PLANNING REFORM: A FUTURE WITHOUT PLANNING INQUIRIES, S.106 AGREEMENTS – OR LAWYERS?

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Introduction

1. The Government's Green Paper on planning[1] of 2001 argued that planning law and procedures were too complex, took too long to reach decisions and did so without adequate clarity on the relevant criteria. In particular, the adoption of plans was too slow and expensive, so that many local planning authorities either had no plan at all or one that was out-of-date; yet the whole system was supposed to be plan-led.

2. The Government's response to the Green Paper consultation set out the objectives of the proposed legislation. In particular, the Government said:

> "We want a simpler, clearer, more user-friendly structure of strategic planning at the regional level and detailed planning at the local level. We want to plan for development in a way which is better integrated with other planning processes. We want procedures for putting plans in place which are open and transparent, that enable the community to be fully engaged but which are more efficient and effective than we have now."[2]

3. With those objectives in mind, the Government reformed the legislation. The Planning and Compulsory Purchase Act 2004, which received Royal Assent on 13 May 2004, re-wrote the process for preparing development plans and introduced significant changes to the plan-led system in England. The changes are such that Part II of the Town and Country Planning Act 1990, on the local plans process, was repealed rather than amended. The 2004 Act also re-wrote the process for development control by amending Part III of the 1990 Act.

4. This reform has not been enough for many, including the Government. The Barker review of land use planning and the Eddington transport study both considered the scope for further reform. The resultant reports have been taken up and formed the basis of the Government's White Paper, *Planning for a Sustainable Future*.

[1] Planning: Delivering a Fundamental Change.
[2] Para 25.

5. The following is a summary of the White Paper's proposals.

"For key national infrastructure such as major airport and port projects, improvements to the Strategic Road Network, major new power generating facilities and facilities critical to energy security, and major reservoir and waste water plant works, we propose to:

- produce, following thorough and effective public consultation and Parliamentary scrutiny, national policy statements to ensure that there is a clear policy framework for nationally significant infrastructure which integrates environmental, economic and social objectives to deliver sustainable development;

- provide greater certainty for promoters of infrastructure projects and help them to improve the way that they prepare applications by making better advice available to them; by requiring them to consult publicly on proposals for development; and by requiring early and effective engagement with key parties such as local authorities, statutory bodies, and relevant highway authorities;

- streamline the procedures for infrastructure projects of national significance by rationalising the different consent regimes and improving the inquiry procedures for all of them;

- clarify the decision making process, and achieve a clear separation of policy and decision making, by creating an independent commission to take the decisions on nationally significant infrastructure cases within the framework of the relevant national policy statement;

- improve public participation across the entire process by providing better opportunities for public consultation and engagement at each stage of the planning approval process; improving the ability of the public to participate in inquiries by introducing a specific "open floor" stage; and, alongside the introduction of new system, providing additional funding to bodies such as Planning Aid.

For the town and country planning system, we propose to:

- produce a more strategic, clearer and more focused national planning policy framework with PPS1 – Delivering Sustainable Development at its heart, to provide the context for plan-making and decision-taking;

- publish a new Planning Policy Statement, Planning for Economic Development, which will further reinforce the Government's commitment set out in PPS1 to promoting a strong, stable and productive economy with access for all to jobs, to regeneration and improved employment prospects;

- improve the effectiveness of the town centre planning policy by replacing the need and impact tests with a new test which has a strong focus on our town centre first policy, and which promotes competition and improves consumer choice, avoiding the unintended effects of the current need test;

- finalise the Planning Policy Statement on climate change and introduce legislation to set out clearly the role of local planning authorities in tackling energy efficiency and climate change;

- work with industry to set in place a timetable and action plan to deliver substantial reductions in carbon emissions from new commercial buildings within the next 10 years;

- review and wherever possible extend permitted development rights on microgeneration to non residential types of land use including commercial and agricultural development;

- place planning at the heart of local government by aligning the Sustainable Community Strategy and the local development framework core strategy. We will also work with the Local Government Association and others to continue building capacity, promoting culture change in planning and we will issue 'place shaping' guidance;

- introduce changes to local development frameworks to ensure a more streamlined and tailored process with more flexibility about the number and type of plans, how they are produced and a more meaningful, engaged level of community involvement;

- introduce Planning Performance Agreements, which will help streamline the processing of major applications, and support a properly resourced planning service with changes to planning fees and consult on devolving the setting of planning fees to local authorities;

- introduce a new impact approach to householder development which will reduce the number of minor applications whilst protecting the interests of neighbours, the wider community and the environment, and then extend this approach to other types of development; and

- streamline the planning application process, reduce the number of applications called in by ministers and introduce a range of measures to substantially improve the appeals process."

