

GROWTH AND INFRASTRUCTURE ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Other infrastructure provisions

Section 18: Power stations: repeal of requirements to give notice

87. **Section 18** repeals section 14 of the Energy Act 1976 (“the 1976 Act”) and has the effect of revoking the two orders made under it, namely the [Electricity Generating Stations \(Fuel Control\) Order 1987 \(S.I. 1987/2175\)](#) and the [Electricity Generating Stations \(Gas Contracts\) Order 1995 \(S.I. 1995/2450\)](#). Section 14 of the 1976 Act implemented European Council Directive [75/404/EEC](#) of 13 February 1975 on the restriction on the use of natural gas in power stations and Council Directive [75/405/EEC](#) of 14 April 1975 concerning the restriction on the use of petroleum products in power stations.
88. Both Directives have since been repealed (EC/75/404 in 1991 and EC/75/405 in 1997) and the policy objectives behind section 14 (arising in response to market conditions for gas and petroleum products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 from the requirements of section 14(1) by section 33(1) (e) of the Planning Act 2008. Section 14 of the 1976 Act and the two orders (referred to above) no longer have practical application.

Section 19: Conditions of licences under Gas Act 1986: payments to other licence-holders

89. **Section 19** amends section 7B of the Gas Act 1986 (“the 1986 Act”), 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 section 19 is to clarify that conditions included in a licence granted under section 7 of the 1986 Act 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 1986 Act (not just gas shippers or suppliers).
90. 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 1986 Act (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 1986 Act.
91. The amendment in section 19 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.

Section 20: Variation of consents under Electricity Act 1989

92. Under section 36 of the Electricity Act 1989, consent is required for the construction, operation or extension of certain electricity generating stations (although the scope of this requirement is now limited to those projects which do not require development consent under the Planning Act 2008). Depending on the location of the proposed development, these consents are granted by the Secretary of State, the Marine Management Organisation, or Scottish Ministers. At present, if the developer's plans regarding aspects of their proposals which have been specifically referenced in the section 36 consent change, they may find themselves unable to proceed. Because it has not previously been possible to vary section 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. Section 20 provides the Secretary of State, Scottish Ministers and the Marine Management Organisation with a power to vary section 36 consents.
93. The provision is intended to put holders of section 36 consents in a position similar to that of those who have the benefit of development consent orders made under the Planning Act 2008, to which changes can be made by the relevant Secretaries of State to take account of, for example, changes in technology and design.
94. **Section 20** 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 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 new section 36C set out the scope of regulations which the Secretary of State and Scottish Ministers may make about the procedural aspects of applications for variation. The definition of "the appropriate authority" in subsection (6) of new section 36C sets out in which cases the powers will be exercisable by each of the authorities concerned.

Section 21: Consents under Electricity Act 1989: deemed planning permission

95. When a consent is granted under section 36 of the Electricity Act 1989 ("the 1989 Act") by the Secretary of State, section 90(2) of the Town and Country Planning Act 1990 ("the 1990 Act") 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 section 37 of the 1989 Act. Similar provision is made in section 57(2) of the Town and Country Planning (Scotland) Act 1997 for Scotland.
96. **Section 21** 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 section 36 consents under new section 36C of the 1989 Act or the existing power to vary section 37 consents (see section 37(3)(b)) is exercised. This power is exercisable in respect of England and Wales (as defined in 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 in relation to England and Wales in the amended section 90.

Section 22: Variation and replacement of pre-Planning Act 2008 consents

97. **Section 22** inserts a new section, section 237A, into the Planning Act 2008 (“the 2008 Act”). Article 6 of the **Planning Act 2008 (Commencement No 4 and Saving) Order 2010 (S.I. 2010/101)** states: “[t]he 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-2008 Act consent regimes could continue to be considered under the relevant pre-2008 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 2008 Act.
98. 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 2008 Act. This would, amongst other things, be contrary to the intent of sections 20 and 21 above, and was not what was intended at the time. Section 22 aims to clarify the position as regards projects with pre-planning Act consent that have been varied or replaced.
99. Subsection (1) of section 22 inserts new section 237A into the 2008 Act. Subsections (1) and (5) of section 237A set out that section 237A applies in relation to consents of the various types listed in section 33 of the 2008 Act, which were originally applied for before 1 March 2010 (“section 33 consents”). Subsection (3) contains the main operative provision of new section 237A. The types of “replacement” consents that benefit from the transitional provision are defined in subsection (4).
100. Subsection (2) of section 22 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.

Section 23: Removal of Planning Act 2008 consent and certification requirements

101. **Section 23** removes three separate certification and consent procedures under the 2008 Act. The issues dealt with under these procedures can be dealt with as part of the examination process for an application for development consent.
102. Subsection (2) removes the requirement in section 127 of the 2008 Act 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 certain matters before making a development consent order in these circumstances.
103. Subsection (3) removes the requirement in section 137 of the 2008 Act 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.
104. Subsection (4) removes the requirement in section 138 of the 2008 Act for the Secretary of State to provide his consent 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 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. 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.

