

IN THE MATTER OF THE PLANNING WHITE PAPER

JOINT ADVICE

1. We are instructed to advise Friends of the Earth on the Planning White Paper and, in particular, on its proposals for the consideration of major infrastructure projects. We consider how the proposals would operate within the United Kingdom's international and European obligations, the common law and the practicalities of decision-making. It can perhaps be noted at the outset that there is always a danger that a new decision making process, which is intended to be simpler or quicker, will turn out to be as complicated or even more complicated than the process it replaces.

National Policy Statements

2. Chapter 3 of the Planning White Paper proposes a series of national policy statements which would establish the national case for infrastructure development. There is nothing in principle unusual or novel in this proposal. The government already produces a great deal of national policy, some of which does relate to future infrastructure needs, for example, the Airports White Paper.
3. The Planning White Paper recognises that National Policy Statements will be subject to a Strategic Environmental Assessment 'wherever appropriate'.¹ Since the statements will be setting the framework for approvals of projects which will then require Environmental Impact Assessment, we would expect that all National Policy Statements will require Strategic Environmental Assessment.
4. The Planning White Paper says it will not be possible for National Policy Statements to identify and address how individual projects would take into

¹ Planning White Paper, para 3.9, first bullet.

account a wide range of obligations.² There will be circumstances where the National Policy Statements will have to address such matters. Appropriate Assessment under the Birds and Habitats Directive will be required if the statement's proposals are likely to have a significant effect on Natura 2000 sites. A statement of ports development is likely to affect such sites. Similarly the United Kingdom's commitments on climate change would be relevant, as a matter of common law, to any infrastructure statement, for example, on aviation.

5. We are surprised that the Planning White Paper's description of consultation makes no reference to the Aarhus Convention on public participation in decision making, particularly Articles 6 and 7.³ The Convention's requirements of publicity and public participation go well beyond the Cabinet Office Code of Practice on Consultation. Clear procedures for notification, consultation and consideration of the responses need to be established by law. The Convention also recognises the role of non-governmental organisations. Whilst a lengthy list of governmental organisations is contained in the third bullet point of paragraph 3.25, environmental and conservation bodies at the national and local level are not referred to at all.
6. The Planning White Paper envisages some form of Parliamentary scrutiny.⁴ We consider that a Select Committee would need to consider the National Policy Statements in draft, inviting the submission of evidence and take some oral evidence. If the statement identified locations for infrastructure projects the Select Committee would need to carry out a site visit.
7. It is suggested that some existing policy statements should be given the status of National Policy Statements.⁵ Changing the status of an existing document does pose grave difficulties. It will have been adopted for a different function or weight in a process and will not have been subject to some of the new

² Planning White Paper, para 3.13.

³ Planning White Paper, para 3.25.

⁴ Planning White Paper, para 3.27, 3.28.

⁵ Planning White Paper, para 3.38.

procedures proposed for National Policy Statements, such as Parliamentary scrutiny. It may also pre-date European and international obligations on policy preparation, in particular Strategic Environmental Assessment, Appropriate Assessment under the Habitats and Birds Directives, and consultation in accordance with the Aarhus Convention.

Infrastructure Planning Commission

8. At present infrastructure projects are approved by Secretary of States or local authorities. Whilst some decisions are taken by civil servants or planning inspectors, the process is ultimately one of decision-making by democratically elected politicians. The House of Lords endorsed the role of politicians in making planning decisions in *R(Alconbury) v Secretary of State for the Environment, Transport and the Regions*.⁶ In that case Lord Nolan said:⁷

“In the relatively small and populous island which we occupy, the decisions made by the Secretary of State will often have acute social, economic and environmental implications. A degree of central control is essential to the orderly use and development of town and country. Parliament has entrusted the requisite degree of control to the Secretary of State, and it is to Parliament which he must account for his exercise of it. To substitute for the Secretary of State an independent and impartial body with no central electoral accountability would not only be a recipe for chaos: it would be profoundly undemocratic.”

9. The Planning and Compulsory Purchase Act 2004 amended the procedures for planning inquiries into major infrastructure projects and new procedural rules were adopted in 2005.⁸ New procedural rules for Electricity Act inquiries came into force in April 2007.⁹ These changes are intended to improve and

⁶ [2003] 2 A.C. 295

⁷ At 323.

⁸ Town and Country Planning (Major Infrastructure Project Inquiries Procedure) (England) Rules 2005.

