April 2010

Review

Planning

Open Source Planning: Conservatives' Green Paper on Planning

Since our last review in January, the Conservative Party has released their Green Paper on planning. The paper was launched on 22 February 2010 in ample time for the general election which has been called for 6 May 2010. We reported in November 2009 that organisations like the British Property Federation were cautiously positive about the Conservatives' plans to boost localism within the planning system.

The answer to the perceived problems within the current system is, according to the paper, a "reboot" or overhaul of the entire planning system which is labelled as "Open Source Planning". The aim of Open Source Planning is to (1) restore democratic and local control over planning system; (2) rebalance the system in the favour of sustainable development and (3) produce a simpler, cheaper and less bureaucratic system.

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New Planning Policy System

- The Conservatives propose a basic national framework of planning priorities and policies to replace the current PPS system, which will form the basis of a new local planning system. The national framework will need to be voted in by Parliament and will set out economic and environmental priorities which the planning system aims to deliver.
- The next layer of policy will be simplified guidance notes, which will be treated as part of the national framework, and will set out the minimum environmental, architectural, design, economic and social standards for sustainable development. Designations like the Green Belt and Areas of Outstanding Natural Beauty will be maintained to "stop unsustainable urban sprawl and preserve wildlife".
- The present planning policy system, introduced by the 2004 Planning and Compulsory Purchase Act, will be scrapped and entirely new local plans designed and produced within a specified timeframe. The Conservatives aim to construct the new local plans from the "bottom up" with every single resident of each neighbourhood approached to take part. Local communities will be able to agree what kind of development they would like in their community and which changes of use do or do not require planning permission. This suggests that there will be different codes of permitted development rights and use class changes for different areas of the country.
- The local plan will have to be in accordance with national guidance. If the local plans are not completed on time the local planning authorities will be deemed to have an entirely permissive approach so that all planning applications would be automatically granted as long as they conform to the national guidance (basic framework and simplified guidance policies).
- The Conservatives will remove the power from Planning Inspectors to recommend binding amendments in the local plan. Local plans must be approved by Inspectors as long as they comply with national standards, sensibly relate to neighbouring communities and have been developed by the full and proper process. The power for the Inspectors to make binding representations is a recent power which was introduced by the 2004 Act. Also, Inspectors will not have the power to amend the plan but must ask the authority to submit a revised plan, if necessary.

- The planning system has undergone two major revisions by the 2004 Act and the Planning Act 2008. In particular the local plan system was completely overhauled in 2004 to achieve many of the same aims set out in the Green Paper. Some sympathy must be had with authorities who are potentially facing another revision which may or may not achieve these aims and will almost certainly slow down the system in the first instance.

- Also a number of the changes proposed to speed up the system have an inherent risk of delay built into them. For example, in relation to the "entirely permissive approach" for authorities which fail to produce a local plan on time, the question of whether the development complies with the national framework is potentially one which could be complex and time consuming. The same applies to consideration of whether or not the local plan complies with the national framework. Of course, designing and producing local plans with the aspiration that every single resident is involved will be a lengthy process that is at odds with the Conservatives' plans to build simplicity and speed into the system.

Development Control

- The paper introduces a presumption in favour of sustainable development, which means that the planning permission should be granted if the development complies with national environmental, architectural, economic and social standards set out in the local plan (which of course needs to be in accordance with the national framework). It will be unlawful to refuse planning permission if (1) it has the required level of local support (i.e. the local people have had a chance to rule out the development at the local stage); (2) it conforms to the local plan; (3) it is accompanied by the necessary local tariff and (4) larger projects have gone through the prescribed public consultation. This change would immediately increase the risk of a substantial number of high court challenges for refusal of planning permissions where the courts will be asked to decide whether the development conforms to the local plan as well as the other issues.

- The paper also introduces the concept of "collaborative design" where local projects above a certain threshold must be designed through a collaborative process which includes the local community.

- The development's "immediate neighbours" will have a special role in the Conservatives' new proposed system. Firstly, a fast track system for planning applications is proposed if a significant majority of immediate residential neighbours raise no objections to the application. It will also be possible for developers to enter into a voluntary agreement with neighbours to compensate them for loss of amenities. If more than a small minority of "immediate neighbours" in the "immediate vicinity" (both terms to be consulted on) object on the grounds of conformity of the application to a local plan, the application has to be formally assessed by the authority.

