

Barker Review of Land Use Planning

Note by Brian Kingsley Smith

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Summary

1. As a member of the Planning Group of the Country Landowners and Business Association, I understand that you had a discussion with Fenella Collins following her paper. Fenella is on extended sick leave and it has been suggested that I should submit this Note.
2. My history is attached¹. As I come to the end of my legal planning practice lasting more than 40 years, I may be able to put current problems in a wider context; the issues in the Call for Evidence are not new although the problems, and particularly the effect on the national economy, are now more acute than ever before. There are several causes which I fear are unpalatable to the planning establishment; indeed central government's solutions to problems encountered in implementing national and regional planning policies at local level are at the root of the problem.
3. In short the planning system has become obsessed with process instead of striking the right balance between competing interests and policies. It has become so complex that it is difficult for those not professionally qualified in planning to comprehend;² it is difficult to administer (because few are appropriately qualified) and so complex that members of the public are either deterred from contributing or, more likely, conclude that their contribution will be ignored. In consequence, far too much

¹ Annex 1

² Indeed there are many involved in the day to day administration of the system who frankly concede that they do not understand either its mechanisms or its objectives.

influence is exercised by those to whom the public turns for assistance when such bodies are unrepresentative and respond only to those who fund them.

4. It is crucially important to simplify and invigorate the planning system which will otherwise soon reach meltdown particularly if, as I confidently expect, the 2004 legislation leads to litigation. There are so many unsatisfactory features of the system that the writer finds it difficult to make this submission concise.

5. Planning Gain Supplement The proposal to heap yet further complication on an already overburdened and failing system is counter-productive and will actually hinder the policy objectives, bring the development industry to a halt and substantially damage the national economy.

How has the planning system got into such a mess?

6. Until the introduction of s.54A in 1991 there was a presumption that development should be approved unless it would cause demonstrable harm to an interest of acknowledged importance. Whatever the intent when this was changed, it has effected a profound change which the country cannot afford whether in economic, social or environmental terms. The planning system had always revolved around "planning" in both senses of the word. Development plans comprised maps and policies taking account of predictions. The effect of s54A was to make "the development plan" the cornerstone of planning. Whilst it is possible for development to be approved which is not contemplated by or is even contrary to the development plan, planning decisions now have to be in accordance with the development plan except where material considerations indicate otherwise. As the editor of the Encyclopedia of Planning notes³ "a presumption in favour of the plan is irreconcilable with a general presumption in favour of development". The conclusion⁴ is: "To the extent that the duty under this section succeeds in achieving the Government's ambitions for it by ensuring that planning becomes firmly 'plan-led', it will inevitably place increased pressure on the plan-making process. There is concern already that local inquiries are becoming ever more complex and time consuming. A strict application of the new provisions will cause landowners and developers to take plan-making and local plan inquiries more seriously than before, but plan-making would be drawn out even further if local plan inquiries were to become any more the vehicle for determining large scale planning applications". Although that quotation has not been amended⁵, the position is actually far worse.

7. One can entirely understand why central government has felt it appropriate to turn to a plan-led system. For decades, local planning authorities have thwarted implementation of central government policy.⁶ Some believe that the invention of new regional government was partly influenced by this frustration but, as we can see in the emerging South East plan, even that tactic has not succeeded. There is a basic problem of equating democracy with economic development, an issue which is acute for every politician having a constituency and exaggerated by assertions of community involvement. The unpalatable truth is that those who suffer most through failures of the planning system either have no vote (companies whose contribution to

³ Paragraph P54A.11.1

⁴ P54A.13

⁵ Last revision December 2005

⁶ Examples range from Richard Crossmans's grant of planning permission for New Ash Green, through the emergence of what Nicholas Ridley coined NIMBY's to the refusal of strategic and then even the new regional planning authorities to provide sufficient dwellings.

the national economy is fundamental) or are unlikely to exercise it (suffering from the social consequences of, amongst other factors, poor housing).

8. Central government has taken direct control of the planning system yet is not equipped to exercise that control. The abolition of structure planning authorities has forfeited much knowledge and experience to which neither regional nor central government has access.

