GROWTH AND INFRASTRUCTURE BILL

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EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Growth and Infrastructure Bill as brought from the House of Commons on 18th December 2012. They have been prepared by the Department for Communities and Local Government, the Department for Business, Innovation and Skills, the Department of Energy and Climate Change, the Department for Environment, Food and Rural Affairs, the Department for Transport, and the Department for Culture, Media and Sport. The purpose of these notes is to assist the reader of the Bill and inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

2. These notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

BACKGROUND AND SUMMARY

3. There are three main sections to the Bill: promoting growth and facilitating provision of infrastructure, and related matters; other infrastructure provisions; economic measures.

4. The main elements of the section of the Bill that covers promoting growth and facilitating provision of infrastructure, and related matters, are: the option to make planning applications directly to the Secretary of State, when a local planning authority has been designated (the intention being to make such designations where an authority has a record of very poor performance), which will (for example) enable applicants to avoid delays in local decision-making; broadening the powers of the Secretary of State to award costs between the parties at planning appeals; limits on the powers that local planning authorities have to require information with planning applications; allowing for the reconsideration of economically unviable affordable housing requirements contained in section 106 agreements; excluding the right to apply for land proposed for development to be registered as a town or village green to safeguard against the system being used to stall or stop development, while protecting existing registered greens; and enabling the relaxation of the requirements in

regulations made under section 109 of the Communications Act 2003 for installation of electronic communications apparatus.

5. The main elements of the section of the Bill that covers other infrastructure provisions are: modifying special parliamentary procedure to ensure that the procedure will consider orders under the Planning Act 2008 and Acquisition of Land Act 1981 only to the extent that these authorise compulsory acquisition of land falling into a special category; enabling the Secretary of State to direct that business and commercial projects of national significance can be considered under the nationally significant infrastructure regime contained in the Planning Act 2008, to enable these applications to proceed faster than they currently do; similarly, speeding up processes for holders of consents under section 36 of the Electricity Act 1989, by putting them in the same position as holders of development consent orders made under the Planning Act 2008 and therefore allowing them to be varied by the relevant Secretaries of State to take account of, for example, changes in technology and design; and clarifying the position of variations and replacements of pre-Planning Act consents under the Planning Act and associated saving provisions.

6. Some of the above elements of the Bill take forward recommendations from the "Penfold Review of non-planning consents" review undertaken by Adrian Penfold in 2010 into consents which have to be obtained alongside or after, and separate from, planning permission in order to complete and operate a development (non-planning consents), specifically: elements of the Town and Village Green provisions; the Energy Act 1976 section 14 repeal; and the Highways provisions.

7. The main elements of the section of the Bill that covers economic measures are: postponing the date on which new non-domestic rating lists (which relate to business rates) in England should be compiled from 1st April 2015 to 1st April 2017, in order to give businesses stability; and creating a new employment status of employee shareholder with different employment rights compared to employees in return for shares of a value of at least £2,000 in the employer's company or parent company.

8. Further background is included on these and other elements of the Bill in the "Overview of the Structure" section.

OVERVIEW OF THE STRUCTURE

Promoting growth and facilitating provision of infrastructure and related matters

9. This section of the Bill covers the following:

- Clause 1 provides applicants for planning permission with the option to apply direct to the Secretary of State if a council been designated (the intention being to make such designations where an authority has a record of very poor performance).

- Clause 2 broadens the powers of the Secretary of State to award costs between the parties at planning appeals and certain other planning proceedings, and to recover the Secretary of State's own costs from the parties.

- Clause 3 broadens the powers of the Secretary of State to award costs between the parties at Compulsory Purchase Order inquiries. These inquiries are generally conducted on behalf of the Secretary of State by Inspectors in the Planning Inspectorate (PINS). It provides consistency with the Town and Country Planning Act 1990.

- Clause 4 allows the Secretary of State to provide in a development order which gives planning permission for change of use, that the local authority or the Secretary of Start may approve certain matters relating to the new use of the land. It also provides that a local planning authority can decline to determine repeat applications.

- Clause 5 amends the primary legislative framework that governs what local authorities can and cannot ask for in support of a planning application so that such requests are reasonable and relate to matters that are likely to be material planning considerations.

- Clause 6 allows the modification or discharge of the affordable housing elements of Section 106 agreements to make developments viable.

- Clause 7 removes an anomaly whereby currently general consents for the disposal of land by local authorities can be given under the Local Government Act 1972 for less than best consideration but cannot be given under the Town and Country Planning Act 1990 where land is held for planning.

- Clause 8 adds the need to promote economic growth as another consideration to be taken into account in making regulations under section 109 of the Communications Act 2003, which set out the conditions and restrictions subject to which the electronic communications code (which is in Schedule 2 to the Telecommunications Act 1984) is applied to operators.

- Clause 9 and Schedule 2 change the current regime of fixed reviews of minerals permissions every 15 years to give mineral planning authorities local discretion over when reviews are required, subject to a provision that the interval between any two reviews cannot be less than 15 years.

- Clauses 10 and 11 provide provisions to enable the stopping up or diversion of highway and public path procedure in the Town and Country Planning Act 1990 to commence before planning permission has been granted in all cases. This will speed up the development process as at present the applicant must, in most cases, wait until planning permission has been granted before initiating the process.

- Clause 12 amends section 31 of the Highways Act 1980 to facilitate join up between the administrative procedure and detail in respect of statements and declarations to counter rights of way claims in that Act with that for statements deposited to protect land from registration as a town or village green provided for in clause 13 of this Bill. This will facilitate the process for landowners to make statements and declarations for both purposes at the same time, for example to allow the same form to be used for both purposes.

- Clause 13 amends the Commons Act 2006 so as to allow landowners to deposit a map and statement to protect their land from registration as a town or village green, whilst allowing access to it.

- Clause 14 excludes the right to apply to register land as a town or village green under section 15(1) of the Commons Act 2006 where any specified event related to the past, present or future development of land occurs. Such events are known as 'trigger events' and these are specified in the table set out in Schedule 1A to the Commons Act 2006, which is inserted by this clause. An example of such an event is the point when an application for planning permission is first published. Schedule 1A also specifies terminating events which correspond to each trigger event and cause the exclusion of the right to apply under section 15(1) to lift.

- Clause 15 amends an existing power to allow regulations to prescribe more flexible fees in relation to applications under Part 1 of the Commons Act 2006, including applications to register land as a town or village green. Any fees prescribed under this power will be set out in secondary legislation.

Other infrastructure provisions

- Clause 16 repeals section 14 of Energy Act 1976 that requires developers or operators to give written notice to the Secretary of State for proposals to establish or convert electricity generating stations to be fuelled by natural gas or petroleum.

- Clause 17 amends the Gas Act 1986 to clarify that licences under that Act for gas transporters (companies licensed to operate a gas grid) may contain certain conditions requiring gas transporters to make payments to other persons holding licences under Part 1 of that Act, including other gas transporters and gas interconnectors.

- Clauses 18 and 19 provide powers to vary planning consents for energy infrastructure projects once granted under section 36 of the Electricity Act 1989 (and to make associated directions deeming planning permission to be granted under section 90 of the Town and Country Planning Act 1990 where such variation occurs).

- Clause 20 inserts a new section into the Planning Act 2008. The new section is concerned with projects consented under pre-Planning Act legislation where the consents concerned have been varied or replaced in certain ways permitted by that pre-Planning Act legislation. The intention of this new section is to avoid any suggestion that as well as their pre-Planning Act consents, changes to such projects also require development consent under the Planning Act.

- Clause 21 removes the need for three separate certification and consent procedures. These issues can be dealt with as part of the examination process for an application for development consent.

- Clause 22 repeals provisions under the Planning Act 2008 applying special parliamentary procedure where land belonging to a local authority or a statutory undertaker is compulsorily acquired. It also removes the requirement for the Secretary of State to issue a certificate if satisfied that an order under that Act authorising compulsory acquisition of commons, open space or fuel or field garden allotments should not be subject to special parliamentary procedure, and provides additional circumstances in which the Secretary of State may determine that an order authorising acquisition of open space will not be subject to that procedure.

- Clause 23 makes modifications to special parliamentary procedure by amending the Statutory Orders (Special Procedure Act) 1945 to ensure that the procedure will consider orders under the Planning Act 2008, the Acquisition of Land Act 1981, and specified provisions in a number of other Acts, only to the extent that these authorise compulsory acquisition of land falling into a special category.

- Clause 24 amends the scope of the planning regime for Nationally Significant Infrastructure to include significant commercial and business development.

Economic measures

- Clause 25 postpones the next non-domestic rating revaluation in England from 2015 to 2017, providing business with increased certainty over their business rates bill and allowing them to focus on delivering growth.

- Clause 26 amends the Local Government Finance Act 1988 by inserting a new section 54A which allows the Welsh Ministers to make an order postponing the date on which

the new non-domestic rating lists in Wales should be compiled from 1 April 2015 to 1 April in 2016, 2017, 2018, 2019 or 2020 and ensures that new lists must then be compiled every five years thereafter.

- Clause 27 creates a new employment status of employee shareholder in order to increase the range of employment options companies may use as they grow and adapt their workforce.

TERRITORIAL EXTENT AND APPLICATION

Territorial extent

10. This is largely an amending piece of legislation, with the amendments having the same extent as the provisions they amend. The exception to this general rule in relation to amendments is clause 23, which modifies the application of the special parliamentary procedure in certain cases. The existing provisions in the Statutory Orders (Special Procedure) Act 1945 extend to England and Wales, Scotland and (for certain purposes) Northern Ireland. The amendments made in that Act by clause 23 only extend to England and Wales, and Scotland.

11. The majority of the provisions extend to England and Wales.

12. The following provisions also extend to Scotland. Clause 16 relates to section 14 of the Energy Act 1976 (fuelling of new and converted power stations). Clause 8(7) amends the National Parks (Scotland) Act, which extends only to Scotland. Although the amendments affect a devolved matter, they are incidental to a reserved matter. Clause 17 relates to conditions on licences made under section 7B of the Gas Act 1986. Clauses 18 and 19 make provision about consents granted under section 36 of the Electricity Act 1989 and deemed planning permission granted under section 57 of the Town and Country Planning (Scotland) Act 1997 as well as section 90 of the Town and Country Planning Act 1990. Clause 20 amends the Planning Act 2008 in relation to consents under regimes superseded by that Act. Clause 21 relates to sections 128 to 132 of Planning Act 2008, amending the application of the special parliamentary procedure to the development consent regime. Clause 27 relates to certain employment rights. All of these provisions, with the exception of the provisions in clause 19 amending the Town and Country Planning (Scotland) Act 1997, relate to

matters that are reserved in relation to Scotland, although clause 18 touches on functions of the Scottish Ministers in relation to reserved matters.

13. On being brought forward from the House of Commons, this Bill contains provisions that trigger the Sewel Convention. As discussed in the previous paragraph, these provisions relate to functions under the Electricity Act 1989 and to deemed planning permission. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. If there are amendments relating to such matters with trigger the Convention, the consent of the Scottish Parliament will be sought for them.

14. Clause 8(1) and (9) relate to section 109 of the Communications Act 2003 (restrictions and conditions subject to which the electronic communications code applies). Clause 8(1) and (9) also extend to Scotland and Northern Ireland and relate to matters that are reserved in relation to each of Scotland and Northern Ireland. Clause 8(3) amends the Nature Conservation and Amenity Lands (Northern Ireland) Order 1985, which extends only to Northern Ireland. Although the amendments affect a transferred matter, they are incidental to the reserved matter.

15. Clauses 12 and 15 contain provisions which, in addition to amending the law applicable to England, simply restate the existing law applicable to Wales.

Territorial application

16. Most of the provisions in this Bill apply to England only. Those provisions that apply beyond England are detailed below.

17. Clause 8 is designed to facilitate the provision of communications infrastructure. It makes provision in relation to section 109 of the Communications Act 2003, which relates to the electronic communications code. These provisions also apply to Wales, Scotland and Northern Ireland, and are dealt with in subsections (1) and (9) of the clause.

18. Clause 8 also makes provision in relation to section 11A of the National Parks and Access to the Countryside Act 1949, and section 85 of the Countryside and Rights of Way Act 2000. Both of these provisions also apply to Wales. Clause 8 also makes amendments to the Nature Conservation and Amenity Lands (Northern Ireland) Order 1985, which applies only to Northern Ireland, and to Section 14 of the National Parks (Scotland) Act 2000, which applies only to Scotland.

19. The following provisions also apply in relation to Wales and Scotland. Clause 16 relates to section 14 of the Energy Act 1976 (fuelling of new and converted power stations). Clause 17 relates to conditions on licences made under section 7B of the Gas Act 1986. Clause 18 relates to consents granted under section 36 of the Electricity Act

1989. Clause 19(1) to (3) make amendments in the Town and Country Planning Act 1990 which are linked to clause 18 and apply also to Wales, and clause 19(4) to (6) make and apply only to Scotland. Clause 20 amends the Planning Act in relation to variations and replacements of pre-Planning Act consents. Clause 21 amends provisions of the Planning Act 2008 relating to statutory undertakers' land. Clause 22 relates to sections 128 to 132 of Planning Act 2008, amending the application of the special parliamentary procedure to the development consent regime. That regime applies to Scotland only in connection with cross-border pipelines. Clause 27 relates to certain employment rights.

COMMENTARY ON CLAUSES

Part 1: Promoting growth and facilitating provisions of infrastructure, and related matters

1 Option to make planning application directly to the Secretary of State

20. This clause amends the Town and Country Planning Act 1990 ("the 1990 Act") by inserting a new section 62A.

21. Section 62A allows a planning application, an application for reserved matters consent and certain connected applications to be made directly to the Secretary of State, where the local planning authority has been designated by him. New section 62A(8) requires the Secretary of State to publish the criteria to be used in making any such designation and to publish any designation made. The 'connected applications' would include applications for listed building or conservation area consent and other applications under the planning Acts that the Secretary of State may prescribe in regulations.

22. Schedule 1 makes consequential amendments, in particular, it–

- Amends section 2A of the 1990 Act to allow the Mayor of London to continue to 'call in' planning applications of strategic significance where they have been submitted direct to the Secretary of State, rather than to a planning authority within Greater London.

- Inserts a new section 76C into the 1990 Act which allows applications submitted direct to the Secretary of State to be subject to the same procedural provisions (set out in a development order) as apply to applications made to a local planning authority.

