

# Caught in the act: policy hurdles to implementation

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## a) Introduction

1. The planning system is undergoing a quiet but comprehensive revolution. In the style of this Government, that revolution is not so much the result of a single big idea or a major, landmark announcement, rather it is the accumulation of a remorseless tide of individually minor but progressive steps towards a totally different world from that which most of us have known.

2. Imagine a planner who has been away for slightly longer than the normal barrister's summer holiday and returned to find a complete new lexicon of planning:-

*...sustainability. . .spatial planning. . .social inclusion. . .community engagement. . .permeability. . .inclusive design. . .consensual planning. . .best value targets. . .mediation. . .plan, monitor and manage. . .stakeholders. . .PPS, RSS, LDF, LDD. . .planning contribution. . .optional planning charge. . .planning gain supplement. . .Sustainable Communities. . .participatory planning. . .*

3. The biggest single step may be the Planning and Compulsory Purchase Act 2004 but the act is no more than a symptom of the tide of change that has gathered irresistible momentum. The genius of the Government is presentation. Ministers have proclaimed the change to the development industry as being faster, more reliable and more efficient at the same time as proclaiming to the public a new system which is based on community planning which "*puts sustainable development and people power at the heart of the system*". It goes without saying that there is a fundamental conflict between these two ideas but that is not my principal theme.

4. As the planning system has always been (and certainly is now) an exciting toy for politicians, it is not perhaps for me to judge whether the changes are for the good or bad. As an alleged planning professional, I may personally lament the passing of an age of greater rigour in favour of an apparently deliberate attempt to create an era where everything is relevant but nothing is definitive but that does not make the new era illegitimate. Rather than being judgemental, therefore, this paper concentrates on the consequences of the changes and the adjustments that developers and their advisors need to make if they are to continue to succeed in actually building something of value to them and to the community at large.

## b) Why did they do that?

5. Planning has always been in a state of flux. Even those of us with rose tinted memories of Circular 22/80 should recall that nothing was ever certain. It is pointless for me to attempt to pin point the beginning of the current era but it may be useful to identify some of the motivating factors because they help to explain why change is occurring and what that change is trying to achieve. Understanding these factors helps us to understand the new game that we are playing.

6. The tide of change clearly started before the 1997 election perhaps partly as a reaction against a rush of unbridled consumerism and market driven economics. *This Common Inheritance 1990* was a seminal work as was PPG13 and the adoption of "*sustainability*" as an emblem for everything that good planning should represent. Retail policies reacted against "*sheds on the bypass*", concern grew about the loss of

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countryside to suburban development and the liberal attitude to development caricatured by Sir Nicholas Ridley already seemed a distant memory.

7. Other societal factors were almost certainly more important, however, and planning should never delude itself that it is anything other than a pawn in the hands of the much more powerful forces of the market economy on the one hand and public attitudes on the other. Changes in planning have replicated changes in many other areas of public life, perhaps principal amongst which has been the shift in the financial burden from Government to producers and consumers across all sectors of the economy. Significant factors have included :

- The termination of a public house building programme.
- The sale of Council houses.
- The privatisation of infrastructure and utility companies.
- Decades of under investment, coupled with chronic shortages in public funds.

8. One significant consequence of these changes is that the state no longer sees it as its responsibility to pay for infrastructure and services which could be financed in other ways; healthcare, road tolls and pensions are examples and so is public infrastructure.

9. One of the great ironies is that these factors have combined to achieve an almost complete political role reversal, *i.e.*

- The consequence of many of these Conservative initiatives is a need to increase rather than reduce the burden on business and the individual;
- At the same time, politics requires that Conservatives in opposition make their most prominent statements on planning against development, in favour of the protection of the countryside or the suburbs;
- By contrast, it is a labour Government which is attempting to drive ways of greatly increasing house building and it is labour Councils which represent themselves as the developer's friend, recognising that development is necessary in order to pay for their social agenda.

10. All of these factors combine in a heady mix to explain a policy agenda which is packaged to appeal to both the development industry and to the wider community. The recent plethora of changes could be seen as a series of un-coordinated bodge jobs, each addressing its own interest group and appealing to lowest political denominators. I am prepared to be more charitable than that, however, and to accept that we are witnessing the implementation of a vision to "*change the face of planning*" to fit the modern political agenda.

11. I turn to address some consequences of those changes but, before I do, it may be worth reminding ourselves of the reasons given by the Government for wanting to change the face of planning in its green paper of December 2001: *Planning; Delivering a Fundamental Change*. Stephen Byers explained that the need for change was driven by the fact that the existing system had significant deficiencies. Principal amongst these he highlighted the following:-

- *Planning is complex, remote, hard to understand and difficult to access.*
- *The planning process is too often perceived to be a set of rules aimed at preventing development rather than making sure good development goes ahead.*
- *Decision making is slow and variable with a distinct lack of predictability.*

Interestingly:

*“the outcome of applications is frequently uncertain because there is insufficient clarity about the criteria against which an application will be judged. It is uncertain whether and why an application will be called in for determination by the Secretary of State or an appeal recovered. The time it takes to deliver a decision is uncertain.”*

- *The process of updating plans is expensive and always takes several years.*

12. These identified deficiencies provide a helpful check list in the quest for better planning.

**c) Where have all the rules gone?**

13. It is, perhaps, instructive to examine three or four aspects of planning in order to understand the extent and effect of the new policy regime.

