

THE PLANNING & ENVIRONMENT BAR ASSOCIATION

BARKER REVIEW

23rd MARCH 2006

Introduction

1. The Planning and Environment Bar Association (“PEBA”) is the representative association for barristers specialising in the fields of planning, environment, local government and associated areas of European and domestic law. It is committed to maintaining the highest standards in all areas in which its members practise and as such has close liaison with Government departments and agencies, the Planning Inspectorate and other professional associations engaged in these fields.
2. We have consulted members of the Association in preparing this response.

Preliminary Considerations

3. Before addressing the specific questions set out in the consultation paper, it may be helpful to deal with some preliminary considerations which are directly relevant to the review but in many cases cover a number of the questions raised. They are as follows:
 - (a) In the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”) the government has established a new system for the planning and delivery of development. Those involved, including this association, have committed considerable time and effort into seeking to make the new system work in conjunction, in

particular, with the Planning Inspectorate (“PINS”). PEBA is reasonably confident that with sufficient financial and other resources the new system can be made to work so as to deliver the underlying objectives of securing development at the right time and in the right place. We would stress, however, that this outcome is heavily dependent upon the provision of both adequate financial funding and other resource.

- (b) In the opinion of PEBA it is clear that in these circumstances this is not the time to carry out any further extensive replacement or revision of these new procedures. In the view of PEBA the planning system with its balance of a plan-led framework and the grant of specific planning permission is well established and understood and, with appropriate support from Government and local bodies, has the ability effectively to achieve that fundamental objective in a way that enables proper community involvement and independent evaluation and determination, as and where appropriate.
- (c) We would, however, make two relatively modest proposals, which we believe could materially contribute to speeding the planning system and indeed the saving of resources.
- (d) PEBA is strongly supportive of the principle of front loading and the involvement of stakeholders including development and other representative interests. While there is no doubt that that needs to

be carried out in substance and with commitment and again with proper resource and opportunity, PEBA is firmly of the view that the specific administrative processes for the examination of the statement of community involvement through the Inspectorate together with its soundness is unnecessary and inappropriate as a separate exercise. PEBA believes that this could be better dealt with as part of the overall examination of the local development documents and should be included as a specific requirement for soundness at that stage.

- (e) The other aspect of the new reforms which is widely acknowledged to be defective is the failure to include in section 113 of the 2004 Act power for the court where appropriate to quash a specific administrative stage in the adoption of the local development document, be it the decision of the Inspector or some other act. As presently enacted, section 113 effectively replicates the provisions previously in section 287 of the Town and Country Planning Act 1990, which leaves the court no option other than to quash the document as a whole. The result is that the process has to start all over again and there is no opportunity simply to go back and reconsider the plan from the point at which the error was made. Similarly here is no power to make a declaration or give other relief which could well be appropriate in this situation.

(f) There has been no explanation so far as we are aware why this defect was not addressed as part of the recent amendments. From experience PEBA is in no doubt that it has resulted in significant delays as a result of the need to start the local development plan process all over again. Moreover there is as a result either the danger of a policy vacuum or other delays in development through concern over prematurity or otherwise.

4. PEBA considers, in common with other professional bodies, that a matter of overriding concern in securing development is the provision of infrastructure both in enabling the delivery of development and in reducing delay in the planning system. It is largely common ground that the present system of reliance on ad hoc section 106 obligations is in this respect completely unsatisfactory. This is a classic example in many cases of what is definitely not “joined up planning”.
5. It frequently involves what are deep divisions of opinion as to the appropriate level of infrastructure provision or contribution founded in what is too often a confrontational view of either what can be secured from the development for the local community or, on the other hand, what would be appropriate by way of reduction in the contribution to be made. It is the lack of a certain or identifiable framework within which a contribution can be equitably determined which will often be at the root of the problem.

