

JOINT PLANNING LAW CONFERENCE

THE DEVELOPMENT PLAN - MASTER OR SERVANT?

PROBLEMS WITH THE PLAN

by

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The Law Society
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PRACTICAL PROBLEMS WITH THE PLAN

1. Introduction

- 1.1 We have heard this morning about the evolution and the ups and downs of our development plan system. Despite the logic of the renewed focus on the plan introduced by the Planning and Compensation Act 1991, inevitably, we are already finding a number of problems in practice with the plan-led process.
- 1.2 It is early days for the new system. However, as the system is tested at appeal and, no doubt, in the Courts the proper interpretation of Section 54A will emerge. Meanwhile we are faced by some practical problems.
- 1.3 In reviewing these I am going to concentrate on the interpretation of the system. The effectiveness of the planning system is defined not just by the structure of the system, but by how the users of the system perceive it and how they interpret it. The appropriate saying is "Castles must be well manned as well as well planned".
- 1.4 I have to start by re-stating the main purpose of the planning system and the role of the development plan.

2. The Main Purpose of the Development Plan

- 2.1 Put simply, the planning system is designed to regulate the development and use of land in the public interest. Last June, Sir George Young¹ stated that the system does this by weighing and reconciling different priorities. Some priorities are primarily economic and social, whilst others relate to conservation and the effects on the environment.
- 2.2 The development plan provides the framework for development in a pro-active way through policies which encourage development, and in a reactive way by providing the basis for development control.

¹ Speech by Sir George Young, Minister for Housing and Planning, RTPI Conference 9 June 1992.

3. Against that clear objective I shall highlight some key issues arising from giving the plan its elevated status, namely:
- (i) Whether or not a Local Plan Inspector's report is or should be a material consideration.
 - (ii) The opportunities for public debate about important policy and land allocation options.
 - (iii) The weakness of policies based on out of date analysis
 - (iv) The importance of negotiations between officers and objectors.
 - (v) The need for flexibility as well as certainty.
- 3.1 By particular reference to statements by ministers and others on the workings of the development plan system, I shall suggest remedies for problems which these issues are causing.

4. The Importance of a Local Plan Inspector's Report

- 4.1 In his paper in June the Minister gave guidance on the workings of the new plan-led system. The guidance was generally useful and positive.
- 4.2 However, I am very concerned about what he said on the status of the Inspector's report and recommendations after a local plan inquiry, namely:

"The Inspector's report to an authority following a local plan inquiry should not be a material consideration in any subsequent appeal. It is the adopted plan that matters."

- 4.3 The Minister went on to say that it is entirely for the local authority to decide how to respond to the Inspector's report. He noted this will be subject to the Secretary of State's reserved powers to intervene, but added that he expects these reserved powers to be used infrequently.

- 4.4 I read this part of the statement with dismay. Although the Minister's comment was made in the context of the more rigorous approach to plan scrutiny which is to be carried out by the Department of the Environment (DoE), the potential implications are alarming.
- 4.5 If the local plan Inspector's report is not to be a material consideration at any subsequent challenge of a policy, this will almost surely lead to two undesirable consequences.
- 4.6 First, it offers encouragement to local planning authorities to disregard recommendations by the Inspector to modify or delete policies.
- 4.7 However well justified an Inspector's proposed modifications may be, the local authority will be in a position to decide that "on balance" it will reject them and continue with its preferred policy. It will be able to do this, confident that the views of the independent Inspector will carry no weight whatsoever in any subsequent consideration of the policy.
- 4.8 The whole public local inquiry procedure could be perceived to be little more than a sham. In such circumstances there seems little point in having Inspectors. One way to streamline the system would be to do away with the inquiry entirely and allow local planning authorities to deal with all objections by way of written representations. Following their own consideration of the objections they would publish and adopt their preferred plan.
- 4.9 Second, this down-grading of the status of an Inspector's report could undermine the role of the Inspectorate itself.
- 4.10 The existence of checks and balances is an important part of the planning system. The independence of the Inspectorate is crucial; it lends credibility to the system. An Inspector's recommendations should not be lightly disregarded.
- 4.11 But the Minister has effectively said that the Inspector's views after a local plan is adopted are irrelevant. How are the users of the system to continue to put their faith in the right of appeal to an independent Inspector when the DoE itself treats its Inspectors in this way?

