 reflects the time available for appeals elsewhere in the planning legislation and will assist in building consistency and understanding of the new requirements.

3.0 OTHER ISSUES

There are also a number of technical Statutory Rules being taken forward in this phase, which are not subject to public consultation.

4.0 CONCLUSION

NILGA welcomes the approach taken by the Department in developing a suite of subordinate legislation. Aside from a small number of issues which will require a change to the Primary Act, it is clear that the Department has ensured a degree of flexibility and the ability to amend the regulations and guidance once areas for improvement become evident.

We look forward to working with the 11 new councils and the department as the reformed and transferred system evolves.