The Relationship between Planning Permission and Non-Planning Consents—Unfinished Business?

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Introduction

When, in December last year, I was asked by the then Government to lead a review of non-planning consents I started out with a number of pre-conceptions, many of which have not survived the process. I had thought for some time that the scope of issues covered and consequently the powers exercised under the Planning Acts had grown to be too large, encompassing technical areas that were better left to other control regimes and, in general, requiring far too much detail at too early a stage. As a frequent applicant this had led me to reflect on the rising costs involved in gaining planning permission.

I undertook some research into the cost of British Land's own large scale planning applications from the mid 1990's to the end of 2008 and this showed a significant increase taking place after 1999. I put this down to two factors: requirements for additional consideration of environmental issues, and the fact that we were taking design to a more detailed level. This was partly to satisfy the need to consider these issues but also, I have to acknowledge, because, on some projects, as soon as the planning permission was granted we knew we would start construction. We were therefore prepared to take design to a more detailed level than that required to submit a planning application. Even so, on a like for like basis, it was possible to identify a clear difference between the cost of making a planning application for a major development before and after 1999.

A further concern was the increasing duplication and overlap between planning and non-planning control regimes. Over the last two or three years there has, for example, been an increasing requirement to provide detailed information on the energy performance of proposed new buildings in response to policies such as the Merton Rule[1] and the Mayor of London's policy hierarchy for addressing Greenhouse Gas emissions from new buildings[2]—passive energy performance, combined cooling, heating and power, and renewables. These sorts of assessments had previously been left to be dealt with by Pt L of the Building Regulations[3] at a later stage of design development. Bringing the requirement forward inevitably leads to increased cost resulting from the need for more detailed design, entailing more risk at an earlier stage. The inevitable inconsistency of approach between local authority areas as councils introduced their own versions of the Merton Rule has also ked to a more complex regulatory environment.

All of this led me to the conclusion at that time that planning needed reining back in its scope; perhaps returning to something more like the approach I learned as a junior development control officer in local government in the dim and distant past. Building control matters were in those days left to my colleagues in the District Surveyor's office, and environmental health matters such as construction impacts, to the Director of Environmental Services (who in those days emphatically didn't have responsibility for planning).

The most I could hope to accomplish was to keep the roads around the site clear of mud by applying the standard wheel washing condition.

[1] Policy requiring use of renewable energy onsite to reduce carbon dioxide emissions. See *http://www.merton.gov.uk/living/planning/planningpolicy/mertonrule.htm* [Accessed September 29, 2010].

[2] Policy 4A.6 of the London Plan 2004 (consolidated).

[3] The Office of the Deputy Prime Minister, March 15, 2006, *The Building Regulations 2000, Conservation of Fuel and Power, Approved Document L1A, L1B, L2A, L2B* (2006 edn), soon to be superseded by the 2010 edn.

My view has however changed during the course of the review and when undertaking research for this paper. I now believe that there is no going back to that rose-coloured past where each department and area of regulation had its role and protected it assiduously. The scope of planning, both in policy formulation and development control, is unlikely to be seriously reduced; in fact it is more likely to continue to grow. However, the logical implications of the increase in scope have not been followed through in the structure and organisation of the consent landscape, creating tensions and inefficiencies which will at some point need to be addressed. The increased scope of planning doesn't appear to have been accompanied by any increase in its authority, particularly in relation to other consent regimes.

The Penfold Review Final Report[4] explains some of that thinking as a part of a much wider ranging consideration of non-planning consents, including the roles and working practices of the organisations that have responsibility for the control regimes, the opportunities to repeal and rationalise consents, and how Government manages and controls the landscape. This paper is focused on one specific area covered in the report, i.e. the relationship between the planning machinery, mainly as it applies to England, and the 80 or so non-planning consents we have identified in the Review's work. I will examine the factors driving the expansion of planning's scope, the problems that arise when planning and non-planning regimes deal with the same or similar issues, some of the suggestions that have been made to deal with these issues and how they have been implemented, and finally some thoughts about how things might evolve.

The Penfold Review

The Review was set up by Government with a clear focus on facilitating economic growth and as a follow on from Kate Barker's reports on Housing[5] and Land Use Planning,[6] and the Killian Pretty Review,[7] published in November 2008, which had made a series of recommendations on the "end to end" planning application process, many of which have now been implemented.

Non-planning consents is an inelegant term but it does help define the scope of the review by clearly excluding planning from the brief. We did though interpret it broadly to include any consent a developer has to obtain alongside or after, and separate from planning permission in order to bring a development into its first operational use. We went on to exclude a number of types of development, including very small developments, marine developments and significant national infrastructure projects which at that time were going to be subject to the Infrastructure Planning Commission process.[8]

We started work in December 2009 and were given a deadline date to produce the report in March 2010. We quickly issued a Call for Evidence[9]; Killian Pretty had issued a Call for Solutions but planning had been a well trodden path and, in contrast, it was already clear to us that the world of "non-planning consents" would require further description and analysis before anyone would be likely to come up with recommendations that could be taken seriously.

In the event, we received 71 direct responses from organisations as diverse as the Environment Agency and the National Society of Master Thatchers, as well as 12 other pieces of correspondence. The team and I between us met with about 60 individuals, small groups and organisations, we held two Sounding Board meetings and undertook considerable research into what these consents are and how they operate.

[4] A. Penfold, July 2010, *Penfold Review of Non-Planning Consents, Final Report*. See *http://www.bis.gov.uk/penfold* [Accessed September 29, 2010].

[5] K. Barker, March 2004, *Review of Housing Supply, Delivering stability: Securing our future housing needs*. See *http://www.barkerreview.org.uk/* [Accessed September 29, 2010].

[6] K. Barker, December 2006, *Barker Review of Land Use Planning*. See *http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/independent_reviews/barker_review_land_use_planning/barkerreview_land_use_planning_index.cfm* [Accessed September 29, 2010].