- Inserts a new section 76D into the 1990 Act which allows for a person to be appointed to determine on the Secretary of State's behalf those applications that are submitted direct (in practice, the intention is to allow the Planning Inspectorate to determine the majority of such decisions on behalf of the Secretary of State).

- Inserts a new section 76E into the 1990 Act which allows the Secretary of State to 'recover' for decision any case that would otherwise be determined by an appointed person; the intention being that the Secretary of State should be able to determine any cases that raise issues of national importance.

- Amends the 1990 Act to give the Secretary of State the power to decline to determine applications of a similar nature to those recently refused, or which are similar to ones currently being considered (mirroring the powers available to local planning authorities).

- Amends the 1990 Act to provide that the right of appeal to the Secretary of State, against non-determination of an application within prescribed time limits, does not apply to applications that are submitted direct. Section 78(1) of the 1990 Act already limits the right of appeal against a refusal of permission to applications submitted to a local planning authority. Taken together, these provisions mean that there would be no right of appeal to the Secretary of State where an application is submitted direct to him (but, as a result of the amendment of section 284(3) of the 1990 Act, any decision on the application can be challenged in the High Court).

- Amends the 1990 Act to allow the Secretary of State to make regulations through which a fee may be charged for direct submission of a planning application, or for the provision of pre-application advice (as local planning authorities may do already).

2 Planning proceedings: costs

23. Clause 2 broadens the powers of the Secretary of State to award costs between the parties at planning appeals, and to recover the Secretary of State's own costs from the parties. It is an enabling measure that builds on existing powers to ensure that the Secretary of State may recover costs in full or in part, in respect of all appeal procedures, and where an inquiry is arranged but does not take place.

24. In practice, costs powers are usually exercised by Inspectors in the Planning Inspectorate (PINS), who are appointed under Schedule 6 to the Town and Country Planning Act 1990 to determine planning appeals on behalf of the Secretary of State.

25. Subsection (1) clarifies that costs may be recovered in part, as well as in full, following an appeal held at inquiry. It amends section 250(4) of the Local Government Act 1972 as it applies to planning appeals conducted as a local inquiry under section 320 of the Town and Country Planning Act 1990. Section 250(4) enables the Secretary of State to recover "the costs incurred by him in relation to the inquiry". This amendment clarifies that a portion of the costs incurred by the Secretary of State may be recovered, not just the whole costs as section 250(4) currently implies.

26. Subsection (2) clarifies that costs may be recovered in part as well as in full following an appeal held by another procedure, such as a hearing or written representations. It amends section 322 of the Town and Country Planning Act 1990 (which deals with costs awards between parties) to apply section 250(4), with the same amendment as in subsection (1), to planning appeals which are not conducted as an inquiry, i.e. to appeals dealt with at a hearing or by way of written representations. This allows the Secretary of State to recover his own costs, or a portion of those costs, at all planning appeals, not just at inquiries as currently. New subsection (1D) applies section 42 of the Housing and Planning Act 1986 to hearings and written representations. Section 42 is an existing power which currently applies only to inquiries; it sets out the sorts of costs which may be recovered by the Secretary of State.

27. Subsection (3) clarifies that costs may be recovered in full or in part even when the inquiry or hearing does not take place. It makes similar amendments to section 322A of the Town and Country Planning Act 1990 (which deals with costs awards between parties) to ensure that the power of the Secretary of State to recover his own costs extends to situations where an inquiry or hearing has been arranged, but does not take place. This power could be used, for example, to recover from the responsible party wasted costs associated with arrangements for an inquiry or hearing which is cancelled at short notice.

28. Subsection (4) ensures that arrangements are in place with regard to appeals in London by amending section 322B of the Town and Country Planning Act 1990 in a similar way to subsection (1) to clarify that a portion of the Secretary of State's own costs may be recovered at local inquiries in London.

29. Subsection (5) amends an existing power at section 323 of the Town and Country Planning Act 1990 to make regulations setting out the procedures to be followed at planning appeals conducted by written representations. Section 323 already enables procedures about costs to be made, and the amendment enables those procedures to set out the circumstances in which costs may be awarded between parties or recovered from the parties by the Secretary of State. This power would enable provision to be made about the criteria for awarding or recovering costs – for example, types of behaviour by parties which might result in costs being awarded or recovered.

30. Subsection (6) makes similar amendments to subsection (5), but to an existing power at section 9 of the Tribunals and Inquiries Act 1992 which is used to make procedures for planning appeals conducted as an inquiry or hearing. This power would enable provision to be made about the criteria for awarding or recovering costs, for example, what behaviour or actions by parties might result in costs being awarded or recovered.

31. Subsection (7) amends the Secretary of State's power, under Schedule 6 to the Town and Country Planning Act 1990, to appoint persons to determine planning appeals and matters connected with planning appeals. This is the power under which PINS Inspectors are appointed. New sub-paragraph (11) enables connected matters, such as costs, to be dealt with directly by the Secretary of State rather than by a PINS Inspector. In practice, such matters are likely to be dealt with by officials acting on behalf of the Secretary of State under the Carltona doctrine.

3 Compulsory purchase inquires: costs

32. This clause broadens the powers of the Secretary of State to award costs between the parties at compulsory purchase order inquiries. These inquiries are generally conducted on behalf of the Secretary of State by Inspectors in the Planning Inspectorate (PINS). The clause adds a new subsection (4) to section 5 of the Acquisition of Land Act 1981. Section 5 applies section 250(5) of the Local Government Act 1972 to inquiries set up by Ministers to hear objections to compulsory purchase of land by public authorities. Section 250(5) allows costs to be awarded between the parties at the inquiry. New subsection (4) of section 5 of the 1981 Act provides that where an inquiry is held as referred to in section 5(3)(a) and (b), section 250(5) of the Local Government Act 1972 also applies to allow the Secretary of State to award costs where an inquiry is cancelled, or where a party does not appear at an inquiry.

4 Permitted development rights for changes of use: prior approvals

33. Clause 4(1) amends section 60 of the Town and Country Planning Act 1990. Section 60(1) provides that planning permission granted by a development order may be granted unconditionally or subject to such conditions or limitations as may be specified in the order. Section 60(2) enables development orders for physical development to require the approval of the local planning authority with respect to the design or external appearance of the buildings. Clause 4(1) inserts a new subsection (2A) which provides that where planning permission is granted for development which is change of use the order may specify matters that relate to the new use for which the approval of the local planning authority or the Secretary of State may be required. For example, in relation to a change of use which might generate extra traffic and be noisier than the existing use, the local planning authority may be given the opportunity to approve a transport strategy prepared by the developer, and a plan to address noise impacts.

34. Clause 4(2) provides that a local planning authority can decline to determine repeat applications for approvals.

5 Limits on power to require information with planning applications

35. Clause 5 introduces a new provision into section 62 of the Town and Country Planning Act 1990 which introduces limits on local planning authorities' power to require information with planning applications. The limits are defined as: 1) information requests must be reasonable having regard to the nature and scale of the proposed development, and 2) it being reasonable to think that the subject-matter of the information will be a material consideration in the determination of the application in question.

6 Modification or discharge of affordable housing requirements

36. This clause inserts two new sections into the Town and Country Planning Act 1990. It also contains the power to repeal those sections by order.

New section 106BA – Modification or discharge of affordable housing requirements

37. This section provides for an application to vary an "affordable housing requirement" contained in a planning obligation, and defines that term for these purposes. The Secretary of State has the power to amend that definition by order, subject to the affirmative procedure. Special provision is made in relation to a first application made under this section. If, on a first application, the affordable housing requirement makes development of the site economically unviable, the authority must modify or remove it so as to make it viable. The authority can not make the revised obligation more onerous than the original obligation.

38. In relation to a second or subsequent application, the authority has more flexibility in amending the affordable housing requirement. However, they cannot amend the requirement so as to make the relevant development economically unviable.

39. This section makes provision for regulations to prescribe procedural matters linked to these applications, and requires the local planning authority to have regard to guidance issued by the Secretary of State. It also provides for a default provision that the authority must give the applicant notice of their determination within 28 days if no regulations have been made about the length of the determination period.

New section 106BB

40. This section provides for an appeal to the Secretary of State in relation to applications made under section 106BA. An appeal can be made if the appropriate authority does

not modify the planning obligation as requested, or fails to make a determination within a specified time. Such appeals are generally to be handled by the Planning Inspectorate on behalf of the Secretary of State.

41. The special provision in section 106BA in relation to first applications also applies in relation to appeals. It will apply where a first application is appealed to the Secretary of State. It does not apply to an appeal in relation to a second or subsequent application, whether or not it is the first appeal.

42. Where an appeal made under this section is successful, the modifications made by the Secretary of State only last for three years. The modified planning obligation must contain provision to ensure that if development is to continue past that time, the original affordable housing requirements are reverted to. In this context, the original affordable housing requirements are those contained in the planning obligation before the first application under section 106BA was made in relation to it. The Secretary of State must vary the original requirements to ensure that they will be effective, and will not apply to that part of the development that is commenced in the three year period. This reversion provision can be removed through negotiation with the local planning authority on a voluntary basis or through a formal application under section 106A or 106BA, or on appeal. If it is removed on appeal under section 106BB, it must be replaced with a new reversion provision along the same lines.

43. As with section 106BA, this section provides for regulations to prescribe procedural matters linked to these appeals. It also contains a default provision that appeals must be made within 6 months if no regulations have been made about the time limit for appeals.

Schedule 2

44. Schedule 2 makes related amendments. These include:

- Amendments to section 5(3) of the Town and Country Planning Act 1990 to make the Broads Authority the sole district planning authority for these purposes.

- Amendments to section 106C of the Town and Country Planning Act 1990 to provide for a legal challenge where decisions are made under section 106BA by the Secretary of State. In particular, the amendments provide for legal challenge where a planning obligation is modified otherwise than in accordance with the application.

- Amendments to Schedule 6 to the Town and Country Planning Act 1990 to ensure that appeals made under section 106BB can be determined by the Planning Inspectorate on behalf of the Secretary of State.

7 Disposals of land held for planning purposes

45. This clause amends section 233 of the Town and Country Planning Act 1990 (disposal by local authorities of land held for planning purposes) by providing for the Secretary of State to grant general consent for disposals as well as specific consent upon receipt of an application from a local authority.

46. Subsection (2) enables the Secretary of State to give consent generally for the disposal of land at less than the best consideration reasonably obtainable. Such consent may be granted:

    a) For any particular disposal or disposals, or in relation to a particular class of disposals;
    b) To local authorities generally, or to local authorities of a particular class, or to any particular local authority or authorities, and
    c) either unconditionally or subject to conditions (either generally or in relation to any particular disposal or disposals or class of disposals).

47. Subsection (3) applies the protection for purchasers in respect of certain land transactions contained in section 128(2) of the Local Government Act 1972 (c. 70) to all purchasers of land disposed of by local authorities under section 233 of the Town and Country Planning Act 1990. At present, section 128(2) applies to some purchases under section 233 but not to all purchases under section 233. Such transactions will not be void where a local authority has failed to obtain the relevant consent and a prospective purchaser will not have to enquire whether the disposing local authority has obtained the necessary consent. Section 29 of the Town and Country Planning Act 1959 also provides protection to purchasers of land from local authorities in certain circumstances.

8 Electronic communications code: the need to promote growth

48. Section 109 (1) of the Communications Act 2003 ("2003 Act") gives the Secretary of State power to make regulations imposing conditions and restrictions on the application of the electronic communications code (under section 106) to network operators. Section 109(2) sets out a list of considerations to which the Secretary of State must have regard in exercising the power to make regulations under section 109(1). Subsection (1) of the clause adds to that list the need to promote economic growth.

49. Subsections (2) to (4), and (6) and (7) of the clause remove the making of regulations under:

a) section 109 of the 2003 Act from the scope of duties owed under section 85 of the Countryside and Rights of Way Act 2000 (relating to areas of outstanding natural beauty in England and Wales),
b) section 11A of the National Parks and Access to the Countryside Act 1949 (relating to National Parks in England and Wales),
c) section 17A of the Norfolk and Suffolk Broads Act 1988 (relating to the Broads),
d) Article 4 of the Nature Conservation and Amenity Lands (Northern Ireland) Order 1985 (relating to areas of outstanding natural beauty in Northern Ireland)
e) and section 14 of the National Parks (Scotland) Act 2000 (relating to National Parks in Scotland).

50. Subsection (5) removes electronic code operators from the meaning of "statutory undertakers" in the 1988 Act, such that they will not be subject to the duty to have regards to Broads purposes when exercising their function so as to affect land in the Broads. These provisions are subject to a sunset date of 6 April 2018.

51. Subsection (9) provides for consultation in advance of commencement to count as if it were undertaken later for the purposes of making regulations under section 109.

9 Periodic review of mineral planning permissions

52. This clause of the Bill together with Schedule 3 changes the current regime of reviews of minerals planning permissions to give mineral planning authorities in England greater local discretion over whether reviews are required and when they take place.

53. Schedule 14 to the Environment Act 1995 requires mineral planning authorities in England and Wales to cause periodic reviews of the mineral permissions relating to mining sites in their areas to be carried out. Schedule 14 makes separate provision for the first periodic review (Paragraph 3) and any second or subsequent periodic review (Paragraph 12). In each case, the review date is the date falling 15 years after the conditions to which the site's mineral permissions were last determined.

54. This clause of the Bill gives effect to Schedule 3, which would amend Schedule 14 to the 1995 Act. The amendments would give mineral planning authorities in England discretion as to whether to cause a periodic review to be carried out in any case and to set a review date. The review date may not be earlier than the date found under paragraph 3 (in the case of a first periodic review) or paragraph 12 (in the case of a second or subsequent periodic review). These changes do not apply to Wales.

10 Stopping up and diversion of highways

55. This clause amends section 253 of the Town and Country Planning Act 1990. A stopping up order extinguishes the public right to pass and re-pass over the land in question. This enables development to be carried out on the land. A diversion generally also involves a stopping up together with the creation of a new highway. The effect of the clause is to enable a draft order for stopping up or diversion of highways to be published in draft at the planning application stage. At present, in the majority of cases, the applicant must wait until planning permission has been granted before he can apply for a stopping up or diversion order. This clause applies to England only and retains the current provisions for Wales.

