The modernisation of local government and its impact on planning

By Stephen Cirell

Planning officers and those involved in development schemes have not been immune to the frenetic pace of change which has affected local government since the Labour Government came to power in 1997. The reform programme introduced in relation to local authorities, which is examined below, has had a profound effect on the way local government operates.

This has had wide implications and this paper examines their effect, principally on the planning function.

The analysis provides a "bigger picture" review of the local government landscape in which planning takes place, focusing less on the black letter law perspective but more on the practical implications of how the various policy initiatives tie together. This is likely to become increasingly important for those engaged in planning over coming years.

The reform programme

Upon coming to power in 1997, Labour had a clear vision of what it wanted to achieve. Having been in opposition for over 15 years, it had enjoyed ample time to actively consider this policy direction on assuming power. The General Election victory followed the election of Tony Blair as Leader and a core thread which can be traced through all of the policy initiatives is his personal views on how the public sector should operate.

Having been elected, the Government embarked on a programme of radical reform, known as the "Modernisation Agenda" which continues to this day. Its purpose is to change the whole nature of public service provision, to bring it into the twenty-first century and to improve the effectiveness and efficiency of all public services.

It is revealing to note Tony Blair's personal views for the development of society in the context of the formal Modernisation Agenda. The so called "Blairite vision" was set down in a Fabian Society booklet entitled, *The Third Way: New Politics for a New Century*.[1] In this booklet, Tony Blair gives his idea of the so called "third way" which moves beyond the old left and new right arguments. He sets out his core values, the values which have provided progressive politics for more than a century and how they relate to a world of rapid change at home and abroad.

Tony Blair dismisses the "old way" of a large state sector, with jobs being created to give people employment rather than focus on service delivery. He also dismissed the Conservative way of leaving all solutions to the free market. His "third way" is to create new opportunities for everyone and to help those who need assistance in order to share in those opportunities. The idea of the new deal for communities, for schools and a host of other policy initiatives embodies this approach. If the public sector in general is still locked in the old way of job creation, protection of employment and an inward looking protectionist policy, then the Modernisation Agenda was intended to change this.

The Modernisation Agenda was set out as an impressive blueprint for change in the White Paper

[1] Blair, T., *The Third Way: New Politics for a New Century* (London: Fabian Society, 1998).

Modern Local Government—in Touch With the People, which was published in July 1998. A cursory examination of this paper reveals the extent of the proposals. Areas covered were new political structures, improvements to local democracy, introduction of a new ethical framework, fundamental amendments to the financial system and the introduction of Best Value and community leadership. This White Paper provides the foundation for the Modernisation Agenda and whilst a number of subsequent initiatives have been introduced by the Government (in particular the so-called second phase of the Modernisation Agenda following the General Election victory in 2001) the aims of the Modernisation Agenda are largely still true to the 1998 White Paper.

The three pillars of the whole Modernisation Agenda are provided by the Best Value regime, changes to the governance arrangements in local authorities and the introduction of community leadership. The effect of each of these elements on the overall operation of local authorities is profound:

Best Value

The Best Value regime rose phoenix-like from the ashes of the former Compulsory Competitive Tendering (CCT) regime. CCT had been introduced by the former Conservative Government and had required local authorities to put certain defined activities out to tender. Initially directed at blue collar activities, the regime was starting to bite on some white collar areas, (such as legal services) before it was abolished. Principally aimed at increasing efficiency and effectiveness (but with local authorities harbouring deep suspicions that its ultimate aim was to privatise more services), the CCT regime had largely failed. Labour could not afford to be criticised for being soft on efficiency and so needed an alternative. Best Value was born following substantial consultation and development as a way of ensuring that local authorities were delivering value for money without rigidly requiring external tendering. Although planning fell outside the CCT regime, it is caught by Best Value.

Best Value was formally introduced by the Local Government Act 1999 and came into effect on April 1, 2000. Section 3 of the 1999 Act places on local authorities a legal duty to make arrangements to secure "continuous improvement" in the way in which their functions are exercised. Best Value works by requiring local authorities to review key functional areas and to ask difficult and searching questions about whether the service is the right service, provided by the right organisation and meeting the needs of service users. Best Value was intended to be a tool for performance improvement and has undoubtedly had a big effect on the operation of local authority services.

Governance changes

The Government had also formed a view that the longstanding committee system in local government was confusing and inefficient and did not involve councillors having influence in the manner intended. Accordingly, it was proposed to produce new models of political management, as described below, with the potential for the far reaching and innovative directly elected mayors, similar to those in existence in other countries, such as the US. Allied to the introduction of new political management structures was the introduction of a new ethical framework, following significant criticisms of those in public office by the Nolan Committee.