6. It is the view of PEBA that provision of infrastructure requires in the first place that the community takes responsibility for provision but in a manner that is transparent and locally accountable. As part of that overall responsibility, the community can legitimately look for funding from developments within its area.
7. In common with other professional organisations and the industry, PEBA has the gravest doubts over the ability of PGS to secure this objective¹. In the first place it is not locally accountable and will, we suspect, not be seen to be transparent. We believe that the impact of the payment of PGS at the start of development would provide a powerful disincentive to development and as such delivery of the government's objectives.
8. However, importantly, we doubt that, whether through hypothecation or otherwise, the tax will be seen to secure the timely provision of infrastructure on which developers can rely in seeking to bring forward development. Rather, we anticipate that local authorities will continue to look to section 106 obligations to impose requirements directly linked to the provision of infrastructure on the existing and unsatisfactory basis.
9. It is in that context that PEBA supports the proposals outlined in paragraphs B21 to B24 of Annex B to circular 5/2005 Planning Obligations, that is for pooled contributions to be made within a plan-led context. We believe that there should be a responsibility on plan-making

¹ For an excellent summary of the concerns see the report of Planning Gain Supplement Working Group of the National Planning Forum (of which PEBA is a member) dated 9th March 2006.

authorities, both at the regional spatial level and through the local development framework, to set out the appropriate basis upon which a tariff for development by way of contribution to community infrastructure can be determined. This assessment should make allowance for the benefit that infrastructure provision has for the whole community and in its provision for inherent growth in the area.

10. We believe that the proper requirement for contribution towards infrastructure of all kinds, together with the identification of a tariff, should be a specific requirement for soundness within the new system. We would anticipate that this would be achieved through local development and supplementary planning documents, enabling the latter to deal with detailed monitoring and adjustment in the actual figures to be contributed with the identification of infrastructure requirements and overall costs in local development documents and as such subject to examination and determination by the Inspector. The provisions would of course be subject to continuing monitoring and review with community involvement as part of the new system.
11. If a locally accountable system of this kind was introduced, a number of advantages could be secured. First the identification of a specific financial contribution would provide certainty to the development industry and a sound basis for appraising development opportunities and in particular would reduce the problems that arise from the sterilisation of development opportunity through non availability of land.

12. We believe from experience that in the absence of positive encouragement or requirement many authorities would be reluctant to commit the time and resource to this important aspect of future plan making. We recognise that it would impose a significant obligation and responsibility on the inspector examining the plan, something to which we return below. We are considerably encouraged by the initiative of PINS in establishing a panel of independent valuation experts through the RICS. We believe that that resource should be of considerable potential value in examining matters of this kind to enable a proper infrastructure contribution framework to be set up through the local development framework.
13. Equally, in our opinion, it is highly relevant to the realisation of development opportunities that, once the contribution is made towards the infrastructure requirement, the community should take responsibility for ensuring that that infrastructure is provided at the right time and in the right place. We do not include in this the immediate requirements of a development such as access onto the adjoining highway or services or community facilities internal to the development itself. That apart, however, we believe that there should be positive discouragement of the imposition of Grampian or other obligations restricting development pending the provision of infrastructure in the wider area and funded through the community.
14. We recognise that a useful precedent for this approach has been established in the Milton Keynes area with English Partnerships as the appropriate fundholder. Similar initiatives are taking place in Ashford.

An important initiative has also been taken in Reigate and Banstead BC. There the review local plan proposed two major urban extensions in addition to development on urban capacity sites. The Local Plan Review (adopted in 2005 but before circular 5/2005) included policies for contribution from all developments towards overall community infrastructure needs. The Borough Council has now adopted SPD setting out a formula based on dwelling numbers and estimated costs and incorporating a model Framework Agreement for contribution towards the overall costs with provision for repayment in the event of surplus or non-use and contribution from other development land. It may well be that lessons can be learnt from both the overall scheme and its detailed application in the light of experience.

15. These are, however, we believe, generally the exceptions. PEBA considers that there is now an important opportunity to put in place a system that would have all the benefits claimed for PGS but without its manifest disbenefits in terms of lack of transparency and local accountability.
16. PEBA recognises that in some parts of the country the burden and cost of infrastructure provision would not be realistically fundable through development opportunity or the local community. It is in precisely those areas where public grant is required and appropriate either through RSG or from other funding sources. PEBA believes in this respect that it is far better that the particular need for the particular area is assessed in the

public interest rather than having a system by which there is transfer of resource from one area to another with the obvious problems in terms of public support and local accountability.