⁹ Electricity Generating Stations and Overhead Lines (Inquiries Procedure) (England and Wales) Rules 2007

speed up the process. It is too early to judge whether they should be replaced. The 2005 Circular on the new major infrastructure rules says:¹⁰

“The purpose of the new inquiry procedures is to achieve significant improvements in the time taken to handle major infrastructure projects by streamlining the process and reducing unnecessary delays whilst continuing to ensure that adequate opportunity is given for people to have a say, to test the evidence and to make a sound decision.

The new arrangements will be monitored over a five-year period. Given the infrequency with which major infrastructure projects of national or regional importance come forward, it is thought that to monitor over a shorter period would not be constructive.”

10. Approvals for major schemes can in some circumstances be granted without hearings or inquiries and inquiries are often relatively short. For example, the Olympics and Heathrow East Terminal planning permissions were granted without holding inquiries and the inquiry into the Olympics and Legacy Lands Compulsory Purchase Order lasted only a few months.
11. In practice, inquiries are held for planning and infrastructure decisions in four general situations:
 - (i) where the Secretary of State decides that the matter is of such importance and complexity that it cannot properly be decided without the rigorous testing of evidence and analysis of a public inquiry;
 - (ii) where the promoter of the project considers that the scheme is best presented at an inquiry;
 - (iii) where a public authority wishes to exercise a statutory right to be heard;
 - (iv) where a person's rights are to be taken away, for example by compulsory purchase or the closure of a highway, and he objects and exercises his right to be heard.

¹⁰ ODPM Circular 07/2005, para 4, 5.

12. The Planning White Paper proposes that decisions on particular infrastructure projects would be taken by an Infrastructure Planning Commission. It is a curiosity of the White Paper proposals that it does not refer to any role for the Planning Inspectorate whose inspectors have considerable expertise in examining and reporting on major infrastructure projects. Aside from the Casino Advisory Panel, whose recommendations were rejected by Parliament, and a small number of MPs and Peers on infrastructure Select Committee, inspectors are the only people with experience of conducting hearings into such projects.

Matters which may be considered by the Infrastructure Planning Commission

13. The common law requires a decision maker to have regard to all relevant considerations. Some relevant considerations will be identified expressly or by implication in the statute creating the power, but other matters will become relevant because of the nature of the decision and the particular circumstances of the case. Whilst taking relevant matters into account has a firm legal basis, it is simply an aspect of good decision making. Parliament has on occasion put the principle into statute, for example, the duty on local planning authorities to have regard to the development plan and other material considerations.¹¹ It is unusual for Parliament to exclude matters from consideration.
14. The Planning White Paper proposes that the Infrastructure Planning Commission should consider the relevant National Policy Statement and certain matters which are already referred to in European or domestic law.¹² These matters are illustrated in box 5.2 of the White Paper as human rights, likely significant effects assessed in an Environmental Impact Assessment or Habitats and Birds Directives assessment, environmental standards set by legislation and interests which have by legislation to be considered, such as National Parks and Areas of Outstanding Natural Beauty.

¹¹ Section 70(2), Town and Country Planning Act 1990.

¹² Planning White Paper, para 5.46.

15. This approach is neither practical nor lawful.
16. The Infrastructure Planning Commission would not, on the White Paper's proposals, be able to take into account Government policy (other than the National Policy Statement for the infrastructure proposed), regional policy (which is adopted by the Government) or local policy. For example, Government policy on sustainability and design (in Planning Policy Statement 1), on the Green Belt (in Planning Policy Guidance 2) and on transport (in Planning Policy Guidance 13) would have to be ignored unless it was written into the National Policy Statement. Writing every piece of national and regional policy which might be relevant to a particular National Policy Statement into that policy statement would be a lengthy and difficult job. It would make the National Policy Statement difficult to follow and would reopen debate across the whole range of Government planning policy before Parliament.
17. If the Government's national and regional policies will be relevant, then the local outworking of them, in development plan documents will also be of assistance to the Infrastructure Planning Commission. For example, if an infrastructure scheme was next to a proposed housing site, then the housing allocation would be highly relevant.
18. Where the proposal to limit the relevant considerations fails legally is that the Infrastructure Planning Commission will need to have all the information to enable it to grant the particular consent sought. A consent will not simply be an approval in principle of a scheme but will also deal with the detail of the scheme and the measures, such as highway diversion, required to enable it to happen in an environmentally acceptable fashion. The detail required may include matters which are not 'likely significant effects' of the scheme and so are not in the Environmental Statement. These could include footpath diversion or the effect of overshadowing on a small number of houses next to the site. The application itself would be far more detailed than is required by

European or domestic law and the Infrastructure Planning Commission must be able to take into account that detail and the comments upon it.