Community leadership

In effect, the Government wanted to change the entire role of local authorities within their communities. The view had been formed that local authorities were too insular, inward looking and concerned with the services that they directly provided, rather than being a pivotal part of the community and having substantial influence across the public sector, way beyond those areas over

which managerial, financial or other control was exerted. The Government's answer to this was to encourage local authorities to become leaders of their communities. Indeed, para.1.1 of the 1998 White Paper commented: "Successful councils' priorities are to lead their local communities. . ..." In order to achieve this, new powers would be required of community initiative, which were subsequently included in the legislation introducing the governance changes mentioned above, namely the Local Government Act 2000.

Whilst this could be viewed simply as a programme of structural change, to do so would miss the main point that what the Government aimed to do was to change the entire role of local authorities in society as well as the way in which they operate.

By the fourth year of the Government's term of office, demonstrable progress was being made in each of these areas. The Local Government Act 1999 had introduced Best Value; the Local Government Act 2000 had introduced the governance changes and provided new powers of community initiative to support community leadership. However, time was ticking away and during the election campaign of 2001, it became clear that the people were far from satisfied with the performance of public services. Whilst Tony Blair and his colleagues might have thought that substantial progress had been made, in terms of "output" there was sometimes little to show for it. There was no doubt that the Government was stung by criticisms of public services, such as that the trains were still late, hospital waiting lists were still increasing and council tax rising with no obvious improvement in local services. Perhaps it was the thought that a third term would be at risk if the pace of change was not hastened that prompted the Government to embark on the second phase of the Modernisation Agenda after the election victory in 2001. Interestingly enough, there was no change in direction as such, merely a hardening of resolve to move forward the Modernisation Agenda more quickly and to be able to demonstrate the necessary successes in output terms. Many commentators identified a distinct "toughening" of the Government's line with local authorities, and nowhere is this better demonstrated than in relation to the introduction of the Comprehensive Performance Assessment (CPA).

The reform programme continues to this day. As recently as the weekly press conference on July 30, the Prime Minister was personally acclaiming the "substantial progress" made across public services. Some elements of it, as described below, have yet to be fully felt, such as the e-government changes. Featured below is a selection of the more important issues and those which are likely to have the greatest impact on the planning function.

Performance management

The Government had a number of concerns about the general performance of local authorities. The replacement of a Conservative Government with a Labour one did not change the central view that local authorities were not providing services in key areas to the satisfaction of local inhabitants. The concerns spanned a wide area including insufficient interest in local affairs (as demonstrated by poor turnout at elections); the performance of services in functional areas directly delivered by the local authority (*e.g.* education and social services); the corporate management and decision making abilities of authorities; and their interaction with the community at large. Each of these areas is accommodated in the Modernisation Agenda: the elections issue by the creation of new governance arrangements (in particular elected mayors) and the interaction with the community via the new duties of community leadership. However, so far as the corporate management of local authorities and their performance in delivering direct services are concerned, the Government sought to go further.

Following re-election in 2001, the Government built upon the foundations of Best Value under the Local Government Act 1999 but took another step in seeking to place the Best Value regime within an

overall performance framework. The proposal was introduced by the second White Paper *Strong Local Leadership—Quality Public Services* which was published in December 2001. This performed the same role as the original *Modern Local Government* White Paper and introduced the second phase of the Modernisation Agenda. This latter White Paper was published by the Government following a considerable appraisal of how its first term in office had gone and the achievements against manifesto promises in the reform programme. A realistic look was taken of how the key reforms were going, particularly Best Value. It was thought that the regime had not delivered against its promise but whilst still recognised as a foundation for the reforms, that a further enhancement was required. Paragraph 3.3 of the 2001 White Paper stated:

> "The Government will put in place a comprehensive and integrated performance framework to help councils deliver better services for their communities. This will include: clearly defined priorities and exacting performance standards; a framework for performance assessment and proportionate and coordinated performance inspection including regular comprehensive assessment of each council's overall performance assessment; extra freedoms and flexibilities for councils which are able to use them to make a real difference for their communities, over and above the universal deregulation described in this paper; local PSAs to deliver accelerated improvements in priority services supported by additional freedoms; and a streamlined and reformed Best Value framework to help councils manage improvements across all services."

These changes will be brought in via the Local Government Bill which is currently before Parliament.

