

**PLANNING DECISION MAKING:  
Independence, subsidiarity, impartiality and the state**

## ABSTRACT

This paper explores recent changes that involve the Planning Inspectorate (PINS) in England, considering as part of this the relevance and value of independence and impartiality in effective decision making, together with a consideration of the significance of these changes in the context of localism and the subsidiarity narrative. To inform this debate, this paper focuses upon the value of having an independent body for planning decisions through a comparison with the Planning Appeals Commission (PAC) in Northern Ireland. The paper points towards the potential need for change in the structural approach and arrangements of the system in England, drawing particularly upon the PAC as a potential model for consideration.

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## 1. Introduction

The Conservative and Liberal Democrat coalition moved quickly after their election in 2010 to bring about significant changes to planning in England. The structural approach to this change was focused around a dual process of localism and centralisation, with a key instrument in this change process being the Growth and Infrastructure Act (2013).

This paper focuses upon the decision making and fact finding roles of the Planning Inspectorate (PINS) in England and the manner in which the organisation's remit has changed since 2010. These changes raise important concerns about the integrity, and indeed legality, of the planning appeals process in England and the position of PINS as a planning body. In addition, the validity of the organisational approach in the context of localism and the principle of subsidiarity is considered, alongside questions concerning the role of politics in planning. Finally, the philosophical questions raised by this are of note for a planning system founded upon decision making which balances interests with fundamental principles of openness, fairness and impartiality. As a response option, the Planning Appeals Commission (PAC) of Northern Ireland is considered, with an assessment of the value and transferability of this model into the English context.

## 2. Research Approach

This paper is based upon a literature review supplemented by primary research. A range of academic papers and case law informs the literature review. The secondary evidence is complemented by an in-depth examination of the activities and mechanics of PINS and PAC. The PAC is used as the primary case study, from which contrasts, comparisons and lessons are drawn. Case studies were selected on the basis of both the similarities and the differences from the situation in England; a degree of similarity in the system of planning is desirable to increase the comparability of the systems in question.

The research also considers the role of the courts in appeal decision making given the pre-eminence of their use worldwide in decision reviews, drawing upon secondary evidence to explore the relationship of the judiciary to merit based planning review decisions.

In the paper, primary and secondary research is used to present and identify the potential implications of the arrangements now in place in England. The study will highlight the potential need for change in the structural approach and system arrangements in England, drawing upon Northern Ireland as a case study for an alternative, non-court based system.

This paper is informed by informal interviews and discussion with expert planning professionals working within PINS, the PAC, an Australian State Government planning professional, and private planning practitioners from around the UK. The respondents were selected by the researchers as being known to them as being experts in their field and on the basis of their differing positions within the planning appeals process and perspectives on the system. The individuals interviewed represent the public and private sectors, and includes stakeholders with involvement throughout the development process. A list of themes for discussion were drawn up beforehand and the discussions took place with an adopted semi-structured approach, carried out face-to-face and by telephone. The discussions were analysed by the researchers and used to inform the analysis and conclusions. In order to protect the anonymity of the interviewees any quotes will be used in a non-attributable way.

### **3. History and principles**

In England the planning system is based upon a discretionary model and a merits based decision making process (Northern Ireland mirror this approach). Within the codified system of planning found in much of the world, planning decisions are made against binding plans; the application decision is a matter of legal compliance. In contrast, decisions in England are taken in accordance with the local Development Plan document unless other material consideration indicate otherwise, meaning that discretion exists at the point of a decision being made upon each individual planning application.

In England the modern mechanism we find in existence today for regulating the use and development of land was created in 1947 by the Town and Country Planning Act. The form of the planning system that emerged in the post-war period was the culmination of a process of change in the philosophical underpinnings of the planning system. The need for a reaction to the environmental and social conditions created by the rapid growth from the mid-nineteenth century onwards led to a transition from a legal construct which was driven by private interest (through nuisance, land rights and easement legislation) to one also concerned with social justice and well-being. It represented an acceptance of the necessity for state intervention, interfering with market forces and private property rights through the creation of a planning construct operating in the public interest (Booth, 2003).