[7] J. Killian, D. Pretty, November 2008, *Planning applications—A faster and more responsive system: Final Report Executive Summary and Recommendations*. See *http://www.communities.gov.uk/publications/planningandbuilding/killianprettysummary* [Accessed September 29, 2010].

[8] Planning Act 2008 Pts 1–8.

[9] December 2009, *The Penfold Review of Non-Planning Consents: Call for Evidence*. See *http://webarchive.nationalarchives.gov.uk/+/bis.gov.uk/news/features/2009/12/penfold-review* [Accessed September 29, 2010].

This work led us to a number of initial conclusions, explained in what became the Interim Report, published in March 2010. The first and perhaps the most important point was that the world of non-planning consents is enormously wide ranging and complex. By March 2010[10] we had identified 86 different consents, with the most complex manufacturing developments, for example in the chemical industry, needing up to 30 separate consents.

The Eddington Report[11] points out that Heathrow Terminal 5 needed 37 consents under seven separate pieces of legislation. There are about 20 different types of consenting bodies, with local authorities having the greatest responsibility, followed by the Environment Agency and English Heritage.

The relationship between non-planning consent regimes and the planning process was a major focus for many of the respondents and the people we spoke to. Three main areas of concern emerged—the extent to which planning permission confers the right to develop; sequencing issues, sometimes referred to as the "planning bar"; and post-planning interventions, including statutory designations, that can delay or prevent development.

The right to develop

Respondents were concerned that the grant of planning permission didn't confer the right to develop, despite the detailed consideration of issues in the plan making and development control process. This leads to uncertainty remaining through the subsequent non-planning consents processes. The Minerals Producers Association (MPA) in their response, for example,[12] point to the gradual erosion of the status of planning whilst the CBI Minerals Group[13] suggest that there is an increasing divergence in decision making between the planning decision and non-planning consents. They argue for the "primacy of planning" with a focus on the significance of the planning application decision:

> "Unless impacts are satisfactorily addressed at the planning stage, planning permission will not be granted. There should therefore be a presumption in favour of granting non-planning consents."

Interestingly the MPA also link this argument for planning permission as "the pre-eminent consent" to the importance of sustainability, i.e. planning is the best way of considering relevant environmental, economic and social issues in the round.

> "Consideration of these issues separately is at best superfluous and at worst contrary to the principles of sustainable development."

This is a subject which has had much detailed consideration in planning case law, some of which I refer to below.

The Ramblers in their response made it very clear that it would be foolish to assume that planning permission confers a right to develop:

> "19. Developers should not assume that because planning permission has been granted the local authority will invariably make or confirm a public path order. This view is backed by case law, in particular *KC Holding (Rhyl) Ltd v Secretary of State for Wales* (1989)."[14]

[10] A. Penfold, March 2010, *Penfold Review of non-planning consents, Interim Report*. See *http://www.bis.gov.uk/penfold* [Accessed September 29, 2010].

[11] R. Eddington, December 2006, *The Eddington Transport Study*. See *http://webarchive.nationalarchives.gov.uk/+/http://www.dft.gov.uk/about/strategy/transportstrategy/eddingtonstudy/* [Accessed September 29, 2010].

[12] Response from Minerals Producers Association

[13] Response from CBI Minerals Group p.3.

[14] *KC Holdings (Rhyl) Ltd v Secretary of State for Wales* [1990] J.P.L. 353.

They also cite *Vasiliou v Secretary of State for Transport*.[1516] Both cases illustrate the point that in the process of achieving planning permission, and thereby obtaining the right to make an application for a public path order, most of the issues relevant to such a decision will have been considered. It is also made quite clear that, even where there is clear "overlap" between regimes, a different decision maker may in considering much the same issue sometimes properly arrive at a different decision.

The *Vasiliou* case establishes that the Secretary of State for Transport in making his decision on a stopping up or a diversion of a highway under s.209 of the 1971 Town Planning Act (now s.247 of the Town and Country Planning Act 1990) should take into account the decision on the preceding planning permission but that he can and should also take into account a factor that was not material to the planning decision, i.e. Mr. Vasiliou's financial loss as a result of Temple Street being turned into a cul-de-sac, resulting in the loss of passing trade and, potentially, the consequent closure of Giggi's Taverna.

Sequencing issues

A number of other respondents have experience of issues arising from the inability to make applications for non-planning consents until planning permission has been granted leading to delay and often duplication of effort. Gatwick Airport[17] for example, refers to water drainage and relocation of species as examples of consents that can't be dealt with until planning permission has been granted. There is also concern on the regulator side, with the Environment Agency[18] pointing to extractive waste consents for landfill and mining waste operations needing planning permission prior to environmental permitting, whilst permits for incinerators, power stations, chemical works and cement kilns can be dealt with at the same time as planning—indeed there is encouragement in Government guidance PPS10[19] and PPS23[20] that they should be.

To further confuse things, the Environment Agency identifies some developments which combine activities that don't require planning permission before an environmental permit can be applied for with activities that do, e.g. a waste to energy plant doesn't require planning permission prior to applying for an environmental permit but is often combined with a front-end materials sorting activity which does.

In examining this somewhat bewildering landscape further the Review team found that only a very limited number of non-planning consents can in law only be applied for following grant of planning permission.

There is though evidence that some consenting organisations will not in any case entertain an application until planning permission has been granted on the grounds that it might prove to be a wasted use of their increasingly limited resources.

Subsequent designations

There are a number of designations that can effectively stop developments which have achieved planning permission and, on the basis of evidence we received, are causing frustration to many developers. These include spot listings, conservation area designations and habitat designations. The area that received most attention though was the designation of Town and Village Greens (TVGs).