Following the proposals made in the White Paper, this system has now been implemented by the Audit Commission. It has created the Comprehensive Performance Assessment (CPA) and rolled out the system to the single tier and county council authorities during 2002. The system will apply to district councils during 2003 and 2004. Following the completion of that process, the Government will have a complete benchmark on the performance of local authorities throughout the country. The proposal is then to repeat the exercise in 2006 and to consistently drive up standards by the presentation of clear performance information to the public.

The CPA works by assessing both the corporate management of the local authority concerned (via a corporate assessment) and also its service delivery in key areas. Following the external and independent assessment of these areas by the Audit Commission, each local authority is scored in accordance with a predetermined model and placed in one of five categories, namely: *excellent*, *good*, *fair*, *weak* or *poor*.

The category that each local authority is placed within is so important as to define its future relationship with the Government. It has been made clear that the CPA will be the foundation of the determination on how each local authority operates. The full extent of the system becomes clear when it is known that extra powers will be available to those in the upper categories (such as the power to engage in trading) but these will be denied to those in the lower two categories; furthermore, those in the lower categories are likely to be subject to direct governmental intervention and will be required to produce extra plans and be subjected to greater scrutiny and inspection. A number of other issues will be relevant, such as Government funding.

This means that any stakeholder in a locality who is dealing with a local authority will need to know its CPA categorisation. Furthermore, any developer considering entering into arrangements with a local authority for urban regeneration developments will also need to give consideration to the CPA. After all, if a local authority is in the lowest category it is described in the words of the Audit Commission as a poor council, offering inadequate services and lacking the "leadership and managerial capacity or focus to improve them. Performance management is ineffective and resources are not used to the best

advantage of the council." In these circumstances, developers would probably think very carefully about whether it would be prudent to expend time and effort investigating the possibilities of a deal. The difficulties might go further than that, too, in that if a local authority is the subject of an intervention action, then this may have a knock-on effect on a number of its other functions, including planning and building control. The CPA is therefore very relevant to all those dealing with local authorities in future.

Modernisation of governance arrangements

For the last 100 years, Council business has been carried out largely through the Committee system. Decisions which were not taken by full Council were delegated to committees, sub-committees or officers. The provisions in the Local Government Act 2000 reflect the Government's belief that this system is in need of reform. The Act applies to all local authorities. The objective of the Act is to deliver greater efficiency, transparency and accountability of local authorities and to promote community leadership. This is achieved by separating the executive, policy making and scrutiny functions. A separate executive is intended to provide strong leadership, and to take decisions more quickly and efficiently. Decision makers can be more readily identified by the public and held to account by Overview and Scrutiny Committees, which are a mandatory requirement under the Act. New political management structures include a choice of three forms of Executive, together with a fourth option for District Councils in England with a population of less than 85,000 which is a modified Committee system. There are still some committees, however, under the new arrangements, to deal with regulatory functions prescribed by regulations and non-executive functions such as planning, staffing matters, accounts and financial administration.

Under the new Executive arrangements, the Council's policy framework and budget are agreed by the full Council, following proposals from the Executive. The Executive is charged with implementing the Council's policy framework. The Overview and Scrutiny Committee is responsible for holding the Executive to account and for advising on policy development. The Local Authorities (Functions and Responsibilities)(England) Regulations, 2000 (SI 2000/2853), as amended, specify 11 plans and policies which must be dealt with at full Council. These include the plan or plans which make up the Council's development plan. The Development Plan is part of the local authority's policy framework. The executive is responsible for formulating the Development Plan.

By virtue of the Local Authorities (Functions and Responsibilities)(England) Regulations 2000, development control decisions are not the responsibility of the executive. Therefore development control will continue to be exercised under delegations from the local authority in accordance with s.101 of the 1972 Act, although some residual planning functions such as preparation of supplementary planning guidance, designation of conservation areas, areas of archaeological interest and nature reserves, removal of permitted development rights through Art.4 Directions and making compulsory purchase orders will be the responsibility of the executive.

The Secretary of State Guidance on New Constitutions "considers that full exchange of information between the executive and any committee which takes development control decisions is essential. The executive will need to ensure that there is effective two-way communication between them and any such committee and should consult any such committee on successive drafts of the Development Plan while policy is being formulated. In addition, local authorities should consider including a member of the executive, if possible with responsibility for the Development Plan, on one or more committees which take development control decisions although she or he should not normally be the chair".

