Improved participation in the planning process?

It is 15 months since the Government announced an overhaul of the land use planning system to tackle a regime that was seen as neither efficient nor effective. In December 2001, the Government stated that the current system failed to engage communities.¹ Improved community involvement was regarded as critical when the Deputy Prime Minister announced in July 2002 that new proposals would open up the planning system and increase participation right from the start of the process.²

However, in February 2003, the latest proposals and draft legislation culminate in a significant reduction in public participation. This can be seen by the replacement of Structure Plans with a regional planning regime that reduces the opportunity for communities and individuals to participate.³ There is the progressive reduction in the discretionary right to attend public planning meetings by a drive to delegate up to 90% of planning decisions to non-elected officers.⁴ Finally, there is the continuing rejection of the right of local communities and individuals to challenge the merits of a planning decision, despite the fact that it is they who have to live with that decision in the long-term.⁵

In terms of the purported increase in community involvement the Government is relying on the introduction of a Statement of Community Involvement to ensure that the community has a voice. Yet Government has given no indication as to what standards this statement will include. Nor will compliance with these standards in development control decisions be compulsory and binding. Perhaps most concerning of all is that the current proposals will not meet the now imminent obligations in relation to access to justice under the Aarhus Convention 1998.

Analysing just three key aspects of the planning reforms, Regional Spatial Strategies, the Statement of Community Involvement and the distinction between legislation and guidance, helps to explain how the attempt to improve community participation has gone radically off course.

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² Announcement by Deputy Prime Minister (18 July 2002). ‘Planning to drive communities future’ (ODPM press release).
³ Part 1, Planning and Compulsory Purchase Bill. (December 2002)
⁴ BVPI 188. Best Value Performance Indicators for 2002/03. ODPM: London
RSS: a net reduction in participation

Part 1 of the Planning and Compulsory Purchase Bill states that for each region there is to be a regional spatial strategy (RSS) which will set out the Secretary of State’s policies in relation to development and land use. The RSS will provide a spatial framework for each region over a 15 to 20 year period including policies for housing, environmental protection, transport, agriculture, economic development and waste treatment. The RSS will replace current Regional Planning Guidance (RPG) and the Structure Plans that are presently in place at county level. However, there are key differences between the proposed RSSs on the one hand and the RPGs and Structure Plans on the other. First, as the name implies, RPGs are guidance whereas the RSSs will be statutorily based, which means that the importance attached to them by local decision-makers in preparing local plans will certainly increase. Second, because they will largely be replacing Structure Plans, they will also have to take account of sub-regional aspects of spatial planning as well as regional. Finally, as spatial strategies they will have much greater influence over all aspects of land use and society over the long term. The replacement of the Structure Plan process reduces the opportunity for participation at county level and so the very limited number of places at the RSS EiP table is of even greater concern.

The key concern is the increase in the importance and influence of regional planning which has not been matched by an increase in community participation. Clause 7(3) of the Bill states that no person has a right to be heard at the Examination in Public (EiP) of a draft RSS. The net result is that many community groups and individuals directly affected by a proposed RSS will not get a chance to debate their needs and concerns, nor will they have an opportunity to test proposals by others. The reality of this exclusion has been clear in the EiP for London’s emerging spatial development strategy: the London Plan. At a recent preliminary meeting, community groups expressed their concern that they had not been invited to EiP meetings relevant to them, in favour of developers’ interest. It was noted by the EiP Panel that there were only limited seats available at the meetings and that seats had to be prioritised. While it is important to have spatial strategies that integrate land use with other social policies, this should not be done at the expense of the voice of the communities that live in those regions. These arguments are set out more fully in the opinion of William Upton in the Annex.

Finally, there should be a duty on the Secretary of State to give reasons for decisions taken in relation to the adopted RSS and to take account of the representations received.

Recommendation and suggested amendments to the draft Bill

- That there should be a right to be heard at an EiP by deleting existing clause 7(3) and inserting new clause 7(3): ‘Any person who makes representations seeking to change a draft Regional Spatial Strategy must (if (s)he so requests) be given the opportunity to appear before and be heard by the person carrying out the examination.

