

November 26 2008



## Planning Bill

### Nuisance Immunity for Major Infrastructure Projects - Briefing 2

The Planning Bill<sup>1</sup> has now passed through the Lords and is reaching its final stages as Lords amendments are put to the Commons, and is scheduled to receive Royal Assent this session. The Bill as currently drafted removes Clause 151 which gave all major infrastructure<sup>2</sup> projects immunity from nuisance<sup>3</sup>, and substitutes Clause 157, which confers statutory authority on any of these projects should a nuisance complaint be made.

#### Our View

This apparent blanket exemption is highly irresponsible, particularly in view of the wide range of developments covered by the Bill. We refute the rationale behind this that individual nuisance complaints should not stand in the way of major development. These types of complaint get to court infrequently, as nuisance gives local authorities a valuable legislative lever with which to open negotiations where development is impacting on local communities, and to come to a solution acceptable to all parties. In its current draft the Bill still affords communities scant opportunity for redress from potential impacts of smoke, dust, odour, noise, light, effluvia or deposits, that may arise during the lifetime of these developments. While we accept that some short term impact is an inevitable and acceptable consequence of any development, we remain dismayed at the proposed blanket immunity from nuisance action which shows little regard for the potential for impact on the health, quality of life and amenity of any communities who are unfortunate enough to be in proximity to any of the developments proposed. These effects are manageable through proper planning and operation – and are sometimes unforeseen – so while National Policy Statements can take potential impacts into account, we do not believe that all possible issues that might arise over decades of operation can be accounted for in these. Most of the developments listed should not cause local environmental problems – if they do they should be accountable.

We, and partner organisations have urged the Government to reconsider the inclusion of this Clause, and/or include robust provision for protection of the health, amenity and local environmental quality for communities at risk of adverse impact – to date our concerns have not been fully addressed.

#### Further Work

It now seems likely that the Bill will proceed, with Clause 157 conferring statutory authority, and therefore de facto immunity from nuisance.

- We will continue to communicate our concerns to CLG.
- We will work to ensure National Policy Statements are as robust as possible and that potential nuisance issues are fully considered in these.
- We will work for protection from nuisance to be accounted for in any relevant enabling Statutory Instruments.

## Background

### **Nuisance Immunity - Clause 151 - Removed**

In the Lords, Clause 151 (added during the last Commons reading and therefore not subject to considered debate) which gave blanket immunity from nuisance has been withdrawn and replaced with Clause 157, following lobbying from Environmental Protection UK, LACORS, Environmental Law Foundation, CPRE and CIEH.

### **Nuisance: Statutory Authority - Clause 157 Added**

In the Lords, Clause 157 (below) was added.

#### **157 Nuisance: statutory authority**

*(1) This subsection confers statutory authority for—*

*(a) carrying out development for which consent is granted by an order granting development consent;*

*(b) doing anything else authorised by an order granting development consent.*

*(2) Statutory authority under subsection (1) is conferred only for the purpose of providing a defence in civil or criminal proceedings for nuisance.*

*(3) Subsections (1) and (2) are subject to any contrary provision made in any particular case by an order granting development consent.*

This clause confers statutory authority on developments covered by the Bill, should a nuisance complaint be made. Therefore, our fundamental concerns remain, that the Bill as currently drafted does not give satisfactory consideration to protection of the local environment and quality of life.

We asked MPs to support our view that Lords Amendment 95, which prevents councils and individuals from taking nuisance action should be removed (this is the amendment inserting Clause 157), and that Lords Amendment 96, (that removed the previous Clause 151) be supported.