The Overview and Scrutiny functions, including pre-review and call in will be harnessed to support the

Development Plan and policy making process. However, the Secretary of State's guidance is firmly against the review of specific development control decisions.

Developers engaging with the local authority, either as applicants for consent or in joint ventures will need to be fully au fait with the tensions to which these new arrangements give rise between the different functions of the council. A proactive cabinet with enthusiasm for the regeneration agenda will need to carry with it the members who are responsible for scrutiny and regulatory functions. The track record of Councils in responding to these changes is variable as is the enthusiasm for the new regime.

The new ethical framework, to regulate the conduct of Members and Officers is a key element of the Government's Modernisation Agenda. The Government has largely entrusted the policing of member misconduct to an independent Standards Board for England though less severe cases can be referred to the Council's own Standards Committee after independent investigation. The Secretary of State issued a Model Code of Conduct for elected and co-opted members, which has now been adopted by every relevant authority.

During the course of the debate about the new councillors' code of conduct the question has been raised about the interface between declaration of interests and predetermination or predisposition. Some confusion has arisen between the two principles and the legal approaches but the two should be viewed as separate. There will be certain circumstances under the new codes of conduct adopted by each local authority under the Local Government Act 2000 where there is a personal interest to declare which might not preclude participation in the meeting and there will be other circumstances where a prejudicial interest, such as to disqualify a member from participation, has to be declared.

However, the absence of a personal or prejudicial interest under the Code does not itself permit a member to participate in the debate or the decision making. The question which must be further addressed is whether there has been any pre-disposition or prejudice such as to render the decision susceptible to challenge. A member who exercises discretion not to declare an interest under the Code of Conduct may nevertheless be found to have acted in a manner which will cause a right minded and reasonable observer to believe that the decision could not be taken properly and fairly by the Committee. A member may still be in a situation that predisposition or appearance of bias will give rise to the risk of jeopardy for the decision if the member participates. The process of disbarment as a result of pre-disposition or prejudice will not be automatic and each case must be weighed on its merit. So, for example, the Parish Councillor and District Councillor who has declared "do or die" opposition to a particular planning proposal might find themselves in difficulty seeking to participate in the decision at Committee whereas the Councillor who has simply said "on the basis of what I presently know I am minded to think that" is in a much stronger position.

A cautious approach therefore seems to be prudent to avoid challenge on the basis of failure to consider proper and relevant considerations. The decision in *Bovis Homes Limited v New Forest DC* [2002] EWHC 483 confirms that challenge because of the risk of prejudice or predetermination is a real issue.

Modernisation of planning law

The long awaited shake up of the planning system set out in the now delayed Planning and Compulsory Purchase Bill is a key component of the modernisation agenda.

The Bill has received a mixed press, with many commentators complaining of a missed opportunity to conduct a major overhaul of the planning system. Instead what is presented in the Bill is a mixture of measures to streamline, but not radically overhaul the development control system; provisions aimed at enhancing the role of the regions in the planning system; measures aimed at revamping the

development plan system (which controversially include the abolition of structure plans and therefore a reduced role for county councils) and some limited improvements to the compulsory purchase regime.

According to the explanatory notes which accompany the Bill its main aims are to reform and speed up the planning system and increase the predictability of the planning decisions. The controversy surrounding the Bill is heightened by the decision of the Deputy Prime Minister to hold referenda in relation to the introduction of regional government in three regions. This in turn affects the future of planning authorities since the introduction of unitary Councils of sizes and shapes yet to be determined is a condition precedent of regional government in those areas.

The introduction of e-government

With the rapid advancement of technology, the Government has started to appreciate the potential benefits from the harnessing of technology in the delivery of governmental and public services. It has embraced the technological agenda with gusto and has developed over the past few years a detailed policy framework which will oversee its introduction into central government, local government, health service and all public bodies. There is no doubt that over the coming years the pressure will grow upon local authorities to comply with the technological agenda and to introduce more technological and information and communication technology solutions, both in the direct delivery of public services and in their administrative and organisational functions. The Best Value regime—and ultimately the CPA—is being used to enforce this policy. The original proposal was in the White Paper *Modernising Government* published in March 1999 and culminating for local authorities in the new national strategy entitled: *www.localegov.gov.uk* in the spring of 2002.

The Government is anxious that the public sector does not fall behind technological developments in the private sector and that criticism is not levied in due course by members of the public that they can buy a CD or download music from the internet, talk to others across the world in chat rooms and vote online for Big Brother evictions, but cannot make a complaint to a local authority, pay their council house rent or commission a repair using similar means.