11 Stopping up and diversion of public paths

56. This clause amends section 257 of the Town and Country Planning Act 1990. This currently enables an order authorising the stopping up or diversion of footpaths (and certain other paths) where this is necessary in order to enable development to be carried out in accordance with planning permission (or by a government department). The amendment enables an order stopping up or diverting a public path to be made in anticipation of planning permission. The clause also amends section 259 of that Act so that the competent authority or Secretary of State may not confirm a stopping up or diversion order until planning permission has actually been granted. It also amends section 259 of that Act so that the competent authority may not confirm an order unless it is satisfied that it is necessary to enable the development to be carried out. This clause applies to England only.

12 Declarations negativing intention to dedicate way as highway

57. Section 31(6) of the Highways Act 1980 allows for a landowner to deposit a map and statement with the highway authority, showing admitted public paths, followed by a declaration that the landowner has no intention to allow any other part of the land to become subject to a public right of way. The role of the statement is to provide a date from which to reference the lack of intention to dedicate (evidenced by the declaration) and to identify the land in respect of which the deposit is being made.

58. This clause amends section 31(6) to allow the Secretary of State to make regulations prescribing: (i) the form of such statements, maps and declarations with the aim of minimising the administrative burden on landowners who wish to make such statements at the same time as statements are made to protect land from registration as a town or village green under clause 13; and (ii) fees to be levied in relation to the deposit of a map and statement and the lodging of a declaration (including for a fee payable under the regulations to be determined by the appropriate council).

59. Clause 12 allows the Secretary of State to prescribe in regulations the steps an appropriate council must take in relation to a map, statement, or declaration deposited with it, as well as the manner and period in which such steps must be completed.

Clause 12 also amends section 31(6) to extend the period for renewing declarations from ten to twenty years and, consequential to this, omits paragraph 3 of Schedule 6 to the Countryside and Rights of Way Act 2000. Clause 12 contains a restatement of the existing law applicable to Wales. It does not amend the law applicable to Wales.

13 Registration of town or village green: statement by owner

60. Applications can be made under section 15(1) of the Commons Act 2006 to register land as a town or village green, broadly, where the land has been used 'as of right' for lawful sports and pastimes by a significant number of the people in the local community for at least twenty years. Use 'as of right' means without force, secrecy or permission, the rationale being that a landowner must be in a position to know that a right is being asserted and acquiesce in the assertion of the right.

61. This clause inserts a new section 15A in the Commons Act 2006 which allows an owner of land in England (as defined in section 61(3) of the Commons Act 2006) to deposit a statement and map with the commons registration authority, the effect of which is to bring to an end any period of use as of right for lawful sports and pastimes on the land to which the statement relates. The form of the statement and map will be prescribed by regulations which can provide for the statement to be combined with a statement or declaration made to counter rights of way claims under section 31(6) of the Highways Act 1980. Regulations may provide for the statement to refer to a map deposited under section 31(6) of the Highways Act 1980. The aim is to reduce the administrative burden on landowners who, for example, wish to make statements or declarations for both purposes at the same time.

62. Where the requisite period of twenty years' use as of right has already accrued by the time the deposit of the statement and map takes place, an application for registration of the land as a town or village green can still be made within a period of two years from the date of the deposit in reliance on section 15(3) of the Commons Act 2006.

63. The deposit of the statement and map will not prevent commencement of a new period of recreational use as of right, but an owner of land may deposit subsequent statements in order to interrupt future periods of use.

64. The Secretary of State has the power to prescribe in regulations the steps a commons registration authority must take in relation to a statement and map deposited with it, as well as the manner and period in which such steps must be completed. An example of how this power may be used is to require a commons registration authority to give notice of the deposit of a statement and map, in order to make the local community aware that any recreational use of the land as of right has been interrupted and has triggered the operation of the grace period for an application to be made in reliance on section 15(3) of the Commons Act 2006 (in cases where the criteria for registration have been satisfied).

65. Subsection (5) of new section 15A allows a landowner to make a statement referring to a map which accompanied an earlier statement, whether the landowner is the same person that deposited the earlier statement or not. For example a successor in title may wish to treat a map provided with a statement deposited by the previous landowner as accompanying his later statement.

66. The Secretary of State may make regulations prescribing the fees payable in relation to the depositing of a statement and when a statement is to be regarded as having been deposited with the commons registration authority.

67. Any straddling agreement made under section 4(3) of the Commons Act 2006 or section 2(2) of the Commons Registration Act 1965 which has the effect of requiring an owner of land in England to deposit a statement with a registration authority in Wales, is disregarded to avoid imposing new burdens on Welsh registration authorities.

68. This clause also inserts a new section 15B in the Commons Act 2006 which requires each commons registration authority to keep a register containing prescribed information about statements and maps deposited with that authority. Such information may be included in a register maintained by the authority under section 31A of the Highways Act 1980 and regulations may make provision for the creation of a new part in such register for that purpose.

14 Restrictions on right to register land as town or village green

69. This clause inserts a new section 15C into the Commons Act 2006, the effect of which is to exclude the right to apply under section 15(1) of the Commons Act 2006 for registration of land in England to which Part 1 of the Act applies as a town or village green if any of the trigger events specified in the first column of the Table set out in Schedule 1A occur. The right to apply under section 15(1) becomes exercisable again only where one of the terminating events specified in the Table set out in Schedule 1A occurs against its corresponding trigger event. The exclusion of the right to apply does not affect the accrual of any period of user as of right or prevent any such user ceasing to be as of right.

70. The Secretary of State may by order make provision as to when a trigger event or terminating event is treated as having occurred for the purpose of the exclusion under section 15C and define circumstances in which the exclusion will not apply. The Secretary of State may also by order insert additional trigger or terminating events, or amend or omit any trigger or terminating events for the time being specified in Schedule 1A. He may make provision for the provisions of the clause to apply to additional trigger or terminating events where these have occurred before the date on which the order is made or comes into force. Any additional trigger or terminating

event specified must be an event related to the development (whether past, present or future) of the land.

71. If an application for registration of land as a town or village green is made in reliance of section 15(3) (i.e. where use of the land as of right ceased before the application was submitted), any period during which the exclusion in new section 15C applies is disregarded for the purpose of calculating the period of two years in section 15(3)(c) in which an application must be made. The operation of this grace period is suspended while the exclusion is in place. For example, if use of the land ceased and the exclusion in new section 15C applied a year later and continued to apply for one year, an application for registration of the land as a town or village green could be made under section 15(1) (in reliance on section 15(3)) within the period of a year after the date on which a terminating event occurred causing the exclusion to lift.

72. For the purpose of the exclusion in new section 15C it does not matter whether a trigger event occurred before or after the commencement of clause 14. For example, land subject to a planning application which had been advertised before commencement of clause 14 will trigger the exclusion in new section 15C. However, under clause 14, the exclusion in new section 15C does not apply in relation to an application which is sent before the day on which clause 14 comes into force. Where an application pertains to a site which is partly subject to the exclusion and partly not, the commons registration authority should proceed to determine the application in respect of the part which is not subject to the exclusion.

15 Applications to amend registers: modification of power to provide for fees

73. This clause amends in relation to England the power in section 24(2)(d) of the Commons Act 2006 to charge fees for applications made under Part 1 of that Act which amend a register of common land or a register of town or village greens. The revised power allows the Secretary of State to make provision in regulations for fees payable in relation to an application, in particular provision for a fee payable to be determined by the person to whom an application is made or (if different) the body by whom the application is to be determined. The aim of this clause is to allow for greater flexibility and targeting of fees – subject to secondary legislation and Parliamentary scrutiny - for example in circumstances where an application is made to the commons registration authority but referred to the Planning Inspectorate. The power as it applies to Wales is restated but is unchanged.

Part ***2: Other infrastructure provisions***

16 Power stations: repeal of requirements to give notice

74. Clause 16 repeals section 14 of the Energy Act 1976 and has the effect of revoking the two orders made under it, namely the Electricity Generating Stations (Fuel Control) Order 1987 (1987/2175) and the Electricity Generating Stations (Gas Contracts) Order 1995 (1995/2450). Section 14 of the Energy Act 1976 implemented European Council Directive 75/404/EEC of 13 February 1975 on the restriction of the use of natural gas in power stations and Council Directive 75/405/EEC of 14 April 1975 concerning the restriction of the use of petroleum products in power stations.

75. Both Directives have since been repealed (EC/75/404 in 1991 and EC/75/405 in 1997) and the policy objectives behind section 14 (arising in response to market conditions for gas and petroleum products in the 1970s) no longer exist. Generating stations of 50 megawatts or greater are exempt by section 33(1)(e) of the Planning Act 2008. Section 14 of the Energy Act 1976 and the two orders (referred to above) therefore no longer have practical application in Great Britain.

17 Conditions of licences under Gas Act 1986: payments to other licence-holders

76. Clause 17 amends section 7B of the Gas Act 1986, specifically subsection (5)(b)(ii). Section 7B was inserted by the Gas Act 1995, and has subsequently been amended by the Utilities Act 2000. The purpose of Clause 17 is to clarify that conditions included in a licence granted under section 7 may require such a licensee to increase his charges for the conveyance of gas and to pay the amounts so raised to holders of any licences under the Gas Act 1986 (not just gas shippers or suppliers).

77. The legislation as currently drafted lacks transparency, as section 7B(5)(b)(ii) (prior to amendment) states that such licence conditions may require the licensee to increase his charges for the conveyance of gas and to pay the amounts so raised to holders of licences under section 7A of the Gas Act 1986 (gas shippers or suppliers), although this is expressed to be without prejudice to the Authority's general power to include licence conditions under section 7B(4) of the Gas Act 1986.

78. The amendment in Clause 17 puts the issue beyond doubt and allows for the proposed gas Network Innovation Competition, and other policies requiring gas transporters to pay monies raised to other licensees other than gas shippers or suppliers, to proceed on a clear statutory footing.

18 Variation of consents under Electricity Act 1989

79. Under section 36 of the Electricity Act 1989, consent is required for the construction, operation or extension of certain electricity generating stations. Depending on the location of the proposed development, these consents are granted by the Secretary of State, the Marine Management Organisation (MMO) or Scottish Ministers. At present, if the developer's plans regarding aspects of their proposals which have been

specifically referenced in the s. 36 consent change, they may find themselves unable to proceed. Because it is not currently possible to vary s. 36 consents, this can lead to a situation where the terms of the consent prevent construction from proceeding, even along lines which may be more efficient or environmentally beneficial.

80. The provision is intended to put holders of section 36 consents in the same position as holders of development consent orders made under the Planning Act 2008, which can be varied by the relevant Secretaries of State to take account of, for example, changes in technology and design, by giving the Secretary of State, Scottish Ministers and the MMO equivalent powers to amend section 36 consents.

81. Clause 18 inserts a new section 36C into the Electricity Act 1989. The power to vary section 36 consents, exercisable on the application of the person for the time being entitled to the benefit of such a consent, is set out in subsection (4) of the new section 36C along with the matters that the authority exercising the power must have regard to before exercising it. Subsections (2), (3) and (5) of the new section 36C indicate the scope of regulations which may be made about the procedural aspects of applications for variation. The definition of "the appropriate authority" in subsection (6) of the new section 36C indicates in which cases the power will be exercisable by each of the authorities concerned.

19 Consents under Electricity Act 1989: deemed planning permission

82. When a consent is granted under s. 36 of the Electricity Act 1989 by the Secretary of State, section 90(2) of the Town and Country Planning Act 1990 enables the Secretary of State to direct that planning permission be deemed to be granted in respect of any operation or change of use in respect of which the consent is granted (or any ancillary development) and which constitutes development within the meaning of the 1990 Act. This relieves the developer of the need to make a separate application for planning permission to the relevant local planning authority. Deemed planning permission may also be granted on the same basis in respect of electric lines above ground to which consent is given under s. 37 of the 1989 Act. Similar provision is made in s. 57(2) of the Town and Country Planning (Scotland) Act 1997 for Scotland.

83. Clause 19 inserts a new section 90(2) and (2ZA) into the 1990 Act, allowing the Secretary of State to make directions in relation to deemed planning permission when either the new power to vary s. 36 consents under new section 36C of the 1989 Act or the existing power to vary s. 37 consents (see section 37(3)(b)) is exercised. This power is exercisable in respect of England and Wales (as defined in proposed new section 90(6), inserted by subsection (3)) to include certain offshore areas. The directions can either vary an existing deemed planning permission or deem a new planning permission to be granted. In addition, a direction can be given for an approval given under an existing deemed planning permission to be treated as given under a new or varied planning permission. Subsections (4) to (6) amend section 57

of the Town and Country Planning (Scotland) Act 1997 to give Scottish Ministers powers equivalent to those conferred on the Secretary of State for England and Wales (as defined) in the amended section 90.

20 Variation and replacement of pre-Planning Act 2008 consents

84. Clause 20 inserts a new section, section 237A, into the Planning Act 2008. Part 4 of the Planning Act 2008 (Commencement No 4 and Saving) Order 2010 states: "the provisions of the Act brought into force by this Order shall have no effect in relation to an application made before 1st March 2010 for any such consent or authorisation as is mentioned in section 33 of the Act." The aim of this saving provision is to ensure that a number of projects which were the subject of applications under pre-Planning Act consent regimes but were yet to be determined could continue to be considered under the relevant pre-Planning Act legislation, and, if appropriate, granted consent under that legislation, without the need to go through a separate and additional process of applying for consent under the Planning Act. However, the way that it is expressed has been taken by some to mean that if a developer applied for a consent under pre-existing legislation prior to 1 March 2010, but the consent was subsequently varied, or replaced by a new consent, and the application that gave rise to that variation or replacement was made after 1 March 2010, the variation/replacement would fall outside the scope of the saving provision, meaning that the change to the project would require development consent under the Planning Act, thereby negating the intent of clauses 18 &19 above. This was not what was intended. Clause 20 aims to clarify the position as regards projects with pre-planning Act consent that have been changed.

85. Subsection (1) of clause 20 inserts the new section 237A transitional provision.

86. Subsections (1) and (7) of section 237A indicate that section 237A applies in relation to consents of the various types listed in section 33 of the Planning Act, which were originally applied for before 1 March 2010 ("section 33 consents").

87. Subsections (3), (4) and (6) indicate the kinds of variation and replacement of section 33 consents to which the main operative provision of the new section 237A (subsection (5)) applies, excluding the requirement for development consent under section 31 of the Planning Act that would otherwise apply in such cases. Only certain types of "replacement" consents (as defined in subsection (6)) benefit from the transitional provision, and both variations and replacements must relate to "remaining development" (as defined in subsection (4)).

