

RESPONSE BY LAWRENCE GRAHAM

TO THE BARKER REVIEW OF LAND USE PLANNING ("the Barker Review")

Introduction

Lawrence Graham LLP is one of the leading law firms in London. With over 250 lawyers, it offers a broad range of legal solutions based on commercial and practical advice. The Real Estate Department is one of the largest in the UK acting for a wide range of institutional investors/pension funds, local authorities, developers and property companies. The firm has a dedicated and highly regarded planning unit comprising two partners and two assistant solicitors.

The firm therefore has extensive experience of advising both public and private sectors in relation to planning matters, and specifically planning obligations pursuant to Section 106 of the Town and Country Planning Act 1990 ("the 1990 Act"), and is therefore able to make a constructive contribution to the debate on the Barker Review. The terms of reference of the Barker Review are to consider, "how, in the context of globalisation, and building on the reforms already put in place in England, planning policy and procedures can better deliver economic growth and prosperity alongside other sustainable development goals". In particular, the review will focus on ways of improving the efficiency and speed of the planning system, ways of increasing the flexibility, transparency and predictability that enterprise requires and how the outcomes of the planning system can better deliver its sustainable economic objectives.

Lawrence Graham hopes that the responses set out below will be taken into account by the Government both with regards to improving the effectiveness of the recent reforms to the planning system and in implementing any further reforms to meet the above objectives.

Overview

We recognise that the recent reforms to the planning system have not all been viewed as a success and both developers, businesses and local authorities feel there is still confusion and uncertainty (as well as delay) throughout the planning process. Clearly, if the Government is to meet its objectives of creating an efficient, flexible and effective planning system, the inherent

difficulties with the current reforms need to be addressed and any new proposals need to be carefully thought out and integrated into the current system.

Based on our experience of advising both developers and commercial property companies and having regard to the terms of the Barker Review, we highlight from a legal practitioner's perspective a series of areas where we feel inadequacies remain in the current planning system, identify inadequacy and review as necessary.

Delay in Appeals/Call-in Inquiries

The ODPM will be aware that currently the time taken for section 78 (and other) appeals is approximately 12 months in inquiry cases. This is unacceptable, and we believe is exacerbated by the target driven conduct of Local Planning Authorities ("LPA's") (as described below). We do not have any magical solution to this delay other than to urge that additional resources be allocated for the processing of appeal, and that LPA's be encouraged towards better quality decision making, rather than keeping to rigid target timescales.

"Target Driven" Conduct

We have come across a number of instances where the planning authority has invited the applicant to withdraw his application (rather than face a refusal) as the Council would be unable to make a decision within 8 or 13 weeks. We would ask that less pressure be applied to LPA's to reach decisions within the target timescale, as this simply results in either unwarranted refusals, or requests that the application be withdrawn. This process detracts from high quality decision-making, and leads to a greater than necessary number of appeals (either lodged against unwarranted refusals or against non-determination).

Local Development Framework

We appreciate that the new development control system has only recently been introduced, and it may therefore be somewhat premature to pass judgement. However, as we are invited to comment on the operation of the planning system, we need to mention that the concept of Local Development Documents, representing a portfolio of separate documents has caused great confusion to the public as well as planning practitioners. We think it is a shame that the

opportunity was passed over to introduce more straightforward reforms eg to retain the old local plan/structure plan arrangements, but giving the Inspector the power to make final recommendations.

Lack of Join-Up Thinking

As one particular example of the shortcomings of the existing system, we would mention the recent designation of the Thames Heath Special Protection Area. We have advised clients who are directly affected by designation of the SPA, our clients are understandably confused that the LPA had been supportive of the principal of residential development up until the time the SPA was designated last year. They were then told by the LPA that residential development would have to be refused on the grounds of the harmful effect upon the SPA. We are also aware of sites which are allocated in the adopted development plan for residential purposes, but which are being refused because of the impact of the SPA. With hindsight, whilst the development plan was evolving, and the SPA was at draft stage, one would have thought it would be possible for one to reflect the existence of the other.