Progress on e-government has been slower than anticipated but it became clear early on that this would involve both a change in culture and considerable determination on the part of the organisations concerned to introduce new ways of working. The publication of the national strategy for local e-government is the result of a gathering momentum over the last five years. However, the Government has set targets for all key services to be capable of being delivered electronically by 2005 and local authorities have some way to go before they are likely to meet this target.

One that is likely to have a relevance to those dealing with local authorities is that there will be a capability to interact using technological means. In practical terms, this means that planning applications will be submitted, determined and applicants notified using the Internet and email. A further aim of e-government is to provide "seamless" services, particularly where more than one agency is concerned. There are obvious aims in relation to central government/local government and local authorities/the health service and local authorities/quangos and other public bodies. In this regard, the planning portal is a system designed to remove from the planning process any necessity to understand which agency undertakes any particular part in the process. If this were not the case, then an applicant for planning permission could easily become confused as to which elements are determined by the local authority, which by the Secretary of State and the various roles involved.

As mentioned above, local authorities have targets to make all of their services capable of being delivered electronically by 2005 and so this is another area where radical change is ongoing.

Legislative trends

Those who follow legislative trends in local authority law will have noted the movement away from large and detailed Acts of Parliament to much shorter, enabling legislation which often reserves extensive powers to ministers. In constitutional terms this is an unfortunate trend, but one that is likely to continue.

The contrast is illustrated by a comparison of the Local Government Act 1972, a statute of almost 300 clauses and 30 schedules which reorganised local government in 1974 and the Local Government Act 1999 which introduced the Best Value regime, which has but 36 sections. In the past, the Government would set out in detail powers and duties and statutory interpretation would be relatively straightforward. The modern trend adds an extra dimension to statutory interpretation, in that substantial other materials have to be consulted in order to get the full picture. The Local Government Act 1999, for example, sets down the basic duty of Best Value in s.3 but then in s.5 requires Best Value reviews to be undertaken. Under s.5(4) the Secretary of State has the power to specify by Orders what needs to be included in a review. The relevant statutory instrument needs to be consulted to determine what those factors are.

Of more significance, is the modern trend to permit primary legislation to be amended by subordinate legislation, *i.e.* statutory instruments that do not have full parliamentary scrutiny in the same way that an act does. Again, the Local Government Act 1999 provides an example in s.16. This provision is in two parts, with s.16(1) giving the power for the Secretary of State where he thinks that an enactment "prevents or obstructs compliance" with Best Value, to make provision, "modifying or excluding" that enactment. In other words, if a pre-existing statutory provision somehow prevents a local authority from achieving Best Value, then the Secretary of State can by Order simply sweep it aside. The second limb, in s.16(2), is the other side of the coin. This permits the Secretary of State to make provision conferring on local authorities, "any power which he considers necessary or expedient" to facilitate compliance with the Act. This latter provision is extremely wide, enabling the Secretary of State to simply grant a local authority a power needed to achieve Best Value. Needless to say, this new power would not be granted by parliament itself, but via the procedure for parliamentary orders.

This is an important constitutional point that has been raised on numerous occasions in the past. When the Local Government Act 1992 was in the form of a Bill passing through Parliament, there was strong criticism of such provisions contained in its clauses. There the Secretary of State had a wide ranging power to modify primary legislation by secondary legislation. The debate focused on the dangers associated with this (known as "Henry VIII provisions" after the King's Statute of Proclamations which sought to amend Acts by ministerial decree.) The rebellion there was led by Lord Simon of Glaisdale who claimed that such a provision should only be used when necessary and not for convenience alone. Regrettably, this has become a trend and the Government's claim that to adopt the affirmative rather than the negative resolution procedure for the making of the Order is insufficient to allay fears that proper parliamentary scrutiny is being eroded.

What this means in practice is that it becomes much harder to keep a track on new legislation and that the new legislation which emerges has had less Parliamentary scrutiny. We are in an era where it is no longer enough to know the actual statutes themselves—we also need to know about the circulars and government advice which comes with it. Nevertheless, even circulars and advice must have a legal basis in statute or it has no effect. Even the government can get it wrong as the recent challenges over the introduction of the CPA demonstrate.

Development and public procurement

In the case of planners based in the South East, the Government's new proposals to build 250,000 homes by 2016 are likely to ensure a busy future. The interim document *Creating Sustainable Communities Making it Happen* (2003) emphasises that this development will require the public, private and voluntary sectors to work together to ensure the development targets are met. Those based outside of the South East are not immune to development concerns, both in terms of the rebuilding of public sector infrastructure through the PFI and the developments by the private sector, RDAs and the like. These all give rise to interesting issues, but in legal terms public procurement comes to the fore. Whenever a local authority purchases anything, from a simple box of matches to a multimillion pound housing development, this triggers a need to consider the public procurement regime.

