



## The state of the planning system.

Where are we now? Where are we going?

I have the privilege of taking a sabbatical this year, now in fact. It's a time to recharge the batteries and stand back, to put life into perspective. I will be away for a couple of months, incommunicado. It's an interesting time at which to take a sabbatical, just as the new Coalition Government comes to power and is proposing big changes in the planning system. So as I begin it I want to set down some thoughts about the current system and the proposed changes so far as we have seen them.

### **The current position**

Our current system is plan-led, which was the creation of Chris Patten, John Gummer and the Planning and Compensation Act 1991. Before that, the development plan had been only one material consideration, specifically referred to in the Act, and considerable weight would have been accorded to an up to date plan. The Prescott reforms in the Planning and Compulsory Purchase Act 2004 brought in Local Development Frameworks, which I originally thought could be a nimble way of keeping the development plan up to date as it could be revised in parts, to respond to changing circumstances. But we have not actually reached that stage and the system is generally agreed to be cumbersome. The creation of the LDFs is long winded and resource hungry; to understand it one has to grapple with acronyms and initials, consultations and preferred options. I was struck when appearing for a client the other day at the Independent Examination of a Core Strategy, that some of the professionals present were somewhat challenged, so what chance for the public?

The development management system is hardly fleet of foot either. If we accept that consultations take time and that environmental assessment is a vital process and aid to good decision making we may legitimately ask why we have the long lists of documents now needed to validate planning applications and whether design and access statements are really necessary. The negotiation of s.106 agreements can be drawn out (which I have always thought is largely because they are left until after the decision has been made to grant permission – the interest wanes at that point ). But the process is clear – an application has been made and the council must decide it. Local people can object and are heard. The applicant has a right of appeal which it can exercise against delay as well as refusal. It's a more immediate system because it is dealing with actual applications for actual development.

Structurally, the Planning Act 2008 was then overlaid onto this creating the Infrastructure Planning Commission and a new way of permitting major national infrastructure projects. Political input is limited to policy. Deciding the application is then reckoned to be a technical matter for the IPC. I have previously said that this has a democratic deficit – the decision on the application is an exercise balancing the public good – a decision for politicians, not technocrats. The previous government had a position on nuclear (go ahead) runway capacity in the south-east (build more) and housing (build more). Minerals and waste development was decided at County level as it has been for many years. That is recognition that districts are unlikely to be able to stand back and take the hard decisions (somebody had to say that). The minimum supply of minerals needed was known, decided at national and then regional level. It's important to remember that deciding supply at regional level by the Regional Aggregates Working Parties pre-dates by decades the creation of Regional Spatial Strategies, Regional Development Agencies and the attempt at regional government.



The last government also introduced Community Infrastructure Levy to provide infrastructure needed for development. Or is it just an hypothecated tax? CIL has several unexpected oddities, some of which I feel sure are mistakes. I shan't rehearse them here; I have blogged about them on our blog, [www.plan-it-law.com](http://www.plan-it-law.com). Alongside CIL we saw codification in law of the policy tests for planning obligations.

### **The New**

We don't of course yet have a new system, but the bones seem to be local decision making, abolition of RSSs, abolition of the IPC, financial incentives to accept new development, third party rights of appeal and restrictions on applicants' grounds of appeal. We also see a presumption in favour of sustainable development of undesignated land, and the replacement of CIL with a tariff and scaling back of s.106 to site-specific issues.

These proposals are mainly to be found in "Open Source", the Conservatives Green Paper on planning issued when they were in opposition and in "The Coalition: our programme for government", published on 20<sup>th</sup> May 2010. What is striking, is that apart from the commitment to local decision making, there is little principle to unify and underpin the others, though they amount to major change.

### **How will this play out?**

I am not the first to ask whether local authorities will really volunteer to take the sorts of numbers of houses the economists tell us are needed to deal with rising levels of new households. With no guidance from above, will the incentive of council tax matching achieve this? With no numbers coming from central government, how will we know if the numbers being permitted are adequate? The RSSs are all but abolished, or at least greatly reduced in materiality by the letter from the Secretary of State, Eric Pickles, on 27<sup>th</sup> May, committing to their abolition and explaining that thereafter "decisions on housing supply...will rest on Local Planning Authorities without the framework of regional numbers". The letter is highly material.

A similar issue looms with minerals as the Regional Aggregates Working Parties suffer from the inclusion of the R word in their title.

Most planning professionals I know expect the IPC to be merged into the Planning Inspectorate – their offices are conveniently close in any case – and for the major change to be for the Secretary of State to take the final decision. That I think is sensible. Decisions on whether and where to have nationally important items of infrastructure, on which national security (e.g. security of energy supply) can rest, do seem to me to be issues for central government. The fear is of course that the Secretary of State will not be up to taking the unpopular decision and that is certainly what has happened in the past. What I find odd however is the idea that nuclear power applications will go to the "normal" system. Does that mean that a planning application will have to be made to Suffolk Coastal District Council for Sizewell C?