17. PEBA accepts, as we have indicated above, that there may well be a role for section 106 obligations and/or conditions to deal with the specific and immediate requirements of any development. In that respect PEBA would look to advice in Circular 5/2005, reinforced as necessary, that it should be limited to what is necessary for that purpose. In this respect it may be thought that there is the opportunity for the government to encourage local arbitration or mediation to resolve disputes as to what should be required. A good example is found at one authority in the East of England, where the economic development officer with a background of experience in the development field acts as arbitrator or adviser to both the developer and the authority's planning department in determining a proportionate level for contributions including questions of viability and other considerations.
18. A specific aspect of infrastructure is the provision of affordable housing. While the principle of contribution towards the particular housing needs of the area is not in doubt and in our experience is both accepted and supported by house builders, it is notorious that the present system is hopelessly ill-defined and leads to major delays and uncertainty in securing development or its delivery.² It is our experience that negotiations of obligations in this respect can involve literally months of

² It does not seem to us that the consultation draft of PPS 3 effectively tackles this problem.

debate and with it very considerable cost and delay. This is in no small part due to the deeply unsatisfactory basis for housing corporation funding and its adopted policy not to commit towards grant until detailed planning permission is in place and then as part of a short term funding period.

19. We believe that as part of the measures to secure early delivery, the housing corporation or its successor (whether EP or another) should be given power to make a commitment in principle towards funding in advance at the application stage dependent upon the grant of planning permission and possibly subject to a time limit. Without that commitment the level and nature of any obligation for affordable housing provision frequently becomes uncertain both as to outcome and as to the consequences for residual values and the provision of other community gain. That in turn may well affect land availability and call into question the viability of the development as a whole.
20. We have set out above our belief in a plan led system. As part of the new development plan system, there should, we believe, be a positive role for local development orders, but that is only realistic if financial support and incentive is given to encourage local authorities to bring forward local development orders within the scope of their local development framework, securing both the opportunity for development with the required contribution through the pooled tariff to infrastructure provision. That is, as we have said, dependent on the provision of adequate resources including funding from central government or other sources.

21. We also welcome the new provisions for the local development framework and the examination of soundness by the inspector. However they will only be effective if again they are properly resourced and supported. In that respect we consider that it is essential that the examining inspector should be able to call for support to enable him properly to examine not only matters of financial contribution towards community infrastructure over the plan period, but also other technical matters, which, while not necessarily beyond his competence, will generally involve detailed consideration and as such will take time to examine, which would not be available to him within the scope of the time allowed for this process. We believe that the examining inspector would normally carry out his task with a team of other qualified experts to enable thorough but expeditious examination to take place.³
22. We would however express our concern as to the emphasis on speed as an objective in itself in the process (as in the new Guidance on Assessing Soundness from PINS). While PEBA firmly supports an expeditious and effective process of examination, we would reprobate prioritising the former at the expense of the latter. Speed in decision making is often not conducive to good decision making and may well undermine its credibility and public confidence in the system.
23. A further aspect of infrastructure provision is the failure so far of local development plans in general to take on the role of identifying the location

³ We have referred above to the important initiative of establishing the panel of independent valuers through the RICS.

of and timing for the provision of major utility and service infrastructure. We recognise and welcome the policy guidance in, for example, PPS10 and the revised Waste Strategy that waste infrastructure provision should be plan-led. But for that policy to be effective for infrastructure as whole, local authorities should be required, either through policy guidance or through the examination by the Inspector, to include the specific consideration on a front loaded basis of and guidance for the provision for infrastructure. That should be at least area-, if not site-, specific and determined through the overall examination of the local development framework.

24. Coupled with the provision of infrastructure is the time frame within or period over which planning at present takes place. PEBA believes that the current periods are generally too short for this purpose. Many significant developments will be looking at a period of 30 years or more for delivery. Equally infrastructure should be planned on a forward programme of at least 25 to 30 years. At present it is rare for a RSS to look in terms of spatial policy beyond the next 20 years and at local level local development documents are largely restricted to the next 10 years.
25. In our opinion as part of planning at all levels there needs to be policy guidance at an appropriate level of detail⁴ to cater for at least a forward period of 30 years. Alternatively there should be policy provision enabling planning permission to be granted for development which

⁴ Plainly the degree of specificity would reduce for less immediate periods.

extends beyond the current plan period. In our view the former is significantly to be preferred to the latter. We do believe, however, that the provision of a policy framework over this period is an imperative if we are to secure the certainty and confidence in the system to underpin funding and commitment from those responsible for delivery.

