# The Raynsford Review of Planning
# Provocation Paper 1: Do we have a plan-led system?

[July 2017 for the July Thematic Roundtable]

## Introduction

The objective of the Raynsford Review is to examine the problems confronting the current planning framework in England and produce comprehensive and positive proposals to deliver a system which is fair, effective and focused on achieving sustainable development. The **Terms of Reference** and the emerging **Background Papers**, in addition to these **Provocation Papers,** can be found on the review webpage: www.tcpa.org.uk/raynsford-review . As part of the review, the TCPA is organising a series of engagement activities to examine particular questions which are crucial to the success of the review.

The aim of this paper is to provide a brief introduction to one the most important but complex issues facing the planning system: the status of the plan in planning decisions. This paper is not intended to provide legal commentary but to aid discussion.

The paper concludes by raising some question which might help inform the debate. For those with limited time the summary of this paper is simple. We **do not** have a plan-led system in England, neither in law nor in practice, and that has major implications for the effectiveness and governance of the planning system. Tackling the status of plans in England is an issue the review is determined to address.

## Why is a plan-led system important?

In theory, the local development plan is the core expression of a community's vision for the future. It is the output of a complex set of community views, local political priorities, local evidence gathering and national policy. The success or otherwise of these plans has become a litmus test for the wider success of planning, particularly in a framework where there is no other form of coherent strategic planning outside London. There has been intense debate on why local plans take so long; the degree and nature of the evidence they use; the role of the public in delaying them; and the general failure of measures such as the duty to cooperate. There is an extensive set of evidence around these delivery issues summarised in the Local Plan Expert Group (LPEG) report of 2016 and in data on plan preparation rates produced by PINS and the DCLG. With only 41% of LPAs having an up-to-date plan post-NPPF, development plan delivery issues are plainly important and these issues will be the subject of a separate policy analysis paper to be produced by the review team over the summer.

There is a much more fundamental question which underlie these concerns, and that is how much power does the plan have in shaping the future? It is plain that, in practice, the plan is often only advisory and, for a range of reasons touched on below, it is often set aside. This raises important questions about why communities should engage in a local plan if the result of their engagement may carry little weight in the final decision. Despite continued emphasis in ministerial and policy statements, we have a plan-led system. The NPPF has in fact created an environment where plans can be considered out of date within months of their adoption. For communities, a common-sense definition of a 'plan-led' system is where development is normally approved if it is in the plan and normally refused if it is not. This basic proposition simply does not reflect the reality of law, policy and practice.

The confusion about the power of the plan is longstanding and relates to arguments between the English discretionary system and the variety of zonal systems practiced in Europe, the US and New Zealand. The review team faces a big challenge in confronting the question of whether to move to a zonal approach and how much discretion to leave local authorities in making decisions outside the plan. It is difficult to underestimate the importance of this decision because a stronger role for the plan could help resolve a whole series of other key questions relating to the governance and efficiency of the

system. Of all the issues confronting the review team this is also the one where international experience could be most useful.

## Historical background

The 30-year experience of the pre-war planning system, where zonal plans proved difficult to enforce, led to the 1947 system in which plans were backed by powerful new development control powers. The system assumed that the public sector would be the key 'master developer', overseeing or directly delivering the majority of infrastructure and housing. There was a clear line of practical implementation and, as a result, the legal weight of the plan was not resolved in legislation. From the late 1970s, local Governments stopped playing this master developer role and the delivery of local plan policy depended largely on private sector decisions. This change in reality lies behind the majority of the current implementation problems and reduces the effectiveness of the planning system.

Case law and policy defined the general position that decisions should be made in line with the plan and any other material considerations. In practice, many places failed to adopt local plans and some took so long that they were regarded as simply irrelevant. At the core, this discretionary system[1] gave more weight to planning professionals to apply their judgment and more power to locally elected members to respond to local political issues.

There were real benefits to this flexibility in relation to responding to the changing circumstances. However, over time there were also real tensions. The reality of the discretionary system meant that incentives to make a plan were reduced. Local politicians argued that ad-hoc decision making was enough and avoided the hard choices that result from responsible long-term planning. In the first 25 years of the post-war planning system, the pressure on local plans was also reduced by national programmes of planning [2]and infrastructure provision which dealt with some of the strategic pressures on housing.

**Background Paper 2** summaries in more detail the changes to the local plan over time but the key evolution in the status of the plan was the concern in the 1980s about 'planning by appeal'. Due to policy statements such as 'Lifting the Burden' (1985), the Government radially downgraded the status of local and structure plans. At the same time, local plans were now trying to deal with strategic demographic change in the absence of both a new towns programme and any coherent regional planning regime. The result was a record level of successful appeals against local plan policy and an increase in successful appeal rates by applicants. This low point in the effectiveness of the development plan produced a political backlash which led to amendments in the 1991 Planning Act, framing the plan-led system we now work with. What is clear is that the status of the plan has changed significantly over time.