[15] Rights of Way Review Committee, Practice Guidance Notes, December 2007, *Practice Guidance 6—Planning and Public Rights of Way* para.19.
[16] *Vasiliou v Secretary of State for Transport* [1991] 2 All E.R. 77.
[17] Response from Gatwick Airport p.1.
[18] Response from Environment Agency.
[19] Planning Policy Statement 10; Planning for Sustainable Waste Management, July 21, 2005. See *http://www.communities.gov.uk/planningandbuilding/planning/planningpolicyguidance/mineralsandwaste/wastemanagement/pps10/* [Accessed September 29, 2010].
[20] Planning Policy Statement 23: Planning and Pollution Control, November 3, 2004. See *http://www.communities.gov.uk/publications/planningandbuilding/planningpolicystatement23* [Accessed September 29, 2010].

There are of course important rights to consider with TVGs, as with the wider landscape of non-planning consents. There does though seem to be an element of game playing in some applications for designations which might unchecked undermine the credibility of the planning system. That system has been designed to determine whether, following consultation and consideration at the plan making and planning development control stages, a particular development is acceptable, and arguably the planning system should be capable of considering designation issues as a part of the process.

The expansion of the scope of planning

Confusion and duplication between planning and non-planning consents was an area which we concluded would merit further investigation in the Final Report (published in July 2010). This led me back to considering whether the scope of planning had in reality significantly expanded and whether this has been a major cause of increased duplication. The Barker Review of Land Use Planning and the Eddington Transport Study both looked at this at about the same time, in 2006, and came to similar conclusions.

The Barker Review's Interim Report[21] highlighted the complexity driven from national level, identifying six main Government departments having an interest in planning—DCLG, DfT, DCMS, DTI (now BIS), HM Treasury and DEFRA, leading to a danger of lack of integration.

Table 3.3 in the Barker Review Interim Report identifies 21 areas where local planning authorities had been given additional or more complex responsibilities since the Town and Country Planning Act 1990.

The Report also points to the major impact European legislation has had on national planning policy in the United Kingdom, with a number of European Directives and the associated implementing legislation contributing to the complexity of the system, in particular:

- The Environmental Impact Assessment (EIA) Directive[22];
- The Strategic Environmental Assessment (SEA) Directive[23];
- The Habitats Directive[24];
- The Waste Framework Directive[25]; and
- The European Convention on Human Rights (ECHR), transposed into UK law by the Human Rights Act 1998.

The 2006 Eddington Transport Study also refers to some of these directives in the context of the recognition of a growing need for environmental protection. The Study goes on to observe the situation at that time as a:

> "2. Complex system with overlapping statutory and formal processes with"
> 5. "Multiple decision makers"……..", also referring to
> 6. "Legal challenge — The risk of legal challenge is present throughout the process."[26]

As I have already suggested, there does seem to have been a significant change in the cost of making planning applications following the 1999 Regulations[27] which implemented revisions to the Environmental Impact Assessment Directive. Those revisions extended the range of development to which the Directive applies and, after objectors obtained a Screening Direction from the Secretary of State in May 2000, to

[21] K. Barker, July 2006, *The Barker Report of Land Use Planning Interim Report—Analysis*.
[22] Directive 85/337 on the assessment of the effects of certain public and private projects on the environment (as amended by Directives 97/11 [1997] OJ L73/5 and 2003/35 [2003] OJ L156/17) [1985] OJ L175/40.
[23] Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30.
[24] Directive 92/43 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.
[25] Directive 2006/12 on waste [2006] OJ L114/9.
[26] Eddington Transport Study 2006 p.331.
[27] The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293).

the effect that an Environmental Impact Assessment had to be undertaken for the Swiss Re Tower at 30 St Mary Axe ("the Gherkin"), planning authorities and major developers became noticeably much more cautious in their approach.

This has created a lot of work for planning lawyers and environmental consultants, as developers attempt to protect their valuable planning permissions by submitting more and more detailed environmental statements covering an ever widening range of topics. The scoping process generally encourages a safety first, "gold plating" approach by both the local planning authority and the applicant and, as the EIA process appeared to become increasingly useful for those who wish to challenge planning decisions, this trend towards widening the scope of planning seemed to accelerate with little consideration of the implications for the fit of planning with other consent regimes.

More recently the climate change issue has seen a further widening of planning's scope into areas previously covered by other consent regimes, in this case the Building Regulations. The Merton Rule approach first led local planning authorities into considering how energy might be supplied to new developments from renewable and other low carbon sources. Then, as it became clear that much of the Greenhouse Gas emissions performance of buildings is associated with the actual design of the building (its passive energy performance), BREEAM,[28] the Code for Sustainable Homes[29] and other, sometimes locally invented, codes have become the subject of detailed consideration at the planning application stage and inclusion in already over complicated s.106 agreements where once such matters were left to the Building Regulations at a later stage.

Government has sought to address this overlap; the recent draft PPS on Climate Change[30] provides advice and the National Planning Forum has published a report dealing with the matter.[31] The Penfold Review Final Report, published in July 2010, nervously entered the ring and I explain the view we reached below.

Section 106 agreements[32] have themselves had a more general role to play in this widening of the remit of the planning system. Certainly we have in the last 10 to 15 years experienced an increasingly strong nexus between planning policy and financial contributions to an increasing number of public services and goods. This provides an incentive to those responsible for managing these services to identify impacts arising from developments that can be mitigated by the provision of additional facilities or financial contributions. Policing and health provision are two examples of areas which seem to be seeing a growth in planning policy making and in s.106 agreement contributions. The Community Infrastructure Levy[33] will, I suspect, encourage an increase in this trend, particularly as deficit reduction measures bite into the public sector's ability to provide even basic services.

Government guidance and case law

Duplication and confusion between planning and non-planning consent regimes is not new but has, I argue, increased with the growth of planning's remit. Before going on to consider how this might in future be addressed, it is helpful to briefly review the application in case law of some of the advice provided in Government policy statements.

Perhaps the best starting place is the Planning Encyclopedia:

[28] BREEAM: the Environmental Assessment Method for Buildings Around The World. See *http://www.breeam.org/* [Accessed September 29, 2010].