The EC public procurement regime has always excluded disposals (that is sales by local authorities) from its consideration. This means that an authority which sells land to a developer, subject to planning permission that it may only be used for housing, will not be troubled by the detail of the regime. However, selling the same piece of land, supported by local authority imposed covenants as to use for housing, may well trigger the regime. This is because the regime impacts on those authorities who procure a developer to build housing for it; or where they enter into a partnership for some properties (perhaps the "affordable housing" element) to be built to local authority specified designs whilst others to be sold by the developer to the private sector. This is where matters get complicated; not least because land purchases or purchases of existing property are expressly excluded from the procurement regime.

This is because the boundary between what is a procurement covered by the Directives and Regulations and what is effectively a land sale is becoming increasingly blurred as development deals become more innovative, complex and creative. This is so because deals involving a simple land transfer are rarely separate from the contracts to develop the land in question. Urban regeneration schemes involving local authorities provide excellent examples of how such difficulties can arise.

The modern trend is for a developer to come to a local authority with outline proposals for, say, a city centre development. This often involves land that the local authority itself owns that is needed to make the development viable and which will need to be included. Immediately, the position of the authority has changed from overall regulator (granting planning permission etc.) to an active participant.

This is where procurement issues start to arise. First, a typical developer will not countenance proposing development plans to the authority, only to have them subsequently turned into an open tender against which its competitors can bid. An early predicament is whether the authority can enter some sort of exclusivity deal with the developer which avoids competition. In essence, if there is not a procurement involved then a local authority is only bound by general public law rules in entering such an arrangement, not the EC procurement rules. The question is, will there be a procurement involved?

This is best considered in the form of an example, which is provided in the Appendix. It is apparent that these are complex legal issues on which the parties will need to be properly advised. In many of the groundbreaking schemes the procurement rules have had to be sensitively dealt with but have not provided the obstacle that many believed them to be.

Local authority powers

Local authorities are creatures of statute and as such are governed by the *ultra vires* doctrine. The law in this area has been developed over decades, from the early cases involving single purpose statutory corporations to the modern day multi purpose unitary authorities. In many ways, the *ultra vires* doctrine

has long outlived its usefulness. Whilst it once served a purpose, the evils to which it was directed have long since been the subject of more modern, effective and targeted provisions, in particular the local government finance legislation and the comprehensive audit provisions now in place. It is also a source of some irony that the *ultra vires* doctrine was developed from company law yet effective control on companies through the ultra vires doctrine has all but disappeared, due originally to the practice of drafting objects clauses to be all-embracing and more recently through modern company legislation which permits companies to operate as general commercial companies. Local authorities, on the other hand, are saddled with an archaic and outdated doctrine that substantially limits their flexibility in the modern context.

Nor is this just a matter of mere legal comment. The Government realised that its Modernisation Agenda was unlikely to be achieved in local government if the legal framework applicable to local authorities was not similarly amended in tandem. When Labour came to power in 1997, the former Government had pursued a very restrictive line on local authorities, encouraging the restrictive interpretation of their powers and seeking to remove areas of responsibility. When the new Government introduced Best Value, local authorities pointed out that Best Value and community leadership would not be achieved without the ability to be flexible, to enter into partnerships, to work with other bodies and so on. It is for this reason that the Local Government Act 1999 contained in s.16 the sweeping powers referred to above for the Secretary of State to remedy any difficulties that are brought to his attention. Furthermore, in the Local Government Act 2000, the Government promoted new powers of community initiative which enable local authorities to engage in a wide range of important activities.

The *ultra vires* doctrine, however, still applies. This has two limbs, namely that whenever a local authority proposes to act it has to demonstrate that it has the *capacity*, *i.e.* it is able to identify the power or duty upon which it relies; and is also able to demonstrate compliance with the rules on *exercise* of powers. The latter requirements are enshrined in public law and require a local authority to act for the correct motives, in accordance with their own internal procedures, in a reasonable manner (in accordance with the case of *Associated Provincial Picture Houses v Wednesbury Corp* [1947] 1 All E.R. 498, otherwise known as "*Wednesbury* reasonableness"), taking into account relevant matters and ignoring irrelevant matters. Whilst the regulatory bodies have tended to shy away from actions against local authorities purely on the latter grounds, either limb can result in a decision being *ultra vires* and therefore void *ab initio*. It is for this reason that local authorities seek extensive legal advice on the activities they engage in, as do those who contract with local authorities on major schemes such as PFI deals or large regeneration projects.

