# JOINT PLANNING LAW CONFERENCE

## Planning for Growth and Decline

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THE ROLE OF THE LAW?

THE LEGAL VIEW

BY

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THE LAW SOCIETY THE BAR COUNCIL

THE ROYAL INSTITUTION OF CHARTERED SURVEYORS

# THE LEGAL VIEW
## ROBERT CARNWATH Q.C.

1. Introduction

1.1. As lawyers, our interest in the substance of planning is that of laymen. We have views. We are willing to participate. We can usually persuade ourselves that the substance of the case we are paid to put forward is sound. Occasionally some of our more eminent colleagues are called on to sit in judgment as inspectors. But that is not our normal role. We are qualified in procedure and presentation. Our essential expertise is in the mechanics of planning. As a result most of us are not well placed to say what is or is not "good planning"; but we are entitled to express an opinion on how well the mechanics of the planning system are adapted to its objectives.

1.2. So, as a lawyer, I have no view as to whether things are going to grow or decline or how we should plan for it. It is with the mechanics of planning that this paper is concerned - seen in the context of the changing and unpredictable world implied by the title of this conference. My theme will be that the procedures for plan-making (which I believe, perhaps unfashionably, to be an important part of planning) are of a complexity and formality out of all proportion to the significance of the plans themselves, and are an unjustified obstacle to effective planning for growth, decline or anything else.

2. Plan-making procedure

2.1. I begin by citing the basic test of plan-making procedure Circular 22/84. I took at the beginning and the end (see Appendix). The beginning (Paragraph 1) defines the objectives of the exercise. It's all about being flexible and up-to-date - new ideas and appropriate solutions. The end (Annexes I and J) shows us the mechanics - as flexible and up-to-date as a traction engine. After that process any relevance the plan has to contemporary problems is

likely to be fortuitous.

2.2. The problem does not stop there. For such elaborate procedures to have any justification, one would need to have a clearly defined relationship, on the one hand, between the procedures and the content of the plan, and, on the other, between the content of the plan and the practical implementation of planning through development control. Unless these relationships are defined and understood, people are unlikely to see much point in spending large amounts of time and money on the procedures. I have yet to find any clear definition of those relationships. A few examples will illustrate the point.

2.3. The inspectors recommendations

The most obvious feature of normal legal procedures, and one which is understood by lawyers and non-lawyers alike, is that there is a reasonable chance for either side to win. This is not a feature of local plan procedure. One has all the panoply of a quasi-judicial hearing designed to give the objector the appearance of being heard on an equal basis with the authority. Yet at the end of it all, there is no way in which the authority can lose, if it chooses not to (other than in the very exceptional case of a call-in). It can reject an adverse recommendation with a comment as terse as those of the London Borough of Westminster in the Great Portland Estates case ([1985] A.C. 661, 673). ("Not accepted. It is considered that the opportunities for office development to take place outside the CAZ can be appropriately indicated in the non-statutory guidance...") or the London Borough of Hammersmnith in the People before Profit case [1981] J.P.L. 869. ("The Inspector's Report does not raise issues which would require the Committee to consider again its decision in the L.T.E. application"). As Comyn J. said in the latter case, the Borough had the law on their side "to an extent that might make individuals incredulous", and it was no objection in law that

"the objectors won after a months inquiry and lost after a few minutes consideration by the Committee".

2.4. Multiplicity of plans

There are still more problems for the objector where there is a multiplicity of plans in prospect. Take the objector in the Fourth Estates case [1985] J.P.L. 285. His land was included in the Green Belt by the county in a Green Belt Subject Plan but after an inquiry the inspector recommended its exclusion. It was then put back into the Green Belt by the District in their local plan. There was another inquiry. The inspector recommended that it should remain there, but the High Court - going somewhat beyond its usual role - said it should be taken out again. I believe the authority gave in at this stage and granted him permissions. If so, he was rewarded for his sheer persistence. But the end result has very little connection with the elaborate and expensive procedures which went before.