14. Starting with *Housing*, I wonder how many people remember the good old days with:

- Structure Plans which used Chelmer and other models in order to define with some precision the extent of housing land required over the plan period, divided by local authority areas.
- Local plans which, based on detailed methodologies, allocated land for the lifetime of the local plan, with a reserve identified for the period beyond:
- The five year housing land supply test; and
- The days before affordable housing was regarded as the obligation of the private sector.

15. Planning was a relatively precise exercise. EiPs and Local Plan Inquiries featured a carefully choreographed dance within well understood rules, at least for developers. The abolition of Structure Plans, however, immediately creates less certainty as Regional Spatial Strategies cannot provide the level of precision necessary and few genuinely understand the statutory basis or purpose of sub-regional strategies if they are not to replicate Structure Plans. The revision to PPG 3 in 2000 advocated an approach of *plan, monitor and manage* which required authorities to:

- Adopt policies to release sites for housing development according to the sequential preference for urban sites.
- Manage the release of sites over the plan period in order to control the pattern and speed of urban growth.
- Allocate sufficient sites on the Proposals Map to accommodate at least the first five years of housing development.
- Review site allocations as the plan is reviewed and rolled forward at least every five years.
- Monitor closely the uptake of land and be prepared to alter their plan policies in the light of that monitoring.

16. These changes left many planning professionals puzzled as to how the system was to be sure that it was delivering sufficient housing to meet the needs of an individual area, particularly given the long lead times for development and the inherent futility of relying on a fleet footed development plan system to monitor and up date itself with sufficient rigour on a sufficiently timely basis.

17. Arguably, none of these changes benefit a nation which needs to provide more housing land and it may be no coincidence that the Barker Review found the UK producing the lowest level of housing

annually since World War II and that house building over the last 10 years has been 12 per cent lower than in the previous decade, despite the buoyant housing market.

18. Now we have a brand new draft PPG3 which is already being used to undermine very recently adopted local plans demonstrating once again that change causes delay and continued uncertainty.

19. I shall say more about affordable housing later but the decision to legitimise requests for affordable housing as main stream planning policy in Circular 6/98 may be justified for many reasons but it is not, in itself, likely to have stimulated the house building industry towards greater supply.

20. The Government, of course, is trying to take dramatic steps towards stimulating house building, not least through the *Sustainable Communities* initiative which is beginning to pervade all planning guidance as well as (according to CPRE) being a licence to concrete over large parts of the south east. Notwithstanding its title, however, Friends of the Earth have declared the Sustainable Communities Plan:

“A profound policy failure. . .and a . . .major impediment to sustainable development.”

21. We can all, perhaps, understand the reasons for abolishing recalcitrant Structure Plan authorities in the interests of forcing through acceptance of high house building targets. We could also recognise the contrary desire to protect the countryside that may have stimulated the decision to move towards a protocol of *plan, monitor & manage* but we can also recognise the lack of clarity or rigour in planning for housing that results.

22. Cynics might suggest that an approach of *plan, monitor & manage* was introduced to avoid the political fall out from the previous approach which sought to take and fix a longer term version, thereby exposing the full scale of necessary new building. In announcing this change the Deputy Prime Minister characterised that previous approach negatively as *predict & provide* – words which in the hands of another linguist might reasonably and more positively mean *plan & meet the need*.

23. Terminology is a useful tool for politicians but the real consequence of the changed approach was the introduction of doubt and a step was taken towards enabling greater political intervention, both nationally and locally in a process which had previously been established with greater certainty of process and outcome.

24. In other respects as well, the bar for residential development has been progressively raised. For many years, for instance, it has been a reasonably safe assumption to make that the Inspectorate would side with residential developers on issues relating to outlook, private amenity standards etc—recognising that these were substantially matters for prospective purchasers and the consequence of the drive to increased densities. Recent decisions, however, have shown a significant hardening of attitude in pursuit of excellence. Similarly, design standards are a hot topic for modern residential development, particularly since the publication of the Government’s best practice companion to PPG3 on design: *by design: better places to live*. In a recent decision on a Fairview scheme in Maidstone, for instance, consent was refused notwithstanding acceptance by the Inspector and the Secretary of State that the development would “*greatly improve the riverside in terms of both appearance and public access*”. In reaching his conclusion, the Inspector explained his understanding of the test now to be applied:-

“However, it does not follow, as the appellant argues, that the issue is not whether a “better” design could be formulated but rather that poor designs are to be weeded out. Such an approach would effectively negate the legitimate efforts of local planning authorities, through both development plan policies and development control to improve poor designs and to raise standards generally. It is clear from the whole thrust of national guidance and advice (and

particularly recent advice) that the Government are looking for standards of design to be raised significantly everywhere, and this inevitably means subjecting proposals to more critical examination than would have been thought necessary or reasonable in the past. Although this change of emphasis is being primarily signalled through supporting advice, which is not prescriptive, this does not detract from the force of the message.”

25. Even if I am right about the radical change in policy towards all aspects of residential development, the changes are not necessarily wrong. Greater control is available to the decision makers and scope exists for more sensitive decisions to reflect community concerns—but at a cost.

