Written evidence submitted by Paul G Tucker QC [FPS 153]

My views are based on my experience of local plans for most of the last 30 years of my professional practice as a barrister specialising in the field of town and country planning. I have sought to excise from my representations to Government on the White Paper those matters which might properly be described as evidence. I trust that this is useful to members of the committee – append the same at appendix 1.

I have practiced in this field since 1992 when I was brought into assist a colleague, John Barrett who was then promoting the Garstang and Over Wyre Local Plan at a local plan inquiry. I have practiced exclusively in this area since around 1998. I am presently Head of the Planning Department at Kings Chambers, one of the principal planning sets in the Country – where I also have the privilege of being Head of Chambers. I am also the Deputy Chair of the Planning and Bar Association, the Specialist Bar Association for those who practice in this field.

At appendix 2 I have set out my experience of local plan inquiries and examinations, so far as I can recall. I have promoted well over 20 local plans, including the Liverpool Local Plan whose examination is still ongoing at the time of writing. I am presently advising on five emerging local plans in the Midlands and North of England. Over the years I have advised on local plan objections on multiple times, but I can recall at least 20; and I am engaged regularly on local plan related advice. Without wishing to overstate my credentials I suspect that there are few members of PEBA who have more local plan experience than I.

You will therefore appreciate that my views, whilst entirely my own, are informed by long service in the world of development plan preparation in various parts of England and Wales, as well as brief forays into other jurisdictions such as the Isle of Man, and dealing with all manner of objections.

In overall terms, my view is that the reforms to the development plan system that have taken place since 2001 have been a monumental failure. Rather than a simpler, faster system with greater public involvement, we now operate in a slow and grossly overcomplex system in which the public are undoubtedly involved but all too often at the point of frustration of already formulated ideas. Worse still strategic decisions which should be taken at a regional or even national level (such as areas of growth, new settlements or logistics proposals) are generally put into the 'too difficult' pile.

The consequence of the revocation of structure plans, the introduction of regional spatial strategies and then their revocation, has placed too great a burden on district and unitary authorities to create local plans. That is compounded by the introduction of a toothless "duty to co-operate" which pre-supposes that authorities will all be able to agree to sub-regional, and regional issues when all too often competing pressures inter-cede (for example, the failure to rapidly progress of the Greater Manchester Strategic Framework, South Oxfordshire's attempts to derail the Oxfordshire Growth Board, the collapse of local plans such as St Albans, Bedford etc).

The advent of the doctrine of localism has introduced the unsatisfactory Neighbourhood Plans into the system, but more importantly has held as an article of faith that district and unitary authorities are best place to shape their areas, and determine their needs. Whilst in some respects this is precisely the right level

of decision making, in relation to other areas, such decisions involve complex economic and demographic considerations which are all too often, ill understood, take up vast amounts of time and effort at local plan examinations, are rarely effectively scrutinised and usually include thinly veiled policy decisions masquerading as a robust methodology.

More importantly my very strong view is that there are a host of reasons why the solution to the planning system is not immediate radical surgery, but rather the careful identification of where the current problems lie and identifying how those problems can be solved. I have therefore made submissions to Government in response to the Planning White Paper, again in a personal capacity to the effect that almost all of the current problems of the system can be resolved without primary legislation and some of the more radical changes proposed in the White Paper might best take place whilst a geographically limited pilot study takes place. And that that some of the less radical steps should be tested first before the system is dramatically altered. My strong view is that substantial change can be effected through the medium of changed to NPPF and PPG, which could radically improve the existing system and once again make it fit for purpose, without the need for the need for some of the more radical reforms proposed in the White Paper.

Finally I would observe, again on a very personal basis, that I have spent the last 20 years of my life at planning appeals, which all too frequently arise because the development plan is out of date or that housing and employment needs haven't been properly assessed. It would be a joy if changes informed by those who work within the system and know its faults could be brought forward in the immediate term to speed up the delivery of plan making just at the time when the nation most needs a stable development plan system that works.

Paul G Tucker QC

Manchester

November 8th, 2020

APPENDIX 1

RELEVANT EXPERIENCE OF THE PLANNING SYSTEM

1. GENERAL

1.1 My experience primarily relate to the development plan system.

1.2 My overall view is that there is an acute need for:

- spatial direction on housing figures & other issues which transcend local considerations;
- a scything of unnecessary content in a development plans, whilst retaining necessary content;
- a reworking of what is meant by "soundness";
- reducing what actually needs to be examined;
- redrafting the costs regime to ensure allocations are delivered; and
- providing proper guidance on planning obligations.

1.3 Primary and secondary legislation isn't needed for any of the above. However substantial improvements could be made to the speed of plan preparation with comparatively minor changes to the 2012 Regulations, PPG and NPPF

2. Past Reform

2.1 In 1991 the Planning and Compulsory Purchase Act introduced the framework for Unitary Development Plans for metropolitan areas and a system of County Structure Plans and District Local Plans elsewhere. The intention was to secure nationwide coverage by the millennium (PPG12). The same Act also introduced s.54A and the presumption that applications for permission should be determined in accordance with the provisions of the development plan unless material considerations indicated otherwise. In policy terms there was a raft of Planning Policy Guidance, which in PPG1 set out a presumption in favour of development – ie that planning permission should be granted unless there was demonstrable harm to interests of acknowledged importance.