26. A further procedural improvement, which could be achieved without any legislative or regulatory change but would contribute to speeding up the process, would be to encourage inspectors, both in an examination or inquiry context, to make preliminary rulings or initial findings or reach conclusions on individual matters in issue. This has in our experience been adopted to good effect by some inspectors, enabling the parties at an early stage to negotiate on the basis of the inspector's initial conclusion. Plainly if there is a change in circumstances before the final decision, that would be a material consideration calling for the matter to be further considered. However, in most cases the parties would recognise that the preliminary conclusion reached would remain the view of the inspector. Equally, where the inspector is reporting to the Secretary of State, the recommendation on this matter would be on that basis and therefore the parties can negotiate in the light of that conclusion, albeit, if need be, with the reservation of any fundamental point in issue to be the subject of independent submissions direct to the Secretary of State.
27. We turn then to policy. In our opinion, policy needs to be proactive in seeking to support development subject of course to areas of fundamental restraint. In this respect we believe that significant questions have to be

asked as to the justification for sub-regional embargos, such as one finds in the context of Pathfinder or Heartland areas and whether in the interests of social engineering there is truly any market or other evidence of a need to impose an embargo on development elsewhere, leading to the frustration of economic and residential building opportunities in areas where people want or need to live.

28. Second and importantly, we believe that the opportunity for development to come forward at an early stage of the plan process should be encouraged. In practice this has been adopted in several cases, but there should be specific policy guidance in enabling decisions to be made when on balance the issues have been sufficiently explored and identified to enable a decision on the development properly to be made on its own merits. There should not be discouragement of applications being made and considered in parallel with the local development framework process. Too often prematurity is relied upon by authorities as an objection of principle upto a stage late in what is too often a drawn out development plan process to the detriment of securing economic and other benefits of development without unnecessary delay or at all. It may be that the advice in circular 8/93 should be revisited to ensure that the appropriate balance is struck between encouraging development proposals while ensuring that costs are not unreasonably incurred.
29. A further consideration is the impact of environmental constraints and requirements, largely based on European Directives. While PEBA is supportive of environmental conservation and protection, there is little

doubt that European directives requiring environmental assessment, strategic environmental assessment of plans and the imposition of the habitats and species protection as transposed in this country impose a heavy burden on and in that respect disincentive to development coming forward.

30. We recognise that any amendment in the basic directive framework would require measures in Europe and that is beyond the scope of the current review. We do not as an association suggest that there is not a proper requirement for environmental assessment or control on development in respect of habitats and species of European importance. However, for example, in respect of environmental assessment it seems to us that within the present directive and regulatory regime there is real opportunity through guidance from government or otherwise to encourage a more positive use of the scoping provisions to identify what really is likely to have a significant effect on the environment and which requires assessment, rather than what is more commonly the case where almost any conceivable implication of the development is required to be assessed with the inevitable consequences for delay and use of resources. The same approach would apply to the strategic assessment of plans.
31. So far as habitats and species regulation and protection are concerned, we recognise that this is led by European jurisprudence, such as in the Waddenzee judgment, and that this is again essentially beyond the scope of this review. However it is open to question whether the right balance has been struck between the competing interests particularly in the

restrictions on the discretion of the member state and the application of the precautionary approach. It does, however, in our opinion call for English Nature to take particular responsibility in scrupulously ensuring the objectiveness of its advice in recognising that balance and the importance of the public interest both in the conservation of natural resource and in securing development as part of a sustainable environment.

32. We would also wish to comment specifically on community involvement. The present system of town and country planning is, on paper, well devised. There is provision for consultation throughout preparation of plans and independent review. However, the key to delivery of development and, more importantly, a planning system which commands the confidence and respect of the public is to seek to inform the public (a) as to their rights, both at the plan stage and individual planning application stage and (b) how to exercise them. If people are involved during the plan preparation, it is more likely that the system will deliver the right development within a reasonable time period. A local community which understands and accepts that development, for example, in its village is needed can help to decide where in the village is the best location. Truly local knowledge can be invaluable. The developer and the community then have certainty; and involvement tends to make acceptance of change more palatable.
33. The existing system too often fails in this regard at present. As to knowledge of rights and how to exercise them, it is not enough to rely

upon advertisement in a newspaper "circulating in the locality". This requires members of the public to buy a newspaper which may not be their preferred choice every day of the week in the hope of spotting and being able to read the small print of the public notice in the back pages. A notice on a nearby lamp post again may be ineffective.