88. Subsection (2) of clause 20 provides that new section 237A has retrospective effect, in order to ensure that developments whose section 33 consents were varied or replaced between 1 March 2010 and the coming into force of new section 237A have the benefit of the new transitional provision.

Clause 21 Removal of Planning Act 2008 consent and certification requirements

89. Clause 21 removes the need for three separate certification and consent procedures. These issues can be dealt with as part of the examination process for an application for development consent.

90. Subsection (2) removes the requirement at section 127 of the Planning Act 2008 for the Secretary of State to issue a certificate in certain prescribed circumstances before a development consent order can authorise the compulsory acquisition of statutory undertakers' land or rights over their land. The amended section requires the Secretary of State to be satisfied about the effect on statutory undertakers before making a development consent order in these circumstances.

91. Subsection (3) removes the requirement at section 137 of the Planning Act 2008 for the consent of the statutory undertaker or operator where the development consent order provides for the acquisition of land and which authorises the extinguishment or diversion of a public right of way for non-vehicular traffic over land on which there is statutory undertakers' apparatus or electronic communications apparatus.

92. Subsection (4) removes the requirement at section 138 of the Planning Act 2008 for the Secretary of State to provide his consent in circumstances where a development consent order authorises the acquisition of land falling into one or more of two categories: land on which a statutory undertaker has erected apparatus or where electronic communications apparatus is kept installed; and land in respect of which a statutory undertaker or electronic communications code network operator has a right of way, or a right of laying down, erecting, continuing or maintaining apparatus on, under or over the land. The amended section enables a development consent order to remove such apparatus or extinguish such rights only where the Secretary of State is satisfied that the extinguishment or removal is necessary for the purpose of carrying out the development.

22 Special parliamentary procedure in cases under the Planning Act 2008

93. Clause 22 repeals sections 128 and 129 of the Planning Act 2008. Section 128 requires that in specified circumstances an order granting development consent which authorises compulsory acquisition of land of a local authority or statutory undertaker must be subject to special parliamentary procedure. Section 129 disapplies section 128 where the authority compulsorily acquiring land is one of a number of specified bodies.

94. The clause amends sections 131 and 132 of the Planning Act 2008. These sections currently make provision for special parliamentary procedure to apply to an order authorising compulsory acquisition of, or compulsory acquisition of rights over, common land, open spaces, or fuel or field garden allotments. In both cases, where the Secretary of State is satisfied that one of a number of prescribed circumstances apply, the Secretary of State may issue a certificate disapplying this requirement. If the Secretary of State proposes to issue such a certificate then he must give notice of this proposal (or direct the applicant to do so) and give interested persons an opportunity to make representations, and may cause a public local inquiry to be held. If the Secretary of State gives a certificate, he must publish a notice of this in a local newspaper or direct the applicant to do so. The clause removes the requirement for the Secretary of State to issue a certificate where satisfied that one of the circumstances prescribed in the section is applicable, and removes the accompanying procedural requirements. Instead, if the Secretary of State is satisfied that one of these circumstances applies, this fact must be recorded in the development consent order itself.

95. The clause also makes further amendments to sections 131 and 132 of the Planning Act 2008 to insert additional circumstances in which the Secretary of State can provide that an order granting development consent shall not be subject to special parliamentary procedure where open space land or a right over open space land is compulsorily acquired. Where open space land or a right over open space land is compulsory acquired, the Secretary of State will be able to provide that the relevant order will not be subject to special parliamentary procedure where exchange land is not available or is available only at a prohibitive cost, and it is strongly in the public interest for the development to proceed sooner than would be likely if special parliamentary procedure were to apply. The Secretary of State will also be able to provide that an order authorising the acquisition of open space land, or rights over such land, will not be subject to special parliamentary procedure if the land or right over land is acquired for a temporary purpose, even if this purpose is long-lived.

96. Furthermore, to ensure that section 130 (special parliamentary procedure where a development consent order authorises compulsory purchase of inalienable National Trust land despite the Trust's objections) continues to apply where the land in question is open space land, provision is made so that this section applies to the exclusion of sections 131 and 132.

97. Any amendment or repeal made by clause 22 apply to any order granting development consent made after the amendment or repeal come into force.

23 Modifications of special parliamentary procedure in certain cases

98. Clause 23 removes an inconsistency between the Planning Act 2008 ("the 2008 Act") and the Statutory Orders (Special Procedure) Act 1945 ("the 1945 Act"), and similar inconsistencies between certain other provisions providing for the compulsory

acquisition of land and the 1945 Act. It amends the 1945 Act so that in circumstances where an order under one of the specified provisions authorises the compulsory acquisition of certain types of land ("special land") and is subject to special parliamentary procedure, the order can only be the subject of petitions and be considered by Parliament insofar as it authorises the acquisition of special land.

99. The clause achieves this by amending the Statutory Orders (Special Procedure) Act 1945 so that:

a) sections 130, 131 or 132 of the 2008 Act (under which a development consent order under that Act may be subject to special parliamentary procedure);
b) sections 17, 18 or 19 of the 1981 Act (under which a compulsory purchase order under that Act may be subject to special parliamentary procedure);
c) paragraph 22 of Schedule 3 to the Harbours Act 1964 (under which a harbour revision or empowerment order under that Act may be subject to special parliamentary procedure);
d) paragraph 12 or 13 of Schedule 4 to the New Towns Act 1981 (under which an order under that Act authorising the acquisition of local authority land, inalienable National Trust land or land forming part of a common, open space or fuel or field garden allotment may be subject to special parliamentary procedure); and,
e) section 12 of the Transport and Works Act 1992 (under which an order under that Act may be subject to special parliamentary procedure)

are to be known under the 1945 Act as "special-acquisition provisions".

100. The clause then modifies the effect of the 1945 Act in respect of special acquisition provisions. New subsection 1A of that Act provides, where an order is subject to special parliamentary procedure under a special acquisition provision, that insofar as the order authorises the compulsory acquisition of special land it is to be known as a "special authorisation".

101. Section 3 of the 1945 Act, which provides for the examination of petitions against an order by the Lord Chairman of Committees and the Chairman of Ways and Means ("the Chairmen"), is then modified so that references to the petitions against an order are to be construed as references to petitions against a special authorisation. This has the effect that only petitions against the elements of the order authorising the compulsory acquisition of special land may be certified as being proper to be received by the Chairmen. Under the modified provisions, the Chairmen may therefore certify either that a petition is one of amendment to a special authorisation or, if it is against the special authorisation generally, that it is a petition of general objection. In the case of orders under the Transport and Works Act 1992, the 1945 Act is amended to provide that where a petition is a petition of general objection against the special authorisation, the petition shall not be certified as proper to be received if the

Chairmen are of the opinion that the removal of the special authorisation would be inconsistent with proposals which have been approved by each House of Parliament

102. Section 4 of the 1945 Act, which makes provision for proceedings subsequent to the report of the Chairmen laid before both Houses of Parliament under section 3, is modified so that in the 21 day period beginning with the date on which the report is laid either House may resolve to annul the special authorisation. The clause also provides that if either House resolves to annul a special authorisation, the relevant Minister may either withdraw the development consent order or compulsory purchase order to which that special authorisation relates or cause such an order to be submitted to Parliament for further consideration by means of a Bill for confirmation of the order. If neither House resolves to annul the special authorisation, at the end of the 21 day period any petitions against the special authorisation certified by the Chairmen as proper to be received shall stand referred to a joint committee of both Houses, or if there are none the order to which the special authorisation relates will come into operation. Where a petition against a special authorisation is one of general objection then either House may resolve that it should not be referred to the joint committee.

103. Section 5 of the 1945 Act, which makes provision in respect of the powers of a joint committee where a petition against an order is referred to them under the preceding sections of the Act, is then modified so that references to an order are to be read as references to a special authorisation. The effect of this is that the joint committee will be able to report the special authorisation with or without amendment, or where a petition of general objection has been received may report that the special authorisation should not be approved.

104. Section 6 of the 1945 Act, which makes provision for the operation of orders following the report of a joint committee, is also modified. Where a special authorisation is reported by a joint committee without amendments, the order to which that special authorisation relates will come into operation on a specified date. Where a special authorisation is reported by a joint committee with amendments, then the order to which that special authorisation relates will come into force as amended on a date determined by the relevant Minister. Where the Minister considers it is inexpedient for an order to take effect with the amendments to the special authorisation, then he may either withdraw the relevant development consent or compulsory purchase order or cause it to be submitted to Parliament for further consideration by means of a Bill. Where the special authorisation is reported such that it should not be approved, the order to which that special authorisation relates will not take effect unless confirmed by an Act of Parliament.

105. Section 7 of the 1945 Act, which provides makes provision in respect of petitioners' costs, is modified to refer to a special authorisation instead of to an order.

106. The clause also makes provision in respect of Standing Orders of a House of Parliament where the modified provisions of the 1945 Act are applicable.

107. The new sections 1A and 9A of the 1945 Act apply to any order made or confirmed after the amendment comes into force.

24 Bringing business and commercial projects within Planning Act 2008 regime

108. Clause 24 replaces section 35 of the Planning Act 2008 and inserts a new section 35ZA.

109. The substituted section 35 enables the Secretary of State to direct that certain commercial and business development requires consent under the nationally significant infrastructure regime contained in the Planning Act 2008 as well as retaining the existing power of the Secretary of State to direct that development in the fields of energy, transport, water, waste water or waste requires consent under the Planning Act 2008.

110. In relation to commercial and business development, the development must be in England or adjacent waters (but only in Greater London with the Mayor of London's consent) and be, or form part of, a prescribed business or commercial project. Prescribed projects will be set out in regulations made by the Secretary of State but those regulations may not contain projects that consist of dwellings. Following receipt of a written request for a direction under section 35(1) the Secretary of State must conclude, before making a direction, that the project is of national significance either by itself or when considered together with another prescribed business or commercial project or proposed project.

111. Section 35ZA contains procedures relating to directions under section 35. The procedures relating to section 35 directions were previously contained in subsections (4) to (10) of section 35. Section 35ZA(2) provides that a direction relating to business or commercial development can only be made if a qualifying request is made by a person who proposes to carry out the development; or a person who has applied, or proposes to apply for a consent mentioned in section 33(1) or (2) of the Planning Act 2008 or a person who proposes to apply for a development consent order.

112. If the Secretary of State issues a direction under section 35(1) he must give reasons for the decision.

113. Clause 24 also amends section 232 of the Planning Act 2008 so that a draft of regulations made under section 35(2)(a)(ii) must be laid before, and approved by, each

House of Parliament. It also amends references in section 35A to reflect the insertion of the new section 35ZA.

Part 3: Economic measures

25 Postponement of compilation of rating lists to 2017

114. Clause 25 amends sections 41 and 52 of the Local Government Finance Act 1988 to postpone the date on which new non-domestic rating lists in England should be compiled from 1 April 2015 to 1 April 2017 and to ensure that new lists must then be compiled every five years thereafter.

26 Power to postpone compilation of Welsh rating lists

115. Clause 26 amends the Local Government Finance Act 1988 by inserting a new section 54A which allows the Welsh Ministers to make an order postponing the date on which the new non-domestic rating lists in Wales should be compiled from 1 April 2015 to 1 April in 2016, 2017, 2018, 2019 or 2020 and ensures that new lists must then be compiled every five years thereafter.

27 Employee Shareholders

116. Clause 27 amends the Employment Rights Act 1996 to create a new employment status of employee shareholder. An employee shareholder agrees to have fewer employment rights than an employee in return for fully paid up shares of a minimum value of £2,000 in the employer's company or parent company. The value of the shares is to be determined in accordance with sections 272 and 273 of the Taxation of Chargeable Gains Act 1992. In order for the employee shareholder status to come into existence, the individual must give no consideration for the shares other than agreeing to become an employee shareholder.

117. The employee shareholder status can be used by any company with a share capital i.e. companies registered under the Companies Act 2006, a Societas Europaeas, companies registered in other EU jurisdictions and non-EU overseas companies.

118. An employee shareholder has all the employment rights of an employee except for the following:

a. unfair dismissal rights (except for automatically unfair reasons for dismissal and dismissal on the grounds of discrimination);
b. the right to statutory redundancy pay;
c. the statutory right to request flexible working (except that an employee shareholder has a statutory right to request flexible working within 2 weeks of returning from parental leave); and
d. certain statutory rights in relation to requesting time of for training.

The clause also requires employee shareholders to give 16 weeks' notice before returning early from maternity leave, adoption leave or additional paternity leave.

119. The clause further amends the Employment Rights Act 1996 by giving an employee the right not to be unfairly dismissed as a result of refusing to accept an employee shareholder contract. An employee also has a right not to suffer a detriment as a result of refusing to accept an employee shareholder contract. Neither of these rights is subject to a qualifying period.

120. The clause contains two powers exercisable by the Secretary State to make delegated legislation using the affirmative resolution procedure which requires a debate in each House of Parliament. The first power allows the Secretary of State to increase, but not to decrease, the minimum value of the shares to be offered to the individual as part of the employee shareholder status. The second power allows the Secretary of State to make provision for regulating the buyback of shares given to the employee shareholder as part of his employment status.

General provisions

121. Clauses 28 to 30 make general provision for the Bill.

122. Clause 28 makes general provision for orders made under the Bill and sets out the procedure which is to apply in respect of the powers conferred by the Bill. It states that these powers include the power to make different provision for different cases and to make incidental, consequential, supplementary or transitory provision or savings. Clause 29 confers upon the Secretary of State an order-making power to amend, repeal, revoke or otherwise modify any provision made by or under an enactment where doing that is consequential.

Commencement

123. Clause 31 makes provision about commencement. The provisions listed in Sections 4, 6, 8, 17, 24, 28, 29, 31, and 32 and Schedule 2 come into force on the day on which the Act is passed. Sections 10, 11, 14, 15, 16, 25 and 26 and Schedule 4 come into force two months after the Act is passed. Otherwise, the Bill is to be brought into force by order made by the Secretary of State, except that the amendments of Scots planning law are to be brought into force by order made by the Scottish Ministers.

124. The Secretary of State can make transitional, transitory or saving provisions by order in relation to the coming into force of any provision within the Act, but in relation to the amendments of Scots planning law this power is given to the Scottish Ministers.