Those who disagree with the *ultra vires* doctrine and claim it merits abolition, usually cite as the obvious alternative powers of general competence. These exist on the continent and allow local authorities to engage in any activity which is not prohibited by the civil or criminal law. Although originally suggesting that powers of general competence might be given to local authorities, upon entering government, Labour determined that the provision of a general power of community initiative would be preferable. This power reached the statute book as Pt I of the Local Government Act 2000. Section 2 of the Act is the key provision which enables every local authority to have power "to do anything which is likely to achieve the promotion or improvement of the economic, social or environmental wellbeing of their area."

The wellbeing powers were primarily introduced to support the community leadership role that the Government wants local authorities to embrace. Local authorities had pointed out that they lacked

crucial legal powers to engage with many other elements in the community; this power was introduced to remove legal doubts. As the Circular introduced by the Government comments:

> "For many years innovative actions by local authorities have been stifled by concerns over the scope of their powers. Whilst some legislation contains deliberate and specific constraints on local authority activities, there has been considerable uncertainty over the extent of the enabling powers that had been conferred on councils. The result has been a necessarily cautious approach to innovation and joint action, and a concomitant limitation on a council's contribution to the improvement of their community's quality of life. The Government's purpose in introducing the wellbeing power is to reverse that traditionally cautious approach, and to encourage innovation and closer joint working between local authorities and their partners to improve communities' quality of life." (*Power To Promote Economic, Social Or Environmental Wellbeing*, March 2001, DETR).

It is for this reason that the power has been framed extremely widely and is described by the Government as "a power of first resort". It can be seen from s.2 of the Local Government Act 2000 that it is up to the local authority whether it considers wellbeing will be achieved and ultimate failure is permitted by the inclusion of the words "likely to achieve" that aim. So far as the three areas are concerned, these are close to general competence in economic, social and environmental matters. The areas include economic development and wealth creation, community safety and contentment and everything to do with the fabric of the environment.

The wellbeing powers have therefore become an important foundation stone for many new activities local authorities are engaging in as part of their community leadership role. However, they are also useful as a source of legal authority for many transactions where the powers hitherto might have been found elsewhere. Specifically, the economic development powers in s.33 of the Local Government and Housing Act 1989 were repealed following the enactment of these provisions.

Other legal developments are also being linked to the wellbeing powers. As an example, the requirement in s.123 of the Local Government Act 1972 that a local authority shall not dispose of land "for a consideration less than the best that can reasonably be obtained" except with the consent of the Secretary of State is now being linked to wellbeing. The Government consulted in late 2002 on a new General Disposal Consent which would replace DoE Circular 6/93 and previous General Disposal Consents. The idea is that this would enable local authorities to dispose of any interest in land held under the terms of the 1972 Act which they consider will contribute to the promotion or improvement of the economic, social or environmental wellbeing of their area for less than the best consideration reasonably obtainable, providing the undervalue does not exceed £2 million. The new Guidance and general consent was issued on August 4, 2003 and was sent to all chief executives of local authorities and also published on the ODPM website (on the planning pages) and on *www.Info4local.gov.uk*. This link to the wellbeing powers is important, and reinforces the fact that it is these powers that will be relied upon to promote many regeneration schemes.

Conclusions

There has been much change in local government over the past six years and the temptation is to concentrate on the detail of relevant provisions in a narrow context but not to see the broader picture. As indicated above, the local government landscape is changing fast and the implications of the Modernisation Agenda will continue to reverberate for some considerable time to come.

For many, the detail of the changes will provide food for thought in how the planning function is to be best performed in the future.

Appendix

In order to demonstrate the practical implications of some of these changes with an example, the Appendix contains a fictional example of a local authority regeneration scheme and what the relevant factors in relation to it might be. This is not intended to provide definitive legal advice but simply to illustrate the breadth of different issues arising and how some of these might be accommodated.