[29] The Code for Sustainable Homes: Setting the standard in sustainability for new homes, February 27, 2008. See *http://www.communities.gov.uk/publications/planningandbuilding/codesustainabilitystandards* [Accessed September 29, 2010].

[30] A consultation on the revised draft Climate Change PPS was published on March 9, 2010 *http://www.communities.gov.uk/publications/planningandbuilding/ppsclimateconsultation* [Accessed September 29, 2010].

[31] *Improving the Connection* Proposals from the National Planning Forum Planning and Building Control Group.

[32] Meaning obligations under s.106 of the Town and Country Planning Act 1990.

[33] Planning Act 2008 Pt II, Community Infrastructure Levy Regulations 2010 (SI 2010/XXXX).

> "P70.18 The relationship between planning control and the specific environmental controls under the Environmental Protection Act 1990 is inherently difficult. There is clearly an overlap between the two: in taking planning decisions, local planning authorities and the Secretary of State are entitled to have regard to the need to protect the environment yet separate controls, including integrated pollution control, are exercisable over emissions in the environment."

It goes on to provide a useful summary of cases; first *Gateshead MBC v Secretary of State for the Environment*,[34] which held that, in dealing with an application for clinical waste incineration, the Secretary of State had been justified in concluding that it was possible to design and operate the plant to meet the standards that were likely to be required by Her Majesty's Inspectorate of Pollution (now the Environment Agency). The court also determined that it was reasonable to conclude in this case that those controls were adequate to deal with emissions from the plant. Importantly, however, it made clear that this should not be regarded as carte blanche for applicants for planning permission to ignore the pollution implications and "leave it all to the EPA".

R. v Bolton MBC[35] revisited the issue, dealing with an application to upgrade an obsolete waste incinerator, and came to much the same conclusion. The local planning authority had been entitled to take into account the system of IPC controls and:

> "…unless it appears on the material before the planning authority that the discharges will, or will probably, be unacceptable to the EA, it is a proper course to leave that matter to be dealt with under the IPC system."

There seems to be some clarity to the approach that local planning authorities should adopt, although the varying nature and levels of detail of "the material before the planning authority" might prove a problem in allowing it to assess how the environmental permitting authority might respond. Consultation with that body, whether local authority environmental health department or EA, is likely to be an important factor.

More recent cases dealing with the relationship of planning with environmental permitting do however seem to expose a rather more complex picture. *Hopkins Developments Ltd v (1) The First Secretary of State and (2) North Wiltshire Council*,[36] dealing with an application for a concrete batching plant, focused on the issue of dust emissions, involving a challenge of an inspector's decision dismissing an appeal. The inspector had concluded that, despite the Environmental Health Officer's acceptance of mitigation measures to control dust which would satisfy the requirements of the Pollution Prevention and Control Regulations 2000:

> "…the air quality would suffer to an extent that the amenities of the area and those of local residents would be seriously harmed. Therefore, the proposal would be contrary to Policy RE17 of the adopted local plan."

The judgement moves on from Gateshead and Bolton, holding that:

> "…planning authorities can leave pollution control to pollution control authorities, but they are not obliged as a matter of law to do so."

Interestingly, the judgement also considers the issue of "primacy", disagreeing with the assumption that primacy must be accorded to the judgement of the regulator above that of the planning authority. This is, however, a long way short of suggesting that it might operate in entirely the other direction, as suggested by the CBI Minerals Group referred to above.

[34] *Gateshead MBC v Secretary of State for the Environment* [1994] Env. L.R. 11.
[35] *R. v Bolton MBC Ex p. Kirkman* [1998] Env. L.R. 719.
[36] *Hopkins Developments Ltd v First Secretary of State* [2006] EWHC 2823 (Admin).

A similar line is taken in the 2009 case *Harrison v Secretary of State for Communities and Local Government and Cheshire West and Chester Council*,[37] favouring the judgement of planning authorities.

The case dealt with agricultural land that had been converted into an animal food processing plant. The main issue was smell and the Council had issued an Integrated Pollution and Prevention Control (IPPC) permit in 2007. The inspector concluded that, notwithstanding the IPPC controls, the smell from the plant was likely to continue to cause significant harm to local amenities. He considered Government advice in Planning Policy Statement 23 para.10, emphasising that the planning and pollution control systems should complement rather than duplicate each other. The judge in upholding the inspector's view, considering the situation where an IPPC permit has actually been issued, concluded that:

> "…it cannot be right in my judgement that paragraph 10 simply says that the planning system must assume no pollution issues will arise."

The relationship between planning and environmental permitting is a difficult area of interaction between planning and non-planning consents, and the arguments over the roles and powers of the regimes have been well rehearsed over a number of years. For a local resident affected by a potentially polluting development it is difficult to be convinced that the way the two regimes work together will effectively protect amenity, particularly given the discretion which is apparently allowed to the planning decision maker in determining how far he or she can rely on a pollution control regime that, on the other hand, cannot be trusted apparently to protect their amenities without the intervention of the planning system.

Paragraph 1.34 of PPS23, dealing with the interaction of the two regimes encouraging parallel consideration, illustrates further the potential for confusion:

> "Any conditions that are likely to be imposed under pollution controls, such as minimum chimney heights, can then be taken into account in the planning application."

In more visually sensitive areas, given the requirements of environmental impact assessment, it might be argued that maximum chimney height must be taken into account in the planning decision. An encouragement to run the regimes in parallel provides little assurance that it always will be. If the parallel approach is taken, the Annex to PPS23 points out:

> "The LPA should be able to address any conflict and duplication between the pollution-control authorisation and the planning requirements."

It remains silent on what the LPA should do if the two are dealt with sequentially rather than in parallel, as they are in many cases.