26. Turning to **Retailing**, I suggest that it is also fair to say that (despite or perhaps because of constant policy overview) the climate of uncertainty for planners is at least as great as it has ever been. The roller coaster ride of retail planning appeal decisions in recent years has justified several papers in its own right but it is sufficient for my purposes today to talk about draft PPS6. Despite the published intention of reducing the length and complexity of policy advice, draft PPS6 is exactly the same length as its predecessor and is in danger of sponsoring a similar fairground experience. The overt message is clear (*town centres good: out of town bad*) but the draft PPS attempts to recognise that grown up planning needs to try to deal with the complexity and importance of the retail industry.

27. Such is the resulting uncertainty of the meaning of draft PPS6, however, that the Deputy Prime Minister was obliged to issue a statement to *The Guardian* in March of this year explaining that the PPS did not represent any substantive change in Government Policy.

28. Before proceeding, it is worth noting that the performance of the retail industry is central to the performance of the UK economy for at least the following reasons:

- Nearly three million people are currently employed directly within the retail sector.
- Retail expenditure is expected to grow from £228 billion in 2003 to £256 billion by 2008.
- The retail industry spent over £730 million on construction in 2003.
- Modern retailing is a show case for manufactured goods.
- The quality of retailing drives the quality and character of our towns and cities.

29. On the face of it, there are elements of draft PPS6 which do make a clear attempt to provide positive planning guidance. In particular, in recognition that many town centres cannot cope with the full scope of retail demand, the draft places an increased emphasis on the need for positive planning from planning authorities to create new town centre opportunities, eg through the use of compulsory purchase powers, action plans *etc*. I might be forgiven for thinking, however, that there is a deliberate intention to retain many of the uncertainties and inconsistencies which have plagued retail policy in recent years including:-

- The insistence on a quantitative need test, rather than a qualitative need test when there is already an impact test to protect against over provision.
- The existence at all of a need test which, otherwise, is only apparent in planning policy for waste disposal in the Green Belt and which gives an indication of the extent to which policy has failed to embrace a positive approach to retailing;
- The insistence on a class of goods approach to retail planning at the same time as recognising that local authorities must take account of genuine difficulties which individual retailers may have to adapting their business model or format to available sites; and

- Recognising that need is the key driver for provision but insisting that a sequential assessment is based on a class of goods approach—surely, if there is an established need for a large new foodstore, for instance, there is no logic in retaining policy which requires it to be disaggregated?

30. Many observers believe that these internal illogicalities are convenient to Government as it allows the selective approval or rejection of individual proposals of apparently equal merit depending on the whim of the decision maker or the political sensitivity of the decision. Providing advice to clients in such situations is a challenge and can resemble a lottery. As an example, B&Q are one of the most experienced and informed users of the planning system but even they cannot predict with any certainty the outcome of their planning inquiries. The most recent results have shown no discernable pattern:

	<b>Allowed/Dismissed</b>
East Kilbride March 2003	Allowed
Gloucester October 2003	Allowed
Eastbourne, October 2003	Dismissed
Castleford , December 2003	Allowed
Margate, December 2003	Dismissed
Durham, December 2003	Allowed
Rugby, January 2004	Allowed
Bristol, March 2004	Allowed
Southend, April 2004	Allowed
Telford, May 2004	Dismissed
Kettering, May 2004	Dismissed
Halifax, June 2004	Allowed
Gillingham, June 2004	Allowed

31. The decisions still feature the Secretary of State regularly disagreeing with all or some of his Inspectors' conclusions *e.g.* on the question of whether large bulky goods can be sold from town centres. If the Inspectors are confused about the policy approach, what chance for the rest of us?

32. The draft PPS is rumoured to be a battleground between a pro development minded Treasury and a more sustainability driven ODPM with consequences that are apparent in the draft policy which represents an unhappy compromise between conflicting interests.

33. The world of **Development Plans** is also undergoing fundamental upheaval. The Planning and Compulsory Purchase Act 2004 introduces a new system for Development Plans with the intention explained in draft PPS1:

“The Country needs a simpler, more flexible, more predictable, efficient and effective system that will deliver the quality of development needed to secure sustainable communities.”

34. Fine words butter no parsnips, however, and the collection of so many fine words in one sentence does raise at least an eyebrow.

35. The reader might immediately wonder whether there could ever be consistency between the aims

of simplicity, flexibility and predictability and in my view the reader is not rewarded by closer examination. The expectation that the development plan process will be shorter, for instance, will need to be proven in practice given that new PPS12 (announced under the heading “*Let the People Decide*”) explains the need for:-

1. Much greater emphasis on community engagement throughout the process but, particularly in “front loading” plan preparation;
2. The need for a sustainability appraisal, incorporating the requirements of Strategic Environmental Assessment (applying both to Supplementary Planning Documents as well as LDDs);
3. The obligation to express in land use planning terms all elements of the Council’s *Communities Strategy* that relate to the development and use of land. This could include regeneration, economic development, education, housing, health, waste, energy, bio-diversity, recycling, protection of the environment, transport, culture and social issues.