Example of urban regeneration scheme involving Barchester City Council—redevelopment of part of the town centre

1. The City Council has been approached by Real Estates, a major developer/financier of national reputation and substantial financial resources, with a proposal to redevelop a major site within the town centre.
2. The developer has indicated that there is commercial interest in its proposals and wishes to move ahead quickly; having identified that such a proposal will bring benefits to a run down area of the city already zoned in the Development Plan for mixed usage, but with predominantly retail and residential usage.
3. The developer has approached the Council as some of the land is owned by the authority; and it wishes to know whether the land zoned for housing will need to include a significant percentage of affordable housing and whether the Council is interested in becoming its development partner for that part of the scheme. The developer has already obtained options on various pieces of land not owned by the authority.
4. The developer has already had a number of meetings with certain local councillors; these are not members of the Executive but are ward members for the relevant areas of the City. Those members are keen on allowing the scheme to go ahead, particularly as the developer has promised that the percentage of affordable housing will be higher than the national average recommended by government provided the Council makes a fast decision.
5. Within the area, the City Council owns a bus station, a car park, and other properties (held for investment purposes). There are listed buildings in the area. Some premises are of a high standard and well maintained others clearly need demolishing or major works done to them.
6. The outline proposals include the demolition of the Council's bus station and car parks. Any replacement car parks would be underground, and remain in private ownership. The bus station could be located elsewhere within the site, or elsewhere within the town centre.
7. The proposed redevelopment could cost between £200–300 million.
8. There is no redevelopment brief at present. The position is that the developer is willing to spend considerable time and monies in putting together substantial redevelopment proposals, and acquiring land in the area, but only on the understanding that the City Council enters into an exclusivity agreement/statement of intent.
9. Under the exclusivity agreement the City Council would:
   (a) keep confidential the developer's proposals, particularly as the developer wishes to continue acquiring land;
   (b) not dispose of any interests in the affected area during the exclusivity period;
   (c) have a continued dialogue between the Council's officers and the developer in relation to the redevelopment brief.

10. In return, the developer would produce a full redevelopment brief, and seek all necessary planning permissions, etc. The Council would be compensated for its land holding by the building of affordable housing to the Council's specified designs. The number and type of housing units would be negotiated so that the Council obtained a fair value for its land; and if no agreement were to be reached, by assisted mediation for the parties.
11. The proposed exclusivity agreement would also require the Council to enter into a full redevelopment agreement once the necessary permissions have been obtained and to use its CPO powers to acquire outstanding interests if necessary.
12. The Council have adopted executive arrangements under the Local Government Act 2000; but in the light of urgency the Council is being asked to enter into an agreement on the basis of the agreement of the Chief Executive and the relevant ward members.
13. For the modernised Council the issues which are likely to arise from the scenario outlined above will include the following:

The reform programme	• Are the community fully engaging in the debate about the redevelopment so that the Council is ensuring that as community leaders the proposals have the local support which is essential to success? • Do the proposals satisfy the requirements of Best Value; and its Community Strategy? • How will the Council ensure it receives best consideration for its land holding and complies with its fiduciary duty?
Performance management	• What is the Council's attitude to partnership working? • Does it have a cohesive Community Strategy to which the proposals relate.

Modernisation of governance arrangements	• Are the decision making processes in relation to its exercise of its statutory powers separate from the decision making process for the promotion of the development?
	  • Are there systems in place to ensure that in its dealings with the bidders and preferred bidders and land owners the highest standards of conduct are maintained in the light of the new ethical framework?
	  • Has the fairness of any subsequent transaction been compromised by the initial discussions with ward members?
	  • Has the developer a claim against the Council on the basis of legitimate expectations arising from those discussions?
	  • Should the Council commit to such a scheme without discussion, at least at Executive level?
	  • Should the integrity of the decision making process be confirmed by creating an Executive Sub Committee to deal with issues affecting the Council as land owner?
	  • Is there a potential conflict between the Council's role as planning authority and its wish to develop the area? If so, how should this be managed?

Development and procurement issues	• Will the entering into of the exclusivity arrangement trigger the procurement regulations?

	• What will the authority end up with; is it procuring "public works" at all? • Will the subsidised works rules apply to the procurement of the housing? Will these permit exclusive negotiation? • Can the authority structure the arrangement as a disposal and therefore avoid the procurement regulations altogether? • If the authority transferred its assets to an ALMO; would that be a contracting authority covered by the procurement regulations?
Local authority powers	• Is the Council satisfied that it has the necessary powers [including the exercise of these new powers of wellbeing] to promote the development? • Is it able to enter into a land swap arrangement under s.123 of the LGA 1972? • Have all and only relevant considerations been taken into account? • How will the Council ensure full compliance and full public engagement in all the statutory procedures in relation to compulsory acquisition, traffic management, land use planning and other procedural requirements?