34. Experience suggests that neighbour notification is both patchy and arbitrary. Further, the notification, whether in advertisement, notice or letter fails to convey useful information which would enable appropriate representations: after the description of the proposed development, it should be stated that the application will be determined in accordance with the local plan unless there are other material planning considerations. It should identify for example the main policy pertaining to the proposed development and the criteria that must be satisfied. It could usefully explain that planning considerations do not include directly the effect on the value of land or the identity of the particular occupier but rather on, for example, loss of amenity and road safety and other land use considerations.
35. The recipient of such information may then direct his/her representations to relevant matters to the benefit of all concerned. Too often the representations are not focused on relevant matters. It can be unfortunate at public inquiries when a member of the public has waited patiently for some days to have his/her say if the member of the public simply raises the question of the effect of the development on house prices. That person's time has been wasted. Sometimes, underlying that effect may lie

a point of planning significance but it is doubtful whether that will be discerned.

36. Government relies upon local Councils who rely, to some extent, on Parish Councils and other community bodies. But democracy itself does not provide for good decisions. Good planning officers are the backbone of the system: his/her advice should help the Councillors to reach a balanced decision. Without good advice the process of decision making is further weakened. This satisfies neither the developer nor the public interest. Informed debate is, therefore, important. Thus we believe that proper funding should be made available to ensure that planning officers are fully trained and that there is sufficient staffing of planning departments to provide full and informed advice to members.
37. Moreover there is often a lack of transparency in some areas of determining certain issues at a local level, such as for example housing need. This can again lead to understandable feelings of cynicism and disenfranchisement. There needs to be far greater transparency in all areas of local plan-making and planning decisions.
38. Finally, as to governmental input to planning, the interpretation of PPGs (and now PPSs) has given rise to unnecessary expense, time and delay, particularly at planning inquiries. Although such documents can never realistically cover all eventualities, there are some notorious examples of a lack of clarity. PPG 6 and its many subsequent 'clarifications' was an

example. We welcome the greater use of consultation by the government and indeed by other bodies such as PINS in the preparation of guidance. We believe that continuing attention needs to be given to the clarity and scope of government and other guidance.

The Questions

39. In the light of the above, we turn shortly to address the questions set out in the consultation paper:

- (1) Generally, we believe that the present system does have the flexibility to secure delivery of the right development in the right place and at least with adequate and timely support in terms of resource and funding to which we have referred. Policies are urgently required however to secure the provision and funding of infrastructure through the community. That should be coupled with the ability to plan over a sufficient period ahead and to ensure that both those responsible for preparing and those examining the local development framework have proper resources to fulfil that duty.
- (2) We generally support the present division between the regional spatial strategy and the local development framework. We believe that there is a real difficulty in the regional spatial strategy identifying area or locational policies for development beyond broad regional spatial guidance as to the general area within which strategic development is to take place. We believe that the time period for spatial and development plan guidance is inadequate for major developments and the provision of infrastructure. The local development framework should, as a matter of public imperative, be positive and proactive. This will depend, as we have said, on ensuring strong policy guidance including the contribution

to and provision of infrastructure and support for the examining inspector.

There is often , however, a lack of transparency at central government level as to how and upon what assumptions and/or evidential basis decisions have been reached. The reasons given are often bland and lacking in any detailed discussion or analysis. This does not encourage a positive approach to the plan-making process but merely encourages cynicism.

At the regional level there is little opportunity for input/involvement for members of the public so there is a gap in democratic decision-making and the scope for discretion at local level, whilst inevitably and necessarily more limited, adds to the disillusionment with the planning system.

At the local level on occasion, local authorities do co-operate with others in the same region in the development of local policy. This is something which ought to be encouraged for development of regional/national significance eg through the preparation of joint LDDs [s28 of the 2004 Act].