- In larger developments there will be a compulsory consultation process and developers can avoid formal assessment by reaching voluntary agreements with neighbours. Parish councils are classed as immediate neighbours regarding the obligation to consult and the availability of the voluntary agreement. The concept of voluntary agreements may lead to poor development especially if the recipient of the money is able to use it as he or she likes and not necessarily on mitigating the adverse impacts of the proposed development. It also introduces or increases the perception that developers can buy their way out of complying with proper planning. Compatibility with public law principles and European Law will be necessary considerations if these new concepts are developed into law.

- The Conservatives plan to restrict Section 106 Agreements to site-specific remediation and adaption, and replace the Community Infrastructure Levy and non-site specific applications with the local tariff. The LPA will set the local site tariff and publish the rates in the local plan.

- The paper proposes other financial incentives to move developments forward, including tax and business rate inducements for councils who promote development and affordable housing, and exemptions from the local tariff for affordable housing and local housing trusts.

- In relation to house building targets, the paper criticises the regionalised approach. Local authorities would return to the Option 1 numbers until further consultation and revision.

- The paper proposes that the grounds of appeal in respect of a determination of a planning application will be restricted to (1) failure to follow correct procedure and (2) that the decision is reached in contravention of the local plan. Appeals under the first ground would be decided by the Local Government Ombudsman and the Conservatives will increase their powers to deal with this new duty. The second ground of appeal would be decided by the Planning Inspectorate. The decisions of the LGO or PINS can be judicially reviewed.

- There is a risk that the amendments would result in the increase of planning issues being debated in the High Court, via the judicial review process, rather than at the planning appeal, if it is felt that relevant issues (like material considerations) have not or cannot be properly dealt with under either ground of appeal or PINS has not sufficiently dealt with the planning issues.

Infrastructure of National Importance

- In relation to what are essentially nationally significant infrastructure projects, the Conservatives will replace the IPC with what they consider to be a more democratically accountable system. Major infrastructure linear projects will be determined by hybrid or private bill, a system which is broadly similar to the Transport Works Order. Non-linear infrastructure projects will be considered by streamlined planning inquiries which will focus on planning issues and not discussion of wider policies (much like the current system envisages with the introduction of National Policy Statements). The difference is that democracy would be re-introduced as the decisions on non-linear infrastructure projects would be made by the Secretary of State, with the inquiries run by a special unit within PINS.

- The Conservatives propose to retain the expertise of the IPC and to allow the application which had been submitted under the IPC to be renewed in transitional arrangements. A relevant question is whether the perceived benefits (more democratic accountability in the context of the multitude of planning decisions that are made by Planning Inspectors rather than the Secretary of State herself) warrants the changes proposed by the Conservatives.

Upper-Tier Planning

- The Conservatives intend to abolish the entire regional planning structure including Regional Assemblies, Regional Development Agencies and Regional Spatial Strategies. They will retain the county or unitary authority's powers in relation to waste, roads and minerals.

Conclusions

- The paper proposes some good ideas, for instance, financial incentives and tax advantages for affordable housing and business development and an Open Source Planning website where planning information would be available in one place to members of the public. The paper also contains some justifiable criticism of the current system.

- However, there are some ideas which appear to be ill-thought out, like the proposal to do away with the rule against predetermination. This rule prevents Councillors and other public officials from making up their minds about planning decisions before the application and details are presented to them. It has caused some confusion, but the courts have made it clear that the fact that a party has adopted a policy to support or reject a particular development does not disqualify members of the party group from sitting on the committee which will determine the planning application (R v Amber Valley DC ex p Jackson [1983] J.P.L. 742). The rule simply prevents members from by-passing the genuine decision-making process at the application stage (or giving the appearance of doing so). The fact that it can admittedly be difficult to follow in practice is not a good reason for abolishing the rule, which is fundamental to public law.

- Where it is clear that planning in the UK has become unnecessarily complex, some of the changes proposed and in particular the overhaul of the system, do not appear to be justified. In particular, there are no guarantees that the anticipated benefits, many of which are also the aims of the present government, will be delivered through these changes. The Labour government recently introduced two major sets of changes to the planning system and the impact is still being felt, particularly amongst those who have to implement the system. Apart from systems which are proven to be obviously flawed, should these recent changes should be allowed to settle within the system before further wide-scale changes are introduced?