Summary of Impact Assessment

125. In line with the new Regulatory Policy Committee (RPC) procedures, published in August 2012, the RPC, an independent advisory body sponsored by the Department for Business, Innovation and Skills, have considered whether provisions within the Bill are deregulatory or low-cost regulatory measures (with an impact on business below £1 million per annum). An impact assessment covering all of the provisions in the Bill has been published and is available through the Printed Paper Office and has been laid in the House Library.

Public sector manpower implications

126. This Bill will not represent a significant change to public service manpower.

Privacy Impact Assessment

127. We have considered the question of whether or not there are any risks posed to the privacy of the individual in the legislation that we are putting forward and have concluded that there are none as no personal information is involved in the legislation.

Equalities Statement

128. We are aware of our responsibilities, under the Public Sector Equality Duty, to consider whether any of our policies or the way that these policies are carried out will affect people who share relevant protected characteristics in different ways from people who don't share them. We have considered this and have concluded that they do not.

United Nations Convention on the Rights of the Child

129. We have considered the question of whether or not this legislation has any direct or indirect impact on children and conclude that it does not.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Introduction

130. Under section 19 of the Human Rights Act 1998 ('the HRA 1998'), the Minister in charge of a Bill is required to make a statement before Second Reading about the compatibility of the provisions of the Bill with the European Convention on Human Rights. Having considered the provisions of the Bill Baroness Hanham has given a statement of compatibility with the HRA 1998, in accordance with section 19(1)(a) of that Act.

131. The Bill engages several rights under the Convention, including the right to a fair hearing (Article 6), and right to respect for homes and the protection of property (Article 8) and Article 1 of the First Protocol ('A1P1').

Discussion of ECHR compatibility

132. The proposals in the Bill raise potential Convention issues arising from Articles 6 and 8, of the ECHR, and from Article 1 of the First Protocol to the ECHR.

133. Article 6(1) of the ECHR provides that in the determination of civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.

134. Of particular relevance to the consideration of Article 6 in relation to this Bill is *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23 ('Alconbury')*. In this case the House of Lords found that that determination of administrative matters such as land-use and planning decisions involved the determination of "civil rights and obligations" for the purposes of Article 6(1) and that in challenging such decisions people are entitled to the protections of that article.

135. In specialised areas of administrative decision making such as planning, it is appropriate for an administrative body to make findings of fact and exercise its discretion as to matters of policy. In such cases, Article 6(1) may be satisfied by a right of appeal on a point of law to a judicial body with limited jurisdiction as to matters of fact (see *Bryan v UK (1995) 21 EHRR 342*). This is particularly the case where the decision making process involves a quasi judicial procedure. In *Alconbury*, the House of Lords found that although the Secretary of State is not an independent and impartial tribunal for the purposes of Article 6(1), planning decisions taken by him were not incompatible provided that they were subject to review by an

[1], but in administrative cases involving finely balanced issues of policy and discretion this can be the case[2].

136. Article 8 of the ECHR provides that everyone has the right to respect for his private and family life, his home and his correspondence; and that 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.

137. Article 1 of the First Protocol ('A1P1') provides that everyone is entitled to the peaceful enjoyment of his possessions, and that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. However, these provisions do not in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest, or to secure the payment of taxes or other contributions or penalties.

138. Interference with rights under A1 P1 is permitted if it is for a legitimate purpose which cannot be achieved by other less interfering means and the interference is proportionate. As to proportionality, the European Court of Human Rights has held that states enjoy a wide margin of appreciation when taking decisions on social and economic measures (see *James v UK (1986) 8 EHRR*). Whether compensation is payable is pertinent when considering whether an interference is proportionate to the aims pursued.

Promoting growth and facilitating provision of infrastructure, and related matters

Clause 1 Option to make planning application directly to Secretary of State.

[1] See Tsfayo v UK (2009) 48 EHRR 18, in which judicial review was not sufficient to comply with Article 6(1) in circumstances where the preliminary decision makers were not required to possess professional knowledge or experience and were deciding solely issues of fact. There are good arguments that Tsfayo is distinguishable on the basis that the Housing Benefit review Board was found to have a fundamental lack of objectivity which could be cured by judicial review.

[2] In a social welfare context, a similar structure was found to be article 6 compliant by the line of cases including Runa Begum v Tower Hamlets London Borough Council and R (Tomlinson & others) v Birmingham City Council. These cases establish the principle that judicial review is a sufficient safeguard where an administrative decision has been made by a non-independent executive decision-maker. In the case of Fazia Ali v. Birmingham City Council the CA held that the decision in Begum was unaffected by the reasoning in Tsfayo.

139. Under clause 1 the Secretary of State has the power to designate a local planning authority and where that local planning authority is designated a relevant application may be made instead to the Secretary of State. There is no statutory right of appeal against this designation other than judicial review. The consequence of designation is that a person wishing to apply for planning permission (of prescribed types) would be entitled (but not obliged) to submit their planning application to the Secretary of State for determination, instead of the local planning authority.

140. The right to a statutory planning appeal, in section 78 of the Town and Country Planning Act 1990 ('the 1990 Act'), is an appeal to Secretary of State. It would clearly not be proper for the Secretary of State to consider appeals against his own decisions and consequently we have excluded the right to a statutory appeal where a person makes a planning application directly to the Secretary of State. .

141. Removing the right of appeal from an applicant who has chosen to apply to the Secretary of State instead of to the designated local planning authority could affect compatibility of the planning regime with Article 6. However judicial review of the Secretary of State's decision will, of course, remain available

142. With regard to Article 6 rights, the decision in *Alconbury* confirms that although the determination of administrative matters such as planning decisions involved the determination of "civil rights and obligations" within the meaning of Article 6 there was sufficient judicial control within the planning process, including the scope for judicial review, to ensure a determination by an independent and impartial tribunal.

Clause 2 and 3 Costs on planning appeals and Compulsory purchase inquiries

143. Planning appeals and CPO inquiries are usually conducted by persons appointed under statute by the Secretary of State. As public authorities under HRA 1998, decision-makers in these proceedings are required to exercise powers to award costs in a way that is compatible with the ECHR. The Article 6(1) fair process requirements are engaged, as is A1P1, since costs awards may be considered a deprivation of property.

144. The Bill makes amendments to cost-awarding powers, none of which will prevent decision-makers from continuing to award costs in accordance with Article 6(1) and A1P1. These clauses will encourage proportionality in the recovery of Ministers' own costs at planning appeals, by enabling a portion of the costs to be recovered, rather than the entire costs.

145. The Bill amends existing delegated powers for planning appeals so that the circumstances in which costs may be awarded may be set down in secondary

legislation. This power is positive in terms of A1P1 compliance because it provides a mechanism to make costs awards more clearly "subject to conditions provided for by law". The Secretary of State will be under a duty to exercise the power in a way that is compatible with ECHR rights.

Clause 4 Permitted development rights for changes of use: prior approvals

146. Clause 4 amends an existing power in section 60 of the 1990 Act, under which planning permission may be granted by a development order subject to conditions. Such planning permissions are known as "permitted development rights". New subsection (2A) of section 60 enables development orders to require the prior approval of the local planning authority or the Secretary of State for a change of use, or in respect of matters relating to a change of use.

147. As with any planning permission, Article 6(1), Article 8 and A1P1 are potentially engaged. In exercising the power to create permitted development rights of general application the Secretary of State will be under a duty to act compatibly with ECHR.

148. For property owners, permitted development rights are positive in terms of A1P1 as they free up owners from planning controls. For neighbouring third parties who may be affected by the permitted development, the enabling power allows conditions and limitations to be imposed to ensure that the development is kept within reasonable bounds so as not to impinge on anyone's enjoyment of their homes to the extent that Article 8 is engaged, nor to affect the value of their properties such that A1P1 is engaged. The new power to attach prior approval conditions to permitted development rights for change of use is positive in respect of both A1P1 and Article 8, because it provides an opportunity for potential impacts on third parties to be addressed in a proportionate way taking into account local conditions.

149. The new power is compatible with Article 6(1) as explained in Alconbury and other cases on administrative decision making (see earlier). If a local planning authority refuses a prior approval, their decision may be appealed by the owner of a property which would otherwise have benefited from the permitted development right. The appeal would be to the Secretary of State under the 1990 Act, and the Secretary of State's decision on appeal may be judicially reviewed[3]. Where the prior approval function rests with the Secretary of State, a refusal could be judicially reviewed by a property owner. For third parties, there is no right of appeal within the planning system, but third parties would be entitled to judicially review a prior approval decision whether given by the local planning authority or by the Secretary of State.

[3] In practice many planning appeals are dealt with by the Planning Inspectorate (PINS) under a statutory delegation, with the PINS decision also being subject to judicial review.

Clause 5 Limits on power to require information with planning applications

150. Clause 5 inserts limitations on the powers of local planning authorities into section 62 of the 1990 Act in relation to the information they may demand from planning applicants. This clause does not engage Convention rights.

Clause 6 Modification or discharge of affordable housing requirements

151. Clause 6 provides a new application for seeking variation of an agreement of the affordable housing requirements in a planning obligation entered into under section 106 of the 1990 Act.".

152. The Government considers that there are two aspects of this that merit consideration in relation to human rights. Firstly, whether the potential impact on the levels of affordable housing could engage human rights; and secondly, the procedure for determining applications.

Affordable housing provision: Article 8 and A1P1

153. In relation to the levels of affordable housing, the Government considers that there is no identifiable individual that would be prejudiced by these proposals, or whose human rights would be affected. Neither the local planning authority, nor the wider community, can have any firm expectation that any affordable housing in a section 106 agreement will be delivered. The developer may not decide to build the development, for example as a result of financial difficulties. Alternatively, the developer and the local planning authority may agree to amend the section 106 agreement.

154. The proposals do not relate to the planning merits of the development, such as its siting or design. As such, these proposals will not impact on the amenity of neighbouring buildings, or engage the Article 8 or A1P1 rights of their owners or occupants.

Procedure: Article 6

155. In relation to the procedure, these applications will usually be considered by the local planning authority ('LPA') in the first instance, under section 106BA. Under section 106BB there is then a right of appeal to the Secretary of State, whose functions are delegated to the Planning Inspectorate ('PINS'). It is open to the Secretary of State to "recover" these appeals for determination. This appeal decision itself is subject to judicial review. This mirrors the approach taken in relation to applications made under section 106A of the 1990 Act and related appeals under section 106B.

156. In relation to an appeal under section 106BB, the Secretary of State will be able to determine the procedure to be followed in relation to that appeal under section 319A of the 1990 Act. This could be by written representations, a hearing or a full inquiry. The Government considers that this flexibility will allow the Secretary of State to ensure that the parties are given a suitable opportunity to express their views, in compliance with Article 6, in any particular case.

157. The Government considers that this overall procedure is Article 6 compliant. The LPA, the Secretary of State and PINS are obliged to comply with the ECHR in exercising their functions. We also consider that the Secretary of State and PINS are sufficiently removed from LPAs to provide an independent review. This structure of decision making, with first instance decisions made by the LPA and appealed to the Secretary of State is a structure that was found to be compliant with Article 6 in *Alconbury*.

Clause 7 Disposals of land held for planning purposes

158. Section 233(1) of the 1990 Act enables a local authority to dispose of land held for planning purposes in order to secure the purposes set out in paragraphs (a) and (b).

159. Consent of the Secretary of State is required where the disposals are of common land (section 233(2)) or the disposal is to be for a consideration less than the best that can reasonably be obtained (section 233(3)). Unlike other local authority disposal of land powers that are subject to Secretary of State consent, section 233 does not enable the Secretary of State to grant consent generally by way of descriptions of types of transactions or local authorities. Local authorities must therefore seek consent on each occasion it intends to dispose of land held for planning purposes at less than best consideration. Clause 6 provides for the Secretary of State to grant consent to local authorities to dispose of land held for planning purposes generally. The power is similar to that under section 128(1) of the Local Government Act 1972.

160. Clause 7 provides protection for persons to whom local authorities have disposed of land relying upon 233 of the 1990 Act so that such transactions are not void because the local authority has failed to obtain the necessary Secretary of State consent. A1 P1 is relevant as it deals with the possession of land by persons. However it is not engaged as persons in possession of land are afforded greater protection by the provision.

Clause 8 Electronic communications code: the need to promote growth

161. As paragraph 47 above explains Section 109(1) of the Communications Act 2003 ("2003 Act") gives the Secretary of State power to make regulations imposing conditions and restrictions on the application of the electronic communications code (under section 106) to network operators.

162. The proposed Regulations to be made under section 109 of the 2003 Act (amended by clause 8), could make it easier for network owners to install electronic communications apparatus such as broadband cabinets, and overhead lines and the poles supporting them. The state's failure to protect the environment by failing adequately to regulate industry could possibly give rise to a breach of Article 8. But the amendments to primary legislation made by the clause do not, in themselves, impinge directly on the environment and the Secretary of State, in making regulations under the amended powers in section 109 and without being subject to the respective duties in the Acts relating to protected areas, would still be under a duty to act in accordance with Article 8, by virtue of section 6 of the HRA1998. Therefore the Government do not consider that the proposed amendments to primary legislation engage Article 8 and do not consider that they raise any other ECHR issues.

Clause 9 Periodic review of mineral planning permissions

163. Clause 9 of and Schedule 2 to the Bill will amend Schedule 14 to the Environment Act 1995. The effect is that an English mineral planning authority ('MPA') would have the discretion – but no obligation – to set any review date that falls more than (but not less than) 15 years after the most recent previous determination of planning conditions.

Application of the ECHR

164. The Government considers that Article 8 and possibly A1P1 may feasibly be engaged by a mineral planning authority exercising its discretion under the amended Schedule 14 to review the permissions of a mining site in its area at less frequent intervals than at present (or not to review them at all). If the existing planning conditions to which the mining site was subject were insufficiently robust to prevent environmental impact to nearby inhabitants and/or property, then prolonging the date of a review or failing to initiate a review at all might prolong the impact on those individuals and/or property owners.

165. Severe environmental pollution might affect individuals' wellbeing and prevent them from enjoying their homes in such a way as to affect their private and family life adversely (*Lopez Ostra v Spain (1995) 20 EHRR 277*). The State's responsibility in environmental cases may arise from a failure to regulate private industry in a manner securing proper respect for the rights enshrined in Article 8 (*Hatton v United Kingdom (2003) 37 EHRR 28*). By similar reasoning, A1P1 may potentially be engaged if the value of property were adversely affected by the impact of inadequately controlled mining operations.