- A new clause 6(5) be inserted: ‘The Regional Spatial Strategy shall not be adopted by the Secretary of State until after he has considered any objections made in accordance with the Regulations.’

- That the Regulations should contain a provision requiring the Secretary of State to EiP report and prepare a Statement of Decisions that he has reached in the light of the EiP report, and give reasons for those decisions(as for local plans).

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6 Clause 1 of the Planning and Compulsory Purchase Bill (December 2002). ODPM: London.
7 Para 6, ‘Making The System Work Better - Planning At Regional And Local Levels.
The Statement of Community Involvement

The Statement of Community Involvement (SCI) will be the key expression of a right to participate in the local plan making and development control process. The draft Bill makes it clear that the local planning authority (LPA) must prepare an SCI and that it must 'comply with' the contents of an SCI in preparation of local development. This is encouraging but the Government has not specified the kind of standards the SCI may include. Neither does the Bill insist that the SCI be prepared prior to the Local Development Documents so that LPAs only have to comply with the SCI if they have one. Further, the legal status of the SCI in relation to development control is uncertain. The SCI will not benefit from TCPA 1990 Section 54a (or equivalent) status. Instead LPAs need only regard the SCI as a material consideration when considering planning proposals. This is deeply confusing and may mean that applications can be refused for purely procedural reasons or conversely that standards of community involvement can be set aside if policy and other material considerations warrant it. Finally it is unclear how much discretion LPAs will have in enshrining rights into the SCI. The Government has ruled out the prospect of the SCI incorporating a third party right of appeal but has failed to indicate where the boundaries may lie and whether this amounts to real local discretion. At this time the SCI offers a good deal of procedural and legal complexity with no indication of increased standards of public participation in local planning.

The SCI should be clear, concise, compulsory and comprehensive. The SCI should enable an independent examiner or auditor to check, simply, whether an LPA has complied with its SCI and allowed every opportunity for local communities to be effectively involved in the local decisions that affect them. Above all, the SCI should set out clearly how effective public participation is being met on a continuing basis.

Recommendation and suggested amendment to the draft Bill

- That regulation, not guidance (see below), sets out the scope and depth of the SCI and that Clause 18(4) of the draft Bill is deleted.
- That a list of matters that the SCI intends to cover is contained in the main body of the Act.

Legislation v Guidance

It is understood that the detailed implementation of SCIs and the standards of RSS will be expressed in guidance and not secondary legislation. If so, local authorities will not be required to work to the regulations but merely to refer to the detail as a 'guide'. There is a clear distinction between the legal and practical effect of regulations and guidance. It is appropriate for regulations to set down legally enforceable standards by which local planning authorities should abide. Guidance offers a mechanism to ensure effective implementation of such regulations, outlining best practice. The difficulty of using guidance to describe opportunities for public involvement is that such guidance by its very nature can be ‘set aside’ in defined circumstances so long as this is reasonable in a legal sense. Inevitably organisations will seek to test what weight the courts give to such guidance documents. This will entrench a friction into the process whereas regulations can clearly prescribe legally defined standards.

Recommendation and suggested amendments

- That the detail for implementing an SCI is contained in regulations and not guidance.

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Conclusion

The Government is right to point out the lack of public confidence in the present planning system and if it seriously wants to improve community involvement in the system it must accept that a robust system is required, providing the rights of participation to levels that meet both the letter and the spirit of our international obligations. It means providing for effective participation at all levels of strategic planning, providing clear, comprehensive and effective community involvement in local decision-making and providing a robust regulatory framework on which the public and local government can rely with some certainty.
Appendix

Regional Planning Guidance - Opinion of William Upton, Barrister at 6 Pump Court

1.1 I have been asked to give my opinion on the compatibility of the provisions for public participation in regional planning guidance with, firstly the Human Rights Act 1998 and, secondly, the Aarhus Convention. The particular matter of concern is the absence of a right to be heard. I am instructed by Friends of the Earth, in conjunction with the Environmental Law Foundation. I have considered the procedure for adopting Regional Planning Guidance (RPG) in the light of the reforms the government announced in July 2002 as part of the overall reform of the planning system. This will require both primary and secondary legislation, and I understand that we will see this brought forward in the next Parliamentary session.