This transition led to an irreconcilable scenario of competing interests; McAuslan (1980) considered that the failings of planning are directly associated with three competing ideologies that exist where state intervention is operating with both private and public interest objectives. The three ideologies McAuslan (ibid) presents recognises that the traditional common law role of the law is to protect private property, yet at the same time the law exists to serve both the public interest and the cause of public participation. These ideologies can be competing and lead to tensions. The 1947 Act represented in some respects the confirmation of the pendulum swing from the private interest to the public interest in respect of state intervention actions. The ability of the system to balance

interests remains perhaps its greatest challenge; supporting private interests and enabling appropriate new developments whilst providing a robust system for managing impacts effectively. The controversial implications of the removal of the private individual's unrestricted right to develop their land was such that a right of appeal was created to counterbalance this control (CPRE et al, 2002; Warth, 2012). The right of appeal evolved in parallel to the planning system; a recognition of the attempts to manage the growing impact upon private interests of enhanced state intervention. Initially, the government Minister accountable for planning was responsible for planning appeals with support from professional planners ('Inspectors'), but s23 of the Town and Country Planning Act 1968 changed this landscape significantly since it allowed the Minister to appoint "another person" to determine appeals (HMSO, 1968). The result of this was that the planning Inspectors were placed in a position where they were actually making the final decision on appeals rather than producing recommendations for approval by the Secretary of State (Wraith and Lamb, 1971; Warth, 2012). Since this point, the PINS evolved into a position where the organisation and the Inspectors are, or at the very least perceived to be, more independent of the Secretary of State. This organisational evolution was described by Leonora Rozee, former Deputy Chief Executive of PINS, as a "gradual evolution from a direct arm of ministers in its early days to a semi-autonomous Agency" (2000).

#### **4. The process of decision making in England**

The planning system in the England is modelled upon the concept of the 'Local Planning Authority' (LPA). This designation denotes the legal position of an organisation of local government as the responsible decision making body for planning applications. The right of appeal against a refusal of planning permission, or a non-determination of an application within the statutory time-period for the application type in question, is to the Secretary of State (SofS) with responsibility for planning. The Planning Inspectorate acts on behalf of the SofS and makes the decisions on appeal matters in accordance with the arrangement already introduced.

The Planning Inspectorate in England is an Executive Agency, one of many forms quasi-autonomous non-governmental organisations (QUaNGOs) that form the organisations of governance in the United Kingdom. The two primary families of QUaNGO are the Executive Agency and the various forms of non-departmental public bodies (NDPBs). The concept is that whilst both are ultimately responsible to a SofS, a NDPB sits at 'arms-length', whereas an Executive Agency, whilst still having a separation from the responsible government department, has a closer organisational relationship with its associated 'parent' department. The Planning Inspectorate therefore acts on behalf of the Secretary of State. In England, the structure found is as follows:

INSERT FIGURE 1 HERE

In addition to this, a right of appeal exists to the High Court. This route is not available on merit grounds however; the High Court appeal option is available where a procedural or legal matter is being questioned. This has parallels with the court based options for challenge that exist in the codified planning systems found in much of the rest of the world; here, it is the legality of the decision that is tested against a legally binding plan.