166. However, the regimes for reviewing pre-1948 and pre-1982 mineral planning permissions mean that all active mining sites now operate under modern planning

conditions that provide significant environmental safeguards. Additionally, section 196A of the 1990 Act gives MPAs powers to carry out regular visits of individual sites to monitor them. If MPAs deem it necessary to take enforcement action, they have wide ranging powers under Part VII of the 1990 Act. Site visits also allow a consideration of whether a review of the planning conditions is necessary.

167. The reforms also give MPAs discretion to schedule reviews at intervals that are appropriate for the particular site in question and the conditions that are already in place. If 15 years is the appropriate interval for a particular site, the MPA would retain the power to cause a periodic review to be carried out at that point.

168. The policy concern is that the current requirement for full reviews every 15 years, regardless of the effectiveness of the current planning conditions, is a disproportionate burden on mineral operators (and MPAs). The clause is therefore designed to give greater flexibility to MPAs and to potentially reduce the economic burden on mineral operators, which it is hoped will bring benefits for the mineral products industry and the wider economy. The courts have recognised that in Article 8 cases the State is entitled to strike a fair balance between the interests of the individuals affected and the economic wellbeing of the country; in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy maker should be given special weight (*Hatton v United Kingdom (2003) 37 EHRR 28*). The Government's assessment of the economic benefits of this measure should therefore be accorded significant weight in any balancing exercise with the Article 8 rights of individuals (and, by analogy, in a claim invoking A1P1 rights).

169. It should also be noted that section 6(1) of the HRA 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. This provision will apply to a mineral planning authority's functions in relation to the periodic review of mineral planning permissions and should ensure that a MPA does not exercise these functions in a way which is incompatible with Convention rights.

170. Any impact of these proposals on the property rights of a mine or mineral owner (potentially protected under A1P1) is likely to be positive, reducing the burden of regulation and having a direct economic benefit where reviews are required less frequently than at present.

Clauses 10 and 11 Stopping up and diversion of highways and Stopping up and diversion of public paths

171. The intention of the proposed amendments to the Town and Country Planning Act 1990 ("1990 Act") is to remove the existing requirements which in the vast majority of cases, restrict the making of an application for the stopping up/diversion of a highway and restrict the making of an order for the stopping up/diversion of a footpath, bridleway or restricted byway to cases where the applicant has been granted planning permission in accordance with Part III of the 1990 Act.

172. Stopping up has the legal effect of extinguishing the right of the public to pass and re-pass over the highway. The purpose of these changes is to enable a stopping up/diversion order to be considered at the same time as a planning permission application. This should reduce delay and uncertainty for developers. At present developers usually have to wait until they have got planning permission before applying for such an order.

173. It is considered that the changes do not engage the Article 1, Protocol 1 rights of owners of:

a) highway land, because they seek only to remove the restrictions on when an application for stopping up/diversion of the highway can be made;
b) land over which a footpath etc. runs, because they seek only to remove the restrictions on when an order for the stopping up/diversion of the footpath etc. can be made.

174. Whilst there is no definitive authority on the point, it is accepted that it is highly likely that the decision whether or not to grant a stopping up/diversion order engages Article 6(1) of the ECHR as a determination of a civil right. However, the proposed amendment does not of itself alter the stopping up/diversion order making process. It is therefore considered that given the availability of judicial oversight by way of judicial review in accordance with *Alconbury*, the provisions comply with Article 6(1).

Clause 12 Declarations negativing intention to dedicate way as highway

175. Clause 12 amends section 31(6) of the Highways Act 1980 (the '1980 Act') to allow for regulations to prescribe the forms and procedures related to the deposit of maps, statements and subsequent declarations as well as the payment of fees related to those deposits. It also amends the period of time in which a landowner may deposit a subsequent declaration from 10 years from the date of deposit to 20 years. It is not considered that this clause has an impact that engages human rights.

Clause 13 Registration of town or village green: statement by owner
Clause 14 Restrictions on right to register land as town or village green and Clause 15 Applications to amend registers: modification of powers to provide fees under Part 1 of Commons Act 2006: charging of fees

176. The rationale for reform is that currently applications for registering land as a town or village green under section 15(1) of the Commons Act 2006 are considered in isolation from the planning process. This in some cases leads to development which has planning permission being delayed or prevented. One of the recommendations of the Penfold review of non-planning consents was to review the operation of the regime for registering town or village greens in order to reduce the impact of current arrangements on developments which have planning permission. Implementation of this recommendation is achieved through clause 14, which aims to stop the registration system for town or village greens being used to stop or delay planned development. The reforms will protect local communities' ability to promote development in their areas through local and neighbourhood plan-making. The proposals also aim to reduce the financial burden on authorities in determining applications and the costs to landowners whose land is affected by applications.

177. The need to consider whether Article 6 is engaged arises because the proposed measures affect the right to apply to have land registered as a town or village green.

178. In order for Article 6 to be engaged there must be a determination of civil rights or obligations. It is highly debatable whether the right to use land registered as a town or village green for lawful sports and pastimes is a civil right since it is a form of local public right rather than a private property right. In any event, however, Article 6 rights apply only where there is a "determination" of civil rights or obligation which requires there to be a dispute or "contestation". Since the proposed measures do not determine the existence of any recreational rights, it is considered that Article 6 is not engaged.

179. The effect of depositing a statement provided for in clause 13 is simply the equivalent of a landowner erecting a fence around the land and/or putting up a notice prohibiting access to the land. It brings to an end any existing period of use as of right but does not prevent the accrual of any use as of right from the date of the deposit. Further, where the requisite 20 year period of use as of right has accrued without challenge, the deposit of a statement does not prevent an application for town or village green registration being made. In such a case applicants would have a period of 2 years from the date of the deposit to submit a town or village green application (see section 15(3) of the the Commons Act 2006).

180. The proposed measures relating to development make provision, for example, that where a planning application has been made and advertised in relation to an area

181. The need to consider whether A1P1 is potentially engaged arises because the proposed measures affect the right to apply to have land registered as a town or village green.

182. Case law has established that the notion "possessions" in A1P1 has an autonomous meaning which is not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions", for the purposes of this provision, *Gasus Dosier und Fordertechnik GmbH v The Netherlands (1995) 20 E.H.R.R. 403, paragraph 53.* The Court has adopted a wide view of possessions to include property rights such as shares, securities and patents, all of which have an economic value. However, it is the Government's view that a right to use land registered as a town or village green for lawful sports and pastimes is a recreational right which does not hold any intrinsic economic value and cannot therefore be regarded as an "asset". Such a right is not vested in one particular person and it cannot be bought or sold unlike those possessions listed above. Although strictly exercisable only by local inhabitants, it is not limited to inhabitants who own local land, and the right is a form of local public right rather than a private property right. Consequently it is considered that a right to use land registered as a town or village green for lawful sports and pastimes is not a "possession" for the purposes of A1P1 and therefore this Article is not engaged.

183. If the right to use a town or village green for lawful sports and pastimes were a possession, the Government considers that Article 1 Protocol 1 would be unlikely to be engaged since the right to apply for land to be registered as a town or village green is not an existing possession, but is merely the right to apply for a future possession. It is also considered that, in removing the right to apply for town or village green registration in certain circumstances, there is no interference with any claim since the legislation will affect future rather than existing applications.

Other infrastructure provisions

Clause 16 Power stations: repeal of requirements to give notice

184. The effect of clause 16 will be to repeal section 14 of the Energy Act 1976 and to revoke two orders made under it which provided certain exemptions to its requirements. The majority of generating station developments (i.e. those larger than 50MW) are now exempt from the requirements of section 14 under the Planning Act 2008 ('the 2008 Act'). Since the only effect of the clause is to remove a burden on

businesses (albeit one which, as far as the Government is aware, has no current, measurable impact), and does not effect individuals, the Government considers that the measure does not engage Convention rights.

Clause 17 Licences under the Gas Act 1986: conditions requiring payments to other licence holders

185. Clause 17 amends section 7B(5)(b)(ii) of the Gas Act 1986, which relates to the conditions which Ofgem may include in a licence granted to a gas transporter under section 7 of the Gas Act 1986.

186. As the provision does not change the substance of section 7B of the Gas Act 1986, but rather clarifies it, the Government considers that there is no change to the effect of section 7B on the rights of the individual. The imposition of licence conditions may engage Article 1 of Protocol 1 and the right to peaceful enjoyment of possessions. The right to peaceful enjoyment of possessions is qualified and by virtue of the second paragraph of Article 1, it does not prevent a state enforcing such laws as it deems necessary to control the use of property in the general interest. A fair balance must be struck between the general interest and the rights of the individual.

187. It is considered that Ofgem's power to impose licence conditions under section 7B(5)(b) of the Gas Act 1986 strikes a fair balance between the general interest and the rights of individual licensees. Before issuing or modifying a licence under section 7 of the Gas Act 1986, Ofgem must give notice that it wishes to issue such licence and must consider any representations received. In order to impose any licence conditions under this power, Ofgem must have regard to its duties under sections 4AA, 4AB and 4A of the Gas Act 1986 and moreover, as a public authority, Ofgem is bound by section 6 of the Human Rights Act 1998 to act compatibly with the ECHR. Further protection for individual rights is also given by section 23B of the Gas Act 1986 which provides that licence conditions imposed by Ofgem are subject to appeal to the Competition Commission.

Clause 18 Variation of Consents under the Electricity Act 1989 and Clause 19 variation of consents under the Electricity Act 1989: deemed planning permission

188. It is proposed to give the Secretary of State, the MMO and Scottish Ministers the power, in their respective jurisdictions, to vary section 36 consents where they consider it appropriate to do so. It is also proposed to give the Secretary of State power to vary deemed planning permission granted under section 90 of the 1990 Act, or to grant a fresh deemed planning permission, when a variation is made to a section 36 consent (or a section 37 Electricity Act consent in respect of an electric line above ground – which can already be varied under section 37). The intention is that such variations should only take place where the person with the benefit of the consent for the time being applies requesting such a variation. The clause provides for the

application process to be set out in regulations and for the variation procedure to be able to address any changes required in deemed planning permission which has been granted with a section 36 consent.

189. The grant or refusal of section 36 consent (and associated deemed planning permission) is a determination of civil rights within the meaning of Article 6 ECHR. Once granted, such a consent is arguably a possession for the purposes of Article 1, Protocol 1, and the terms of a consent may evidently affect enjoyment of physical property. The same will be true for variations.

190. The process for considering and determining any application to vary a section 36 consent (and/or deemed planning permission) will be based on that for granting section 36 consent in the first place. This is similar to the procedure for applying for ordinary planning permission, and, since Ministers figure heavily in the decision-making process, it relies on the analysis of the House of Lords in *Alconbury* (and of the ECHR in *Bryan*, both as referred to above) for its compatibility with Article 6 because of the problems which might otherwise exist in characterising e.g. the Secretary of State in his decision-making function as an "independent an impartial tribunal".

191. The Government is not proposing that the power to vary should include a power to revoke existing section 36 consents (or deemed planning permission), so there is no prospect of absolute deprivation of the "possession" inherent in a consent. However, as far as the section 36 consent itself is concerned, the proposal is that the outcome of the process should be a variation of the existing consent rather than a completely new consent (under the proposed amendments to section 90 of the 1990 Act, it will be possible to grant a new deemed planning permission). As far as section 36 consents are concerned, therefore, the process could constitute an interference with enjoyment of possessions. If the variation were instead to result in a new consent and the developer found some aspect of the new consent unexpectedly unattractive (e.g. more stringent conditions were imposed on some aspect of the development), there would always be the opportunity to use the old unamended consent instead. But once a variation of the existing consent has taken effect, that option will be closed.

192. The Government considers that any decision that imposed e.g. tighter conditions in a varied consent would be compatible with A1P1 in that it would have to follow the procedure to be set out in regulations and would only be lawful if motivated by public interest considerations relevant to planning decision-making, such as environmental impacts. However, it is also proposed to prevent situations arising where a developer is stuck with a varied consent which is more unattractive than the existing consent by providing in the Regulations that the developer (and local planning authority) must be consulted before the imposition of conditions which were not in the existing consent or contemplated in the developer's application and by permitting the

developer to withdraw its application at any point prior to the making of a final decision on it.

Clause 20 Variation and replacement of pre-Planning Act 2008 consents

193. Clause 20 inserts a new section 237A, into the Planning Act 2008. The new section is concerned with projects consented under pre-planning Act legislation, where the consents concerned have been varied or replaced in certain ways permitted by that legislation. The intention of this new section is to clarify that in relation to such projects, the coming into force of the Planning Act does not have the effect that its requirements for development apply in addition to those under the relevant pre-Planning Act regime.

194. New section 237A is required because of the terms of a saving provision in the Commencement Order which brought Part 4 the Planning Act 2008 into force. The saving provision aims to ensure that projects for which pre-Planning Act consent was originally applied for before 1 March 2010 do not require development consent under the Planning Act. However, the way in which this was expressed could be taken to mean that in cases where one of the pre-Planning Act consents relating to a project whose pre-Planning Act consents were originally applied for before 1 March 2010 were subsequently varied or replaced pursuant to a further application made after 1 March 2010, Planning Act consent is required as well – even though this was not, and was not generally understood to be, the policy intention.

195. The purpose of new section 237A is to remove this source of potential legal uncertainty. The new section focuses on cases where the types of consents which were replaced by the Planning Act development consent regime were applied for before 1 March 2010 and subsequently granted, but are then varied (for example, as will now be permitted in the case of section 36 Electricity Act consents, by virtue of clause 18) or replaced (in the way provided for by s. 73 Town and Country Planning Act 1990 in relation to planning permission).

196. In particular, it is concerned with those cases where the variation or replacement relates to development which would otherwise have required development consent under the Planning Act, and has not been carried out.

197. The concept of a "replacement" consent is narrowly defined (based on the wording of section 73 of the Town and Country Planning Act 1990) so as to ensure that the new section does not allow changes to projects consented under pre-Planning Act legislation which fundamentally alter the character of the development concerned to evade the Planning Act regime.

198. In order to ensure that the legal position of projects whose consents were originally applied for before 1 March 2010 but which have since undergone variation

or replacement of the type specified in new section 237A is not called into question as a result of the clarification provided by the new section, it is to apply retrospectively.