4.12 To avoid these undesirable consequences and to maintain a perceived fairness in the system the Minister should make it clear that he expects the local planning authorities to normally adopt the modifications proposed by Local Plan Inspectors and that any proposed variation from an Inspector's recommendations must be fully justified. The Inspector's report should of course be a material consideration in any subsequent appeal.

4.13 In short, given the increased weight attached to development plans and the greater involvement of the development industry and others in the plan making system, greater weight should be attached to Local Plan Inspector's recommendations, not less.

5. The Opportunities for Public Debate About Important Policy and Land Allocation Options

5.1 It is widely accepted that the planning system is made stronger when everyone with an interest in the future of an area has an opportunity to have their say on the future pattern of development.

5.2 The Minister has said local planning authorities should give all concerned an adequate opportunity to have their say and the new regulations will give more opportunity for this than the system they replace. This is put forward as a practical example of the Government's Citizen's Charter commitment to give more power to the citizen and ensure local choice.

5.3 I strongly support the principle of maximum local autonomy within a framework of national and regional objectives.

5.4 Although it is difficult to be sure, because I have been unable to find a definitive explanation, I believe this may be what is meant by the principle of subsidiarity! However, without clear national and regional objectives, the "nimby" syndrome could result in no new or extended airports, major roads, business parks, industrial estates, shopping centres, power stations, housing estates, oil refineries, channel tunnel rail links, rubbish tips, sewage works etc.

- 5.5 The current recession has meant that many in the development industry have more pressing concerns. Presenting an argument at a local plan inquiry is an expensive business, and as a result, many are unwilling or unable to take an active part in the process. Indeed, most developers are either in the trenches or in their graves, either way, few are sticking their heads above ground.
- 5.6 Despite this, if greater weight is to be accorded to plans then plan making authorities have somehow to ensure proper debate of key options, such as major changes to allocations of housing land or employment land.
- 5.7 The problem is that the opportunities for genuine debate about accommodating growth are limited. I have discussed this with local planning officers who although sympathetic to the principle of a wide discussion of development options at an early stage in the plan making process, are concerned about setting out options in consultation draft plans because they fear that the proponents of the options will argue that their very inclusion gives them some weight.
- 5.8 The fear of many local planning authorities is that those who support rejected options will gain greater standing to challenge adopted policies, and that this will tend to undermine the ability to hold the position on the preferred option in the eventually adopted plan.
- 5.9 The result is that local planning authorities are tending to review the options internally and present only the preferred option for public debate.
- 5.10 Two examples which illustrate quite different approaches are the plans prepared by Castle Point District Council in Essex, and West Dorset District Council in Dorset.

Castle Point District Plan

- 5.11 The southern part of Castle Point District is Canvey Island. There is landowner pressure for substantial development on the western part of the Island, on land which Essex County Council regard as Green Belt.

- 5.12 Other opportunities to meet adequately the Structure Plan's development land requirements for Castle Point exist on the southern part of the Island and elsewhere on the mainland.
- 5.13 We know that the District Council has reviewed various options at confidential meetings of its local plan working parties. Informal views of various parties have been canvassed by the Council but the real debate about development of the Island is being carried out behind closed doors.
- 5.14 When the Consultation Draft Plan emerges only the "preferred option" will be proposed and all the other allocations in the plan will, no doubt, have been adjusted to accommodate this preferred option. Those with development interests on land affected by one of the other options will be faced with the task of not just objecting to the Council's preferred option, but presenting their own options and having to deal also with all the related policies and allocations.
- 5.15 Why not allow for a more genuine debate about the future of the Island by setting out a range of development options more in the form of an Issues Report and encouraging a wider debate?