The traditional decision making process in England can therefore be summarised as shown below:

INSERT FIGURE 2 HERE

The organisational structure for decision making in England is more complex than figure 2 suggests though, with some forms of development not being determined by the LPA in the first instance, but rather directly to the national tier of governance. This is summarised in the model below:

INSERT FIGURE 3 HERE

The Growth and Infrastructure Act of 2013 included two significant changes to planning decision making. Firstly, the criteria for what constituted 'major infrastructure' was broadened to include a wider range of development types and scales; this therefore increased the number of matters considered at the national, rather than local, level. Secondly, Clause 1 of the Act allows an option to applicants whereby if a Local Planning Authority is judged to be a 'failing' authority (Councils determining fewer than 30 per cent of major applications within 13 weeks over a two-year period) it is possible to apply directly to the national tier for the determination of a major planning application. It is the MAP Directorate within PINS who have responsibility for delivering this process and, as is the case for major infrastructure applications, no right of merits based appeal to a higher authority is available.

It merits highlighting that PINS therefore plays two distinct roles; it acts as both decision maker and finder of fact. In a planning appeal scenario, PINS acts to adjudicate in cases of dispute between local authorities and applicants. In determining a major application which has bypassed a 'failing' Authority, PINS are also decision makers on behalf of the SofS. In contrast, in SofS 'called in' cases and in national infrastructure applications, PINS acts as a finder of facts, presenting these to the Minister for their decision. The fact that PINS holds these two roles presents a clear challenge; as decision maker it must be independent and free from political interference. As a finder of fact however, it is working directly to the Minister making the decision, a closer relationship and one which brings tension given the political position of Ministers.

## 5. Relationships

There is currently a positive view of PINS, the work they undertake, and the decisions that they make. A Select Committee considering planning appeals in England in 2000 stated that in most aspects of its work PINS is doing "an excellent job" (Select Committee on Environment, Transport and Regional Affairs, 2000). Wiley (2005, 2007) has shown that most respondents discussing the work of PINS and their decision making reasoning were complimentary. This view is supported by Kate Barker's Review of Land Use Planning (Barker, 2006), which states that the appeal system is seen to deliver a high quality service (Warth, 2012). The research findings also suggest that PINS is considered to be operating in a manner considered generally fair, open and impartial. It is argued however, that the *perception* of fairness and impartiality could be compromised at the very least by the implications of the changes being introduced. The real and perceived relationship between PINS and government is hugely important. To challenge a refusal of planning permission on its merits the applicant should benefit from an 'independent and impartial tribunal' (ECHR 6(1)). The need is therefore for an appeal to be undertaken in an impartial manner, free of interference (thus 'independent') from government, national government included.

In a scenario where PINS is acting *for* government in its actions PINS can be seen as being *used* by the SofS to fulfil the government ambitions; for example, where PINS are acting to deliver decisions in a more timely, efficient and effective manner than the 'failing' LPA are able to deliver, or acting as finder of fact for the decisions of the SofS. This raises questions of political motivations being presented in the context of planning decision making, and this then being associated with PINS. Furthermore, as established, in an increased number of scenarios the right to appeal to a higher and separate authority will not exist, a concerning scenario given the importance of this right in the context of providing a counterbalance to state intervention into the market. In such a scenario the *perception* of the independence and impartiality of PINS may be threatened, and the integrity of the planning system questioned.

There is a risk that PINS will be seen as a 'tool' of the government, making decisions on their behalf, or indeed that they are the Government, as opposed to a 'state actor' with recognisable independence from the governing political party.

Although PINS is indeed an Executive Agency of government, they have managed to operate historically in a manner that allows them to be seen as independent and impartial. PINS are widely seen as a body making a merit based decision in a fair, open and impartial manner in accordance with the Franks principles (1957). Published by a British Committee of Inquiry, the Franks Report emphasised that tribunals should be based upon openness, fairness and impartiality, without political interference. This is despite PINS close relationship with government and role in relation to 'called in' applications and national infrastructure decision making. However, interviewees for this research suggested that the perception of PINS as a fair, open and impartial decision making body is a challenge in the context of the changes seen over the last 5 years. As PINS becomes seen to be more closely associated to government, so to there is the risk of being seen as Government, making the decisions of the governing political party. The close relationship with government in 'called in' applications and national infrastructure applications particularly reinforces this perspective, with such decision more open to suggestions of political decision making. In such a scenario, conceptions of impartiality and independence are truly lost and concerns of political influence in decision making become more significant.