## Unpicking the status of the English development plan

In trying to unpick the current status of the English development plan it is unfortunately necessary to examine the balance between two powerful legal and policy presumptions which are more or less contradictory: the 'presumption in favour of development', whereby development should take place unless there is powerful reason why not and the 'presumption in favour of development in the plan' which puts the development plan centre stage.

A general 'presumption in favour' of development was a key operational principle of planning for many years. This general presumption in favour was contained in national policy and ministerial statements

[1] Unlike zonal systems the plan did not confer the right to develop. A separate planning application was required and the plan could be set aside.

[2] Recent reforms and the introduction of 'permission in principle' for a range of housing sites has both mixed zonal and discretionary planning but has created new forms of quasi-development plan in the Brownfield Register.

and was supported by case law. In practice, the articulation of presumption has changed radically over time from a limited measure focused only on minor development to an overwhelmingly powerful policy which is seen as outranking the legal presumption in favour of the development plan. The NPPF formulation means that the presumption in favour can only be overturned by proving 'significant and demonstrable harm' to interests of acknowledged importance.

This is a world away from how the presumption was introduced in 1949, where it applied to cases where 'no serious issue is involved' (MTCP Circular 69/49, Para 5). By 1980 the presumption had evolved further and was expressed as 'always to grant planning permission, having regard to all material considerations unless there are sound and clear-cut reasons for refusal' (DOE Circular 22/80 paras 3 and 4). The circular made clear, however, that a breach of established restraint policy would amount to clear cut reason. The most forceful expression of the presumption came in 1985 on the back of the white paper 'Lifting the Burden' and was contained in Circular 14/85. This circular significantly downgraded the development plan ***'to one, but only one, of the material considerations that must be taken into account in dealing with planning applications'.*** The clear intention of this policy was to downgrade the status of the plan which had no more legal status in decisions than the vast array of issues which can be deemed 'material' to planning decisions.

The result was a growing number of appeals and a significant increase in the success rate of developers upon appeal. Appeals increased to a record of 33,200 in 1988/89 with the success rate rising from the average of approximately 33% to 43%. The policy undoubtedly encouraged greater land speculation, but communities and infrastructure providers could no longer be confident that the contents of plans were a meaningful guide to planning outcomes.

The policy position changed with the introduction of the Planning and Compensation Act (1991) which introduced, in Section 54a an effective **presumption in favour of the plan** in decision-making. Some commentators doubted whether section 54a made any real difference but for others this represented a major departure from the traditional presumption in favour of development (Telling and Duxbury, Oxford 2009 page 224). Section 54a did not make the plan overwhelmingly determinate in all cases, because all presumptions are capable of being overturned by individual circumstances, but it was seen by some, and particularly by politicians, as a reinforcement of the plan-led strategic approach. In short, it refined the general presumption in favour of development to a focused presumption in favour of development described in the plan. The language of the general presumption in favour of development was subsequently removed from national guidance and did not feature in PPS 1, issued in 2005. For around 20 years, from the 1991 act to the publication of the NPPF in 2012, the general presumption in favour of development no longer had a legal or policy basis.

Whether Section 54a was in fact a major change should not take away from the wider policy and culture change which surrounded its introduction. By the mid-1990s the number of appeals had halved from the 1989 high, and the percentage of appeals upheld had returned to historic average, or around 33%. As a comparison, in the buoyant years between 2002 and 2008, appeals never exceeded 23,000 (PINs Statistical Reports).

The 2004 Planning and Compulsory Purchase Act reinstated the Section 54a approach to a plan-led system. Section 38 (6) requires that the 'determination must be made in accordance with the plan unless material considerations indicate otherwise'. There has been extensive debate about what this means in practice, including a view that the plan is first amongst equals of material considerations in decisions. But Section 38 falls short of delivering a plan-led system in any reasonable understanding of the notion. This is partly because the definition of what is material is very broadly drawn in case law

and can include anything that relates to use and the development of land[3]. It might be better to say that, normally, the development plan is the starting point for the decision.

## The NPPF and the end of the plan-led system

One of the many reasons why the 2012 NPPF represented such a radical change in planning was that it reintroduced the presumption in favour of development in a new and very powerful form[4]. The general impact of this presumption is to make the status of the plan even harder to understand, but overall it has had the effect of reducing the weight of the plan in decisions on housing.