6. The recent Queen's Speech included a proposal for a Planning Reform Bill. The Government notes accompanying the speech said that:

> "The Bill would implement proposals in the May 2007 Planning White Paper to streamline and improve the planning regime, including introducing a single consents regime for major infrastructure projects, establishing an Independent Infrastructure Planning Commission, and further measures to improve the Town and Country Planning System."

7. In addition, there has been much debate on how best to secure contributions for infrastructure from developers. Important changes are proposed in this area as well. I will deal with this issue first, before turning to the White Paper.

Infrastructure Contributions

8. The delivery of infrastructure alongside development is a concern of all involved in planning. Until very recently, the Government's preferred solution was a new planning gain supplement (PGS). The impetus for the PGS came from the Barker review of housing supply and was said to be related to the aim of incentivising the release of more land for development. The main intention of PGS was to capture a modest proportion of the uplift in land value arising on the grant of planning permission. Revenues would have been dedicated to the provision of infrastructure and community facilities, by way of grants.

9. The main principles of the Government's proposals for PGS were announced in the 2006 Pre-Budget Report. Consultation on the detailed procedures for PGS was launched by HM Revenue and Customs in December 2006. The Planning-gain Supplement (Preparations) Act 2007 was enacted in March 2007 to enable the Government to incur expenditure on designing and facilitating the introduction of PGS. A Planning-gain Supplement Bill was included in the Government's proposed legislative programme. The July 2007 Housing Green Paper said that PGS was still the Government's preferred option, but began a re-consultation on options for planning gain. In the 2007 Pre-Budget Report PGS was abandoned.

10. Instead, the Government said that it would:

> "legislate in the Planning Reform Bill to empower Local Planning Authorities in England to apply new planning charges to new development, alongside negotiated contributions for site-specific matters. Charge income will be used entirely to fund the infrastructure identified through the development plan process. Charges should include contributions towards the costs of infrastructure of regional or sub-regional importance."[3]

11. No detail has yet been provided of how the "new planning charges" would work, but the Housing Green Paper explained the option as follows:[4]

> "A statutory planning charge: The Government could legislate to allow local authorities to require standard charges to be paid for infrastructure need, enabling them to capture planning gain more systematically. This would enable all local authorities to require developers to pay average standard charges, based on the total costs of infrastructure in an area. Milton Keynes is often cited by stakeholders as a model, but in practice it is a very special arrangement which relies on voluntary agreements with developers and on similar land values across a range of sites. A statutory charge would make it easier for local authorities to collect contributions to infrastructure costs in areas in which a large proportion of developments are of smaller–scale."

[3] 2007 Pre-Budget Report, para 6.17.
[4] Chapter 5, paragraph 34, "Approach D".

12. It is not easy to see how these "new planning charges" will be different from the "planning contributions", for which legislation was included in the Planning and Compulsory Purchase Act 2004, but never implemented.

13. Section 46 of the 2004 Act empowers the Secretary of State to make regulations which will enable "planning contributions" to be made in relation to the development or use of land. The contribution may be made by the "prescribed means", by compliance with the "relevant requirements" or by a combination of both (s46(2)).

14. The "prescribed means" are:

    i. the payment of a sum determined in accordance with the criteria;

    ii. by the provision of a benefit in kind, the value of which is determined by the criteria; or

    iii. a combination of the two.

15. The detail was to be set out in regulations. Under the 2004 Act, the regulations could require a local planning authority to include in a development plan document:

    i. a statement of those developments or uses for which it will seek contributions;

    ii. where it will not seek contributions;

    iii. the purpose of the contributions; and

    iv. the criteria to determine the value of the contribution.

16. Section 47 of the Act provides that regulations could, amongst other things:

    i. prescribe maximum and minimum amounts for payment;

    ii. provide for periodic adjustment of the criteria;

    iii. require the local planning authority to publish an annual report providing information relating to the planning contribution;

    iv. provide for the enforcement by the local planning authority of the terms of a planning contribution; and

    v. make provision for the modification or discharge of a planning contribution.

17. The 2004 Act allows for a choice of "planning contributions", by charge or negotiation. It is difficult to see how the "new planning charges" could be much different, nor why entirely new legislation is needed to introduce them.

18. In the meantime, Circular 05/2005 (planning obligations) altered the Government's advice on the existing planning contributions regime. The policy test for planning contributions was somewhat simplified, and the use of unilateral undertakings encouraged, as well as standardised agreements. Perhaps most importantly, local planning authorities were encouraged to use formulae and standard charges, to be set out in development plan documents.

Again, it is difficult to see what more of substance the "new planning charges" could add to the current arrangements.