West Dorset District Plan

- 5.16 An alternative approach has been used by West Dorset District Council in the preparation of its Eastern Area Local Plan - which will now be incorporated in a District-wide Plan. The Council responded to pressure for development around Dorchester by publishing an Issues Report which indicated three main development options.
- 5.17 Each option accommodated the amount of residential and employment land indicated by the Dorset Structure Plan. The options had various advantages and disadvantages in terms of accessibility, ease of development, impact on conservation interests, etc.

- 5.18 The Council invited comments from all parties. The debate was focussed on the issues of key importance. As a result of the consultation the Council settled on its preferred option which was then included in the consultation draft of the Eastern Area Local Plan.
- 5.19 The local authority can justifiably say it has carried out a consultation exercise on the principles of all the main options. This is an example of a genuine and full consultation. All sections of the community from local people and conservation and amenity groups to business and developer interests had the opportunity to comment on a range of development options at an early stage. It is a model to be followed and one which the Department of the Environment should encourage if not insist upon.

Modify the Purpose of the Consultation Draft Plan Stage

- 5.20 I suggest we can improve the opportunities for genuine debate and simplify the plan making process by changing the purpose of the consultation draft plan stage.
- 5.21 The DoE should encourage local planning authorities to use the consultation draft plan stage to focus on those areas and policies where significant change is proposed and set out the range of options. Effectively it will become an Issues Report.
- 5.22 The consultation responses will then be considered by the authority, and only then will the preferred option emerge in the deposit draft plan.
- 5.23 However, if we are to overcome the fears that such an approach will give greater weight to those options which have been rejected should they be taken to appeal, the DoE must go further. Clear guidance must be given about the subsequent status of any option which has subsequently been rejected.
- 5.24 If it does not find its way into the adopted plan following detailed consideration at a local plan inquiry, it should carry relatively little weight as a material consideration in any subsequent challenge of policies.

6. Policies Based on Out of Date Analysis

- 6.1 Given the greater weight which is being accorded to the development plan it is not appropriate for local planning authorities simply to roll forward existing policies for inclusion in the new plan where the policies are based on research and analysis conducted many years ago. There are examples of planning authorities responding to objections to policies by stating that circumstances have not changed. What is really meant is that the policy, and the application of it, has not changed.
- 6.2 Two examples are the Specialist Industrial Area policy in the Westminster UDP and the out of town retail policy in the Swansea Local Plan.

Specialist Industrial Areas - Westminster UDP

- 6.3 The Specialist Industrial Area policy in the Westminster UDP is based upon earlier policies in the 1982 Local Plan which sought to protect industrial floorspace. The reasoned justification for the continuation of the policy despite the 1987 Use Classes Order, refers to an analysis of linkages between West End activities. That analysis was carried out in 1972, and there has been no further detailed analysis since then. Objectors to the policy have rightly criticised it for being based on an analysis which is now clearly out of date.
- 6.4 In its response to these objections, the City Council has admitted that there has been no update of the 1972 analysis but has defended its policy on the grounds that in its opinion there has been no significant change of circumstances and the linkages remain as before. These criticisms by objectors are a concern, a policy is being set in a plan-led system designed to prevent subsequent challenge by way of the appeal system.

Swansea Local Plan

- 6.5 Another example of policies being based on analysis which is clearly out of date is Shopping Policy S1 of the Swansea Local Plan, which was adopted in December 1989. It has a presumption against any new shopping development

outside specified centres with the exception of the Enterprise Zone. This restrictive policy is based upon the West Glamorgan Structure Plan policy S5 which has a presumption against large store development outside existing shopping centres. The analysis for the structure plan was undertaken in the early 1980s.