2.5. Pre-empting the plan

What of development control while the plan is emerging? Everyone knows that "the fact that a local plan is in the offing, is not in itself a reason for refusing planning permission" (Circular 22/84 para. 1.12). But what does that mean in practice? Can the authority grant permission for all the major development sites in the plan before there has been any inquiry or report on it? Apparently, yes. In R v City of London ex p Allan 79 L.G.R. 223 the authority decided to grant permission for an application covering an important part of the area of the draft Smithfield District Plan, which was due to be the subject of an inquiry in a few months time. The Court said they were entitled to do so. That approach has been followed by the Court of Appeal (see Davies v Hammersmith L.B. [1981] J.P.L. 683). Even where the inquiry has been held, the authority can grant permission without waiting for the report (see the People-before-Profit case). This may be realistic, but if it is right what is the point of having the procedures at all? Circular 22/84 says

that "the weight to be accorded to such a plan or to such proposals will increase as successive stages are reached in the statutory procedures". It is difficult to see why. It is still the same authority which determines the plan, and unless there has been a political upheaval in the meantime, its policies are likely to be much the same. All that may have happened with the lapse of time and the grinding of the machinery is that the figures have got out of date and the plan has lost such freshness as it ever had.

2.6. Other material considerations

When one has got a finally approved plan, how definitive is it? The statute says that in determining applications for planning permission the authority must "have regard" to the plan. However the Secretary of State tells us it is "only one of the material considerations that must be taken into account" (Circular 14/85 para. 5). This is ambiguous. Is he saying simply that, although you must apply the policies, you must recognise that in the particular case there may be other considerations which justify treating it as an exception? That approach poses no problem; it is the application of the ordinary administrative law principle that no policy can be absolute (see e.g. Lavender v M.H.L.G. [1970] 1 W.L.R. 1231). Or is he saying that you could decide not to apply the policies at all? The Secretary of State clearly feels free to override local policies he does not like when deciding applications (see e.g. his treatment of the ill-fated Waterloo District Plan in the first Coin Street appeal). However it is hard to see the statutory justification for this. Parliament has entrusted the preparation of local plans to local planning authorities and has even said that, in cases of conflict, they are to prevail over the structure plan (s.14(8)). The Secretary of State, of course, has a residual opportunity to influence the content of a local plan by calling it in (a power exercised, I believe, on only two occasions - one currently subject to challenge). But if he has not exercised that power, what right does he have under the scheme of the Act to treat it as simply another "material

consideration" to which he can attach what weight he likes - rather than as the framework within which Parliament intended decisions to be taken? The position is even more difficult in the case of an inspector's decisions. As he is deciding such cases in the name of the Secretary of State, one would expect him to be able to adopt the same approach. On the other hand (as was observed in Sears Blok Ltd. v Secretary of State [1982] J.P.L. 249) the inspector has no policy-making function under the Act. On what principle, therefore, and by what criteria, can he decide not to give full weight to the local plan policies, however much he may dislike them? Most of us, I suspect, would like him to be able to do so in a proper case, but, if so, it needs to be made clear in the Act and it is difficult to reconcile with Part II of the Act as it stands.

2.7. Conflicts with D.o.E. Circulars and Policy Notes

Departmental policy guidance is generally easy to work with. The principles are clearly and concisely stated, and the documents are reasonably consistent in style and content. The problem is that they have no statutory basis, even though by practice and legal ingenuity they have almost acquired the status of law (see Gransden v Secretary of State [1986] J.P.L. 519). There used to be a Minister of Town and Country Planning charged with the duty of "securing consistency and continuity in the framing and execution of a national policy with respect to the use and development of law throughout England and Wales" (Minister of Town and Country Planning Act 1943 S.1). But he and his duty have been laid to rest long since (see the obituary by Sir Desmond Heap [1984] J.P.L. 74). So what is to happen where there is a conflict between departmental policy, which has no statutory basis, and local plan which has specific statutory effect. The lawyer must prefer the latter, but I am not sure that it is a realistic view. In the hierarchy of policies applied at any rate on appeal, Government policy is likely to come out on top. If that be right, the justification for it is hard to find. Circular 22/84 (summarising the statute) tells how to deal with conflicts between plans (para. 1.8) but I am not aware of any -6-

departmental guidance as to how to resolve conflicts between statutory plans and Government policy statements.