Code law in another area of control does I believe provide helpful guidance on the interaction of planning and other regimes, providing some principles that might potentially be more widely applicable. *Ex p. Powergen v Warwickshire Council*[38] dealt with the refusal of Warwickshire Council to enter into an agreement under s.278 of the Highways Act 1990 following an objection to the grant of planning permission on road safety grounds and then, on appeal to the Secretary of State, following which planning permission was nevertheless granted. The argument that, even following the grant of planning permission on appeal, the highway authority retains an independent discretion to refuse to enter into the agreement is countered by the judge who states that on the contrary the planning inspector's conclusion on the issue: "becomes the only tenable view on the issue of road safety and thus is determinative of the public benefit."

Interestingly, the planning inspector's decision appears to be given more weight than would have been the case if a local planning authority had made the decision.

[37] *Harrison v Secretary of State for Communities and Local Government* [2009] EWHC 3382 (Admin).
[38] *R. v Warwickshire CC Ex p.Powergen Plc* (1998) 75 P. & C.R. 89.

The judge does though allow that the highway authority might have raised a fresh objection sufficiently different from its earlier one to admit a realistic prospect that, had it been advanced before the Secretary of State on the planning appeal and had there been good reason why it was not raised first time round, it might have prevailed. The fact was it had not. *R. v Cardiff CC Ex p. Sears Group Properties Ltd*[39] dealing with a similar but not the same situation takes this point further. In this case a successor highways authority wished to reconsider proposals relating to a s.278 agreement because of changed circumstances at a highway junction.

The judge held that it was not unreasonable to request an updated traffic assessment given the lapse of time between the two decisions and the change in circumstances at the junction.

In rehearsing the debate about the need for the public to be able to rely on the consistency and stability of decisions of public authorities the judge states that:

> "…it is in my view, possible to discern in the cases a broad principle (subject to variations in details) that where a formal decision has been made on a particular subject matter or issue affecting private rights by a competent public authority, that decision will be regarded as binding on other authorities directly involved, unless and until circumstances change in a way that can be reasonably found to undermine the basis of the original decision. The change may be a change in the factual circumstances or something in the underlying policies affecting the decision."

This seems to be eminently sensible as the basis for a rational approach to how non-planning consent regimes should generally interact with the planning process, dealing as it does, with the need for consistency (Powergen) and setting out the basis for exceptions to that principle (Cardiff). Planning might, in this context, adopt a more clearly defined central role in the wider landscape of controls.

There is also scope for more integration of decision making on the principle of whether a development should be allowed to proceed or not, and subject to what conditions. It is possible that the type of unified consent approach introduced in the 2008 Planning Act for Nationally Significant Infrastructure Projects, which is largely targeted at non Town and Country Planning Act (TCPA) determinations, might assist in reducing duplication and the potential for different decision makers to reach different decisions on much the same issues, for a wider set of developments, many of which are now covered by the TCPA. The next section explains how, over the last ten years or so, this sort of approach has been explored and extended.

Integration and unification

The Labour Government that came to power in 1997 took rather longer to get around to reforming the planning system than the Coalition Government has. By 2001 however the debate was well under way and, in December 2001, the Government issued a Green Paper for consultation, "Planning: delivering a fundamental change".[40]

It was much concerned with simplifying planning through changes to development planning, community engagement, customer focus and enforcement. Paragraph 5.17, presaging PPS23, did however advocate parallel planning consents and pollution control authorisations:

> "We think that such development can be handled more efficiently and both the developer and the community can benefit from greater certainty if those proposing to develop such facilities apply for pollution control authorisation and planning permission at the same time."

[39] *R. v. Cardiff CC Ex p. Sears Group Properties Ltd* [1998] 3 P.L.R. 55.

[40] Planning: delivering a fundamental change, December 12, 2001. See *http://www.communities.gov.uk/archived/publications/planningandbuildingdelivering* [Accessed September 29, 2010].

The Royal Commission on Environmental Pollution (RCEP) in its 23rd report, "Environmental Planning"[41] welcomed the recognition in the Green Paper that "the planning system still has an important role".[42] Very early in its key messages the Report though states that:

> "12. A basic weakness in present procedures is the lack of strong connections between town and country planning and the work of specialist agencies dealing with pollution and conservation"[43]

and goes on:

> "….what the public perceives as a single issue is often covered by several Acts of Parliament, and may involve the responsibilities of more than one regulatory body."[44]

The Commission looked at how integration of regimes works in other developed countries, "A Comparison of Environmental Planning Systems Legislation in Selected Countries",[45] and found a number of significant common trends in the organisation of environmental responsibilities, including "….a general concern to establish more integrated systems of administration…."

The RCEP report also points to the number of plans local authorities have to prepare concerning environmental topics (as many as 30).

It has two specific recommendations concerning these areas:

> "We recommend that the legislation on development control, conservation areas, scheduled monuments, listed buildings and control of advertisements should be consolidated and a single consent procedure introduced provided this can be achieved without weakening of the present safeguards,"[46]

and

> "We recommend that pollution control authorisation and planning permission for industrial plants should be obtained through a single open process involving a common environmental statement and, where appropriate, a joint public inquiry."[47]

The Government's response to the RCEP report[48] took on board much of the first recommendation. Although the proposed consolidation of regimes did not find its way into the 2004 Planning and Compulsory Purchase Act, Halcrow were commissioned to look at the matter in greater detail. Their report, Unified Consent Regimes[49] published in 2004, concluded that unification can bring real improvement but suggested that, in the absence of a wider push towards unification, amalgamation of regimes on a thematic basis could provide a way forward by bringing together the "Core" consents of planning permission, listed building consent and conservation area consent.