Planning Obligations/Planning Gain Supplement

Planning obligations are a flexible tool whereby developers and planning authorities can tailor the specific requirements/benefits of the scheme behind the planning application, in order to suit local circumstances. We therefore think in principal that the system of planning obligations should remain (although it is no doubt capable of improvement).

In our response to the PGS Consultation Paper we stated that the PGS proposals are unlikely to be workable and would have an adverse impact on LPA's by disaggregating locally generated funding with uncertainty as to how benefits may be fed back into local areas. There are question marks as to how payment of the PGS might be enforced and as to the timing of infrastructure (or other benefits) in relation to the opening of development. Local accountability will be reduced and LPA's may be encouraged to impose onerous conditions preventing development until off-site infrastructure – the timing of which would be outside the control of both the LPA and the developer- has been provided.

How would the revenues be "dedicated to local communities"? How will the PGS allow the economic and efficient development of Brownfield land? We note that the consultation provides that a lower rate of PGS would be applied to brownfield land, however, we doubt that even a lower rate would be sufficient to overcome the additional cost of reclaiming certain types of brownfield land. There may therefore need to be a zero rate for land which is in need of remediation, in order to avoid a disincentive to brownfield development. This is particularly important given the vast amounts of brownfield land which are available to develop which will help achieve sustainable development goals.

In our opinion, the PGS is ill conceived and insufficient thought has been applied to the practical workings and consequences of the PGS proposals. The current arrangements for planning obligations are not so inherently flawed as to justify the changes put forward. LPA's will be undermined and it is unlikely that LPA's will have sufficient additional resources to properly administer the checking of development start notices and/or PGS returns. We question how the PGS will meet the objectives set out in the Barker Review for efficient and sustainable land use planning which brings the benefits of developments to local communities.

Appeals

The ability of individuals to appeal against a local planning authority's refusal or deemed refusal to planning permission is vital to ensure the planning system's integrity. However, there are currently long delays in the Planning Inspectorate's handling of appeals, for example internal hearings can take up to one year and public inquiries 14 months. Not only does this highlight the current inefficiencies within the planning system but it undermines the confidence and fairness of the system. There appears to be a bureaucratic manipulation of the appeal process and although the written representation procedure may be quicker, less written representations are allowed compared to public inquiries. Developers may prefer to negotiate a solution rather than use the appeal process. We believe that the appeal system requires reform if the government is to create a transparent, flexible and efficient planning system. In our opinion, more planning officers would result in the reduction of the non-determination of appeals, better

decision-making and fewer appeals. More inspectors would result in a more efficient appeal system reducing delays.

The planning system suffers from a lack of resources – there is a lack of finance and a lack of experienced and efficient planning professionals within LPA's.

Code for Sustainable Homes

The ODPM is keen for new housing to be built to higher standards and introduced the "Code for Sustainable Homes". However, we would argue that the objectives set out in the code are unlikely to be met in practice. The code is voluntary for the private sector and it is questionable whether a voluntary scheme will have any impact on the private sector. In order to make sure that future development meets sustainability goals, the scheme should be mandatory and more onerous on both the private sector and Government funded schemes alike.

Draft PPS25: Flood Risk

The draft retains the overall principle that developments should not be allowed in flood risk areas unless there are no alternative, lower risk options and the benefits outweigh the risk. However, a new explicit "exclusion" test makes it easier for the Government to justify major housing development in the areas which are located in one of the Government's four "Growth Areas" as set out in its Sustainable Communities Plan. This means that developments can still take place where flood risk is higher than would normally be acceptable. We argue whether the Government is merely trying to make economic gains by continuing to develop in flood risk prone areas – does this really serve the purposes of sustainable development?

Conclusion

We believe that the Barker Review needs to take account of the shortcomings and uncertainties brought in by the recent reforms, some of which we have highlighted above. We recognise that many of the changes do need time before their success can be measured. However, the Government needs to implement policies which will build on the positive aims of the reforms to create a more streamlined, efficient, economically viable and sustainable planning system which directly brings the benefits to the local communities where developments are taking place.

Reforms need to be made to make sure that new developments benefit the whole community and that more sources of local funding are made available to fund infrastructure required for any new development without threatening the very development itself and the community support for it.

Lawrence Graham LLP

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