19. It seems likely that under the "new planning charges" regime the need for s106 agreements would continue, but reduced so that they covered only matters related to the environment of the development site and affordable housing. The DCLG December 2006 consultation on changes to planning obligations stated that:

> "If the requirement related directly to the viability of the physical environment of the development site or the need for a proportion of housing to be affordable, it could continue to be the subject of a planning obligation. If, on the other hand, the requirement related to the site's social or community infrastructure, it would no longer be included within scope."[5]

20. This definition would include "things which were off-site so long as they fulfilled the requirement of an appropriate relationship to the physical environment of the site".[6] This could include highway access works, offsite ecological mitigation and substitution, and drainage and the like. If this approach is adopted, it will no doubt give rise to very substantial disputes about whether a particular requirement sought by a local planning authority is properly within the scope of the revised s106, or is to be regarded as covered by the planning charge, both in planning inquiries and in court.

21. As far as developers are concerned, this approach would still leave too much to be negotiated on a site-by-site basis to bring any real advantages. Affordable housing in particular would still need to be negotiated. This is the greatest element of s106 obligations at the moment by far – £1.2 billion of £1.9 billion in 2003/4 – and often takes the longest to negotiate.

22. In order to reduce the time involved in dealing with affordable housing further, the Government has previously proposed strong legal or policy requirements for the provision of affordable housing, and a common starting point for negotiations. As to the latter, this has been suggested as the land required for the provision of the required number of units, or the equivalent value of such land. If the developer has particular viability problems, such as land contamination, it is proposed that "the onus would be on the developer to demonstrate that the viability of the site was such that it was unable to support the common value of contribution taken as the starting point".[7]

23. Given the approach to s106 obligations which has previously been proposed, and the nature and value of the matters which would still be dealt with in them, it is to be doubted that the proposed changes will really have a substantial effect on the current inefficiencies in the planning system.

[5] Para 24.
[6] Para 26.
[7] Para 54.

A future without major planning inquiries

24. The proposal for a new independent Planning Commission is perhaps the single most radical change, and it is a few aspects of that proposal which I consider in more detail in this paper.[8] The proposal was made by both the Barker and Eddington reports. It was adopted in the White Paper.

25. Kate Barker proposed that a Planning Commission be established which comprised a panel of experts from a range of disciplines and which determined applications for planning permission for projects of national importance.[9] This would replace the roles of both the local planning authority and the Secretary of State. It was said by Barker that democratic involvement would be retained in the setting of policies which would be applied in the decision-making process. Part of the reasoning was to remove the delays involved in Ministerial decision-making after the receipt of the inspector's report which have occurred in the past.

26. Another reason for the Commission was said to be to remove from the planning system the suggestion of bias which arises from political influence over decision-making.[10] This may well be a worthwhile aim, but it could be counter-productive. There have been a number of high profile cases where Ministerial decisions to permit developments contrary to inspector's reports have been greatly influenced by a different weighting attached to what could be considered to be political issues. For example, the proposed accommodation centre for asylum seekers near Bicester in 2003 and the Cambridge University primate research centre in 2004.

27. In the future, such decisions, taken by planning experts without Ministerial involvement, are likely to result in final decisions not to grant planning permission. The Eddington report noted that the possibility of Ministers rejecting the recommendations of inspectors would be excluded,[11] without apparently recognising that this is quite likely to work against rather than for the aims of the study.

28. The Commission would still hold inquiries, at least for the most complex or controversial cases, but with a less adversarial and more inquisitorial approach, and greater use of written representations.[12] The majority of evidence would be given in writing.[13] The Commission would "have discretion to call witnesses to give oral evidence where it judged that it would help it to understand the issues, or asking a witness to give evidence in writing might disadvantage them".

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[8] See also Keith Lindblom QC and Richard Honey: *Planning for a New Generation of Power Stations* [2007] JPL 843.
[9] Paras 20-21.
[10] *Barker Review of Land Use Planning - Final Report*, para 3.13.
[11] *The Eddington Transport Study*, Annex 4A, para 48.
[12] *Planning for a Sustainable Future*, paras 5.29-5.38.
[13] *Planning for a Sustainable Future*, para 5.30.

29. The Eddington report recommended a procedure which would "largely remove oral cross-examination as a means of testing the evidence from the process".[14] It said:

> "The presumption of written evidence would mean that there would be no right to present oral evidence, or to conduct oral cross-examination. Written representations would be the main way of submitting evidence to the inquiry. The majority of cross-examination of issues would also be carried out by exchange of written materials. This would allow technical questions to be explored and tested in depth, where necessary, to feed into the final decision. The Commission would be assisted by a secretariat to support this process. The Commission would have the powers to call witnesses and could orally question them directly themselves, or could appoint an advocate to ask questions on their behalf. They may decide there is no need to call any oral evidence."[15]

30. The White Paper picked up the theme. It proposes that the Commission will "gather the majority of evidence in writing, [and] probe it by means of direct questioning rather than relying on cross-examination by opposing counsel".[16] The White Paper tells us that the Government's view is that this approach "would also improve the analysis of evidence, because it would allow technical questions to be tested in greater depth through the exchange of written submissions".[17]