This approach formed the basis for a draft Heritage Bill but the Bill was not taken forward. The Government's response to the second RCEP report recommendation was less supportive. It was concerned that:

[41] The Royal Commission on Environmental Pollution, March 2002, *Twenty third Report: Environmental Planning*. See *http://www.rcep.org.uk /reports/23-planning/documents/2002-23planning.pdf* [Accessed September 29, 2010].
[42] The Royal Commission on Environmental Pollution, March 2002, *Twenty third Report: Environmental Planning* para.6.
[43] The Royal Commission on Environmental Pollution, March 2002, *Twenty third Report: Environmental Planning* para.12.
[44] The Royal Commission on Environmental Pollution, March 2002, *Twenty third Report: Environmental Planning* Ch.5 para.5.20.
[45] *A Comparison of Environmental Planning Systems Legislation in Selected Countries*, April 2000, *http://www.rcep.org.uk/reports/23-planning /documents/UWE.pdf* [Accessed September 29, 2010].
[46] The Royal Commission on Environmental Pollution, March 2002, *Twenty third Report: Environmental Planning* Ch.5 para.5.21.
[47] The Royal Commission on Environmental Pollution, March 2002, *Twenty third Report: Environmental Planning* Ch.5 para. 5.24.
[48] The Royal Commission on Environmental Pollution, March 2002, *Twenty third Report: Environmental Planning*. See *http://www.rcep.org.uk /reports/23-planning/documents/2002-23planning.pdf* [Accessed September 29, 2010].
[49] Halcrow Group Ltd, *Unification of Consent Regimes*, June 2004. See *http://www.communities.gov.uk/documents/planningandbuilding/pdf/148208 .pdf* [Accessed September 29, 2010].

> "…The amalgamation of planning and pollution control could reduce flexibility for industry and would not allow sufficient security in respect of location[50]….before making the substantial commitment for authorisation of the specific process."[51]

We heard much the same concerns from industry, i.e. that the amount of work needed to secure a pollution control permit is a financially risky proposition if the planning permission establishing the basic suitability of the site is not in place. The Government response refers to the evolving PPS23 and states that Government will:

> "…continue to encourage parallel applications but recognise the flexibility that is required by industry."[52]

Barker and Eddington

The pressure for further unification did not however go away and the baton was picked up again in 2006 by both the Barker Review of Land Use Planning and the Eddington Transport Study. The focus was on the perceived delays in the existing system, and frustration in Government at the time taken to deliver housing (Barker) and transport infrastructure (Eddington). The five year Heathrow Terminal 5 public inquiry had become a touchstone for this debate.

Eddington considered existing unified regimes, particularly the Hybrid Bill process and the 1992 Transport and Works Act. The 2004 Planning and Compulsory Purchase Act had also involved some provisions relating to major infrastructure projects, providing for concurrent inspector sessions on different consents, reporting to a lead inspector. In the case of the application for a second runway at Stansted, this approach had broken down due to objections from third parties that they did not have the resources to attend concurrent sessions.

Eddington concluded that an entirely new process was required and recommended:

> "(ix) Simplify and consolidate the statutory process for strategic transport schemes, by creating a new consent regime under the jurisdiction of the Commission…"[53]

The Barker Final Report, published at almost the same time also recommended an Independent Planning Commission to deal with major infrastructure projects with:

> "Provisions to allow the Commission to determine the range of consents (Transport and Works Act, Planning Permission, Harbour Order, Listed Building Consents etc.) in place of the current procedures that result in multiple decision makers, which adds to uncertainty and delay…."[54]

I do not propose to describe the history of the Infrastructure Planning Commission concept and its implementation since that time but do note that the Development Consent Order (DCO) approach introduced by the 2008 Planning Act, unifying eight separate regimes into one process has, at the time of writing, apparently survived.

There has been some criticism of the limited extent of integration of regimes into the DCO process. The Society of Parliamentary Agents, among others, expressed concern that the regulations implementing the relevant parts of the 2008 Act do not generally disapply a large number of regimes "which are, to varying degrees, encountered in the construction of major projects and sometimes disapplied, e.g. by TWA and Harbour Orders", [55] citing 25 separate Acts and Regulations.

[50] The Government's Response to the RCEPI 23rd Report p.4, see above.
[51] The Government's Response to the RCEPI 23rd Report p.5, see above.
[52] *The Government's Response to the RCEPI 23rd Report* p.4, see above.
[53] *The Government's Response to the RCEPI 23rd Report* p.339, see above.
[54] *The Barker Final Report* para.3.18.
[55] *Response from the Society of Parliamentary Agents*, October 5, 2009 para.6.

The Barker Report also briefly considers whether the range of developments covered by this new process could be widened:

> "3.20 A critical issue in establishing an Independent Planning Commission would be determining the scope of its decision-making process. In addition to major infrastructure projects, such as transport and energy projects, there is also a range of other schemes which could potentially be brought within the remit of the Commission. These could include water projects such as new reservoirs or treatment plants and waste projects such as incineration as well as disposal schemes and other schemes such as large housing and commercial schemes."[56]

The Report concludes though that there would be a risk of the Commission taking on too much. It is also concerned that an application for say 500 or 1,000 houses would not necessarily be an application of national significance which would justify intervention by the Minister or the Commission.

The Report describes the entirety of the process, i.e. both the decision maker (the IPC) and the form of application and consent, what became the DCO, and deals with them as a bundle, take it or leave it. More recently however it has become clear that the two can be unbundled; the DCO survives but the IPC does not. The determining mechanism is to be through the Secretary of State on the grounds of increasing democratic accountability. In an era of localism the Penfold Review Final Report suggests that there might be scope to extend a unified consent approach, such as the DCO, to a wider range of projects, perhaps with local authorities as the initial decision makers in some cases.

The Penfold review final report

The Review's Final Report, published in July 2010, summarises the analysis of the issues surrounding the relationship of planning and non-planning consents, suggesting that there needs to be a wider recognition that planning and non-planning consents are elements of a single system of development management and that the delivery and management of sustainable development, in the right place and at the right time, should be the common objective. We found, however, that this is not always the way the system operates at present. A thorough and balanced approach to the delivery of economic, environmental and social objectives is sometimes difficult to decipher in what can appear a disintegrated system. The system operates well when there is good communication and mutual respect for the roles and professionalism of the various agencies involved but can break down when there isn't. There was evidence in these circumstances of unacceptable delay, confusion over responsibilities and lack of transparency for those looking in from the outside.