It is argued that appeal decisions particularly must be independent and free from influences such as politics to ensure its credibility and value; indeed, this can be seen as a founding principle of the appeal process given the role as a counterbalance to the implications of state intervention into the market (CPRE et al, 2002; Warth, 2012).

The value of PINS independence of action and decision making is therefore significant given their role and this appears to be at risk. The threat here is reputational damage and questions over the legitimacy and soundness of the current organisational structure for decision making in England and, ultimately, the appropriateness of the arrangements in place.

## **6. Localism and subsidiarity**

One matter that appears clear is that the changes discussed in this paper introduced by the Growth and Infrastructure Act 2013 run contrary to the principles of localism. The principle of subsidiarity in planning was important from inception; decisions made by accountable local decision makers against locally agreed development plans. The current localism agenda is based upon the guiding principle of subsidiarity where decision making and responsibilities are delegated to the lowest possible level. Despite this, a number of changes introduced by the coalition government are focused around centralisation and a passing of power to the national scale. PINS are playing a part in this dichotomy.

The changes to the role of PINS include addressing the argument that the planning system is a barrier to economic growth and the delivery of development by allowing a direct application to PINS for a major scheme where a Local Planning Authority is 'failing'. This compromises the ability of PINS to present itself as independent from state influence, instead being seen as a *tool* of government.

This structure also circumvents the local democratic decision making process and is entirely contradictory to the subsidiarity principle associated with the localism agenda; decisions will be made as far from the local population as it is possible to be the case. Rather than the purported subsidiarity principle, we are actually witnessing a parallel process of subsidiarity and centralisation

and a detachment between the community and decision being made. PINS are playing a role in this situation and it is argued that this is an issue which requires addressing given the potential institutional damage and implications for planning more widely in England.

## 7. Social Justice

The changes introduced under the coalition government pose questions concerning the state of social justice within the planning system. Article 6 (1) of the European Convention on Human Rights (ECHR) guarantees that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to an independent and public hearing within a reasonable time by an independent and impartial tribunal established by law (Article 6 (1) of the ECHR)

Article 6(1) of the ECHR therefore provides for an appeal against a planning decision and includes the right to an *independent* and *impartial* judge or tribunal. In England, Ministers make policy and determine against it through Inspectors of PINS ('standing in the Secretary of State's shoes'), or indeed directly through the call-in process and national infrastructure applications where they are advised by PINS. The relationship of PINS to government is therefore questionable, given that it is not truly independent. The dual role of PINS, as both decision maker and government finder of fact, is argued to be irreconcilable for an organisation that is required to be seen as independent and impartial.

The question of independence has been tested in other circumstances with an outcome that is relevant to the position of PINS. Article 5(4) of the ECHR also provides that everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. Article 6 is closely linked to Article 5 of the ECHR in that together these Articles provide for the right to a fair trial (Epstein, 2007). In *R (Brooke and Ter-Ogannisyan) v The Parole Board [2007]*<sup>1</sup> a challenge was mounted concerning the relationship of the Parole Board and the Ministry of Justice that sponsored it. Essentially the challenge was on the basis that there was not sufficient independence of the review body (Parole Board). As highlighted by Epstein (2007):

The Secretary of State is, via a unit in his Department, its sponsor; he controls its budget, appoints its members and may dismiss them, makes its rules, houses it and staffs it within the Ministry, and closely monitors its activities. All these things he does whilst at the same time being in every case also a party appearing before it.

It was found in this case that the relationship of the Parole Board did not sufficiently demonstrate its objective independence of the Secretary of State (Epstein, 2007). The result of this was the transfer of responsibility of parole review to an independent organisation.