36. If there is a part of the plan making the system which is to be shortened, it appears to be the examination stage, with clear guidance now that those making representations at the *independent examination* are discouraged from bringing fresh material to support their case. This approach is symptomatic of an apparent anti lawyer sentiment in the planning process characterised by the increasing emphasis on curtailing cross examination and favouring more informal round table discussion. A binding Inspector’s Report could have advantages but it does place a huge burden on Inspectors and eliminate the opportunity for review and further scrutiny at the modification stage.

37. Additionally, as if to prove my point, it is notable that the Inspector’s recommendation will bind the local authority but not the ODPM which reserves the right (under s.21) to intervene. Intervention in locally based decision making seems to be too much fun to give up.

38. If the ambitions for shortened timescales and faster review are achieved and Local Authorities do take up the invitation to have more locally focussed plans dealing with only parts of their areas or topics, there is a clear potential for the system to provide the opposite of the long term certainty. Frequent reviews and lack of scrutiny undermine predictability, which is so essential for confident investment.

39. Even against this background, perhaps the area of most radical change relates to **Planning Obligations**, the new name for Planning Obligations. The 2004 Act not only creates the opportunity for regulations to legitimise variable planning fees, in adding fees for pre-application discussions, it also represents a fundamental and far reaching change to the law and the policy relating to planning obligations. Regulations may now prescribe that applicants will be able to choose whether to make a “*contribution*” by:

- Negotiated planning contributions (in the traditional way); or
- An optional planning charge, expected to be a pro rata payment set by the Local Authority and varying according to different types of floorspace.

40. On the face of it, developers should not complain at the opportunity to be given a choice. Much uncertainty exists, however, over the nature of the regulations and the policy advice that will accompany this legislative change. Numerous questions arise including:

1. As Circular 1/97 is to be cancelled, what rules will pertain to the negotiated settlement?
2. If a development requires off site infrastructure to be acceptable such as a new road or school

etc will the regulations allow the cost of those facilities to be offset against the optional planning charge?

3. How will the scale of changes vary between areas and will they deter investment, either locally or generally?

41. Nobody should be under any illusion that the proposed scrapping of Circular 1/97 represents a fundamental shift in social policy. In its statement *Sustainable Communities: Delivering Through Planning*, the Government has advised:-

*“We will revise our policy guidance and work with all the relevant stakeholders to create a more streamlined system that will enable the community to share in the benefits arising from development.”*

42. In particular, it is apparent that the Government intend to scrap the test of “necessity” which currently provides the principal test for planning obligations. Currently, developers and their advisors can resist requests for extraneous benefits on the basis that those benefits are not strictly necessary to enable the development to be acceptable. As the HBF has explained:

*“The Federation is fundamentally opposed to the removal of the necessity test as set out in Circular 1/97. It is this test that ensures that planning obligations are fair, open and reasonable since it relates all obligations to site specific impacts and considerations. This long established caveat on planning consents ensures that planning permission cannot be bought or sold and its removal effectively introduces a local development tax that will allow areas with high land values to charge a large fee, thus getting richer while areas with low land values will get nothing.”*

43. In fact, the Government has not respected the necessity test at least since the introduction of policies to require private sector development to fund affordable housing. Legitimising affordable housing obligations when it cannot be reasonably be argued that they are a direct result of the development or necessary to make it acceptable broke the long established rules and had the effect of creating a tax on housing development which many authorities are now spreading to commercial development through development plan policies.

44. To compound this, the policy legitimises the approach, for instance, of the London Plan, which now requires development to make the “*maximum reasonable contribution*” to affordable housing. The GLA has seized the opportunity to apply this policy literally, to the extent that the developer is only deemed to have satisfied the policy if he has made the largest contribution to affordable housing that he can afford. This inevitably leads to open book financial appraisal and the effective taxation of any profit which is deemed to be excessive. Arguably this policy change could be even more effective than previous governments’ attempts to nationalise land value through a betterment levy or Development Land Tax.

45. Ironically, the Panel considering the draft London Plan recommended the deletion of a table which had suggested different levels of affordable housing for different boroughs, preferring instead that individual boroughs should be the best judge of their own affordable housing requirements. The Government, however, has allowed the adoption of the Plan with policies which the GIA considers have the opposite effect. The adopted Plan simply advises that all boroughs should seek the “*maximum reasonable contribution*” against the background of an overall GLA objective of 50 per cent affordable housing. All Boroughs, therefore, are now treated by the GLA as 50 per cent, irrespective of local circumstances.

46. There is a case to be made that the most important planning policy in London is now the unwritten policy which states what the planning authorities regard as a legitimate level of development profit.

47. If you fall into the camp which resents the insidious sequestration of development value in the community interest in this way—look what is coming next!

48. In addition to the reforms in the 2004 Act, the Barker Review has recommended:

*“Government should use tax measures to extract some of the windfall gain that accrues to landowners from the sale of their land for residential development.*

*Government should impose a Planning Gain Supplement on the granting of planning permission so that landowner development gains form a larger part of the benefits of development.”*

49. Perhaps unsurprisingly, the Government responded quickly to this suggestion. As the Minister for Housing and Planning has advised:

*“The Government agreed that it was in principle acceptable to fund social housing and other measures out of the uplift in land values associated with the development process and the Chancellor of the Exchequer said in the Budget Report of March 17, 2004 that he would consider proposals for a national PGS and make a decision by the end of 2005.”*

50. Your view on this may well depend on your own personal political inclination. I simply observe that it would represent the final stage in a radical transformation of previously established rules governing the development of land. For many authorities, the clear test of necessity which restricted their ability to secure planning benefits beyond those required to make the development work has already been replaced by open season on developer profit, and all this before Circular 1/97 has been officially abandoned.