19. Without going beyond the European and domestic law matters identified in the Planning White Paper, the Infrastructure Planning Commission will not be able to grant a detailed and workable consent. An attempt to limit the matters which the Commission may consider would be impractical and legally unworkable.

Tests to be applied by the Infrastructure Planning Commission

20. The Planning White Paper sets out various tests for the Infrastructure Planning Commission to apply to a scheme which appear broadly to be whether it is consistent with the relevant National Policy Statement and if so, does it meet other legal criteria (primarily the Human Rights Act and the Habitats and Birds Directives) and are its benefits not outweighed by impacts identified in European and domestic law.¹³ The formulation of these tests reflects the attempts in the White Paper to narrow down the relevant considerations.
21. As the attempts to limit the relevant considerations are legally and practically unworkable, the tests for determining applications require reconsideration. The most striking omission is the absence of any reference to other national policy, so, for example, the Infrastructure Planning Commission would not be able to reject a scheme on the grounds of poor design contrary to Planning Policy Statement 1 (as the Secretary of State has recently refused a waste water treatment works at Peacehaven, East Sussex). Since the Infrastructure Planning Commission has to take into account a broad range of considerations and be able to set detailed conditions to make a scheme acceptable, the ability to secure those details must be relevant to the acceptability of the scheme. Put another way, if a matter is relevant to the detail of the consent, it must be capable of being relevant to the principle of the consent.

¹³ Planning White Paper, para 5.43 to 5.47.

22. The proposal to limit the circumstances in which consent can be refused may lead to schemes being approved without any regard to breaches of Government policy. It would be more appropriate for the Infrastructure Planning Commission to consider all matters in the round before deciding whether to approve or refuse an application.

The right to be heard and the conduct of examinations

23. The Planning White Paper says that the majority of the evidence will be in writing and that oral evidence will primarily be tested by questions from the Infrastructure Planning Commission rather than from opposing parties. This is said to be speedier and easier for the public to follow than the present system.¹⁴ The claimed benefits are based on a complete misunderstanding of the inquiry process. The authors of this part of the White Paper seem to be wholly unaware of inquiry legislation, guidance and practice. Evidence is produced in advance in proofs of evidence¹⁵ and oral evidence is only heard insofar as it is necessary to explain or supplement the material before the inquiry. Agreed matters must be set out in writing and mediators may be appointed on infrastructure inquiries to encourage agreements.¹⁶ At major inquiries, the inquiry evidence is often put on a website, sometimes with a transcript of proceedings.
24. In the last ten years the Government has been committed to 'speed up planning decisions, whilst safeguarding public participation and the fairness, openness and quality of decision-making'.¹⁷ Those objectives remain highly pertinent to the Planning White Paper.
25. It is very difficult for members of a tribunal to properly examine a witness's evidence without assistance from other parties. If evidence contains defects these will usually not be readily apparent. We have often had experience of

¹⁴ Planning White Paper, para 5.30-5.33.

¹⁵ For example, under the Town and Country Planning (Major Infrastructure Project Inquiries Procedure) (England) Rules 2005, Rule 17.

¹⁶ Town and Country Planning (Major Infrastructure Project Inquiries Procedure) (England) Rules 2005, Rules 8 and 18.

¹⁷ DETR Circular 05/00 Planning Appeal Procedures.

apparently sound technical evidence being exposed as fundamentally flawed by cross-examination and by evidence from an opponent's experts. The more technical the evidence, the greater is the need for cross-examination.

26. For centuries, people whose rights have been directly affected by another's project have been entitled to be heard and to present their case orally before the project has been approved. This used to be by appearing before a Parliamentary Committee in Private Bill proceedings, but as more decisions were taken by ministers, administrative tribunals and inquiries were set up with rights to appear. The rights of persons whose land is proposed to be taken off them by compulsory powers or whose rights to use a highway are to be removed, to be heard at an inquiry is enshrined in statute.¹⁸
27. The seriousness of compulsory purchase was explained by two judgments in *Prest v Secretary of State for Wales*.¹⁹ Lord Denning said:

"It is clear that no minister or public authority can acquire any land compulsorily except the power to do so be given by Parliament: and Parliament only grants it, or should only grant it, when it is necessary in the public interest. In any case, therefore, where the scales are evenly balanced – for or against compulsory acquisition – the decision – by whomsoever it is made – should come down against compulsory acquisition. I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands. If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen."