In the context of planning there are cases that have tested the position of PINS. In *Bryan v UK [1996]*, which concerned two buildings erected without planning permissions,<sup>2</sup> an Enforcement Notice seeking the demolition of the buildings in question was challenged on the basis of Article 6 (1). It was found in this case that PINS alone did not satisfy the test of independence, but the right

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<sup>1</sup> *R (Brooke and Ter-Ogannisyan) v The Parole Board [2007] EWHC 2036*

<sup>2</sup> *Bryan v UK [1996] JPL 386 (ECHR)*

of further appeal to the High Court in parallel to the merit based appeals process did. A subsequent Select Committee Report from 2000 however suggested that despite the Bryan outcome, the position being taken by the government was a vulnerable one:

It is the Government's role to provide leadership and it must take active steps towards ensuring that the planning system is fully compatible with the Human Rights Act 1998 and the Aarhus Convention, rather than simply waiting to be told by a court that it is not. (Select Committee on Environment, Transport and Regional Affairs, 2000)

Subsequent to this, the 'Alconbury' decisions [2001]<sup>3</sup> are worthy of mention. Three cases testing Article 6 were brought during which it was resolved that the SoS is not prohibited from being both policy-maker and decision-maker. It was found that the process is public and fair, the latter being checked in the High Court, which provides both the independence and impartiality to the system.

The Alconbury cases are important in relation to the testing of the current arrangements. Part of the judgment considered the impartiality of the inquiry process, with the requirement to provide rational justifications for decisions taken being emphasised. Procedural transparency was a key matter in this scenario, and the arrangements currently in place in England were considered to support 'due process' due to the process being appropriately public and fair. The role of the High Court must also be stressed; this right of challenge through the judicial system provides an opportunity for the legality of decision making to be ensured.

It therefore seems that, despite the concerns of the Select Committee, the current merit based appeals system in England has been tested and found sound. It must also be stressed that at no point was the fairness, integrity and openness of PINS suggested as being lacking in any way.

There are clearly causes for concern regarding the current approach to planning decision making in England however. The changes resulting from the Growth and Infrastructure Act 2013 has increased the number of applications being determined by the SofS and PINS where there is no merit based right of appeal. The stance of the government on this is that the loss of right to appeal in cases determined by PINS/SofS maintains current compliance to Article 6(1). It is nevertheless argued that these concerns become heightened in light of the changes resulting from the 2013 legislation, and the loss of a merit based appeal right is contrary to a foundation stone of the post-war system philosophy. The suggestion that the High Court alone offers compliance with the ECHR would appear to be a vulnerable position to maintain and a test of this position is suggested as being possible again in the future.

## **8. The Courts**

Within a codified decision making system as is found in much of the rest of the world, the right of challenge exists through the courts. With a legally binding plan in place, a challenge is on the basis of the legality of a decision. In England, the High Court provides a similar role in allowing the legality of a decision to be questioned, but in relation to the use of courts in merits decisions within a discretionary planning system the matter is more challenging despite calls for their wider use.

Questions over the English approach to merit based planning appeals in England are not new and the Courts have been suggested as a solution. The DETR Environmental Court Project, a report by

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<sup>3</sup> R v Secretary of State DETR ex parte Alconbury Developments and others [2001] UKHL 23.

Malcolm Grant in 2000 considered some of the issues discussed in this paper and proposed a two tier approach based solution:

- Tier 1: Independent Tribunal (replacing PINS)
- Tier 2: Environmental Court (replacing Ministerial decisions)

It was suggested that such a model would address the weakness in the current system in the context of the ECHR and would offer a more robust approach to merit based review of planning decisions. Merit based appeals where the courts are employed as suggested above can be found in place elsewhere. Examples can be found in New Zealand and Australia where a broadly similar solution to Grant's can be found. But the use of the courts is not without issue.