Section 24: Special parliamentary procedure in cases under the Planning Act 2008

105. **Section 24** repeals sections 128 and 129 of the Planning Act 2008 (“the 2008 Act”). Section 128 requires that in specified circumstances an order granting development consent which authorised the compulsory acquisition of land of a local authority or statutory undertaker would be subject to special parliamentary procedure. Section 129 disapplies section 128 where the authority compulsorily acquiring land was one of a number of specified bodies.
106. The section amends sections 131 and 132 of the 2008 Act. These sections currently make provision for special parliamentary procedure to apply to an order authorising the compulsory acquisition of land, or rights over land, forming part of a common, open space, or fuel or field garden allotment. 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, 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.
107. If the Secretary of State issues a certificate, he must publish a notice of this in a local newspaper or direct the applicant to do so. The section removes the requirement for the Secretary of State to issue a certificate when satisfied that one of the circumstances prescribed in either 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 or in any instrument or other document containing the order.
108. The section also amends sections 131 and 132 of the 2008 Act 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 such land is compulsorily acquired. Where land or a right over land which is an open space is compulsorily 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 land or rights over land which is an open space will not be subject to special parliamentary procedure if that land or right is acquired for a temporary (although possibly long-lived) purpose.
109. The section ensures that an order granting development consent made under section 114 of the 2008 Act will be subject to special parliamentary procedure if this is required by either section 130 of that Act (where the order authorises acquisition of land held inalienably by the National Trust), or section 131 or 132 (where the order authorises the acquisition of land, or rights over land, forming part of a common, open space or fuel or field garden allotment). This would ensure that where a development consent order authorises acquisition of land held inalienably by the National Trust, and the Trust has made a representation containing an objection to this acquisition which it has not withdrawn, the order would still be subject to special parliamentary procedure whether or not this is also required under section 131 or 132. It also ensures that if an order would be subject to special parliamentary procedure as a result of section 131 or 132 of the 2008 Act, then the order would still be subject to special parliamentary procedure whether or not this is also required under section 130 relating to land held inalienably by the National Trust.

110. Any amendment or repeal made by section 24 applies to any order granting development consent made after the amendment or repeal comes into force. This is subject to any transitional provisions set out in the order that commences this section.

Section 25: Modifications of special parliamentary procedure in certain cases

111. **Section 25** removes an inconsistency between 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 to ensure that in circumstances where an order is subject to special parliamentary procedure under one of the specified provisions only to the extent that it authorises the compulsory acquisition of land of a particular classification ("special land"), the order can only be the subject of petitions and be considered by Parliament insofar as it authorises the acquisition of that land.
112. The section then modifies the effect of the 1945 Act in respect of special acquisition provisions. Where an order is subject to special parliamentary procedure under a special acquisition provision, new subsection 1A of that Act provides that insofar as the order authorises the compulsory acquisition of special land it is to be known as a "special authorisation".
113. 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 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.
114. 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
115. 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 section also provides that if either House resolves to annul a special authorisation, the relevant Minister may either withdraw the order to which that special authorisation relates or cause the order to be submitted to Parliament for further consideration by means of an Act.
116. 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.
117. 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.

118. 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 the Minister may either withdraw the relevant order or cause it to be submitted to Parliament for further consideration by means of an Act. 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.
119. Section 7 of the 1945 Act, which makes provision in respect of petitioners' costs, is modified to refer to a special authorisation instead of to an order. The section also makes consequential provision in respect of Standing Orders of a House of Parliament where the modified provisions of the 1945 Act are applicable.
120. The new sections 1A and 9A of the 1945 Act will apply to any development consent order made after the amendment comes into force, subject to any transitional provision set out in the order that commences this section. This would include orders granting development consent made in respect of applications lodged before commencement of section 25, but not to other orders authorising compulsory purchase of land, as it is not the intention to apply the modifications in respect of such other orders where proceedings have begun prior to commencement.

Section 26: Bringing business and commercial projects within Planning Act 2008 regime

121. **Section 26** replaces section 35 of the Planning Act 2008 ("the 2008 Act") and inserts new section 35ZA.
122. 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 2008 Act, 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 2008 Act.
123. 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.
124. Section 35ZA contains procedures relating to directions under section 35. The procedures relating to section 35 directions were previously contained in subsections (4A) 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 2008 Act, or a person who proposes to apply for a development consent order.
125. If the Secretary of State issues a direction under section 35(1) he must give reasons for the decision.

126. **Section 26** also amends section 232 of the 2008 Act so regulations made under section 35(2)(a)(ii) will be subject to the affirmative procedure. It also amends references in section 35A to reflect the insertion of new section 35ZA.

Section 27: Authorisation of road user charging under Planning Act 2008

127. **Section 27** adds new subsections (2A) and (2B) to section 144 of the 2008 Act and removes subsection (3) from that section. Section 144 deals with development consent orders for nationally significant highways projects under the 2008 Act. Section 144(2) provides for a development consent order that authorises the charging of tolls to be treated as a “toll order” for the purposes of the New Roads and Street Works Act 1991, so that the procedural provisions of that Act apply. The new subsections clarify that subsection (2) does not apply to a development consent order if (as well as authorising the charging of tolls) it also authorises other road user charging. The repeal of subsection (3) removes an existing limitation on the ability of development consent orders under the 2008 Act to provide for the transfer and appropriation of roads.

Section 28: Delegation of planning functions by Mayor of London

128. **Section 28** inserts two new subsections into section 38 of the Greater London Authority Act 1999 (“the 1999 Act”): sections 38(2B) and (2C). These new subsections give the Mayor of London the power to delegate his decisions on whether to ‘call-in’ applications of potential strategic importance for his own determination; and similarly to delegate decisions on whether to grant permission in cases where an application has been called-in. The new subsections limit the persons to whom such decisions may be delegated to the Deputy Mayor and to members of staff of the Greater London Authority appointed under section 67(1) of the 1999 Act (these are the Mayor’s personal appointments of up to two political advisers and up to ten other members of staff; in practice most of these posts are occupied by the various deputy mayors).