

Planning hits the headlines - The controversy over the National Planning Policy Framework

William Upton, Co-convenor of the UKELA Planning and Sustainable Development Working Party, 6 Pump Court. He has specialised in planning, local government and environmental law since being called to the Bar in 1990. He drives a Peugeot.



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It has not been a quiet time for planning since the coalition government published its draft national planning policy framework for England (“the NPPF”) this summer. Whilst the property industry has broadly welcomed the document, it has also led to the campaign spearheaded by the National Trust, as well as the Daily Telegraph’s “Hands Off Our Land” series and accusations that it is simply a developer’s charter.

The political spat has certainly meant that Planning now has a few colourful phrases to add to the NIMBY. Ministers have accused critics of their national planning policy framework (‘NPPF’) of being ‘semi-hysterical’, of peddling “deeply misleading and simply untrue” claims, and memorably of “nihilistic selfishness”. The Department for Communities and Local Government have even taken the unusual step of issuing a ‘myth-busting’ guidance note. Lawyers who have suggested that the NPPF is likely to lead to more appeals, not less, have not escaped criticism. The Communities Secretary has said: *“I don’t see a system that allows planning silks to buy a Maserati or spend an extra week at their villa in Tuscany as one that is going to improve the lot of my fellow man.”*

You may wonder why a policy document, and one that is only in draft, should matter so much. Whatever one’s views of planning, this NPPF is an important part of the changes being made to the planning system as a whole, together with the Localism Bill and the faster decision making process for major infrastructure (such as nuclear power stations, windfarms, trunk roads and railways etc). The draft NPPF is also a problematic document, and there does appear to have been an element of ‘shoot the messenger’ in the political responses so far. Although we are still looking for the Maserati-driving planning silk who troubles Eric Pickles so much, the consultation responses sent in from local government express considerable concerns. Even English Heritage has had to be reassured that the NPPF will be redrafted. The UKELA Working Party has submitted some trenchant points.

Part of the problem with the NPPF is that the government has undertaken two rather different tasks. The first task is simplification, and the NPPF reduces over 1,000 pages of planning policy (47 documents) into 52 pages (plus glossary). On the whole, most people welcome the idea of a simpler policy guide than that in the current PPGs and PPSs. However, because this editorial task has removed much of the supporting detail, there will be considerable argument about what precisely has or has not changed and what established concepts can now be re-argued. We should not shy away from acknowledging that there will be some dislocation, even though this is perhaps an inevitable consequence of a change on this scale.

The second task the government has undertaken has been to seek to introduce some radical changes to the substance of existing planning policies. The current draft places its emphasis on economic growth and loosens protection for the general countryside. There have also been some deliberate changes to specific areas of policy, such as increasing the amount of deliverable housing land that should be allocated by 20%, removing maximum limits on parking places, removing restrictions on out-of-town offices, and on re-using buildings in the green belt. Whilst that is the prerogative of any government to do so, the way in which these changes have been expressed are also problematic.

The most obvious change is the introduction of the general ‘presumption in favour of sustainable development’. The idea sounds attractive. But everyone appears to be arguing about what the government actually means by it. The Minister in his Foreword has added to the confusion by defining ‘development’ as ‘growth’, and by stating that “sustainable development is about positive growth” – an approach not shared by others who deal with sustainable development. The definition of ‘sustainable development’ contained in the NPPF is stated very simply, and repeats the high-level formulation put forward by the Brundtland Commission that it “means development that meets the needs of the present without compromising the ability of future generations to meet their own needs” (para 9). This does not provide any definite answers to the issue of how to apply this in practice. We are also presented with the dilemma of not having a list of principles and yet are told *“Decision-makers at every level should assume that the default answer to development proposals is “yes”, except where this would compromise the key sustainable development principles set out in this Framework”*. (para 19)

The House of Commons Environment Audit Committee itself recommended (3rd Report, 16 March 2011) that the five internationally-recognised principles set out in the 2005 Sustainable Development Strategy should be included in the Localism Bill – namely, living within environmental limits, ensuring a strong, healthy and just society, achieving a sustainable economy,

promoting good governance and using sound science responsibly. However, the explanation given in the draft NPPF of what sustainable development means in the planning context does not acknowledge these. Indeed, there is no mention of living within environmental limits – which would necessarily restrict how far needs can be met – or the considerable scientific evidence that already exists as to the extent to which the UK is operating within its ecological limits. What we do find is the statement (in para 14) that:

“14. At the heart of the planning system is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan making and decision taking. Local planning authorities should plan positively for new development, and approve all individual proposals wherever possible. Local planning authorities should:

- prepare Local Plans on the basis that objectively assessed development needs should be met, and with sufficient flexibility to respond to rapid shifts in demand or other economic changes*
- approve development proposals that accord with statutory plans without delay; and*
- grant permission where the plan is absent, silent, indeterminate or where relevant policies are out of date.*

All of these policies should apply unless the adverse impacts of allowing development would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.”

As currently framed, the presumption appears to promise an easier ride for developers - indeed it is already seen as such by many commentators. The wording at the end is likely to be a section that is much debated – this is no longer intended to be a planning balance between competing considerations, but one where an adverse impact of a development must be “significant” enough to refuse permission.