2.8. An interesting example of the problem in practice is Holmes v Secretary of State [1983] J.P.L. 476 and its sequel [1984] J.P.L. 837, in which the Secretary of State, following successful High Court action gave consent for a religious meeting-room in the Green Belt on a site of 13 acres. The effect of his decisions is (a) that it was an institutional use; (b) that it was not (or would not be) an "institution standing in extensive grounds" and was therefore contrary to circular 42/55; but (c) that, because of associated proposals to restore adjoining derelict land, it would "preserve or improve the open nature of the area" and was within the G.L.D.P. policy (para. 9.16). In this case the statutory policy won. More recently on an appeal in the Green Belt in Watford (Ref. E1/5259/219/10 - 13/7/86) he decided that a proposed new church in 3 acres of derelict land would be an institution in extensive grounds within Circular 42/55 and should be granted permission, even though it was contrary to the Hertfordshire Structure Plan policy which allowed institutions in the Green Belt only in existing buildings. In this case the statutory policy lost. The moral seems to be that, as long as the appellant can find one policy which favours him, he is in with a chance. The examples raise two questions (1) is it sensible or necessary to have standard policies (such as Green Belt policies) spelt out in different terms in different documents; and (2) if that is to happen, on what rational or legal basis is one to decide between them?

2.9. My own view is that most planning policies are perfectly adequately dealt with by the Department publications, and separate treatment in structure or local plans merely confuses. For example, I find it unhelpful to be told (in the South Hampshire Structure Plan) that the substitution of a "strategic

gap" policy for green belt is intended to produce a policy which is "more selective and flexible than the Green Belt policy, but equally rigorous in the control of development". Does that mean that I am more likely to get permission or less?

3. The way ahead

3.1. It may be thought from the preceding that I have a negative view of plan-making. That would be wrong. My case is not that plan-making is unnecessary or undesirable, but that statutory plan-making is both misleading to the public and an unjustifiable obstacle to effective planning. It elevates the process to a significance to which, in an imperfect world, it can never aspire; and it would be better to acknowledge its limitations. I can see the case for a statutory green belt. That is a concept of acknowledged importance whose significance is reasonably clear and well understood. It does have a special status which justifies statutory recognition, and its rigour warrants a statutory procedure to determine its boundaries. But that quality is not shared, for example, by the plethora of open land and rural areas policies that litter structure and local plans. For general policy statements a non-statutory format is good enough for Government policies. I see no reason why it should not be good enough for local authorities. It would also avoid the confusion that presently exists as to the relative status of the national and local policies.

3.2. Plans of course are not just concerned with policy statements. They are used also to indicate quantitative levels of planned development. But to give those indications statutory force overstates their importance and precision. The elaborate procedures necessary to arrive at the stage of a statutory plan make it likely that they will be out-of-date by the time that stage is reached.

3.3. Local plans also provide site-specific allocations. But to merit such an elaborate procedure the site-specific allocation ought at least to result in something of binding significance, such as a consent in principle. It should not just be another relevant factor to be given as much or as little weight as the authority or the inspector thinks fit.

3.4. Another example of a designation of real significance is the Conservation Area, which carries with it a separate system of planning control. Yet, paradoxically, the designation of a conservation area does not have to be done through the development plan procedure and indeed it has no statutory procedure to speak of at all.

3.5. So I would dismantle Part II of the Town and Country Planning Act 1971. Authorities should be free, like the Secretary of State, to issue non-statutory plans and guidance. They can be given as much or as little weight on appeal as is justified by their merits. They should not be accorded some special status merely because they have been through the turgid processes of a statutory plan. Statutory procedures can be retained for special cases, such as the Green Belt or Conservation Areas, but only if it can be shown that statutory effect actually means something. A policy which the law says one can take into account and then throw into the waste-paper basket, does not deserve to be called "statutory".

4. The new initiatives

4.1. Against that background I turn to consider briefly some of the new initiatives. We have had a succession of circulars and White Papers urging a more positive approach to development - Lifting the Burden; Building Businesses - not Barriers, and

related circulars on employment, housing, and small businesses. In "Lifting the burden" para. 3.13 (see Appendix) there is specific recognition of the cumbersome nature of the plan-making system and its capacity for delay and of the need to review it. I find these indications helpful. They embody a consistent approach and a healthy scepticism about the sanctity of plans. But they do not grapple with the basic problem to which I have referred above - namely that the Secretary of State is not the statutory planning authority. They do not give inspectors any legal or rational basis for disregarding more restrictive policies in the statutory plans. Nor do they explain why statutory plans are needed at all.