We identified some principles to improve integration of decision making, drawn from the previous reviews, the evidence we received, the case law and the history of tentative moves towards more integration:

- As far as possible, all factors relevant to deciding whether a development can go ahead (the "if" decision) should be considered at the same time, as part of or alongside the planning application process;
- So long as all the non-planning consent issues which might affect the "if" decision have been considered by the relevant decision maker in parallel with planning permission, and have informed the decision on planning permission, then the decision in principle as to whether the development can proceed should be considered to have been dealt with;
- Thereafter, the determination of non-planning consents should be concerned with "how" a development is built or operated rather than whether it can go ahead, unless;
  - — There has been a significant change in circumstances or policy;

[56] *The Barker Final Report* para. 3.20.

  - A critical issue that was not material to planning arises and has therefore not been previously considered;
  - The planning decision maker has acted unreasonably; or
  - Following more focused and detailed consideration, previously unforeseen issues of substance come to light.
- Consequently, the consideration of the "if" decision should, in most cases, lead smoothly on to a more detailed consideration of "how" the development should be built and operated;
- Planning and non-planning consent decision makers should only ask for the level of detail that is essential to enable them collectively to reach an informed "if" decision; and
- Developers should have the flexibility to bring forward applications for non-planning consents that deal with "how" questions at the same time as planning.[57]

The Report considers two ways in which these principles might be applied: either an extension of the unified consent approach seen in the Hybrid Bill, TWA and DCO processes, or a more "bottom up" approach focused on the existing planning process.

Specifically considering the extension of the unified consent approach, we summarise the principal advantages put forward by its advocates as:

- Give a simple, potentially quicker, administrative process (one process instead of many, as now) giving greater certainty for the applicant and eliminating much of the duplication that exists in the current arrangements;
- Enable the decision maker to balance competing objectives and considerations by formally bringing together the full range of relevant issues for determination at the same time, maximising the ability to truly evaluate the sustainability of any given development;
- Improve the transparency of the process for applicants and for the local community and other interests affected by enabling them to see the full range of competing considerations and how they have been weighed by the decision maker;
- Bring greater local accountability for decisions by bringing together and making decisions more transparent.[58]

On the other hand, contributors to the Review saw potential disadvantages in the shape of:

- Front-loading of costs for applicants, who would have to satisfy the decision maker on all relevant issues at the same time;
- Possible additional costs for local authorities if a unified consent were introduced as a new element of the current landscape (rather than replacing the existing planning and/or other regimes);
- Whilst itself a simplification the change would represent a complication of the issues for decision makers at a time of extreme pressure on local authorities, such that success would be heavily dependent on the calibre of officers and members;
- Potential for the slowest element of a consent to delay determination of the whole;
- Doubts about whether the approach would provide benefits for smaller developments.

We found that the advantages are likely to be greater for large, complex and controversial schemes which need to obtain multiple non-planning consents and where the public policy case for development is clear and strong. The types of scheme we thought suitable for consideration under a, probably amended, DCO type process include some infrastructure projects not already covered: large scale housing projects; major manufacturing plant; and significant regeneration schemes.

[57] *The Penfold Review Final Report* p.V.
[58] *The Penfold Review Final Report* p.65 para.4.52.

We concluded that it should be possible to extend the operation of DCOs by offering the decision-making powers associated with them to local authorities, particularly where they have demonstrated the capability and desire to take on work of this kind.

When, however, we tested this thinking with businesses and decision-making bodies, including local authorities, we found that the balance of views was at present against universal extension of the DCO process. There is a wish to see how the process works on Major Infrastructure Projects and there are concerns about increased costs for local authorities and developers at an early stage in the approvals process—perhaps not surprisingly at a time when most development is at the margins of economic viability at best. We were though convinced that the rationale for further unification is sufficiently strong to warrant a further look when there has been more experience of working with the DCO approach and recommend that:

> "Recommendation J—Government should look for opportunities to extend the benefits, if realised, of the introduction of Development Consent Orders by reviewing their operation after 2 years experience and actively considering extending their use to a wider range of projects and/or extending decision making powers to appropriate local authorities (potentially by building on any future aims to increase local decision making more generally)."[59]

The main focus of the Report's approach to increasing integration is though derived from the second option, a "bottom-up" approach which builds on the principles described above. The Review asserts that, in so far as it is possible, all the factors that have a bearing on whether a development should be allowed to go ahead should be considered at the same time and by the same decision maker. The process of plan making and planning control should be recognised as having a central role in this, as the point at which nearly all the issues that should determine whether the development should go ahead or not can be brought together and considered in the round, balancing objectives where necessary. The planning process also has the advantages of transparency, public consultation and democratic accountability.

The agencies that have responsibility for non-planning consents also have an important role as consultees at the plan making and planning control stages, often as statutory consultees. The Review suggests that, whether as a consultation response on the planning application, or as a consent process running in parallel with planning, e.g. listed building consent, any "show stoppers" need to be considered in sufficient detail, with an appropriate level of information, to enable an informed and balanced decision. We cite the example of a chemical factory or waste processing plant, where the planning authority, we argue, should satisfy itself that the development is likely to be able to meet the environmental standards required by the environmental permitting regime. This does not preclude the possibility of a Hopkins or Harrison type situation arising, with planning permission being refused in any case; it does, however, suggest that it should be unusual for the inconsistencies to work in the other direction, i.e. the non-planning consent body refusing delaying consent for a protracted time once the planning decision has been taken. The objective is to ensure as smooth a transition as possible between the planning stage and any subsequent non-planning consents. The suggested approach does of course present resource issues for both the applicant and the consulting bodies but we believe that a combination of clear local plans, pro-active pre-application discussion, and possibly the introduction of further fees and charges for accelerated processes, can go some way to addressing these concerns.