199. Section 237A does not provide for any new determination of civil rights or interference with possessions. Rather, it seeks to ensure that decisions taken by the various authorities empowered to vary or replace pre-Planning Act consents (which may involve such determinations or interference) are not invalidated by a quirk of the existing saving arrangements. A provision which validates a consent that may have become invalidated by subsequent variation or replacement should not breach ECHR rights, particularly where the variation or replacement of the consent was dealt with fully in compliance with the relevant regime.

200. Subsection (2) of clause 20 provides that section 237A is to have retrospective effect. This does not raise any ECHR concerns. Where a consent has been obtained in a way which complies with all the procedures relevant to that consent regime, no unfairness to those who might be adversely affected by the development will arise from retrospectively validating that consent where its potential invalidity is the result, as here, of a mere quirk of the existing saving provision. Greater unfairness would arise for the holder of the consent who will otherwise have to deal with the consequences of their development being unlawful notwithstanding consent having been obtained.

Clause 21 Removal of Planning Act 2008 consent and certification requirements

201. This clause removes three separate certification and consent procedures contained in the Planning Act 2008 ("the 2008 Act"). These certification and consent procedures relate to the land and apparatus of statutory undertakers and telecommunications code operators (clause 22, discussed below, deals with the removal of separate certification procedures relating to common land, open spaces, and fuel or field garden allotments).

202. The 2008 Act provides a procedure for the authorisation of nationally significant infrastructure projects. The procedure involves pre-application consultation by the applicant, examination by an examining authority, and a decision by the Secretary of State, who is required to have regard to various matters including anything important and relevant. Authorisation is granted in the form of a development consent order. A development consent order replaces a number of consents that would normally be required for development, such as planning permission and listed building consent, and can also deal with a range of ancillary matters including the compulsory acquisition of land.

203. In addition to the need to obtain a development consent order, the 2008 Act requires separate certificates and consents to be obtained in certain circumstances.

This includes where the land of statutory undertakers and the apparatus of undertakers and telecommunications code operators is affected in certain ways.

204. Potentially, A1P1 and Article 6(1) could be engaged by these changes. However, we do not consider that the existing certification and consent procedures are necessary to ensure compliance with these articles. The consideration of the private interests of statutory undertakers and communications network operators would be adequately and sufficiently taken into account through the standard development consent order procedures in the 2008 Act, as supplemented by the availability of judicial review. The development consent order process provides for parties to make representations about a development consent order and for these to be taken into account. The interests of statutory undertakers can be and are taken into account alongside other interests in that process. Indeed there are already examples of development consent orders containing special protection measures for statutory undertakers. Furthermore, the amendments do not remove any of the existing statutory tests which must be considered before a certificate or consent is given; for example, where the Secretary of State currently has to be satisfied about the effects on statutory undertakers, he is still required to be satisfied under the amendments.

Clause 22 Special parliamentary procedure in cases under the Planning Act 1998 and Clause 23 modifications of special parliamentary procedure in certain cases

205. Where land is being compulsorily acquired, in certain circumstances the instrument authorising the acquisition of land is subject to a parliamentary procedure (SPP). Broadly, this provides for people to "petition" against Parliament against the making of order. If such petitions are brought, and certified as being "proper to be received"[4], then these will be considered by a joint committee of both Houses. The joint committee acts in a manner akin to a committee on a private bill. Whenever an order is subject to SPP it is governed by the provisions of the Statutory Orders (Special Procedure) Act 1945 ("the 1945 Act").

206. The 2008 Act makes provision for applications in respect of Major Infrastructure Projects. Where development consent is granted under the Act this gives the applicant consent for a range of different matters, including planning permission. A development consent order (DCO) can also authorise the compulsory acquisition of land. Currently, SPP is required where a DCO authorises the acquisition of land falling into one of a number of special categories of land (referred to as "special land"): local authority or statutory undertaker land, National Trust land, common land, public open space, or land which is a fuel or field garden allotment. The rationale for the application of the procedure in these cases is to allow, in relation to land which engages competing public interests Parliament to take a view as to how these interests should be weighed.

[4] by the Lord Chairman of Committees and the Chairman of Ways and Means.

207. The Acquisition of Land Act 1981 ('the 1981 Act') makes provision for procedural matters in respect of a range of powers authorising the compulsory acquisition of land. The instances in which SPP will be required under the 1981 Act are broadly the same as under the 2008 Act.

208. The Harbours Act 1964 ("the 1964 Act") makes provision (see paragraph 22 of Schedule 3) for a harbour revision or empowerment order which authorises the acquisition of, or of rights over, inalienable National Trust land or land forming part of a common, open space or fuel or field garden allotment to be subject to SPP. Such an order is subject to SPP to the "same extent" as it would be under the 1981 Act.

209. The New Towns Act 1981 ("the New Towns Act") makes provision (paragraph 12 or 13 of Schedule 4) for an order under that Act authorising the acquisition of local authority land, inalienable National Trust land or land forming part of a common, open space or fuel or field garden allotment to be subject to special parliamentary procedure. In all cases, the New Towns Act states that the order shall be subject to SPP "in so far" as it authorises the acquisition of such land.

210. The Transport and Works Act 1992 makes provision (section 12) for an order under that Act which authorises the acquisition of, or of rights over, inalienable National Trust land or land forming part of a common, open space or fuel or field garden allotment to be subject to SPP. Such an order is subject to SPP to the "same extent" as it would be under the 1981 Act.

211. Clause 22 removes the requirement, where a DCO granting development consent under the 2008 Act authorises the compulsory acquisition of local authority and statutory undertaker land, that it be subject to SPP.

212. Clause 22 also amends sections 131 and 132 of the Planning 2008. These sections currently make provision for special parliamentary procedure to apply to an order authorising compulsory acquisition of, or compulsory acquisition of rights over, common land, open spaces, or fuel or field garden allotments. In both cases, where the Secretary of State is satisfied that one of a number of prescribed circumstances apply, the Secretary of State may issue a certificate disapplying this requirement. If the Secretary of State proposes to issue such a certificate then he must give notice of this proposal (or direct the applicant to do so) and give interested persons an opportunity to make representations, and may cause a public local inquiry to be held. If the Secretary of State issues a certificate he must publish a notice of this in a local newspaper (or cause the applicant to do so). The clause removes the requirement to issue a certificate if the Secretary of State is satisfied that one of the circumstances prescribed in the section is applicable, and removes the accompanying procedural requirements. Instead, if the Secretary of State is satisfied that one of these circumstances applies, this must be recorded in the development consent order itself.

213. Clause 22 makes further changes to sections 131 and 132 to widen the circumstances in which the Secretary of State may provide that a DCO authorising compulsory acquisition of open space land or a right over land shall not to be subject to SPP. The Secretary of State will be able to do this in two additional circumstances. Firstly, if there is no suitable land to be given in exchange for land to be acquired, or any land available for exchange is available only at prohibitive cost, and it is strongly in the public interest for development to be begun sooner than it would if the relevant order were subject to special parliamentary procedure. Secondly, if the open space land in question is being acquired only for a temporary purpose.

214. Clause 23 amends the Statutory Orders (Special Procedure) Act 1945 so that when a DCO (under the 2008 Act) or a compulsory purchase order under the 1981 Act is subject to special parliamentary procedure because it authorises the acquisition of land, or right over land which falls into a particular category ("special land"), the order can only be subject to consideration by Parliament insofar as it authorises the acquisition of special land. The clause also makes similar provision in respect of certain orders made under the Harbours Act 1964, the New Towns Act 1981 and the Transport and Works Act 1992.

Article 6(1)

215. The decision making process under the 2008 Act would fall squarely within the class of decisions identified in Bryan and, in particular, Alconbury (see paragraphs 133 and 134 above). Decisions under the 2008 Act are subject to an intensive scrutiny process. Before an application is submitted to the Secretary of State, there is a pre-application process which involves extensive consultation requirements. If the application is accepted, then a pre-examination stage is held at which members of the public can register and provide a summary of their views. Anyone who so registers is invited to a preliminary meeting. Following the pre-examination stage, a six month examination stage follows (held by the PINS on the Secretary of State's behalf) at which anyone who has registered will be invited to make further representations. In particular, at this stage the authority carrying out the examination must hold a compulsory acquisition hearing if a one is requested by any "affected person" for the purposes of section 59 of the 2008 Act. A recommendation is then prepared and a decision must be made by the Secretary of State within three months. Similarly, under the 1981 Act, the 1964 Act, the New Towns Act and the 1992 Act there are notification requirements, provisions for objections to be made to an order and provisions relating to the consideration of such objections by way of an inquiry or appointed person procedure.

216. The Department considers that this is sufficient, without the addition of SPP, to meet the requirements of Article 6(1), provided that any decision taken may be subject to judicial review. In this regard, section 118 of the 2008 Act provides that a legal

challenge may be brought against decisions of the Secretary of State by way of a claim for judicial review within a 6 week time period. Such a challenge could be brought on full range of judicial review grounds. Challenges under the 1981 Act would be brought by way of an application to the High Court under section 23. Challenges under the 1964 Act would be made under section 44 of that Act; challenges under the New Towns Act would be made under paragraph 14 of Schedule 4 to that Act; and challenges under the 1992 Act would brought by way of an application under section 22 of that Act.

Article 1, Protocol 1

217. In respect of the 2008 Act and the 1981 Act (and the 1964 Act, the New Towns Act and the 1992 Act) we consider that provisions for compulsory acquisition clearly engage A1P1. However, we also consider that sufficient safeguards are in place to ensure that any such acquisition will be in pursuance of a legitimate aim and proportionate to the aim pursued.

218. Interference with rights under A1P1 is permitted if it is for a legitimate purpose and states enjoy a wide margin of appreciation when taking decisions on social and economic measures. Whether compensation is payable is pertinent when considering whether an interference is proportionate to the aims pursued[5].

219. There is a long established general principle that land should only be taken compulsorily where there is a compelling case in the public interest. In the case of Pascoe v the First Secretary of State & Ors [2006] EWHC 2356 ('Pascoe'), it was held that the policy requirement that a compulsory purchase order should not be confirmed unless there is a compelling case in the public interest "fairly reflects the necessary element of balance required in the application of Article 8 and Article 1 of the First Protocol to the ECHR". Section 122 of the 2008 Act states this expressly, providing that an order granting development consent may only authorise compulsory acquisition of land if this is required for development and that there is a compelling case in the public interest for the land to be acquired compulsorily. Where compulsory acquisition is undertaken using any of the powers which require the procedures set out the in the 1981 Act to be applied, it is clear from departmental guidance that a compulsory purchase order should only be granted where there is a compelling case in the public interest[6].

220. The owners of compulsorily-acquired land will be able to claim compensation on the same basis as normally applies, namely under the provisions contained in the

[5] The ECtHR's basic approach to compensation is found in the cases of *Holy Monasteries v Greece* (1994) 20 EHRR 1 and *Gaganus v Turkey* App No 39335/98, 5 June 2001. The need to strike a fair balance when awarding compensation in respect of expropriation of property was considered more recently in *Perdigao v Portugal* App no 24768/06, 16 November 2010

[6] See para 17 of ODPM Circular 06/2004 "Compulsory Purchase and the Crichel Down Rules".

Land Compensation Act 1961, the Compulsory Purchase Act 1965 where applicable and case law. Together these constitute the "compensation code" and this has been held to comply with Article 8 and A1P1 in the case of Howard v UK Application 10825/84, decision dated 18th October 1985 ('Howard').

221. In all the Acts covered by these changes, there is an intensive scrutiny procedure which will allow a decision maker to evaluate the public benefits of compulsory acquisition and the interests of an affected land owner. The procedure under the 2008 Act is set out above. Under the 1981 Act, in broad terms, all parties with an interest in the relevant land must be notified of a proposed acquisition; if there are objections to this then an inquiry will be held. Similarly, and as set out above, the 1964 Act, the New Towns Act and the 1992 Act contain notification requirements, provisions for the making of objections against order and provisions relating to the holding of an inquiry or an appointed person procedure.

Removal of Special Parliamentary Procedure under the 2008 Act in respect of local authorities and statutory undertaker land

222. It is well established that local authorities are not 'victims' for the purposes of the Human rights Act and do not have standing to make claims under the Convention. (see Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37). Accordingly, we have not considered further the changes made insofar as they affect local authority land.

223. Legal persons generally are subject to the provisions of the ECHR. Statutory undertakers can be companies, so we have considered whether the changes will have any affect on their rights. The revocation of sections 128 and 129 of the 2008 Act will mean, where land of statutory undertakers is compulsorily acquired by an order for development consent made under that Act, that this will no longer be subject to special parliamentary procedure (currently this would only be the case if a statutory undertaker were to object to the acquisition of land).

224. Potentially, A1P1 and Article 6(1) could be engaged by this change. However, we do not consider that the special parliamentary procedure is necessary to ensure compliance with either of these articles, nor was this ever the case. As set out above, special parliamentary procedure can only be engaged under the 2008 Act where land falls into one of a number of categories of special land. The rationale for special parliamentary procedure in respect of special land is to allow consideration by Parliament of competing public interests (in the case of statutory undertaker land these would be the interests in the development of the new project for which compulsory acquisition is sought, and the interest in avoiding whatever detriment would flow from the compulsory acquisition of land). The consideration of the private interests of the statutory undertaker would, on the other hand, be adequately and sufficiently taken into account by the standard procedures of the 2008 Act, as supplemented by the

availability of judicial review. This is for the broad reasoning set out above in respect of the relevant articles. It is important to note that if the land being acquired were that of a company which is not a statutory undertaker, or land belonging to a private individual, then unless it fell into one of the special categories of land there would be no need for special parliamentary procedure to be conducted.

Removal of requirement for the Secretary of State to issue a certificate where satisfied that an order authorising the acquisition of commons, open space or fuel or field garden allotments should not be subject to special parliamentary procedure

225. In respect of common land and fuel or field garden allotments, it is arguable that A1P1 and Article 6 may be engaged by this change. In respect of public open spaces, it is not considered that the use by members of the public of such spaces will constitute property rights within the meaning of A1 P1 of the European Human Rights Convention (ECHR). Although it is clear that "possessions" for the purposes of the right are wide ranging and not limited to ownership of physical goods, these must be limited to matters which could be deemed an "asset" or property right[7]. In this regard, a right to open space land is not a right which holds economic value and cannot therefore be regarded as an "asset" (see the discussion in respect of Town and Village Greens above). Accordingly, it is not considered that the changes proposed in respect of open space will engage Article 1 Protocol 1, nor will Article 6 be relevant.