9. The 2004 Act makes inspectors recommendations binding on planning authorities. Current experience reveals that this raises unexpected difficulties. Those making representations on policies of general importance (e.g. strategic gaps, allocations for employment land, retail or economic policies) may be asked to put forward specific amendments which will probably be unacceptable to the planning authority. The inspector is then faced either with drafting a suitable policy for incorporation into the binding recommendation or rejecting the whole plan. It is unlikely that the inspector will always have sufficient knowledge of the local subject to undertake policy drafting – it is not something which has hitherto had to be undertaken by the inspectorate and is fraught with complication and risk of litigation.

10. The process of issuing ever longer planning guidance statements by central government enables every-one to glean support for almost every contention. The essential balance upon which public confidence in the system depended has been overtaken by reliance on a plan-led system.

11. Making a planning application was once a matter of completing and submitting the statutory form. Nowadays making a planning application is a major and costly adventure involving not only submission but “registration”.

12. A developer is enjoined to undertake pre-submission consultations⁷ which, in anything but a minor case, will reveal issues which the planning office will wish to have addressed in the supporting documents. The process of consultation and preparation of requisite reports can cause very significant delays⁸ and expense. The planning officer can be criticised if he registers an application without full compliance with the government's “Best Practice Guidance”⁹ which, in the case of a “full” application identifies 32 “check list” items in addition to those statutorily required.

13. Consideration of applications can take many months despite the “tick box” incentive. An applicant may be reluctant to appeal against non-determination since the appeal process will inevitably involve even more delay; indeed delay is an

⁷ For which a fee may be charged

⁸ An Environmental Statement usually needs to cover a complete year.

⁹ ODPM March 2005 (31 pages)

instrument of planning used to impose unreasonable conditions and exhort unreasonable "contributions".

What is the outlook?

14. The cascade of central government advice naturally includes much about the transitional and new plan-making process. It includes a requirement that when either the planning authority in an initial draft plan or any revisions or when a developer puts forward an “omission” site, it is necessary to have a sequential assessment. In itself that appears reasonable but it involves significant cost in preparation and consideration as well as delay. It adds to the welter of paper required to be considered. One of the first public inquiries which will lead to binding recommendations¹⁰ has got so out of hand that a second inspector has had to be engaged, the start of the inquiry has been set back and the timetable has slipped by a year.

15. Another looming problem arises from the new statutory requirement¹¹ that local plan documents must be “sound”. Again that appears most reasonable but it is likely to lead to litigation because although tests of “soundness” have been promulgated by the government and the Planning Inspectorate has issued guidance on how it should be assessed, the government has also required local planning authorities to proceed immediately to prepare, submit and after examination, approve parts of local development documents; in particular housing strategy. Since PINS is a government agency, inspectors will probably accept this procedure which will then be challenged in the courts. This exemplifies two problems; first the dangers that resource issues conflict with attainment of objectives.

16. The second, and much more profound, problem is that to achieve housing targets, employment sites are being permitted for residential development with multiple consequences to which regard is not be paid notwithstanding the “soundness” requirement:

- sites identified for employment use are reallocated to residential use
- since the definition of “previously developed land”¹² includes land in current employment use, proprietors of businesses have to assess the potential residential redevelopment value when assessing whether to continue to re-invest and continue to trade. Realism results in business closures and loss of employment
- Existing workers thus have to travel elsewhere for employment almost always increasing travel to work¹³

¹⁰ Despite being held under the transitional arrangements

¹¹ Planning and Compulsory Purchase Act 2004 section 20(5)(b)

¹² Annex A PPG3

¹³ In this area there is acknowledged to be a severe and unsustainable “out commuting” problem which current policies are actually exacerbating

- The new inhabitants then have to find employment which, by definition, results in yet further travel to work

The loss of employment land to residential re-development suits both central and local government; the former to meet political targets and the latter because it can blame central government. Both ignore or conflict with central government advice on Employment Land Reviews.¹⁴

17. During its evolution, the planning system has constantly faced increasing delays in the preparation and implementation of plans. The very basis of a plan-led system is therefore flawed. The more comprehensive the system¹⁵ the deeper the flaws. Just a couple of days ago, a minister was exhorting the planning system to recognise the national need for additional gas storage facilities. One company complains that it has taken four years to secure a planning permission. There are always unexpected national, regional or local unforeseen factors which the present system cannot accommodate; indeed with the need for planning decisions to accord with EU policy and law there is nowadays a fourth level of directly relevant legislation and sometimes a fifth in the form of international treaty obligations such as the Human Rights Convention. As a result, in significant cases it is no longer possible to make an application for “outline” consent thus again adding to cost and delay.¹⁶

18. In short, statutory plans should constitute guidance not prescription.

¹⁴ ODPM December 2004

¹⁵ For example by the new provisions requiring a statement of community involvement which is subject to separate independent examination – s.18 of the 2004 Act. Another example is the required Sustainability Appraisal which is frankly a waste of scarce resources. It constitutes a tick box procedure (running to scores or even hundreds of pages). Specialist consultants are able, in my experience without exception, to confirm that every plan is sustainable.