- (3) In our opinion responsibility for infrastructure provision is not properly addressed by the community at present. It should be for the plan making authorities to face up to the need for infrastructure and to make positive provision for it, including

location and timing as well as appropriate funding where that is relevant. The requirement for environmental assessment and the inflexibility of habitat and species regulation, while sound as to their objectives, impose a considerable burden on the process and can impose a straitjacket on decision making, which might be considered to be disproportionate. Similarly, doubts about the availability of funding for infrastructure projects relevant to potential development in the area (eg roads) can deter investment.

- (4) From our direct experience and discussions with others, we do not believe that there is obviously a lesson to be learned from planning or development control systems in other countries. In that respect we have commented on the opportunity for local development orders with appropriate zoning above, which to an extent would reflect the position in other countries, including the United States of America. On the contrary, we believe that the government should be supporting initiatives to apply our considerable expertise in these fields through the professional bodies and otherwise in other emerging countries, particularly China and India for example.⁵ However, we believe strongly that in a country as densely populated as England the planning system needs to focus heavily upon consultation rather than imposition without public local inquiry.

⁵ Such as the initiative by the RICS in China.

- (5) Regrettably, the effect of planning on business investment is presently more by way of impediment than incentive. This can and should be radically reformed by removal of unnecessary restraint, the definition of appropriate and proportionate contributions towards infrastructure provision and a plan led system that is over a sufficient period to secure the necessary certainty for future development. This will require a different mindset among many involved in the regulatory side of the process.

The new regulations have not led in practice to a speeding up of the initial stages in the consideration of major infrastructure applications. In particular there continues all too frequently to be significant delay in authorities addressing or seeking to resolve relevant issues or even engaging the appropriate outside expertise on technical matters. This may be and no doubt often is a question of resources and it may be that there should be additional funding provided for authorities to deal with planning applications of this kind. Probably the greatest area of delay, however, in dealing with planning proposals through the appeal system is the delay at the decision making stage, that is through the Secretary of State.

Generally, however, the present rules are effective and, if properly used by the inspector, can ensure a proper balance between public involvement and expedition.

- (8) Particular areas where costs deter investment include negotiations as to and the form of obligations in respect of infrastructure provision and affordable housing, coupled with the uncertainty in that respect to which we have referred to above. The same arises with the requirements for environmental assessment with the threat throughout of a further requirement for environmental information and the exposure to legal challenge, which has become endemic in the system. We believe that this is unnecessary if the powers for scoping could, with policy assistance, be used more proactively and positively to cut down the burden presently imposed.
- (9) This is not directly within the purview of PEBA. However we are aware of the close links between land availability and delivery costs including the matters to which we have referred above as well as the uncertainty as to their scale and nature.
- (10) There are considerable concerns as to the negative and restraint culture that generally pervades the system at present in respect of the matters to which we have referred above and otherwise.
- (11) There is policy support for the formation of business clusters and other groups of economic activity which is to be welcomed. There is the opportunity for this to be more widely and actively

supported together with integration of commercial uses within the community, such as is found at Poundbury.

- (12) The capability of authorities in this respect is no doubt largely influenced by the availability of resources with other calls on the authorities' funds. Generally it seems to PEBA that the resources made available are inadequate to deal efficiently and effectively with the fundamental requirements in this respect, whether in providing an adequate plan-led framework as identified above or in dealing with planning applications. We have doubts over the effectiveness of the PDG, which in a number of cases seems to have led more to a marked increase in refusals than to any speeding up of the proper decision making process. Efficiency cannot be measured simply by time limits and numbers of decisions. If at all, such assessments should be a matter of qualitative appraisal, including both time and effectiveness.
- (13) This is a fundamental question and will need to be monitored in the light of experience. At this stage it is too early to form any overall view as to the effectiveness of the front loading system.
- (14) We have commented on the PDG and its defects above. The provision of targeted funding is required together with a positive policy framework to ensure the delivery of economic development.

- (15) Plainly yes. In particular by the community taking proactive responsibility for securing infrastructure and not imposing restraint in that respect on individual developments, albeit with locally accountable funding on a certain and pre-determined basis.

Conclusion

40. We are grateful for the opportunity to express our views on these important matters. We have kept our comments short and without elaboration. However we would welcome the opportunity to discuss these issues further if that is appropriate. In any event, should there be any matters upon which further information or clarification would be of assistance, we will be glad to provide it.

ROBIN PURCHAS QC

Chairman