51. The momentum behind these ideas is now almost irresistible. The GLA, for instance, is pursuing its own campaign for a land value tax to be used to fund the infrastructure deficit in London and to enable the construction of projects such as Crossrail. Transport for London recently published a research report it had commissioned from Jones Lang LaSalle highlighting that the opening of the Jubilee Line extension at Southwark and Canary Wharf had increased property values in those localities by £2.8 billion. It is not difficult to predict the next step.

52. Finally, under this heading, I comment briefly on draft **PPS1** – the proposed replacement for PPG1, which is the keynote to Policy Guidance for the planning system as a whole. Interestingly, the draft PPS is entitled *Creating Sustainable Communities* which demonstrates the extent to which this theme dominates Government planning thinking.

53. Again, according to the Minister, draft PPS1 represents:

*“a new vision statement for planning which puts sustainable development and people power at the heart of the system”*

54. Despite the explanation in the draft PPS that:-

*“1.6. . .this plan-led system, and the certainty and predictability it aims to provide, is central to planning and plays the key role in integrating sustainable development objectives.”*

critics would argue that the draft PPS represents a collection of clichés, rather than a clear and coherent strategy. Indeed, the theme of this part of my paper is summed up by the formal comments submitted by the RTPI in respect of draft PPS1:

*“It lacks a hard edge.*

*It takes a broad approach, using cosy words that lack the necessary imperatives; such words can often be*

*interpreted just as the reader wishes. . . . One consequence is that PPS1 will be of little value to any of the proponents in appeal cases.*

*Some things need to be said more clearly and much more strongly . . . it does not recognise the tensions between speed and community engagement.”*

#### **d) Real World Impacts**

55. There are many with a direct stake in these changes, not least lawyers and planning constraints. I have tried in this paper to focus my thoughts on the practical effects of the changes, however, for the actual users of the system, ie, developers, house builders and retailers.

56. In respect of the economy generally many experts wiser than me will have a view. Indeed, for the purposes of writing this paper I have researched some previous studies which have sought to consider the impact of planning reforms, including different types of betterment levies or land value taxes on the performance of the economy. It is fair to say that the reviews are mixed. One Marxist paper which declares that “*capitalism has replaced feudalism*” makes clear its view that capturing development gain for the community is the only equitable route for a civilised society. It is also a fact, however, that previous attempts at capturing land value gain in this way through the 1947 Act, the Land Commission of 1967 and the Development Land Tax Act 1976 were all abandoned as apparent failures.

57. Personally, I share the view expressed by the RTPI Regeneration Framework which has 300 members throughout the country engaged in regeneration and which provided a response the Government on the Barker Report that they were:

*“Dismayed by the possibility of a Planning Gain Supplement—a windfall tax on landowners securing planning consent.*

*This idea has already been labelled as a development tax and is likely to be counterproductive for regeneration, by discouraging landowners to release land for regeneration.*

*A survey of RTPI Regeneration Network Members revealed that—far from imposing a tax penalty on landowners, two thirds wanted to see the introduction of a tax break for landowners releasing sites for social/affordable housing.*

*Taxing before value creation, will be a disincentive to bring forward much needed housing land.”*

58. The Government, of course, may examine and discount the possibility of a Planning Gain Supplement. It is legitimate to consider, therefore, the impact on the economy generally of those planning reforms which are already committed.

59. I have already indicated a view that much of what passes for planning is in general unlikely, in fact, to significantly affect the greater power of the economy or public attitude. It is difficult to discern, for instance, any correlation between statistics on the number of planning applications made over the last 15 years or so with any changes in the planning system. Equally, there is a much closer correlation between development completions and the state of the national economy than there is with planning reform. There is also the ironic factor that if planning reform does, in fact, inhibit development its effect will be to enhance the value of committed or completed development and also the gains to be made from further incremental development thereby providing a perverse incentive to “keep going”. British Land’s annual report this year, for instance, identified that the growth in value of out of town retail floorspace was forecast to be significantly greater in the period 2003 to 2008 than the growth in value of town centre retail floorspace. Where I wonder is the greatest incentive for investment?

60. Planning, therefore, may be suffering under the delusion that it can affect real change in the face of the greater long term forces of the market and public attitude. To illustrate my point, it is only necessary to consider:

1. The determination of the Government to move progressively towards greater sustainability through an incremental increase in the tax on fuel, announced at much the same time as PPG13. Public attitude, however, has caused the abandonment of that approach and even stimulated a renewed road building programme, directly contrary to the dogma that was the foundation of policy.
2. The 10 Year Plan to transform the railways and dramatically increase the proportion of freight carried by rail is now in tatters as a result of the realities of the rail industry and the huge back log of investment which handicaps its performance.
3. The determination to squash out of town retailing has not succeeded despite the most determined policy initiatives. Short of issuing drugs to curb the human desire for a convenient, high quality shopping experience, the strength of the retail economy and the inherent constraints on town centre capacity mean that any set of rules, no matter how challenging will always be capable of being met and the Government is still forced to recognise legitimate cases for out of centre retailing.