Financial incentives appear in several places, from matching funding to buying off objections. It seems to be the way to unlock opposition. The latter could work, albeit as a sort of ransom. It will lead either to more expensive developments or lower land values.

But what about third party rights of appeal and the changes to grounds of appeal? I have lost count of the number of occasions on which I have seen third party rights of appeal proposed. It would seriously slow down planning and be a goldmine for lawyers. But at its heart it fails to understand what planning is about. Planning is not a battle between developers and local people. There used to be a right to develop one's land. That was nationalised in 1948, and from



then the starting point on a planning applications was the presumption in favour of development. That was an important principle in the context of the expropriation of rights without compensation, which is what had happened. That presumption has been modified over the decades to a presumption in favour of development which is in accordance with the development plan, but it is still there at the heart of the system. A third party right of appeal is at odds with that principle. The state must justify denying the landowner's right. It is not for the landowner to justify it to all comers.

What about the changes in the grounds of appeal? These would change the system fundamentally. At the moment the planning authority decides applications on the basis of the development plan and all material considerations (section 70 Town and Country Planning Act 1990) and in accordance with the development plan unless material considerations indicate otherwise (s.38 of the 2004 Act). If an appeal is made, the Inspector or Secretary of State uses exactly the same test. But as proposed, there would only be two grounds of appeal: procedural irregularity (to the Ombudsman) and failure to comply with the development plan (to the Inspectorate). So what happens to material considerations? And why should a planning authority give them much weight at all, when the appeal won't even address them? The development plan becomes all powerful, no matter its age, no matter the real circumstances. Theory triumphs over pragmatism.

All this points to the need for principles to underpin the changes and for the changes to be coherent with the planning system they are going to amend. We have a number of disparate changes in the Coalition's proposals to change the planning system and they need to be earthed in an understanding of the current system if they are going to build on it. Of course, we could abandon it and create a new system altogether, and there are some radical proposals in the policies which point in that direction. That could avoid the difficulties I have outlined.

Which takes me to the tariff. I would like to know if that is going to go ahead or not. The major difference from CIL seems to be that local authorities can keep some of it, by implication for any purpose. The CIL regulations have a number of problems. We've blogged about them on [www.plan-it-law.com](http://www.plan-it-law.com). I've also written about them (e.g. in Planning, 21<sup>st</sup> May 2010, Legal Report). CIL makes innocent landowners – people whose land is included without their consent in someone else's planning application – liable to pay CIL. The codification of the policy tests for section 106 agreements in Regulation 122 is at odds with the requirement in s.70 to take the agreement into account as a material consideration. Nor do the Regulations prevent double recovery which they purport to do. This is because you can get round the codification of the policy by using other powers. A different approach is needed to stop double recovery – the things to be provided by CIL should be deemed to be supplied on time, and they should cease to be material considerations. That way, any attempt at double recovery would be a ground for appeal. Whilst I disagree with the codification of the policy, because it simply hands a weapon to objectors, it's difficult to understand why it only applies to CIL development (i.e. construction of buildings). There are some very strange things in the CIL Regulations which suggest that the last government had no real grasp of the system.

I have two pleas for any change on CIL and s.106. The first is that the straitjacket which was put on the drafting of s.106 agreements by s.12 of the Planning and Compensation Act 1991 would be removed. I have written about that many times before, particularly at 'Planning Obligations - Ideas for Reform', [2001] JPL 12. The second is for change to be underpinned by a good understanding of the existing system.

In fact that is my hope for all the reforms. The planning system as originally enacted has a good, coherent set of principles under it. As the judges have repeatedly said, it is a complete legal code. As we change it, we should work with an understanding of the principles, and what they can deliver. Then we should be able to avoid unnecessary change and ensure that the changes brought in actually work.



### Where will we be when I get back from sabbatical?

I come back in August. By then Parliament will have risen. Will the Decentralisation and Localism Bill have been published by then? I doubt it. And that is a good thing, because much of what is proposed is complex. I hope that we will have forward looking change which builds on what the system can do already. I hope that it will have a coherent set of principles underlying it and that it will work when put with the existing system. I hope it will right what is actually wrong. I also hope we will know which way we are going on CIL and tariffs. Maybe we will learn that in the budget on June 22<sup>nd</sup>.

I have decided to take the Uthwatt Report away with me on sabbatical. It's the report which led to the modern planning system, the one we have now, originally brought in by the Town and Country Planning Act 1947. I have never read it before, but I am struck already as I read only the Table of Contents and the Terms of Reference by the optimism, farsightedness and confidence it appears to reflect. Commissioned during the Second World War, in 1941 and reporting in 1942, one of its two terms of reference was:

*"To advise, as a matter of urgency, what steps should be taken now or before the end of the war to prevent the work of reconstruction thereafter being prejudiced."*

Interestingly, that was our last coalition government. I'll let you know what Uthwatt said – and how coherent it was.



David Brock

Partner and Head of Planning and Environment Law Team  
for Mills & Reeve LLP

+44(0)1223 222438

david.brock@mills-reeve.com

[www.mills-reeve.com](http://www.mills-reeve.com) T +44(0)844 561 0011

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