28. Sir Tasker Watkins (who died recently) said:

"The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be

¹⁸ For example, the Acquisition of Land Act, section 13A, Highways Act 1980, Schedule 6, para 2(2).

¹⁹ (1982) 81 LGR 193.

vigilant to see to it that the authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based on the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought.”

29. Sir Tasker Watkins’ judgment shows in particular the need for rigorous and careful scrutiny of proposals for compulsory purchase.
30. The common law recognises a right to an oral hearing where procedural fairness requires it. This depends on the nature of the decision and the issues which arise in the case.²⁰ A right to an oral hearing in non-criminal matters may also arise under Article 6(1) of the European Convention on Human Rights.²¹ Whether a person has a right to an oral hearing before their land is compulsorily acquired has not been tested, because it has not been challenged.
31. We do though see considerable legal impediments to any attempt to remove the right to be heard from persons who are subject to compulsory purchase orders. It would also be irrational to remove that right when the compulsory purchase is for a defined infrastructure project but to keep the right when houses are to be demolished for a clearance scheme.
32. The nature of the right to be heard also has to be considered. The Planning White Paper proposes that after the evidence has been tested in an examination there would be an ‘open floor’ session for interested parties to have their say for a defined period of time.²² This does not give any greater rights than at present, as Inspectors do permit interested people to turn up and have their say even if they do not want to participate in the rest of the inquiry. However, such an ‘open mike’ session is no substitute for a party who wishes to be able to present its case, call witnesses and cross-examine opposing witnesses. The right of a landowner facing acquisition to be heard will not be satisfied by a ten minute slot on a Wednesday evening. Under the Aarhus

²⁰ *R(West) v Parole Board* [2005] UKHL 1, [2005] 1 W.L.R. 350.

²¹ *Muyldermans v Belgium* (22nd October 1991).

²² Planning White Paper, para 5.34.

Convention, procedures must allow the 'public to prepare and participate effectively during the environmental decision-making'.²³ Where a public hearing or inquiry is held, it must allow the public to submit 'any comments, information, analyses or opinions that it considers relevant to the proposed activity'.²⁴

33. The limited ability to make representations envisaged by the White Paper will also not satisfy the common law requirements of fairness. In *Bushell v Secretary of State for the Environment*, Lord Diplock said this of inquiries into motorway schemes:²⁵

"fairness requires that the objectors should have an opportunity of communicating to the minister the reasons for their objections to the scheme and the facts on which they are based. ... Fairness, as it seems to me, also requires that the objectors should be given sufficient information about the reasons relied on by the department as justifying the draft scheme to enable them to challenge the accuracy of any facts and the validity of any arguments upon which the departmental reasons are based."

34. The promoter of a scheme may want the rigour of an inquiry. The form of an inquiry allows the promoter to present its case, in the knowledge that it can be thoroughly tested and that any views against the project are also thoroughly tested. Requests for public inquiries in planning appeals are made more often by the developer than the local planning authority.
35. Similarly the concerns of the local authority cannot be properly examined if they are unable to put witnesses up for cross-examination and to cross-examine their opponents. For example, local authorities are presently able to require a public inquiry to be held if they object to an Electricity Act scheme.²⁶ Other public authorities, interest groups and the public at large are

²³ Aarhus Convention, Article 6(3).

²⁴ Aarhus Convention, Article 6(7).

²⁵ [1981] 1 A.C. 75 at 96.

²⁶ Electricity Act 1989, Schedule 8, para 2(2).

able to play an important role in supporting or critically examining a proposal. The Aarhus Convention recognises the 'importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection'.²⁷

36. A danger of minimising cross-examination is not just that the applicant's scheme may be inadequately examined, but that the objections to the scheme may appear stronger than they are.
37. Any inquiry or examination will attempt to prevent repetition and if affected landowners and public authorities are allowed to present evidence and cross-examine witnesses, then allowing the public at large to participate will tend not to add materially to the time taken.
38. Consequently, we consider that procedural fairness and quite likely the Human Rights Act 1998 will mean that landowners affected by compulsory purchase will be able to play a full role in examinations. Proper decision making and fairness will require that these people and concerned public authorities are able to call witnesses and cross-examine opposing evidence. This process is not usually particularly long. Whilst the Planning White Paper envisages that the examination stage should usually be no more than six months long,²⁸ 8 of the 11 inquiries given as examples in the White Paper lasted less than that time.²⁹

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²⁷ Aarhus Convention, recital.

²⁸ Planning White Paper, para 5.36.

²⁹ Planning White Paper, para 2.8, table at page 32.