In trying to understand why the legal basis for the plan-led system has proved to be so fragile when faced with the policy presumption in favour of development, we need to reflect on three factors:

1. The vagueness of the Section 38 formulation, which does not provide a strong legal basis for a plan-led system. Section 38 allows the plan to be overturned by material considerations and, crucially, Government guidance has made clear since 2005 that whether or not a plan is up to date is a key material consideration. This appears a perfectly reasonable conclusion, but guidance stopped short of saying what 'up to date' might mean.
2. In 2012 the NPPF reintroduced a powerful policy presumption in favour of development which was to sit uneasily with the vague legal presumption in favour of the plan. The presumption applied, in particular, to circumstances where the plan might be judged to be out of date.
3. For the first time, the NPPF created a mechanism to demonstrate when a plan was out of date by measuring the delivery of housing and Objectively Assessed Need (OAN) over a five-year period[5]. It often failed to mention how to make such assessments and ignored the fact the LPAs do not control the delivery of homes on sites allocated in plans or with planning permission.

Taken together this explains how a plan adopted in January can be judged out of date in February; a failure to demonstrate a deliverable five-year land supply is used to demonstrate that the plan is out of date and this is a material consideration which can be used in the context of Section 38 to overturn the plan. There is further legal debate about whether this relates to the whole plan or just the housing-related policy, and what 'housing related' might mean.

If, as Sir George Young made clear when introducing the plan-led system in 1991, the test of an effective development plan can be judged partly on the level of successful appeals. For major housing appeals which can be judged to be most affected by the NPPF policy on weight of development plans, the average number of appeals upheld between 2012 and 2016 was 46%; in some years, such as 2013, it touched 50%. Such figures are significantly higher than in 1989, but despite strong concerns from bodies such as the LGA they have not produced the same public outcry.

## Why this matters for community participation in planning

Because neighbourhood plans are part of the discretionary regime they share the same basic policy and legal weakness as the rest of the development plan. Since the opportunities to participate in planning are overwhelmingly focused on plan making rather than on development management, the weight given to plans is crucial in determining whether planning is genuinely open and participative[6].



[3] *'In principle...any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances'* (Stringer v MHLG 1971). Material considerations must be genuine planning considerations, i.e. they must be related to the development and use of land in the public interest. They must also fairly and reasonably relate to the application concerned (R v Westminster CC ex parte Monahan 1989).

[4] Paragraph 14 of the NPPF added the words 'significantly and demonstrably', setting the bar of demonstrating harm at an unprecedentedly high level.

[5] See Paragraph 49 of the NPPF.

[6] See Provocation Paper 2 on People in Planning on the Raynsford Review web page

## Going Dutch?

The English local plan is defined by uncertainty as to its status and purpose. Local plans are operating in a difficult context where plans set out proposals but have little or no positive tools to deliver them. They are asked to function in the absence of coherent strategic planning arrangements and with ad hoc national programmes which no longer coordinate housing and infrastructure. Trying to navigate the complexity of the English discretionary system appears to provide a strong case for bringing clarity to all parties about the status of the plan. There are three potential ways forward:

1. Keep the discretionary system with perhaps greater clarity for the public that plans are strictly advisory.
2. Strengthen the status of the development plan to deliver a genuinely plan-led system by amending the wording of Section 38.
3. Abandon the discretionary system altogether and move to a zonal system based on those practised in the Netherlands.

## Conclusions

If nothing else, this brief crash through the issues of the 'plan-led' system reveals the breath-taking complexity and confusion about the status of the English development plan, underpinned by the legal reality that the system has never effectively settled the legal weight of the most pivotal part of the planning system: the development plan itself. Given all of this, the surprise is not that local plans have their problems but that they work at all. Since 2012, attempts to get a highly localised and non-strategic planning system to deal with the real challenge of housing need has led to some perverse outcomes. As **Background Paper 2** pointed out, only nationally coordinated programmes are capable of dealing with the scale of the demographic challenge. However, local plans are vital to setting out a local vision for communities but they can only do this effectively if all parties have confidence in the status of their contents.

## Key questions for debate

- Do people agree that the English 'plan-led' system is largely a myth?
- Does the highly discretionary system of planning we have now work effectively for all parties in the development process?
- Could the status of the English local plan be enhanced by strengthening the wording of Section 38?
- Should the discretionary system be replaced by a more powerful zonal system, and if so what are the international benchmarks?
- Would a more powerful plan incentivise communities and the development sector to participate in the preparation of plans?

## Annex: List of supporting background documents

- Background Paper 1: Creating a blueprint for a new planning system in England
- Background Paper 2: The rise and fall of town planning
- Provocation Paper 1: Do we have a plan-led system?
- Provocation Paper 2: People and planning

## Further information and contact

Website: www.tcpa.org.uk/raynsford-review
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