61. Much the same phenomena may effect the housing market and the development industry as a whole. Increased regulation and policy change may have the short or even medium term effect of slowing or diverting investment into existing buildings or gilts rather than development but, sooner or later, every policy or economic cycle loses out to the insatiable growth in demand for modern standards of business or residential accommodation.

62. If this positive truth holds good, even the most disastrous policy interventions should only have a short or, at worst, medium term effect on the economy.

63. There should be no doubt, however, that the recent wave of policy change has the potential to deter investment.

64. I have to declare that I fall into the camp of those who saw very little wrong in the established planning system and I have never fully understood the reasons for the fundamental review and upheaval represented by The Planning and Compulsory Purchase Act. I also see significant advantages in much of the "old fashioned" approach to planning for housing and I have never subscribed to the theory that Circular 1/97 needed to be replaced because it was in anyway unclear. This declared position also makes me deeply sceptical about the reality of a faster, more efficient and more predictable development plan system which I fear will become bogged down in community engagement and frequent review and which will suffer from its distant dislocation from regional guidance.

65. Far from being released, development is now facing an unprecedented level of regulation. The temptation to intervene has proved irresistible and the industry is struggling to keep up with a remorseless tide of new legislation, PPSs, Good Practice Guidance, Ministerial clarifications, targets and White Papers. Each initiative is, no doubt, well intentioned but what about the overall effect?

66. To contribute positively to the economy, the changes should aid the delivery of development.

67. The Government is alive to this issue and part of the response has been to impose performance targets on itself, on local authorities and on the Planning Inspectorate. Perhaps unsurprisingly, performance has fallen behind target. In its report on the ODPM annual report 2003, the ODPM Select Committee recommended:-

*“The failure to deliver on commitments to reform the planning system by issuing revised guidance notes has led to uncertainty and delays in planning decisions because of impending revisions to policies. We recommend that the department redoubles its efforts to complete the revision of national planning policy and supporting good practice advice, where necessary, by July 2005.”*

68. In response, ODPM has accepted that it must prioritise those revisions which are most important, although this does mean that we are promised 10 new PPGs covering all major aspects of planning by early 2005 and a further review of PPG3 (Housing) later in 2005.

69. Local authorities have also struggled to meet targets and it is interesting to note that the proportion of applications determined within the 8 week timescale is not significantly different now from the proportion achieved as long ago as 1993 when the pressure for quick determination from Government was significantly lower. Local authorities know, however, that points mean prizes and are becoming increasingly adept at managing their performance. One London Borough I have recently enjoyed, for instance, simply refuses to register a planning application until the applicant can confirm that the application will not be varied and is ready to be determined. From that point further discussion is not entertained, no matter what issues arise from consultation. The application is then fast tracked through committee. We spent 12 months in pre-application discussion and six weeks to be refused. The result was a big win for the statistics and a huge frustration for the client.

70. This is not an unusual experience and the Government has been advised that:

- *In the period since 1997 authorities have seen a significant reduction in resources together with an increase in the number of applications. This has resulted in a reduced ability to undertake other activities such as pre-application discussions. Concurrently, there has been increased concern for improved performance of authorities.*
- *Survey evidence suggests that increased concern occurred particularly in 2002 with the introduction of the Planning Delivery Grant which has further incentivised the need for faster methods of decision making.*
- *The authorities have responded in different ways. In particular, there is a group of authorities whose short term response to this pressure has been to refuse applications and this has led to an increased number of appeals.*

71. The increase in the number of appeals has been a particular phenomena affecting the Planning Inspectorate. Statistics produced by PINS demonstrate that the number of appeals lodged has increased from 14,380 in 1998 to 1999 to 18,554 in 2002–2003. PINS also forecast suggests that the number may rise to as many as 25,000 in 2006/07.

72. The Government commissioned research from Arup this year: *Investigating the Increasing Volume of Planning Appeals in England*. That research identified several key causes including:-

- *A number of quite radical shifts in policy (with the effect that previously acceptable development is now unacceptable).*
- *The increasing emphasis on meeting Best Value Performance Indicator Targets.*
- *The fact that the increased workload has not been matched by an increase in local authority resources.*

73. The knock on consequence of the increased number of appeals is that the Planning Inspectorate has also failed to meet its targets and, indeed, the Government has recently been forced to *adjust* performance targets for the Inspectorate, ie to relax them.

74. One consequence of the programme of reform, therefore, has been significantly less efficiency in

planning decision making with an increased demand for appeals but serious delays in prosecuting those appeals. A recent article in *Planning* confirmed that it is now taking 50 weeks for informal hearings, just as long for written representations and longer still for planning inquiries. So far, therefore, judged against the tests set by Mr Byers, the reforms have neither delivered increased predictably, efficiency or reduced complexity.

75. Even without the Planning Gain Supplement, reform has already gone sufficiently far to legitimise planning authorities with a view that excess development profit should be turned into community benefit. The potential ability of developers and land owners to achieve excess profit, however, is one of the most significant drivers for the development industry and the release of land. Whilst most planning reform is only capable of tugging gently at the economy, land value reform has the potential to seriously inhibit its performance.