¹⁶ See also paragraph 12 above concerning the complication of securing registration of a planning application

What is to be done?

19. The government ought to acknowledge the falsity of its constant assertions that the new planning Act is a success. Although such acknowledgement is unlikely, the government must take action because there is no alternative but for it (which is after all democratically elected) to take control of the system preferably in a way which does not leave itself open to daily public criticism and conflict with the courts. This might be less difficult to achieve than might first appear because most of the mechanisms are already in place. By the 2004 Act Inspectors are authorised to delete, amend or add to the development plan. The Act¹⁷ also enables policy changes¹⁸ to take precedence over the development plan immediately upon publication.¹⁹

20. The basic required steps are:

- repeal of s54A²⁰. This will enable inspectors to depart from the restriction of compliance with development plans and will not have to await adoption of Development Frameworks (which is taking years and will take even longer if the courts get involved in the “soundness” or other issues).
- amendment of the procedures for Statements of Community Involvement and Sustainability Appraisals rolling all into consideration of the merits of the plan itself.
- applicants and LPAs be entitled to invite the minister to call in significant applications and the minister should be empowered to do so without waiting for the LPA's decision.²¹

There is a case for ultimately making PINS independent but that is not advanced at this stage because it might be complicated; the writer is seeking brief steps which would have an early impact.

¹⁷ Section 38(5)

¹⁸ Including central government Planning Policy Statements

¹⁹ No doubt, although not necessarily, after public consultation

²⁰ Now s.38(6) of the 2004 Act

²¹ The call-in practice is set only by ministerial announcement.

Planning Gain Supplement

21. This paper is primarily addressed to the state of the planning system and not to the merits of PGS. Appendix 3 sets out several issues which convince the author that PGS will not merely fail but will be counterproductive to the economy.

22. There is already a paucity of human resources, particularly at local level in both the public and private sectors. Simply the time which will be involved in finding and training the necessary staff will impose further pressure on an already dispirited workforce.

23. The critical fact for the planning system is that PGS will compound its already appalling complexities. PGS will accelerate the planning system's imminent stagnation with consequential affects on the national economy.

Brian Kingsley Smith
81 High Street
Chatham, Kent ME4 4EE
31st May 2006.
01634 8111 118
bks@kslaw.co.uk

Appendix 1

Brian Kingsley Smith is a specialist planning solicitor who was born in Medway and has practised there since 1960. He practises with his elder son (who also specialises in planning) and other members of their LLP. Their work focuses on local businesses and property. His younger son is a chartered surveyor specialising in development and commercial property also practising locally. Brian's pro bono work includes a directorship of Rochester Airport plc. He is a past president of the Kent Law Society, a member of the Kent Committee of the Country Land and Business Association and of a CLA national planning committee. He is also a committee member of the River Medway Business Users Association.

Appendix 2

Answers to Questions:

- 1 No. Please see above.
- 2 Yes; the scope is limited as required by government offices (apparently due to lack of resources at both government and local level) with the result that the evolving plans are uncoordinated and hence unsound. No “further improvements” are required – on the contrary the system requires urgent simplification. The system does not strike the right balance – central government has taken over development control but does not have the facilities or expertise to carry through that responsibility.
- 3 The uncoordinated evolution of plans is unsustainable because, for example, the government is ignoring it’s own advice on employment land. The result is evolution of an unbalanced economy both locally and nationally. Economic policies in planning documents are ignored in their implementation. The government’s decision not to revise PPG4 is an another example of ignoring the economy in order to achieve housing targets regardless of the unsustainable consequences.
- 4 -
- 5 Planning is a significant impediment to business which needs rapid responses to particular requirements. The present system is chronically slow (used as a weapon by planning authorities) resulting in closure of businesses in favour of residential development and the export of investment abroad. Again the reference to “the transparency and effectiveness of the system still further” (my emphasis) demonstrates the failure to grasp the current deplorable state of the planning system.
- 6 No. Regional Spatial Strategies are not delivering an economic framework which is carried through to the grant of planning permissions. My experience of SEEDA is that it pours huge funds into projects of doubtful (and in some cases obviously negative) economic benefit e.g. the provision of unwanted offices which undermines and distorts the local market for offices to the point at which private investment is unobtainable.
- 7 As already stated, the planning system is founded upon delay which is commercially unacceptable. Adoption of the straightforward suggestions made in the paper would reduce delays and lessen the impact of the delay weapon. The suggestion of any “undue emphasis on speed” is startling. Delay is endemic at every stage i.e. plan preparation, development control and appeals. The writer attends stakeholder meetings at PINS where the root cause appears simply to be lack of funding to enable the backlog to be removed so that current work is able to receive the prompt it deserves.
- 8 If the question addresses the incidence of “planning fees” (and now charges for planning discussions), no evidence of deterrence has yet emerged. The practice of lengthy examination of applications before “registration” should be included in the time between application and decision when assessing efficiency. However this would make only a tiny impact. The real cause of delay is the ever increasing complexity of the system one effect of which is that local planning authorities have fewer suitably qualified staff. Suggestions for addressing that have already been included in the paper.
- 9 High occupation costs are simply the consequence of demand exceeding supply.
- 10 Simplification of planning procedures is the only route by which competition will be enhanced although there is no evidence of a lack of competition for sites with approval.
- 11 In Kent Thames Gateway, substantial public funds are earmarked for an “innovation centre” but at the same time many wharves (denigrated by the PDL epithet) have been sacrificed to residential redevelopment. The former has never emerged (through the chronic incompetence of the local authority) while the loss of wharves (irreplaceable transport infrastructure) simply adds to unsustainability. The state should abandon the “command economy” and provide sufficient suitable land

for business of every type whereupon commercial competition and innovation will enable business to flourish.

12 No. It is crucial to simplify the system.

13 The posing of this question demonstrates lack of comprehension of the problems of SMEs. They need to react to the market, something which is utterly incompatible with our planning system – that is why so much business which could be undertaken in the UK is forfeited.

14 This is a profound issue. The democratic process inherently conflicts with development. The simple suggestions in this paper would help. The present approach of removing planning from the local level is necessary but the mechanisms now used are failing. Even those previously interested in safeguarding the environment from development are now overwhelmed by the complexities of the system and are deterred.

15 Yes – by allow business to prosper; that involves actually implementing PPG4 instead of strangling business with numerous conflicting policies.

Appendix 3

Planning Gain Supplement

1 The first fundamental problem is that introduction of the supplement will remove development land from the market.

The perception

2.1 The writer recently attended a seminar by Strutt & Parker, a practice respected by its clients. Its assessment of the financial implications coupled with the assessment of risk are echoed by others and will deter landowners or developers bringing forward land. It is said, perhaps wrongly, that the costs associated with promoting a site are probably in the same order as the ultimate profit if, which is a matter of speculation, the project succeeds. All those costs are, of course, forfeited if, which will be the position on the balance of probabilities, the process spread over several years does not succeed. The interaction with other, nowadays extremely complex, taxes requires individual analysis. Landowners will inevitably be advised not to enter into options with developers far less to launch their own proposals. The imposition of planning conditions requiring affordable housing and infrastructure payments have already heavily relieved central and local government of major costs which previously came from the public purse.

2.2 It matters not whether these views are well founded; the problem is that the perception will remove potential development land from the market.

House Prices

3.1 To be effective, one would have to be confident that PGS would not increase the cost of housing. The arguments so far advanced are unconvincing; indeed they actually lead to the opposite conclusion.

3.2 There are two principal drivers for rising house prices. First people's ability to pay and in its simplest terms that is linked to the rate of rise in earnings. For a majority of people their aspirations include home ownership. People want to be in full control of their own house. They have also seen home owing to be a good tax efficient long term investment which, in the fullness of time when downsizing allows, is perceived to provide provision for retirement. Increases in average incomes leads to a greater bidding power for homes.

3.3 The second driver is the imbalance between the number of houses for sale against the number of buyers wanting to buy. In the South East especially, the rate of new houses being built is year on year below the levels of the rates of new households formation. (The plan led system is always out of date and, for example, it cannot anticipate the high levels of migration into the South East).