4.2. Then we have the prospect of "unitary plans". These are the amalgamated structure and local plans made necessary by the abolition of the metropolitan authorities. Making a virtue of necessity the Government claims these as an example of simplification of the planning system (Building Businesses - not Barriers para. 5.16). So far as my pleas for a rational system is concerned, the new procedures confuse the matter by introducing a new quasi-statutory creature called "strategic guidance given by the Secretary of State" (Local Government Act 1985 Schedule 1 para. 2(4)) to which authorities are required merely to "have regard" - yet another "material consideration" for inspectors to grapple with.

4.3. My attitude to simplified planning zones is rather more positive. The procedures may seem cumbersome, and one may wonder whether development-minded authorities will bother to follow them rather than simply inviting applications on individual sites. On the other hand I can see their utility where an authority wants to offer developers a degree of certainty over a substantial period. More importantly for my general argument in relation to

mechanics, the procedures here do bear some relationship to the ends. At the end of the procedures one has something of real significance, namely a planning permission. Thus this process ties in well with my general philosphy which is that statutory procedures can only be justified where they lead to something which has binding significance. But it would seem much simpler to continue this procedure with the local plan procedure (if it is to remain statutory) so that a site-specific allocation in effect results in an SPZ.

5. Conclusion

The title of this conference is, I think, optimistic, in that it assumes that we can plan for growth or decline. At one stage I suggested that it ought to have a question mark, but that suggestion has not been adopted. The other speakers have generally justified that optimism. However all acknowledge the difficulty of planning in a changing world. The plan-making system must be sufficiently flexible to cope with that, and it must not pretend to be able to do things which experience since 1947 has taught us are impossible. As one who earns a large part of his living from planning law, I cannot but applaud the willingness of planners and politicians to enmesh themselves in complex and costly procedures which are considered quite unnecessary in other equally important areas of public life. As an objective observer, I can only regard it as a little absurd.

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14th August 1986

# PLANNING FOR GROWTH AND DECLINE

## THE LEGAL VIEW

# Circular No. 22/84

## MEMORANDUM ON STRUCTURE AND LOCAL PLANS: THE TOWN AND COUNTRY PLANNING ACT 1971: PART II (AS AMENDED BY THE TOWN AND COUNTRY PLANNING (AMENDMENT) ACT 1972, THE LOCAL GOVERNMENT ACT 1972, AND THE LOCAL GOVERNMENT, PLANNING AND LAND ACT 1980)