- 6.6 The restrictive policy is justified by reference to the conclusions of that analysis. The County Council considered there was a limited amount of additional retail floorspace that could be supported in the County at that time and that further superstores would inhibit investment in existing centres.
- 6.7 Since then, there have been fundamental changes in the retail industry. We have seen new types of retailing, such as high quality retail parks, as well as a general improvement in the quality of retail provision.
- 6.8 Under the old system, policies such as this were capable of challenge at appeal on the ground they were based upon analysis which was out of date.
- 6.9 However, with the greater weight being given to plans under the new system it is more important that the policies are based upon proper analysis of the current position.
- 6.10 I suggest that the way forward is for the DoE to insist that local planning authorities should publish detailed information and analysis on which policies are based at the time of the consultation draft plan. In my view, this information should normally be no more than two years old, although exceptions may be necessary for sources such as the Census. Such a requirement will ensure that both established and new policies have a sound and up to date basis for their justification. It will enable inadequacies to be identified and tested at the early stages of the preparation of the plan. It does not lead to efficient consideration of plans for the quality of that information to be tested first at the local plan inquiry itself.

7. **Negotiations Between Officers and Objectors**

7.1 In June, Birmingham City Council held a Conference entitled "How to Survive a Development Plan Inquiry". The Conference was held after Birmingham had completed an eight week UDP inquiry earlier in the year. The Conference was subsequently reported in the planning technical press and its main conclusions reached a much wider audience.

7.2 The Conference was clearly a very good way of passing on experience learned at a UDP inquiry. There was one "key lesson" which emerged from the Conference which I believe is potentially damaging to the development plan process.

7.3 It was a recommendation that officers should not take part in any negotiations with objectors to attempt to agree amendments to the plan after the consultation draft stage. The reason given for this was that further amendments "only confused the Inspector and members of the public." In addition, it was suggested that such negotiations could generate the need for a second inquiry.

7.4 I believe that advice goes against best practice, which must be to attempt to resolve matters through negotiation prior to a local plan inquiry. If nothing else, it can facilitate the inquiry process by allowing the parties to agree on the key points of contention. Two recent examples illustrate the value of continuing negotiations.

Three Rivers District Plan

7.5 The planning officers of Three Rivers District Council were prepared to meet on several occasions prior to the Three Rivers Local Plan Inquiry to discuss objections raised against the Plan's transport policies and the future development of some railway land.

7.6 As a result of the effort put in by the objectors and the planning officers, agreement was reached on the wording of proposed amendments to two key policies. The appearance of the objector at the inquiry was limited to just

one hour and discussion concentrated on a single outstanding point of disagreement. All other matters were dealt with through written representations.

Borough of Bromley UDP

- 7.7 The officers of Bromley Borough Council were prepared to discuss the policies in the Bromley UDP relating to Bromley's town centre, which had a bearing on The Glades - a newly opened shopping centre in the town. These discussions continued until just before the commencement of the public inquiry. By that time, the Council officers and those with an interest in the management of the shopping centre were able to agree proposed amendments to the wording of the text of the plan and to propose a new policy relating specifically to The Glades.
- 7.8 The Council put the proposed amendments before the Inspector, and the objectors confirmed the amendment would meet their objection in full. Again, the objectors relied upon a written representation and did not need to appear at the inquiry itself.
- 7.9 These are examples of real progress being made after the consultation draft stage of the development plan resulting in agreements between planning officers and objectors which removed the need for large professional teams to appear at the local plan inquiries. This I believe is good practice.
- 7.10 If planning officers around the country choose to follow this "key lesson" put forward at the Birmingham Conference - ie to avoid such negotiations, the effect will be to lengthen considerably the time taken at inquiries, and it will be far less cost effective for all concerned.
- 7.11 It is good practice to continue negotiations to identify common ground, minimise the points of disagreement and, where possible, reach an agreed wording on any proposed amendments up until the commencement of the inquiry. I am heartened to note that the DoE appears to support this view in its new document: "Development Plans - a good practice guide", which was published last week.