Court decision making can involve significant cost, a feature that it would not be desirable to further introduce into the English planning system. The nature of the decision maker is also of note; the use of a Judge and the judiciary would resolve issues of impartiality, politicisation, and independence, but the uniqueness of the skill set and role is significant. The courts exist to determine matters of law, whereas planning appeals involve making a values based decision based upon professional judgement and interpretation of knowledge specific matters. Addressing this would be a significant challenge within the context of a court based decision. Of equal significance is the fact that the use of courts can increase the actual role of the law in decision making, rather than the merit discussion. Wiley (2007) notes that:

Indeed, this research has found, particularly in Australia, that planning-appeal processes are currently consumed by the law... (Wiley, S. 2007, pg.1696).

The introduction of a greater legal emphasis is not considered desirable given the merits based decision making principles at the heart of the English planning system.

Given the factors of cost, logistics and intentions, and the desire to retain the merit discussion at the heart of the process this paper does not therefore propose fundamental change and an extended court/tribunal based solution for appeals on the basis of merit. Instead, it is argued that an adaption of the current arrangements should be pursued, with lessons taken from the experience of Northern Ireland.

## **9. Independence and separation**

In contrast to the situation in England, Northern Ireland undertook significant restructuring in 1973 as a response to the 'deeply fractured geography' (Murtagh, 2001). This restructuring involved the centralisation of planning powers into the Planning Service, an Executive Agency of the Department of Environment (DoE). Clearly this political, social and geographical context was important to the nature of the structure of governance that emerged in Northern Ireland. The Planning Appeals Commission (PAC) was set up as an independent to deal with a wide range of land use planning issues in an impartial manner.

The objective of PINS is noted as 'to be recognised as applying policy consistently and authoritatively', whereas the PAC's role has been known to 'independently interpret and frequently depart from planning policies adopted by DOE (NI)' (Turner, 2006, p.82). The PAC have a vision of providing a fair, efficient and effective appellate service to the public, applying expertise and experience to information gathered through the process and to contribute quality of the environment by making the best possible decisions. The PAC is not linked to the Department of the Environment and operates under the 'Franks Principles' of openness, fairness and impartiality. The PAC is made up of twenty full time Commissioners and two Panel Commissioners that are appointed



by the Office of the First and Deputy First Minister (OFMDFM) under Article 110 (2) of The Planning (Northern Ireland) Order 1991.

PAC provides independent examinations in relation to standard planning and water appeals and development plans, conducts public inquiries and hearings for large scale infrastructure projects and major planning applications. In addition the PAC also operates in a wide range of 'hear and report' functions, which includes holding public local inquiries into development schemes, conducting hearings in respect of determinations under the Environmental Impact Assessment Regulations, holding public local inquiries at the request of the DOE in relation to any of its planning functions. These latter roles are a parallel in some respects to the 'called in' and national infrastructure applications in England where the role of PINS is perhaps most challenging from a relationship perspective.

The work of PAC is funded under the aegis of the OFMDFM and a private Planning Consultant stated a belief that this body "doesn't try to influence them", they just fund them. When speaking to a PAC Commissioner, it was explained that the relationship between the two organisations works under a Memorandum of Understanding that sets out the relationship to OFMDFM, where the PAC is an arm's length body and:

They have no interference with our work; however they are taking more of an increasing view on our governance.

An interviewed Commissioner explained that government want insight into how their money is being spent but they do not get involved in decision making issues such as the prioritisation of cases. Despite this, it was also stated by a Commissioner that it was felt to be a struggle to maintain their independence and ensure that there remains a clear line that is not crossed between issues that are purely management related and those that are case related. It was noted that it is not always easy to get across to OFMDFM the necessity for them to remain independent given their role.

OFMDFM began to fund the PAC in 2001 and shortly after that they were given some regeneration powers within the Department of Social Development (DSD) who are responsible for urban regeneration. Within this structure, the PAC could be asked to hold inquiries into potential regeneration sites, which could be problematic, however a Commissioner stated that there is a 'Chinese wall' between the team that would potentially deal with the regeneration sites and the group that separately deals with the PAC.