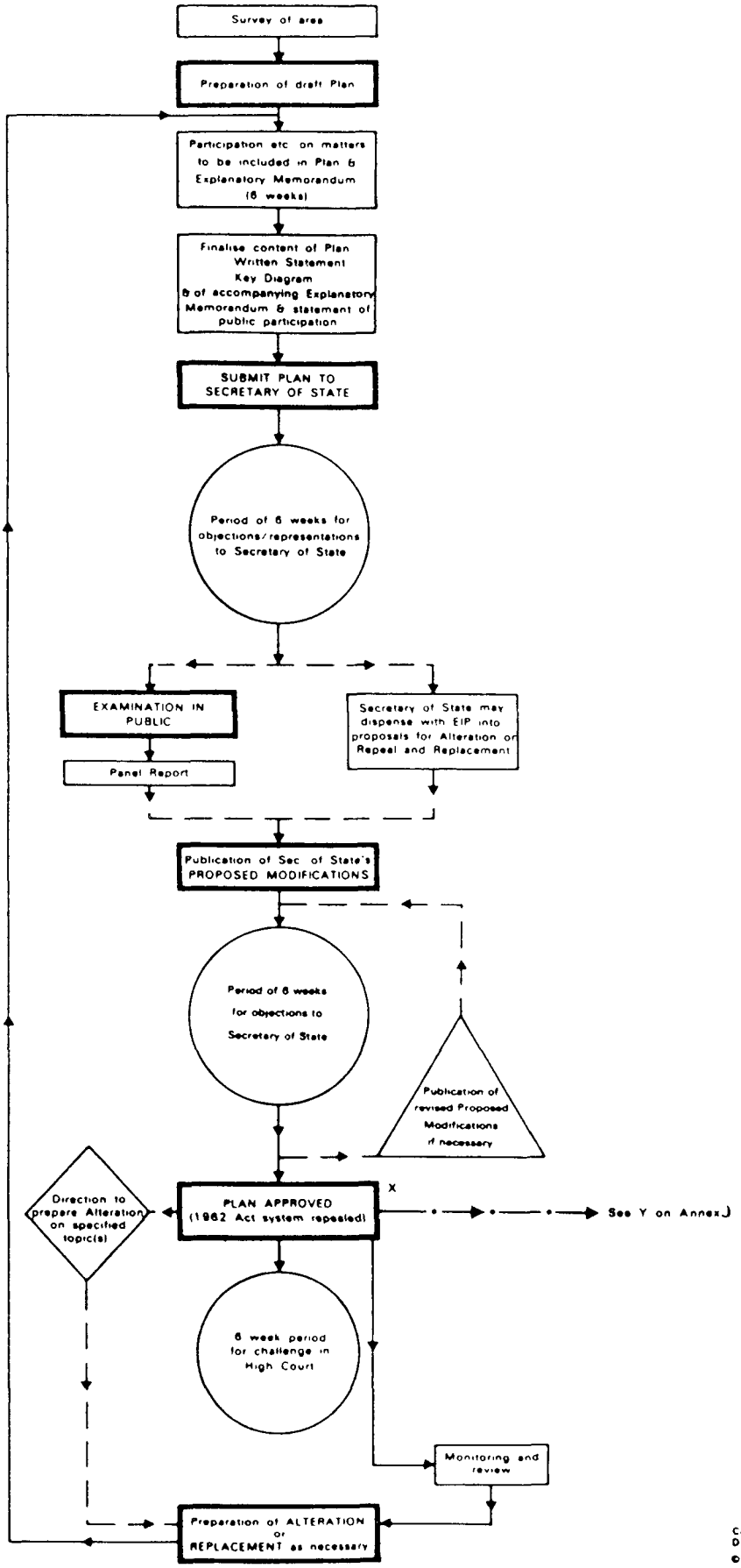
*Dated September 7, 1984, issued jointly by the Department of the Environment and the Welsh Office; Circular No. 43/84 of that Office*

1. Structure and local plans provide the necessary framework for development control and the co-ordination and direction of development: structure plans give a general indication of where development should be located and its scale; local plans provide detailed locations for the future supply of land for housing and industry, define the boundaries of areas of restraint, and co-ordinate development programmes. The end product of the plan-making process should be a clear and concise statement of policies and proposals for development which strike a satisfactory balance in land-use between immediate availability, for various kinds of development, and safeguarding for future contingencies and conservation. To be useful, structure and local plans should be monitored and kept up to date and easy to grasp and to interpret. They should avoid undue rigidity and policies should be sufficiently flexible to cope with minor variations. The plan-making process itself provides authorities with positive opportunities to reassess the needs of their areas, resolve conflicting demands, consider new ideas and bring forward appropriate solutions.