76. Developers are at the sharp end of this. On the positive side, the Government does engage with the development industry and does explain that it had understood the need for certainty and efficiency in the planning process. The optional planning charge, for instance, may allow developers to know with certainty the extent of their liability on individual sites before they buy them and could also reduce the uncertainty and frustration of the mystical negotiations which often characterise s.106 discussions. In a recent development with which I was involved, for instance, it cannot have helped the Developer that its consultant team resorted to running a sweep stake on the likely scale of the planning gain payment that would be required and that bids ranged between zero and £4 million! (My heart went out to the planning officer, a seasoned professional, now cast in the role of poker playing taxman).

77. Stacked high against these advantages, however, are three key hurdles:

- The sheer complexity and confusing nature of the scale of changes which the developer now needs to understand;
- The deliberate tilting of the planning process in favour of community attitudes; and
- The expectation that development gain is “fair game”, rather than a reward for hard work, risk and intuition. The certainty which developers can now expect is that there is less money to be made in development.

78. Perhaps most significant, however, is the entry price which developers now need to pay if they want to pursue development of any significant scale. Few could doubt the appropriateness and benefit of the individual issues which developers are expected to address but, cumulatively, the cost implications are severe. On a mixed use, brownfield development proposal those issues now include:-

1. Intensive and extensive community engagement
2. Environmental Impact Assessment
3. Socio Economic Assessment
4. Affordable Housing Studies and Payments
5. Economic Impact Appraisal
6. Adherence to the principles set out in *By Design* and the scrutiny of bodies such as CABE
7. Sustainability Appraisal
8. Energy, including renewable energy assessment
9. Accessibility, both by all modes of transport and by all levels of mobility
10. Open book financial appraisal
11. Tightening Air Quality standards
12. Sustainable Waste Management

13. The dramatic increase in costs of landfill

79. I am aware, for instance, that some of the recent large-scale applications that have been made in London have cost the clients between £4 million and £10 million even before planning consent is granted! With such a burden of issues to cover, the pre-application preparation periods are also extended as are the determination periods and the complexity of s.106 agreements, especially for a Developer focusing on complex and expensive brownfield sites requiring substantial infrastructure and remediation. The knowledge that all this will be necessary without any prospect of a development profit beyond the minimum permissible starts to describe an industry which is only likely to be attractive to inveterate optimists or fools.

80. Development is inherently risky. If risk is not to be rewarded, the money may just as well stay in the bank.

81. In the pursuit of excellence the maximisation of public benefit can reach a point where development is so strangled that neither excellence nor benefit is in fact achieved.

82. You will each have your own views on whether or not I am exaggerating the difficulties and whether I am failing to recognise sufficiently other benefits which may be found within the range of policy changes. You may also feel that the system needs time to bed down and that now is the worst time to judge its performance. I could recognise the legitimacy of such comments but I could not accept a proposition which suggested that the collective effect of the policy changes will be to encourage and facilitate development.

**e) A Rough Guide to Survival**

83. Complexity and change brings with it the need for advice. In a world where the benefit of confrontation and litigation is marginalised, it is the planning consultant who stands to be in most demand, albeit that he may need to shed his pinstriped suit for his jeans!

84. Each of the factors which Developers need to be addressed and which I have listed above, require coordination and need to be undertaken and presented as a coherent whole; planning consultants are uniquely placed for that task.

85. Whilst it could be financially rewarding for a Consultant to associate himself with the apparently endless gestation period of larger schemes, the only true measure of success is the continuing ability to provide high quality advice which assists client decision-making and, ultimately, to deliver planning consents for worthwhile development. Despite much of my text, the principal ingredient for such success is not to rail against the new regime or to look wistfully back to the good old days, but to recognise that planning has changed fundamentally and to engage and invest in the new world.

86. Of course, it is still necessary to prepare with the thoroughness and rigour that would ultimately strengthen a client's case at inquiry but just as necessary to recognise that the planning regime has moved against confrontational planning in favour of consensus. Even at inquiry, an appellant is unlikely to receive a sympathetic hearing if he or she has not worked hard to attempt to achieve consensus and understanding of their proposals. It is telling, for instance, that despite the doubling of staff in the office in which I work in recent years, we probably undertake only a third of the number of planning inquiries that we did 10 years ago.

87. It is essential not only to keep up to date with all of the policy and legislative changes that are current and in the pipeline but, just as importantly, to tune in to the changing temperature of planning sentiment. Issues, which would not have been decisive just a few years ago, now need to be taken very

seriously—issues such as energy, air quality, disability, design and amenity standards. Recent planning decisions show, for instance, that the previously very high rate of success for high density housing development on non conforming sites has started to falter as the planning system shows increasing interest in issues of private community space, day lighting and overlooking—the conflict with policies urging higher density may exist but concern for environmental issues has grown just as strongly.

88. At the heart of all of this needs to be clear and honest advice to clients and prospective clients. It is always difficult to advise a client that their pet scheme is doomed from the start but that sort of advice is even more essential today when the costs and timescales of ultimately abortive projects are likely to be significantly greater. Predicting success or failure, however, is potentially a less certain game when it is played without any precise rules. In a plan led system, reliance ought to be placed on the plan but government policy moves so fast as to invalidate many plans even before they are adopted and the constant upheaval to the planning system is inconsistent with its stated aims.