The draft NPPF suggests that the decentralisation promised by the Localism Bill will be limited. The regional spatial strategies and targets may be removed by the Bill, but the NPPF wants local people to take the responsibility for meeting the “objectively assessed development needs”. This is Localism, so long as the default answer is ‘yes’.

But there are also some legal issues. As a matter of law, the presumption does not fit with the basic statutory test that planning decisions should be determined in accordance with the development plan unless material considerations indicate otherwise (established in s.54A of the 1990 Act, and now in section 38(6) of the Planning and Compulsory Purchase Act 2004). Some have argued that the presumption harks back to the language used before 1997, that permission should be granted unless “that development would cause demonstrable harm to interests of acknowledged importance” (PPG 1, 1988, para 15, and earlier versions). But that policy presumption was held to be irreconcilable with the statutory duty and the same conflict will arise here.

The status of the local plans in relation to the ‘presumption’ is also a major challenge. The NPPF wishes to see development granted permission where a local plan is “*absent, silent, indeterminate or where relevant policies are out of date*”. The planning system is used to dealing with policies which are “out of date”, and that is probably all that this part of para 14 should have said. Instead, what are we to do with the 70% or so of local plans that have yet to be adopted, and are ‘absent’? Many recent local plans will deliberately be ‘silent’ on important points, as they will have been adopted following the old advice to ensure that they did not repeat national planning guidance. There is a major problem with the idea that the default answer applies when plans are “indeterminate”. This would turn the current working of the plan-led system into confusion. Many decisions in planning are made where the development plan policies pull in different directions and are in effect “indeterminate”. That is part of the normal judgment made by the planning authorities, as was acknowledged by the House of Lords in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, per Lord Clyde:

“There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. [The inspector] will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse.”

As for the document as a whole, the country’s planning committees and planning inspectors will have no choice but to apply

Contributions - William Upton

the policies as they are drafted. They will need to know what they mean, and their definition will ultimately be debated in the courts. The courts will pay due deference to the politicians, and they will only quash a decision based on policy if the decision-maker attaches a meaning to its words which they are not capable of bearing. But this can be taken too far, and the courts will be wary of any approach to interpretation “whereby a decision-maker can live in the planning world of Humpty Dumpty, making a particular planning policy mean whatever the decision-maker decides it should mean.” (*Cranage Parish Council v First Secretary of State* [2005] J.P.L. 1176 per Davis J.).

Consultation on the NPPF finished on 17 October 2011. There has been a high rate of response, of about 14,000 responses. I welcome the fact that the government has now signalled that the document will be redrafted to take on board many of the concerns that have been raised, and that they are likely to allow for a transitional period (there being none suggested in the draft). There was a danger that this scale of change was far more of a shove than a ‘nudge’, and one therefore where the planning system was at risk of stumbling and falling before it found its feet.

So, anyone affected by development must now probably wait until next year to see the adopted version of the NPPF. In the meantime, we will continue to debate the relevance of the draft to current applications. Fortunately, that has become a little clearer. The Planning Inspectorate initially stated in rather bullish form that the draft NPPF “gives a clear indication of the Government’s ‘direction of travel’ in planning policy”. They withdrew that statement in September, and their guidance now more accurately only states that

“It is a consultation document and, therefore, subject to potential amendment. It is capable of being a material consideration, although the weight to be given to it will be a matter for the decision maker in each particular case. The current Planning Policy Statements, Guidance notes and Circulars remain in place until cancelled.”

Contributions - Carol Day

~~Tackling barriers to Environmental Justice: Access to Environmental Justice in England and Wales – A decade of leading a horse to water~~

~~Carol Day WWF. This is a summary of a paper presented by WWF-UK to Aarhus and Access Rights: the new landscape – a conference hosted by the Coalition for Access to Justice for the Environment (CAJE) and the Centre of European Law at King’s College, London on 10th October 2011~~

~~In June 2011, WWF circulated a questionnaire on access to environmental justice to 60 environmental lawyers, statutory agencies and NGOs representing a broad spectrum of interests. 36 responses were received. While this represents a small sample size (and thus no statistical significance can be drawn from it), it reflects the collective views of some of the most senior and experienced environmental lawyers and environmentalists in England and Wales. The questionnaire sought views on perceived barriers to access to environmental justice including, standing, treatment of environmental issues, costs and interim relief. It also canvassed views on potential solutions in order to ensure compliance with EU law and the Aarhus Convention.~~



~~Standing~~

~~In general, how satisfied are you with the current rules on standing as applied in the High Court?~~

~~very satisfied – 8 quite satisfied – 24 not satisfied – 2 no view – 2~~

~~Article 9(3) of the Aarhus Convention requires contracting Parties to ensure that members of the public meeting criteria laid down in national law have standing to challenge acts and omissions by private persons and public authorities contravening provisions of national environmental law. More detailed provisions apply in Article 9(2) of the Convention in relation to standing, to challenge the procedural and substantive legality of decisions, acts or omissions subject to the provisions of Article 6 of the Convention (concerning public participation in decisions on specific activities). Here, members of the public having a sufficient interest (determined within the framework of national legislation and with the objective of giving the public concerned wide access to justice) should be granted standing. In this respect, the Convention holds that environmental NGOs shall be deemed to have sufficient interest.~~

~~The framework in England and Wales respects the provisions of Article 9(3) of the Convention, even though it was established before the Convention was even contemplated. Section 31(3) of the Supreme Court Act 1981 provides that the High Court will~~