THE COMMUNITY INFRASTRUCTURE LEVY REGULATIONS

The CIL Regulations, first introduced by the Planning Act 2008, came into force on 6 April 2010. The CIL Regulations will allow local planning authorities to levy a charge on certain developments which can then be used to support infrastructure projects.

The CIL system will continue to work in parallel with Section 106 Agreements but the scope of the latter will be significantly reduced. Following a four-year transitional period, expiring in 2014, Section 106 Agreements will no longer be able to seek developer contributions to fund infrastructure which

could be funded by the CIL. LPAs wishing to seek such contributions will have to do so through the implementation of the CIL Regulations. The Government is due to consult on the drafting of a new policy statement which will explain the appropriate use of Section 106 Agreements following the implementation of the CIL Regulations.

LPAs can only impose the levy if they implement the CIL Regulations, which is not mandatory, through the production of a Development Plan Document. A charging schedule must also be produced setting out the rate of CIL payable for various types of development which will then be levied on the net addition of floor space of proposed residential or commercial developments.

Exemptions from CIL are allowed in certain circumstances, for charities and social housing for example. In addition, LPAs can include, in their charging schedules, categories of discretionary relief available in exceptional circumstances.

The landowner or the developer is usually responsible for the payment of the CIL but the regulations also make provision for the responsibility to be assumed by another party.

So far, not many LPAs have indicated that they will implement the CIL. However, due to limitations imposed on the use of Section 106 Agreements, we anticipate a significant increase in the adoption of the CIL process.

WILLIAMS V HEREFORDSHIRE COUNCIL (HIGH COURT - 16 FEBRUARY 2010)

The case was an appeal against a conviction by the Magistrates Court for the failure to comply with an enforcement notice. The enforcement notice was served against the Appellants (the Williams) who were living in two mobile homes. The notice required the two mobile homes to be removed from the land along with associated site works and required the land be returned to its original agricultural state.

One of the homes and some of the site works were removed but the Appellants continued to live in the second home. The information laid at the Magistrates Court included a number of allegations, including a failure to cease using the remaining mobile home for residential purposes. The Magistrates found that while there was no express obligation in the notice to stop using the mobile home, this requirement was implied.

The High Court disagreed with the Magistrates Court. This was because of the requirement for an enforcement notice to be completely clear and set out expressly what is required to comply with it. The fact that it did not contain a specific obligation to stop using the mobile home for residential purposes meant that the court had to allow the appeal against the conviction. It was not open to the Magistrates Court to imply an obligation on the Williams to stop using the second home for residential purposes.

R (ON THE APPLICATION OF NAEEM SIRAJ) (CLAIMANT) V KIRKLEES COUNCIL (DEFENDANT) & (1) TIMOTHY CHARLES BENNETT (2) STEVEN BENNETT (3) MARGARET ELIZABETH DEARNLEY (INTERESTED PARTIES) (HIGH COURT - 15 MARCH 2010)

The Claimant applied for judicial review of the Defendant LPA's decision to grant planning permission for the erection of an agricultural machinery workshop in the Green Belt which constituted inappropriate development. The application should therefore have been subject to a consideration of whether there were very special circumstances justifying the development. The grounds for approval were that the Applicant had demonstrated the specialist nature of his business, the needs of his customers, the lack of alternative sites and the need to move from the present location and these constituted special circumstances sufficient to permit development on Green Belt land.

The Claimant argued that the sub-committee had failed to apply the correct test in determining whether the harm caused by the development outweighed the benefit, the decision did not state why the factors outweighed the harm and the factors relied upon by the Applicant developer were little more than evidence of his desire to move to an alternative location.

The Court held that the reasons given by a planning committee should not be subject to the same kind of analysis required of a Planning Inspector's report or a ministerial decision. It was held that it was impossible to find any error of law in the reasons given by the planning committee in their decision. The Court went on to state that the Committee's failure to say why the factors outweighed the harm did not constitute a failure to give reasons. Provided that the reader knew what factors were taken into consideration, no further information was required. The application for judicial review was therefore refused.

FURTHER INFORMATION

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