89. Today's approach involves the following steps:

- It is still appropriate to start with the development plan which can still often be decisive;
- It is even more important than ever to keep up to date with planning appeal decisions, *i.e.* the latest trends in retail planning or house building are often apparent through ODPM decisions on planning appeals rather than through stated policy;
- Take seriously the deference which is now paid to community engagement, in other words, recognise that the community expects to have a significant say and to undertake research and consultation in order to understand and anticipate the consequences of community sentiment.

90. Of course, the balance between these issues will vary from case to case and, indeed, from authority to authority. I have been recently instructed on an Inquiry in London, for instance, where local environmental lobbying has caused the Borough Council to argue that its own adopted (and emerging) UDP is no longer to be relied upon where it shows a site zoned for primary employment use within a Preferred Industrial location. Had the clients undertaken direct community consultation from the outset, rather than making the understandable mistake of limiting their discussions to the planning officers, this outcome might, potentially, have been predicted!

91. Today's consultant, therefore, needs to learn new skills, to recognize that the world has changed and to work with, rather than against, the system. Indeed, so many issues now bear upon a planning decision that value attaches to consultants who can genuinely understand the relationship between development proposals and the new dynamics of planning decision making.

92. One example is environmental impact assessment which, if used properly, can help enormously in moulding developments which then maximise their prospects of gaining approval.

93. Environmental assessment can, therefore, be seen as a key tool in the evolution of a proposal that is more likely to gain planning consent. Quite rightly, the planning system will ultimately weed out proposals which have unnecessary impacts. Done properly, therefore, EIA can shape and define a successful project. It is far more than a tick in a long list of administrative boxes.

94. Against this background, the corporate moves towards multi disciplinary businesses are understandable, as is the emergence of the distinct role for the planning consultant as lead consultant and the developer's right hand, a sherpah on the rocky terrain of the new regime.

95. The planning consultant must also work harder, not only to understand the complexities of a

bewildering world but also to recognise the extent to which a whole range of detailed considerations need to be thought through before a client can be advised to proceed with any confidence. In respect of housing, for instance, these tasks go well beyond understanding the emphasis on brownfield land and mixed-use schemes to addressing the rigours of the sequential approach, consulting to understand local attitudes to development and working hard with a consultant team to design out any detailed aspects of a development, which may ultimately bring the project down.

96. In respect of retail, the formula is very similar, although there are also opportunities created by new planning paranoias. In an apparent effort to make it harder for bulky goods retailers, for instance, draft PPS6 requires quantitative assessments not to recognise individual categories of goods but to be undertaken on the basis of all comparison goods expenditure. Ironically, the need case for your retail proposal becomes easier to demonstrate. Similarly, in an attempt to close the “Tesco Loophole” of retailers piggy backing their superstores on to small local centres and claiming town centre status, the draft requires retail proposals to be consistent with the scale and role of the relevant centre. Again, this can have the advantage for retailers of limiting the search for sequential sites. Arguably, large format retailers no longer need to exhaustively examine sites throughout the lower level of the retail hierarchy and the case, again, becomes easier to demonstrate.

97. The long term strength of the housing and retail economies, combined with the constraints of our urban environments means that out of centre, even greenfield consents are still achievable, but only in circumstances where no better alternatives exist. Consultants should recognise the rigorous, methodical approach necessary whilst developers can still take comfort from an ultimate truism, planning exists to define and direct development needs, not to prevent them from being met.

98. In respect of development plans, the lessons are that the new regime needs to be taken at its word. Developers must now monitor and attempt to influence plan making at as early a stage as possible and must believe that they can legitimately expect to have the opportunity to influence the formation of emerging plans. Developers should learn a lesson from retailers who have been the component of the development industry most active in the planning world and who have demonstrated the ability to influence the shape of emerging policy to their own advantage.

99. As gaining consent for schemes outside of the development plan becomes harder, the shrewd developer recognises the value of investing in the process and adjusts to a long term game based on gradual policy evolution, rather than the elusive prize of instant gratification through the application and appeal route.

100. Finally, you may think that there is no opportunity to succeed in the new world of Planning Contributions. There are, however, perhaps some opportunities:

- Developers should recognise and be advised what is coming on any particular project and factor that into their business decision—the informed developer must have a commercial advantage;
- Recognise that there can be value in sharing your grief with a planning authority through an open book appraisal, particularly for an expensive brownfield land development. On a recent project, for instance, the habitual distrust between developer and planning authority only lifted when the developer consented to an open book appraisal. In this way, the planning authority was required to share the burden of ensuring viable development and to choose between competing demands for more affordable housing, or more transport investment, *etc.*
- Negotiate your planning contributions now before the goal posts move again!

101. I doubt that the Government's principal aim was to enhance the workload of the planning advisor when it embarked on its marathon of reforms, but that does not mean that I am not grateful!

102. Hopefully this paper has presented an explanation for the inevitability of the process of reform but it has also sounded a note of caution. Taken too far, reform carries the potential to undermine its own intention.