8. The Need for Flexibility as Well as Certainty

- 8.1 The final concern I wish to discuss is in relation to the wording of policies.
- 8.2 Development plans cannot be framed to anticipate all changes in circumstances. Policies should allow a degree of flexibility for exceptional cases or for unforeseen changes in circumstances. This is particularly important now that the development plan is to be pre-eminent in determining applications for planning permission throughout the plan period.
- 8.3 Flexible policies give stronger plans.
- 8.4 Where appropriate, local authorities should put forward policies which set out the criteria they will adhere to when assessing development proposals. Policies proposing an absolute ban on particular forms of development should be avoided.
- 8.5 It must be remembered that a plan is only a "snapshot" in time. It clearly reflects the concerns and aspirations of the local planning authority at that time, but unless care is taken in its drafting it can be out of date even before it has been adopted. Rarely do key plan making stages and property cycles coincide. Unless we are to return to planning by appeal, plan policies must have a degree of flexibility.
- 8.6 The word "normally" works well. It clearly indicates the local planning authority's intentions, but does not prohibit exceptions.
- 8.7 The technique of including words such as "normally" in policies, thereby allowing exceptions to the rule where appropriate, is of course now generally encouraged, but it needs more than this. We should be giving a good deal more attention to the drafting of policies for robustness and longer term durability.

- 8.8 The difficulties of striking a balance between certainty and flexibility in the future is nothing new. However, with the new status of the development plan it may provide more difficult for exceptions to be justified in the future.
- 8.9 Without the flexibility afforded by the use of words such as "normally" it may prove extremely difficult for the authority to permit any development not strictly in accordance with the development plan.
- 8.10 Third parties will be in a stronger position to challenge such decisions. The flexibility which is so important would be lost.
- 8.11 An explicit link between policies and their justification will also allow the policies to be applied in a more flexible manner where there is a clear change in circumstances.
- 8.12 I was encouraged by an appeal decision last June. The Inspector allowed an appeal for a supermarket in Tadcaster, against a policy in the local plan which identified a different area for future retail developments.
- 8.13 The Inspector found that despite having been adopted in 1990 a change in circumstances means the policy is already out of date.

CONCLUSIONS

1. In this paper I have tried to highlight some of the practical problems with the development plan arising from giving the plan its elevated status.
2. I have explained why an Inspector's report to an authority following a local plan inquiry should be a material consideration in any subsequent appeal. If it is not to be a material consideration it will not only offer encouragement to planning authorities to disregard the Inspector's recommendations, but will also diminish the status of the Inspectorate. The Minister should make it clear that he expects local planning authorities to normally adopt the Inspector's recommendations. With the increased weight attached to the development plan, greater weight should be attached to the Local Plan Inspector's recommendations, not less.

3. The status of the plan requires better opportunities for genuine debate about future development options. I have suggested that the DoE should encourage local planning authorities to use the consultation draft plan stage more like an Issues Report. Options should not be debated behind closed doors.
4. It is more important under the new system that policies are based upon proper analysis, and the analysis is tested at the early stages of the preparation of the plan.
5. Continuing negotiations between officers and objectors must be encouraged right up to the public inquiry itself. I believe that Birmingham City Council's "key lesson" to local authorities advising them to resist such talks, is wrong. How can the system be efficient when local authority officers go out of their way to avoid reaching agreement with objectors?
6. Finally, the need to balance flexibility and certainty. At present, the implications of Section 54A have not yet filtered through the system. It is clear that policies must be flexible. Flexible policies give stronger plans. Policies are more flexible if they set out the criteria against which development proposals will be tested, and if they include words such as "normally".
7. As I said at the outset, it is early days for the new development plan system.
8. The practical problems I have identified are based on initial experiences with the new system as well as expectations based on previous experiences.
9. The proper interpretation of Section 54A will probably have to be sorted out by the Courts.
11. Some say that Section 54A has not really made any significant difference. I believe it already has. Therefore, it is very important we continue to refine and develop the process of plan making if the system is to prove an effective and valuable tool for controlling the development of land.

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