31. The White Paper goes on to say:

> "5.32 We propose that the commission would test this evidence itself by means of direct questions, rather than relying on opposing counsel to test it via a process of cross-examination – though it would have discretion to conduct or invite cross-examination of witnesses, if it judged that this would better test the evidence.
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> 5.33 This would significantly speed up the process of considering the application as well as improve the analysis of the key issues, because it would allow the commission to focus its examination of the application on the points that it felt were at the core of the issue, and to test these points thoroughly itself, rather than being dependent on the parties and their advocates to pick up on these points and test them via cross-examination. It should also improve the openness of the process and create a much more level playing field for all parties – the current adversarial system can benefit those who can afford to employ professional advocates and, because of the length of time and cost involved in participating, even shut out smaller, less confident or less well resourced parties."

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[14] *The Eddington Transport Study*, Annex 4A, para 65.
[15] *The Eddington Transport Study*, Annex 4A, para 59.
[16] Para 2.13(d).
[17] *Planning for a Sustainable Future*, para 5.31.

32. The main reason for holding an inquiry is to enable the decision-maker to see the factual and expert opinion evidence of the parties subjected to testing and critical analysis. This can only be done by way of oral cross-examination. An exchange of written material will achieve absolutely nothing by comparison.

33. In his Access to Justice final report, Lord Woolf said that "vigorous cross-examination" was "an essential safeguard to ensure the quality and reliability of evidence".[18] He also said:

> "There are in all areas some large, complex and strongly contested cases where the full adversarial system, including oral cross-examination of opposing experts on particular issues, is the best way of producing a just result. That will apply particularly to issues on which there are several tenable schools of thought, or where the boundaries of knowledge are being extended."[19]

34. Major infrastructure cases are just such cases. Not only does cross-examination give "objectors the opportunity dramatically to expose the weakness of the opposition's case",[20] its main purpose is to ensure that the decision-maker properly understands the evidence and its strengths and weaknesses.[21] Experienced planning decision-makers appreciate the value of cross-examination.[22] The Commission would be handicapped rather than assisted by the significant curtailment of cross-examination in its casework.

35. The Eddington report noted – perhaps with some degree of understatement – that the "proposals are not risk-free".[23] That must be right. The prospects of a smooth introduction of the new Planning Commission and the related ideas are not great.

36. Kate Barker also recommended the introduction of a planning mediation service, saying: "there is a good case for the development of a planning mediation service that could be called on in cases where **both parties** were willing to try to resolve their dispute" (emphasis added).[24]

37. The White Paper said the following:

> "9.60 We also support the voluntary use of mediation within the planning system. It has been shown, in appropriate cases, to provide a cheaper, quicker and less confrontational approach to resolving disagreements between applicants and local authorities. It can also result in a higher standard of planning application and fewer cases going to appeal.

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[18] Chapter 13, para 17.
[19] Access to Justice, final report, chapter 13, para 19.
[20] Garry Hart: *The Value of the Inquiries System* [1997] JPL Occasional Papers at p8.
[21] See Lionel Read QC: *The Benefit and Purpose of Cross-Examination* [1997] JPL Occasional Papers at p24.
[22] David Hanchet: *The Usefulness of Cross-Examination in the Decision-making Process* [1997] JPL Occasional Papers at p39.
[23] *The Eddington Transport Study*, Annex 4A, para 1.
[24] Para 6.15. See also *The Eddington Transport Study*, Annex 4A, para 63.

> 9.61 We will work with relevant professional bodies to promote mediation services by local authorities, to develop guidance on when mediation is likely to be a suitable option and how it can be used most effectively."

38. This treats the planning system as effectively dealing in arguments between developers and local planning authorities. It leaves entirely out of account the fact that the planning system is intended to involve other interested parties, whether it is the Environment Agency or Natural England, or local residents or campaign groups. There must be concerns about the probity of mediation leading to a private compromise in respect of an application where judged objectively as consulted upon it ought properly to have been refused.

39. If concerns over planning applications were to be mediated away behind closed doors, it would be radically and fundamentally to alter the entire basis of the planning system, which is transparent decision-making in the overall public interest.

Conclusion

40. Planning procedures have changed very significantly as a result of the 2004 Act. Some important changes remain to be implemented. Some appear largely to duplicate legislation introduced only in the last few years. Other important proposals are in the process of being brought forward.

41. At the same time, changes in Government policy have been made to influence what development occurs. This ranges from housing, to waste and renewable energy developments.[25] This will continue with the new national policy statements.

42. The planning system will as a result have to grapple with the implications of new law, procedures and policy at the same time. It will be in relation to major developments that the implications will be most acute. Radical change looks set to continue. Interesting times lay ahead.

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[25] See PPSs 3, 10 and 22.