## Our Concerns

- Clause 157 will stop councils and individuals taking action to stop or prevent a nuisance. Statutory nuisances set down by the Environmental Protection Act 1990 include noise, dust and odour, and as amended by the Clean Neighbourhoods and Environment Act 2005, light (see notes for full list).
- The Clause provides developers with a defence against nuisance action, not only for the construction of Nationally Significant Infrastructure Projects, but also for their ongoing operation for the lifetime of the project.
- The Government anticipates approximately 40 Nationally Significant Infrastructure Projects (NSIPs) per year, and that the lifetime of these projects could be 30-40 years.
- NSIPs already benefit from a defence of best practicable means against statutory nuisance action under the Environmental Protection Act 1990, which provides sufficient protection.
- The defence will not be available if the developer does not comply with conditions set by the Infrastructure Planning Commission (IPC), however we are not satisfied that the IPC will be able to set conditions that can predict all potential nuisances in the future.
- It is unclear how conditions set by the IPC will be enforced.
- Subsection 3 appears to allow the IPC to extend the defence, so that developers would not need to take reasonable care. Whilst it seems

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reasonable that the IPC should have the ability to disapply the defence where they consider this appropriate, we believe any extension of the defence would be unacceptable.

- Until now, only Parliament had the power to withdraw people's rights, but this Clause gives this power to non-elected functionaries.
  - Compensation is only allowed for the depreciation of land, which provides no protection for those without an interest in the land, e.g. tenants. Also, no provision is made for compensation for damage to health, which could mean the clause is in breach of the European Convention on Human Rights<sup>4,5</sup>.
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### Notes

1. Planning Bill <http://services.parliament.uk/bills/2007-08/planning.html>

### 2. Developments Covered

The 'nationally significant infrastructure projects' covered by the Bill are:

- a. the construction or extension of a generating station;
- b. the installation of an electric line above ground;
- c. development relating to underground gas storage facilities;
- d. the construction or alteration of an LNG facility;
- e. the construction or alteration of a gas reception facility;
- f. the construction of a pipe-line;
- g. highway-related development;
- h. airport-related development;
- i. the construction or alteration of harbour facilities;
- j. the construction or alteration of a railway;
- k. the construction or alteration of a rail freight interchange;
- l. the construction or alteration of a dam or reservoir;
- m. development relating to the transfer of water resources;
- n. the construction or alteration of a waste water treatment plant;
- o. the construction or alteration of a hazardous waste facility.

### 3. Section 79(1) of the Environmental Protection Act 1990, as amended, defines the following statutory nuisances:

- a) any premises in such a state as to be prejudicial to health or a nuisance;
- b) smoke emitted from premises so as to be prejudicial to health or a nuisance;
- c) fumes or gases emitted from premises so as to be prejudicial to health or a nuisance (from private dwellings only);
- d) any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance;
- e) any accumulation or deposit which is prejudicial to health or a nuisance;
- f) any animal kept in such a place or manner as to be prejudicial to health or a nuisance;
- fa) any insects emanating from relevant industrial, trade or business premises and being prejudicial to health or a nuisance;
- fb) artificial light emitted from premises so as to be prejudicial to health or a nuisance;
- g) noise emitted from premises so as to be prejudicial to health or a nuisance;

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- ga) noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street;
- h) any other matter declared by any enactment to be a statutory nuisance.

NB fb. Artificial light from airports, harbours, railway and tramway premises, bus stations, public service and goods vehicle operating centres, lighthouses, prisons and premises occupied for defence purposes are exempt.

### 4. ARTICLE 8 of the European Convention on Human Rights

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Human Rights Act 1998 – section 6

5. In the judgment *Peter Marcic -v- Thames Water Utilities Limited* (Court of Appeal 7 February 2002) the issue of whether a statutory undertaker owes duties of care to individuals separable from the exercise of their statutory duties was examined, and the implication that a statutory undertaker may become liable to pay compensation to individuals whose common law and human rights are infringed was dealt with. This is not the first claim brought against a sewerage undertaker in respect of damage caused by discharge from overcharged sewers. Dealing with the claim under the Human Rights Act, the Court of Appeal concluded that Thames Water had failed to persuade it that a previous judgement was wrong to hold that Thames had infringed Mr Marcic's human rights. The Court of Appeal commented that where an authority carries on an undertaking in the interests of the community as a whole, it may have to pay compensation to individuals whose rights are infringed by that undertaking, in order to achieve a fair balance between the interests of the individual and the community.

A similar admission of a right to compensation for infringement on property was made in July 2008 when Lincolnshire Valuation Tribunal conceded that the construction of a neighbouring windfarm "had had a significant detrimental effect on the appellants' quiet enjoyment of their properties." And awarded them a reduction in council tax.

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