Given these challenges, and the wider context of Northern Ireland, it is significant that the interviewees expressed that the PAC was a truly independent body with one respondent stating that:

I have never once doubted the independence of that body and that is its greatest attribute  
(Planning Law Solicitor)

A Planning Consultant also stated:

I have a lot of time for the PAC...they preserve their independence very well.

Some pressures clearly exist upon the PAC in relation to their relationship with government, but this research points to a system which is genuinely operating in an independent and impartial manner. Importantly, it also appears to be perceived as such too.

Whereas there are around four hundred inspectors in England, there are only 20 Commissioners in Northern Ireland. One respondent stated that the problem with such a small pool is the culture this creates. There is only a very small pool of potential recruitment in Northern Ireland and most Commissioners have at one time or other worked together in DoE Planning or in Private Practice. Such a scenario would not exist to the same extent in England given the scale factor.

In relation to the consistency of decision making, a Planning Consultant stated that:

'I think the consistency is pretty good but there are now and again some random decisions'.

To mitigate the reduced group oversight of decisions a single Commissioner is able to check their position with peers and thus, it was suggested by the Commissioner, ensured consistency. A Planning Lawyer commented that:

(...) there is a consistency from decisions coming out or otherwise there would be more court cases.

Decision making consistency is a challenge in any model of decision review, but a clear view was expressed that consistency is as robust as can be expected within a merits based scenario and the question of consistency is not one which is of concern in the context of moving to a PAC model.

When asked about how the PAC might have changed formats, a Commissioner explained two proposals that were put forward but have never been adopted. The first was a proposal for the DoE to take back funding the PAC. DoE had initially funded the PAC until 2001, however with the introduction of the Human Rights Act 1998, there was a question mark placed over their independence. The Commissioner stated that the DoE was good at not interfering, but their funding powers were still transferred to OFMDFM due to this concern. The suggestion that the DoE could take back the Commission was quickly dropped given this history. Whilst the majority of planning powers are being devolved to local Councils under current reforms, DoE have not surrendered all planning powers. They are reserving considerable power in relation to formulating and coordinating policy, calling in certain applications, determining application for projects of regional significance, and intervening in the production of development plans. Since there was not a complete surrender of powers it was considered inappropriate for DoE to take back the PAC. This point is particularly significant in the context of the question of the independence of PINS given the relationship it has with government.

The other alternative format that was put across was for the PAC to become part of the Courts and Tribunals system along with the Lands Tribunal. It was noted that whilst a similar model has taken place in England for Judicial Reviews, it has taken time to introduce and it was suggested that the Department that has ultimate responsibility for the PAC would be reluctant to give them up to a different department. To date there are no plans for the PAC to be transferred

Perhaps the most controversial proposal for reform related to the Planning Bill (Northern Ireland) 2014 which had a key objective of bringing forward the implementation of a number of the planning reforms contained within the Planning Act (Northern Ireland) 2011 before the majority of planning powers transfer to local government in 2015. This was a controversial Bill. Within this withdrawn Bill was Clause 10, this proposed to amend Article 31 of the Planning (Northern Ireland) Order 1991 (a special procedure for major planning applications where the Department may cause a public local inquiry to be held by the PAC). This would have allowed the Department to appoint a person other than the Planning Appeals Commission (PAC) to hold a public local inquiry (or hearing) to consider representations made in respect of any application to which Article 31 has been applied. This clause

of the Planning Bill would have provided that 'an independent person' could have been appointed by DOE to carry out an examination of the development of lands and major planning applications. The interviewees were opposed to this clause stating that this could threaten the independence of the PAC. They stated that they had great difficulties with this proposal, noting that it would be very hard for DoE to appoint someone independent in a small country where most planning professionals have spent time in both private and public practice (including the DoE), so where were these independent persons to be drawn from? It was also raised that this could cause problems in terms of the administration of these cases, since it was suggested that DoE would have to be in charge of administration and they themselves would likely be one of the parties involved, a situation that would clearly be problematic (Lloyd, G. M. and Peel, D. 2012).