3.4 With rising incomes and propensity to purchase housing coupled with the number of households forming outpacing the provision of new housing, prices will continue to rise and rise. But there will be an increasing proportion of people who will never be able to afford home ownership, and especially (by definition) those who have below average income rises. Those householders increasingly rely upon state aid and developers are contributing to this by being required to provide "affordable housing". As the number of people reliant upon "affordable housing" provision rises, Local Authorities can only provide more housing stock for "affordable housing" by placing greater pressure on house builders as existing private housing stock cannot be reclassified for "affordable housing use only". In the early days, house developers were providing some 10% of the development for social housing; now in London it is 50%. It is quite simply unsustainable. On a development of 100 houses, once 90 houses were for the private sector, now in London only 50 are available. In consequence the developer now has to ensure that more profit is made from the 50 houses available to the open market to pay for the 50 affordables. So someone who once could afford to purchase a house on that development now cannot afford to do

so and bizarrely falls into housing poverty. The most ironic point is that the development of 100 houses, whatever proportion are for affordable or for private ownership, still only yields 100 kitchen sinks!

3.5 If housing development was so profitable why are the numbers of new builds falling year on year? Perhaps it is not so profitable as it is perceived and clearly the introduction of the Planning Gain Supplement will erode developers confidence to enter into new projects. Developers invest large sums of risk capital money attempting to bring forward sites for development which is "written off" - but "written off" against the profits on those few that they are successful in bringing forward for development. Developers will be taxed on the profitable schemes and will have less funds to invest on the more speculative and higher risk projects. If developers do not risk the capital on bringing forward sites for development, few landowners themselves would dare do so. The overall consequence of the proposed Supplement is to exacerbate the housing land shortage and lack of choice for would be homeowners. The existing Section 106 obligations are at the threshold to shear the developers coat short, but the Supplement is most liable to skin the developer to death!

A cascade consequence onto the whole housing market

4 The number of new dwellings completed is tiny when compared to the overall housing stock and small in relation to the number of existing houses changing hands on the open market. However the cost of new housing directly impacts on the price of existing housing. A developer of new housing sets the price at what the market will stand. Buyers compare the relative advantages of new and existing homes. Any increase in the cost of new housing cascades quite a long way down the housing market and thus has a direct impact on the real inflation rate and the real economy. Because housebuilders have to have some sort of supply to stay in business, it is unrealistic to believe that they will always be able to persuade reluctant owners to contract. It is perverse to say that the owners will reduce their price – they will simply withdraw from the market on the advice.

Political considerations

5 Any indication that other political parties²² might abandon the tax will be fatal by adding to this shortage. There is no indication that the government has sought cross party support, probably because it could not be achieved.

Diversion of infrastructure provision from the "enabling" development

6.1 Another fundamental problem is the absence of any assurance that the supplement will be used to provide infrastructure in the area of the development; indeed one purpose of the supplement is to achieve the opposite result. Since government now relies on the development market to provide funds previously coming from the public sector, planning authorities (especially where market demand is strongest such as the South East) will need to secure every possible pound under the continuing system of planning agreements. If they cannot (either because the market will not stand it or because parliament or the government prevents it) the infrastructure will not emerge unless central government goes back to the provision of the necessary finance (something which is now inherently unlikely).

6.2 This is not idle speculation. In a recent case²³ it has emerged that the highways agency will object to all employment allocations (not already having planning permission) in a large local authority area until a complex and difficult motorway junction is rebuilt. Its objective is to secure contributions from all those

²² It will be recalled that the conservative party abolished Betterment Levy immediately taking power in pursuance of a manifesto promise.

²³ This is more recent than the well known problems of J10 on the M20.

sites. Since it is a government agency, the inspectorate will no doubt find itself having to approve a suitable policy in the local development framework. That will delay or increase the cost of economic development land (of which there is an acknowledged shortage) to the point at which it is cheaper to undertake the development elsewhere, thereby increasing the pressure on sustainability, to say nothing of the balance of payments if, as is already the situation in some cases, the development goes abroad. It is often overlooked that economic activity driven from the south-east often goes to the far east rather than the north-east!

6.3 The belief that PGS will not be used for local infrastructure will add even greater pressure by planning authorities to extract the maximum benefit under the remaining planning agreements. If they fail, locally essential infrastructure will not be provided meaning that either development is precluded or the quality of life is eroded by its absence.