Article 1, Protocol 1 – substantive provisions

226. To the extent that A1P1 is relevant to this change, for the reasons set out above, we consider that the making of any order authorising acquisition of land will be in pursuance of a legitimate aim and proportionate to the aim pursued. Any such order would be subject to an intensive scrutiny process, land would be acquired only there were a compelling case in the public interest, and compensation would be payable.

Article 6(1) – procedural matters

227. Furthermore, if and to the extent that Article 6 is engaged, the department does not consider that the removal of the need for a certificate in itself would affect the compliance of the 2008 Act process with the EHCR. Following the change, the fact that the Secretary of State is satisfied that one of the circumstances in which the need for SPP may be disapplied is applicable will be recorded in the DCO itself.

[7] Including, for example, leases (*Mellacher v Austria* (1989) 12 EHRR 391; shares (*Bramelid and Malmstrom v Sweden* (1982) 29 DR 64; contractual rights (*Association of general Practitioners v Denmark* (1989) 62 DR 226); c claim for compensation of lost land (*Broniowski v Poland* (2004) 15 BHRC 573. Latterly, the scope of the article has widened to include certain public law rights, such as non-contributory benefits (eg. *Stec v UK* (2006) 43 EHRR 1017. However, it is clear that the matters to which Article 1, Protocol 1 rights attaches are all economic or property-like in nature.

228. Sections 131 and 132 currently impose a requirement that before such a certificate is issued the Secretary of State must seek representations from interested parties and may cause a hearing to be held. These provisions are to be repealed. For the reasons set out at paragraphs 214 and 215 above, it is considered that the existing provisions of the 2008 Act in respect of the compulsory acquisition of land will meet the requirements of Article 6 following this change. In summary, if land is to be acquired, then this fact must be publicised and parties with an interest in the land must be notified. The 2008 Act process provides for interested parties to make representations regarding a draft development consent order, and relevant representations would be taken into account during the examination and decision making process. Furthermore, a party with an interest in land to be compulsorily acquired would be able to require, and make representations at, a compulsory purchase hearing. Finally, decisions taken under the 2008 are subject to judicial review.

Additional circumstances in which the Secretary of State will be able to provide that no special parliamentary procedure shall be held in respect of the acquisition of public open space

Article 1, Protocol 1

229. In respect of public open spaces, as set out above, it is not considered that the use by members of the public of such spaces will constitute property rights within the meaning of A1 P1 of the European Human Rights Convention (ECHR).

Article 6(1)

230. The acquisition of public open space is not a determination of a civil right for the reasons given above and accordingly it is not considered that the article is engaged.

231. The department would note, however, that even if it were considered that either of these rights were engaged that the provisions of the 2008 Act would be compliant with the ECHR for the reasons set out above.

Restriction of the scope of special parliamentary procedure

232. This change is being made because of an inconsistency between the 2008 Act and the 1981 Act and the 1945 Act. There is a similar inconsistency between the 1945 Act and the provisions relating the acquisition of special land in paragraph 22 of Schedule 3 to the 1964 Act, paragraphs 12 and 13 of Schedule 4 to the New Towns Act and section 12 of the Transport and Works Act 1992.

233. The provisions in relation to which changes are being made all provide that where an order authorising compulsory purchase is subject to special parliamentary procedure, the order will only be subject to this procedure to the extent that it authorises the compulsory acquisition of land or a right over land. The 1945 Act, which applies to all orders subject to special parliamentary procedure, contradicts this position by providing that the entirety of an order subject to this procedure is open to consideration. The proposed changes will clarify, in respect of the provisions listed above, that where an order granting development consent authorises compulsory acquisition of land, or where an order authorising compulsory purchase of land is made, that the only elements of the order open to consideration are those authorising compulsory acquisition of special land. In essence, the changes are to clarify an existing position which is unclear; to this extent it is not envisaged that they will engage Convention rights.

234. However, and in any event, for the general reasons set out above in our discussion of Article 6(1) and Article 1 of Protocol 1, the process by which an order authorising compulsory acquisition is made is compliant with these rights. Special parliamentary procedure is not necessary to ensure ECHR compliance, and this is not its purpose.

Clause 24 Directions bringing business and commercial projects within the Planning Act 2008 regime

235. Clause 24 enables the Secretary of State to direct that certain development should be considered under the streamlined unified consent regime for major infrastructure under the Planning Act 2008 rather than under the Town and Country Planning Act 1990 and other existing consent regimes.

236. The types of determinations that the Secretary of State will make in relation to such projects, for example determining applications for development consent and authorising the compulsory purchase of land, will be determinations of civil rights which engage Article 6. Authorising the use and compulsory purchase of land required to develop major infrastructure (and amending legislation to do so) will engage Article 8 and A1P1.

237. Although under clause 24 a broader range of projects will potentially be considered by the Secretary of State under unified consent regime for major infrastructure under the Planning Act 2008, rather than the under Town and Country Planning Act 1990, the clause does not propose any changes to the consent processes in the Planning Act 2008, which was subject to ECHR scrutiny prior to its enactment and was not considered to be incompatible with the ECHR.

238. For projects that are subject to a direction under clause 24 the decision whether or not to approve the development will be taken by the Secretary of State at first instance rather than the local planning authority. However, large projects are currently (under the Town and Country Planning Act 1990) able to be called in by the Secretary of State for his own determination, and also are considered by the Secretary of State if the local planning authority's decision is appealed; therefore, in that respect, bringing new types of major development within the scope of the 2008 Act does not represent a significant change from the existing consenting arrangements for major development. Under clause 16 there is no compulsion on a developer to use the Planning Act 2008 process; a new type of project will only be considered under the Planning Act 2008 regime if requested by the developer. This is different to the situation that exists for those projects defined in sections 14-30 of the Planning Act 2008 which must use the Planning Act 2008 consent regime rather than any alternative consent procedure.

239. As explained previously the House of Lords in *Alconbury* held that Article 6 did not prohibit the Secretary of State from being both a policy-maker and a decision-maker provided there is the opportunity for a sufficient review of the legality of the decision and the procedures involved. Applications under the 2008 Act are subject to an intense scrutiny process followed by an opportunity for review. Before an application is submitted to the Secretary of State, there is a pre-application process which involves extensive consultation requirements. If the application is accepted, then a pre-examination stage is held at which members of the public can register and provide a summary of their views. A six month examination stage follows at which anyone who has registered will be invited to make representations. A compulsory acquisition hearing must be held if a one is requested by any "affected person" for the purposes of section 59 of the 2008 Act, and an open-floor hearing must be held if any other interested person requests it. The Secretary of State's decision is then reviewable in the courts on normal judicial review grounds.

Article 8 and A1P1

240. A development consent order may only authorise the compulsory acquisition of land if there is a compelling case in the public interest. This test accords with that in *Pascoe* and was held to comply with A1P1 in *Howard v. UK*.

Economic measures

Clause 25 Postponement of compilation of rating lists to 2017

241. Clause 25 postpones the revaluation scheduled for 1 April 2015 to 1 April 2017. Postponing the next revaluation to 2017 will give businesses the certainty they need over the next few years to concentrate on delivering growth. The 2 year postponement comes in the face of exceptional economic circumstances. The

Government remains committed to maintaining up to date rate bills through regular 5 yearly revaluation which will resume after 2017.

242. Revaluation directly affects the amount of non-domestic rates chargeable in respect of a property. It is therefore considered that a postponement of the next revaluation is likely to engage A1P1 (right to peaceful enjoyment of possessions) to the extent that any resulting reduction following revaluation would be postponed.

243. The European Court of Human Rights recognises the ability of States to pass such fiscal laws as they consider desirable, provided that those laws do not amount to an arbitrary confiscation of property. Further, in considering A1P1 courts have to determine whether the interference with an individual's property is lawful under domestic law and if so whether a fair balance has been struck between the general interest of the community and the need to protect the individual's fundamental rights, applying a proportionality test.

244. There is no question that it is legitimate for the Government to make provision for the levying and collection of non-domestic rating, so the key issue in relation to postponement of the revaluation is whether this is necessary and proportionate. Our view is that it is. Although in some cases, businesses will see their non-domestic rates bills go down as the result of revaluation, in many cases bills will go up. Given the need to provide certainty to businesses in the face of exceptional economic circumstances, and given that the revaluation is only being delayed for 2 years, it is considered that any interference with A1P1 rights is necessary and proportionate.

Clause 26 Power to postpone compilation of Welsh rating lists

245. In relation to Wales, clause 22A allows the Welsh Ministers by order to postpone the date of compilation of rating lists from 1 April 2015 to 1 April 2016, 2017, 2018, 2019 or 2020. This will give the Welsh Ministers the opportunity to fully consider all relevant factors and the potential impact on businesses in Wales.

246. The Welsh Ministers are taking a power to postpone the date of the next revaluation in Wales by order. This will enable them to fully explore all relevant factors and fully consider the potential impact on businesses in Wales in the current difficult economic circumstances and therefore such provision is considered necessary and expedient. Given the need to provide some certainty to businesses in Wales and given the fact that the regular 5 year cycle will resume after the next revaluation, the Welsh Government considers that any interference with AIPI rights is necessary and proportionate.

Clause 27 Employee Shareholder

247. This clause creates a new employment status known as the employee shareholder that applies to companies with share capital. The characteristics of this status are different employment rights (compared to employees) and an equity stake of at least £2,000 in the employer's company or parent company.

248. The creation of this new status does not of itself engage any ECHR rights. The status is voluntary. Existing employees can decide whether to move over to the new status and this is backed up by rights not to be unfairly dismissed or to suffer a detriment as a result of refusing to take up the employee shareholder status. Work-seekers, and any other person who is not currently an employee, can decide whether to become an employee shareholder or whether to seek engagement on terms as an employee. None of the rights which are excluded from the employee shareholder status relate to rights derived from EU law or from discrimination legislation.

Sub-section 2(a) – Study or training

249. The statutory right to make a request to undertake training or study in section 63D of the Employment Rights Act 1996 ("ERA") is available where the employer has 250 or more employees and the employee has 6 months qualifying service. This is not a right actually to go on training but to have a request for training considered in accordance with the procedure set out in the legislation. For the employee shareholder, this right is to be removed. The employee shareholder status does not alter any rights in relation to study and training available to 16-17 year olds in sections 28 and 28 of the Education Skills Act 2008.

250. Article 2 of Protocol 1 ("A2P1") of the Convention does not guarantee an absolute right to education, but rather guarantees a right of access to educational institutions existing at a given time. Whilst sub-section (2)(a) may be seen as engaging A2P1, there is no infringement of A2PI. The removal of the section 63D right does not prevent an employee shareholder from making a non-statutory request for training. Furthermore, the right removed is not a right to education per se but a right to have a request for education considered by the employer in a certain way. Finally as explained above, the employee shareholder status is voluntary, not mandatory.

Sub-section 2(b) – Flexible working

251. Certain employees (e.g. those with children) may make a request under section 80F ERA in relation to flexible working. This statutory right will not apply to employee shareholders except in relation to the 14 days period after the return to work of the employee shareholder from parental leave under regulations made under section 76 ERA.

252. The proposal could be seen as engaging Article 8 relating to an individual's family life and Article 14 on the prohibition on discrimination (in that women may be

more likely to request flexible working than men). The Government concludes that there is no infringement of the Convention rights. First, the statutory right to be removed is not a right to flexible working per se but a right to have a request for flexible working considered in accordance with the statutory procedure. Secondly, any decision which an individual makes to become an employee shareholder is voluntary as explained above. Finally there is nothing to prevent an employee shareholder from making a non-statutory request for flexible working.

Sub-section 2(c) & sub-sections 5 and 6 - Unfair dismissal

253. An employee has a right in s.94 ERA not to be unfairly dismissed after two years of qualifying employment. For employee shareholders this right will not apply. Although the Convention does not refer specifically to unfair dismissal, unfair dismissal is used as a remedy for the breach of certain ECHR rights. To take one example, Article 11 on the freedom of assembly and association refers to the right to participate in trade union activities. If a person were to be dismissed in breach of his Article 11 rights, the Bill provisions do not affect his unfair dismissal right for that contravention. The Government considers that the removal of the s.94 ERA unfair dismissal right does not engage a Convention right and furthermore where a Convention right is engaged, unfair dismissal is retained as a remedy.

254. The Government has also considered these provisions in relation to Article 30 of the Charter of Fundamental Right. Article 30 states that every worker has protection against unjustified dismissal in accordance with Community law, and national law and practices. This Article does not create a new and freestanding right to protection from unfair dismissal but rather operates as a restatement of rights found in EU-derived legislation. Since the Bill does not propose removing rights deriving from the EU, such as protection in the event of a transfer of an undertaking, this proposal is compatible with Article 30.

Sub-section 2(d) - Statutory redundancy pay

255. The employee shareholder is to have no right to statutory redundancy pay as set out in s.135 ERA. The Government considers that this does not raise issues in relation to Article 1 of the First Protocol in relation to the protection of property as this does not amount to unlawful deprivation.

Sub-sections 3 and 4 – Maternity, adoption and paternity leave period

256. An employee returning early from maternity leave or adoption leave is required to give 8 weeks' notice of an early return or, in the case of additional paternity leave, 6 weeks' notice of an early return. For an employee shareholder this is to be increased to 16 weeks' notice for these three types of leave.

257. This provision could engage Article 8 relating to the right to respect for private and family life. However as the mother/father/adopter is not being required to give up maternity/paternity/adoption rights or leave, (the proposal merely concerns notice to be given relating to returning to work early) the Government considers that Article 8 on the prohibition of discrimination is not infringed. It is noted that a person returning from additional paternity leave is subject to a greater increase in the notice period to be given compared to a person returning from maternity or adoption leave. However the Government considers that having anything other than a single requirement of 16 weeks' notice would not promote equal treatment in the use of the employee shareholder status and having a uniform early return notice period for all employee shareholders is compatible with the Convention.

GROWTH AND INFRASTRUCTURE BILL

EXPLANATORY NOTES

These notes refer to the Growth and Infrastructure Bill
as brought from the House of Commons on 18th December 2012
[HL Bill 72]

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