There are of course some issues that are not material to planning; the *Vasiliou* "passing trade" case described above is an example. However, that is not a case of two regimes dealing with the same issue. I believe that the ability to apply for a Rights of Way decision in parallel with planning, subject to and linked to the planning permission that is granted, should give certainty, so that the potential "show stopper" has been dealt with as part of or alongside planning.

[59] *The Penfold Review Final Report* p.66.

An added benefit of the suggested approach should be the clarity that matters that do not go to the heart of the question of whether or not the development should be allowed to go ahead (the "how" matters), don't need to be considered as part of or alongside the detailed planning decision.

Outline planning permission will, because of the lack of detail, inevitably provide less certainty but there is a different paper to be written on the future of outline planning permissions which seem to be under assault from many sides and for much the same reasons I have explained in the Expansion of Planning section above.

This more integrated approach should mean that it should not be necessary for example to design a residential building to the point at which it definitely meets Code for Sustainable Homes Level 5 in order to obtain planning permission. Questions as to how that level will be achieved can be left to follow on from the planning permission, either as conditions on the planning permission or, more sensibly in most cases, matters that can be left to Building Regulations.

The Final Report goes on to describe how such an approach might be applied to a number of specific issues. I will focus on two, Town and Village Greens[60] and Species Licensing.[61]

Town and Village Green (TVG) registration

During the first phase of the Review, we received a number of responses raising concerns about the use of the designation processes for TVGs as a means to frustrate developments that have been granted planning permission. These are not non-planning consents; they are though, in our terms, "if" decisions that go to the heart of whether a development should be allowed to go ahead. We suggest that, in line with the principles I have described, there should be a process to allow developers to achieve certainty on the matter, in parallel with or before the planning application process. We examine two options. First, something akin to the Certificate of Immunity mechanism which applies to listing of buildings and structures, and which if successful provides for a five year period of immunity from listing. Alternatively the suggestion that plan making and the grant of planning permission should in itself somehow grant immunity. The latter approach is perhaps more consistent with the thinking that planning can and should provide the basis for a more integrated approach but the certificate mechanism would provide more confidence that the issues involved have been properly considered.

Species licences

There is currently duplication between the consideration of the statutory tests by planning authorities as material considerations in judging impacts on protected species, and the subsequent consideration of the same issues in greater detail by Natural England where a licence is required. Both competent authorities are presently required to consider these aspects independently. We argue that consideration should be given to examining whether this overlap could be reduced or removed by enabling local authorities to determine the substance of the first two tests (the "over-riding public interest" and "no satisfactory alternative" tests which go to the heart of the "if" decision), as part of the planning decision, and allowing Natural England to consider only the third "favourable conservation" test which focuses on how to mitigate or compensate for the impacts on any protected species present on the site once the "if" decision has been taken. The resource implications and the complexity of making the necessary legislative change, whilst also ensuring the requirements of the EU Habitats Directive continue to be met, would clearly need to be taken into account but there does seem to be an opportunity here to remove duplication of process and of effort.

[60] Commons Act 2006 and Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 (SI 2007/2396).
[61] Section 16 of Wildlife and Countryside Act 1981 and Conservation (Natural Habitats, &c.) Regulations 1994 (SI 1994/2716).

Conclusion

Preparing this paper has allowed me to reflect on the experience of working on the Review. Consideration of the relationship between the planning system and all those other consents that surround it has strengthened my belief in the importance of planning at a time when it faces many challenges. Rather more surprisingly, given the starting point of the Review and its objectives of making things easier for business, my respect for the important job that non-planning consent regimes do has also been increased. With the focus now on deregulation it is important to recognise the role they play in protecting our environment and ensuring public safety. I do though also think that the respondents to the Review's Call for Evidence, and many of the people we met, had some important points. The working of the related systems of planning and non-planning consents can be inefficient and confusing, particularly to someone who is not a regular user. This too often results in delay and a type of institutional sclerosis. The Review Final Report suggests a number of ways in which the performance of non-planning consent decision makers can be improved. There may though also be a need for a more fundamental reform to improve clarity and the delivery of development.

Planning's growing scope, in terms of subject matter and the depth of detail now routinely considered as part of the process, is a fact of life. There have been many calls for that increased scope to somehow be drawn back, or at the least for its growth to be stopped or limited. That is a policy option but I believe that the drivers of that growth in scope remain, i.e. European Directives, public expectation, a culture of risk aversion amongst local planning authorities and applicants, the pressure to consider issues in the round coming from the sustainability agenda etc.

Another policy option is to recognise that this particular train has left the station and we need to find a way of acknowledging the implications of the expansion of the scope of planning, by increasing its authority as the basis for a single consideration of issues of principle, the "if" questions. This may well involve a rethink on the amount of detail that needs to be considered at that stage, leaving "how" decisions to planning conditions and the other consent regimes, as in the DCO protected provisions process. The calls from the Joint Commission on Environmental Protection, Barker and others for a recognition of the need for a more integrated system of development management have been taken up in the new DCO process, albeit in a somewhat half-hearted way. The Penfold Review has tried to add to the debate by suggesting that, after a period of time to digest the experience of the DCO process, there might be an extension of the range of projects dealt with, and that local authorities might also, in the appropriate circumstances, be given powers as DCO decision makers.

In the meantime we have tried to suggest ways of making the present system work better by recognising the centrality, if not the primacy, of the planning system. Where possible, the issues of principle that will determine whether a development should go ahead should be considered only once, at the same time and by the same decision maker. There should then be more consistency and alignment between decision makers, and all parties should have a better idea what level of detail needs to be looked at and when. This would allow a more logical and smoother transition between the consideration of issues of principle and the detailed matters that will follow if it is agreed that the development should go ahead.