The considered changes discussed above are all of note to the English situation due to both the clear parallels and the concerns expressed. The unique history of Northern Ireland is significant, but this also reinforces the value of the comparison; the heightened sensitivity of the context makes independence and impartiality paramount. In England, matters are very different but the nature of change being witnessed is such that independence and impartiality are becoming more significant issues which, it is argued, now demand a response.

## **10. Conclusion**

The implications of the changes introduced through the Growth and Infrastructure Act of 2013 are argued to be significant. In an increased number of scenarios the right of appeal against a decision made by the state will be removed, this a serious concern given the importance of this right within a scenario of state intervention into private interests. Furthermore, these changes have the potential to impact upon the perceptions of PINS and the already challenging view of their relationship with government given their dual role of decision maker and fact finder.

The PINS Code of Conduct, states that they are guided by the:

(...)seven principles of public life set down by Lord Nolan when Chairman of the Committee on Standards in Public Life. The seven principles are selflessness, integrity, objectivity, accountability, openness, honesty and leadership. It is also based on the "Franks principles" of openness, fairness and impartiality (The Planning Inspectorate, 2012).

This paper does not suggest that PINS will necessary have any less integrity in reality than is currently the case, but rather it is argued that the perception of the organisation will be influenced to the extent that the 'Franks principles' could, at the least, be perceived to have been compromised.

A further dynamic in play here is the current philosophical stance being presented in relation to planning decision making by the current coalition government; that of localism and subsidiary. Some changes introduced by the Government have indeed followed this principle, but the ability to bypass a local planning authority and apply directly to, effectively, national government flies in the face of this subsidiarity principle. It is argued that in doing this, the Government is significantly undermining PINS, the localism agenda and local planning authorities.

Conceptually, the lessons from Northern Ireland are clear and merit consideration with regards their transferability driven the dynamics associated with the development of the system that is in place. Practically, PINS is well placed to become more detached from government; the Non-Departmental Public Body (NDPB) model PAC represents is a matter of the structural relationship with government. A key issue exists though in the current dual roles of PINS as both fact finder and

decision maker however. Making PINS a NDPB will not address the issue of the perception of independence and impartiality if it continues to have the same role and relationship with government in relation to 'called in' and national infrastructure applications. In parallel to a move to physically separate the organisation, the PAC model of involvement in major applications also demands consideration; this would create a scenario where PINS would have a consistent relationship with government in the different roles it is employed in.

The debate over decision making powers and their execution and review is not a new one. Montesquieu stressed his opinion on the importance of the separation of executive, legislative and judicial function for political liberty in 1748, and questions concerning the execution and scope of decision making powers in the planning system in England have existed as long as the system itself. This paper has presented an assessment of the implications of recent changes and the associated debate. It is argued that these changes could potentially be challenged on the basis of the legality of the planning decision making system in England when considered against the ECHR, and furthermore threatens to undermine the integrity, effectiveness, and position of PINS as a trusted organisation and legitimately independent and impartial decision making organisation. Additionally, the loss of the right of an appeal post decision in more circumstances challenges a key principle and philosophy underpinning the planning system. Finally, the changes clearly fly in the face of the subsidiarity and run entirely contrary to the localism agenda.

It is suggested that the solution in part lies in a shift to a commission based model as found in Northern Ireland which, whilst not beyond criticism, offers a model that is partially transferable, and is robust legally, philosophically, and from the perspective of the manner in which the organisation is perceived. As an organisation, PINS should be entirely separated from government and operate only as an independent decision maker in their operations, reinforcing their perceived impartiality and integrity. Such an arrangement should be the subject of further research.

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