## THE STRUCTURE PLAN PROCESS

**ANNEX I**

4–412





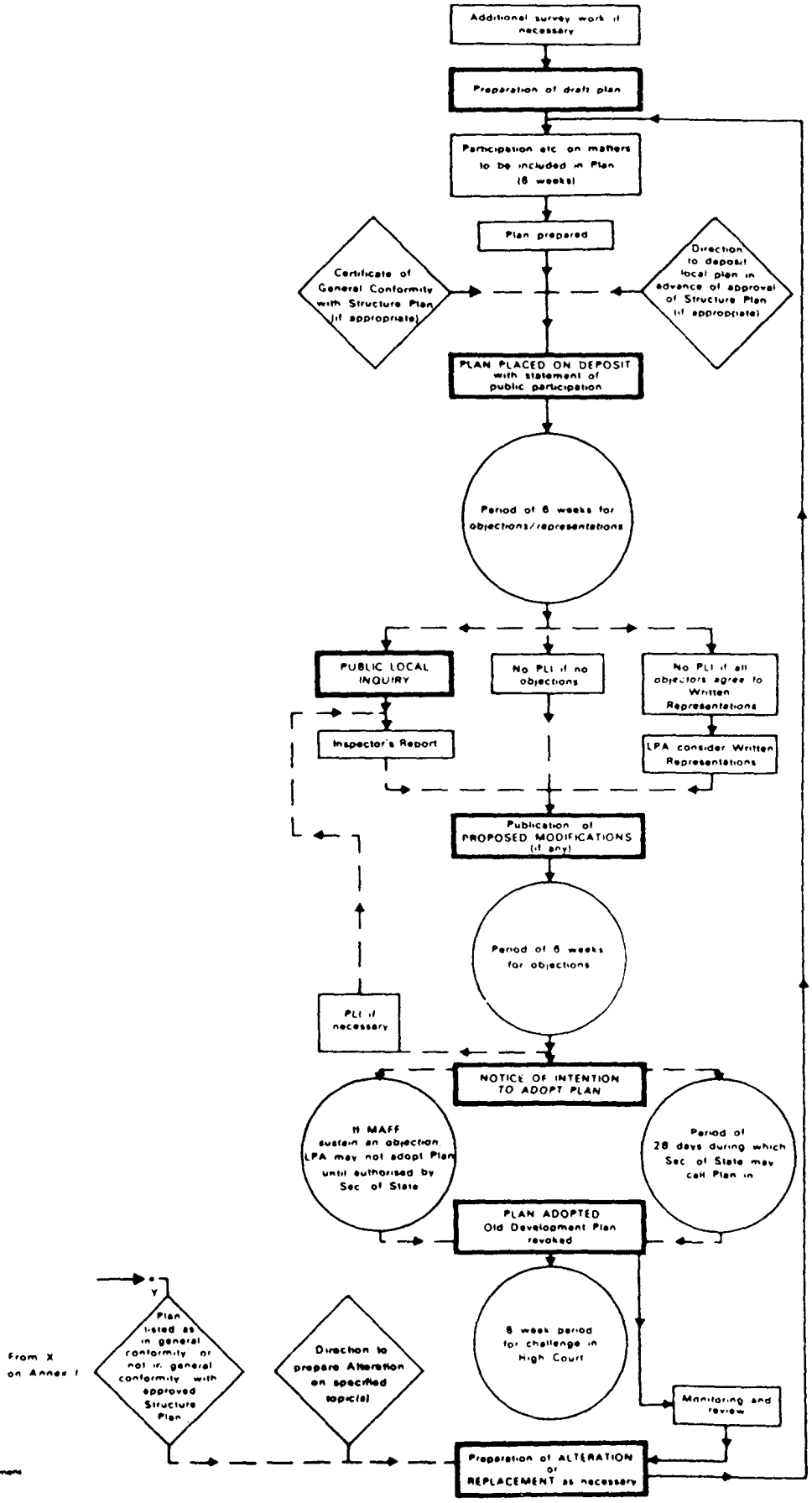

1–412

CIRCULAR NO. 22/84

## THE LOCAL PLAN PROCESS

## ANNEX J

4-412






4-412

3.13 Development plans can assist developers and the business community by providing them with some indicators to guide them in taking their decisions. Development plans include both structure plans and local plans; structure plans are intended to provide the broad policy framework and are prepared by the county planning authorities (regional councils in Scotland), while local plans are prepared by district councils for the whole or parts of their area. Inevitably plans become out-of-date and tend to lag behind current needs and conditions. In particular, the twin priorities of generating jobs and providing sufficient land for housing have not been reflected fully or quickly enough in structure plans and the planning decisions of local authorities. The new circular issued by the Secretaries of State for the Environment and Wales [D.O.E. Circular 14/85; W.O. 38/85, *ante*, para. 4–434] accordingly makes it clear that development plans are one, but only one, of the material considerations that must be taken into account in dealing with planning applications. It is also important that development plans should concentrate on the essential elements and the key planning issues, be well related to current trends in the economy and the factors that influence market demand, and be capable of rapid revision to meet changing circumstances. There is cause for concern that this process of plan review and up-dating is becoming too slow and cumbersome, partly because of the lengthy procedures involved and partly because of the increasing tendency to include in structure plans far too great a degree of detail and of a kind which is either not suitable for inclusion in structure plans or could be more appropriately dealt with in local plans or in published guidance for developers (eg requirements for car parking etc.). The Government are giving further consideration to whether there should be changes in the content and procedures of development plans and in the relationship between development plans and development control. **4–436**