1.3 It is proposed to establish a two-tier system, with “Regional Spatial Strategies” and “Local Development Frameworks” only. The Local Development Frameworks will replace the Local Plan, but the more radical change is at the more strategic level. These Regional Spatial Strategies will replace RPGs and will have the same status as other development plans under section 54A. The Structure Plan (and equivalent part of the Unitary Development Plan) will be abolished altogether. The new Regional Spatial Strategy “will provide a spatial framework for the region over a fifteen to twenty year period”. It will combine both regional and sub-regional priorities for housing, environmental protection and improvement, transport, other infrastructure, economic development, agriculture, minerals and waste treatment and disposal.

Summary and conclusions.

2.1 The proposed adoption of a two tier system does have profound consequences for the level of public participation which will be available. I have endeavoured to take a legal view, rather than discussing what would be seen as a desirable system of public participation in planning decisions. I accept that many of the proposed changes are simply a matter for Parliament to decide. However, there are certain constraints imposed by the Human Rights Act 1998, and the entitlement of every person to a fair hearing in the determination of their civil rights. Parliament will also wish to act in accordance with our international obligations on public participation in environmental decision-making represented by the Aarhus Convention.

2.2 Once it can be shown that a natural or legal person’s civil rights are likely to be determined by the development plan process, then they have a right to a fair and public hearing, within a reasonable time, by an independent and impartial tribunal established by law (Article 6(1) of the Convention Rights). The process as a whole will be considered, including the potential for a High Court challenge. The High Court has held that the current Local Plan process, which includes the right to be heard before an inspector for every objector, is compatible with Article 6.

2.3 The position of the structure plan process, where there is no right to an oral hearing, has not been directly considered. However, I consider that the courts are likely to hold that there is no requirement to provide a hearing. To say that there must be a ‘fair hearing’ is not the same as saying that there is a right to an oral hearing. Nevertheless, there will be instances when an objector will be able to show that their human rights are affected.

2.4 My broad conclusion is that the introduction of Regional Spatial Strategies, and the associated abolition of the structure plans, can be done without the introduction of a general right to be heard. But it would be a risky enterprise to refuse to allow the exercise of a residual discretion by the Panel to allow individuals to argue that they should be heard on human rights grounds. It would also be wise to include the obligation on the Secretary of State to consider all the representations which are made, and to publish a statement of his reasons. It will come as no surprise that I am concerned that the new RSS is presented by the ODPM as a simple transposition of the existing RPG into statutory form. This overlooks the fact that structure plans will be abolished, and the removal of the public’s involvement at that level of decision making. Therefore, I consider that the method for adopting the new RSS will need to be modified to include the safeguards in place for structure plans.

2.5 The Aarhus Convention is not yet in force in the UK, although it is soon to be ratified. Aarhus introduces a specific set of legal rights for public participation in environmental decision making. It draws a distinction between public participation in decisions on specific activities (Article 6), on plans and programmes (Article 7), on policies (Article 7.4) and on laws and regulations (Article 8). The more specific obligations are found in Article 6, as it requires a higher level of public involvement, and greater flexibility is given in articles 7 and 8. These are all intended to be minimum requirements, and the UK can legitimately provide more extensive rights if it so chooses (see Article 3.5).

2.6 On their face, it would appear that the proposals for public participation in the adoption of the RSS will comply with the minimum requirements for plans set down in Article 7 of the Aarhus Convention. However, it is arguable that some of the matters contained in the RSS will be tantamount to decisions on where specific activities will be situated – and would therefore engage Article 6. Moreover, given the history of public participation in this country, it would be surprising if the minimum requirements were only provided.

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9 Prescott’s statement in the House of Commons, and “Sustainable Communities – Delivering through Planning” (18 July 2002).
10 paras 27, 28 of “Sustainable Communities – Delivering through Planning”.
11 Note that the Minerals Plan and the Waste Local Plan are intended to be retained.
12 Para 6, “Making The System Work Better - Planning At Regional And Local Levels”.

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