2.2 The 1991 Act envisages local plan inquiries would be held to consider objections into the local plan and that there would be two formal stages of consultation. That together with the requirement for fully reasoned Inspectors reports whose conclusions were not binding on a LPA meant that local plans took years to prepare, and were very costly. Structure Plans were tested at an examination

which was usually shorter and usually revolved around the distribution of a housing and employment requirement figure which was provided to County and Unitary Authorities in short regional guidance (see below).

2.3 Some reforms to that system took place, allowing some objections to be dealt with by hearings and written representations and reducing the role of the first stage of consultation. However by the turn of the Century Government had decided that reform was needed. At that stage what was missed by Government (though not the precursor to this committee) was that reviews of local plans once established were much much more rapid enabling plans to be rolled forward relatively quickly. Morever the speed of reporting was reduced by Inspector's reports being reduced to the essentials not to report on every aspect of every objection.

2.4 When the concept of a local development framework was first mooted in a green paper at the turn of the Millennium it was seriously contended that a framework would be updated annually and reviewed every three years[1]. In reality the system introduced by PPG11/PPS11 and then by the 2004 Act resulted in a chaotic shaking up of the plan system from which it is only now beginning to recovery. When added to the requirement to maintain a five year supply of housing, the result in many areas has been a substantial hiatus in plan making and permissions being secured on appeal as plans failed to provide for up to date needs.

2.5 Until the Millennium regional guidance had been promulgated by the Secretary of State in an ad hoc fashion, often in very slim tomes that did no more than to identify broad spatial ideas, but more particularly they identified the housing and employment requirements for Counties and Unitary areas[2]. The Regional Development Agencies Act 1998 established Regional Assemblies in England creations from appointments from constituent councils who were charged with producing draft Regional Planning Guidance, to submit to the Secretary of State who then appointed a panel to examine it, with the final version of guidance being issued by the Secretary of State. The process of preparing a document which only had the status of guidance was to say the least tortuous. For example in the NW a draft revised RPG 13 was produced in 2000 but it wasn't until late 2003 that RPG was finally issued by the Secretary of State.

2.6 The intention appeared to be that regional guidance would form the foundation for what became Regional Spatial Strategies which were to be the top tier of the development plan, created in the 2004 Act. RSS's were to be prepared by newly elected Regional Assemblies thereby taking over the role of spatial planning created by the abolition of Structure Plans and RPGs. Unhappily for those promoting this new idea, the NE of England, faced with the opportunity of an elected Regional Assembly decisively rejected it in a referendum in late 2004. As a result the system of Regional Spatial Strategies was always divorced from political accountability. They were promoted in a similar way to the manner in which RPGs had been produced in the early 2000s, but seemed to take even longer to produce, especially in areas such as the South East which had to grapple with the approach

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1 The Report on the House of Commons DETR select committee 3rd session 2001/2 (2nd July 2002) at paragraphs 38 and 39 reporting the content of the Green paper "Planning: Delivering a Fundamental Change" DTLR 2001 §4.9

2 Eg RPG13 for the North West produced in 1996

to complex ecological issues. That lack of political accountability was one of the many reasons which led to their ultimate demise in 2011.

2.7 In the report on the Planning Green Paper, produced by the House of Commons Select Committee on the Environment, Transport and the Regions[3], the authors observed:

"Decisions about Regional Planning should be taken by groups of democratically elected members of local authorities. …We support the proposal in the White Paper[4]… that where elected regional assemblies are set up, they should take over regional planning functions. ***Where elected regional assemblies are not set up, the present system should remain****."* (emphasis added)

2.8 The first effect of the advent of the 2004 Act, and the replacement of local plans with a local development framework ('LDF') was that some LPAs abandoned work on their emerging plans, pending sight of the changes – a process which is ironically happening now, with some LPAs delaying the completion of their LPs to await the outcome of the current White Paper (notably Warrington and Bromsgrove). For those who did proceed (and I worked on the Lancaster Core Strategy which was the first in the NW to be promoted and adopted), the supposedly faster system in fact proved to be the exact opposite:

(i) the LDF was meant to start with a rapidly produced 'thin' core strategy ('CS') followed by an allocations plan and a development management plan, and then area action plans etc. In reality the battle became the figures and distribution in the CS and those documents took ages to produce, delaying the production of the rest of the plan;

(ii) the "soundness" test was simply not understood, and frankly still isn't (see below). It obliges an Inspector to undertake a roving brief rather than the previous approach of obliging the objector to identify what is said to be wrong with the plan, say how it should be changed and then carry the burden of proving why it should change;

(iii) the division between what should be in a core strategy and what should be in the rest of the plan was never clear – resulting in the CS being front loaded;

(iv) promoters of sites felt obliged to make representations to the CS despite the fact that the debate in relation to individual sites was meant to come afterwards. A concern exaggerated when CSs promoted strategic sites with no clear of where the division between strategic and non-strategic sites lay;

(v) there was no clear idea what amounts to a 'proportionate evidence base', thus the preparation of a plan comes with a morass of documentation which rarely was read in full by anyone. If the definition of knowledge is the reduction of prior uncertainty then such documents all too often produced none. Such documents included:

- a pointless 'self-assessment' work essentially a navel gazing document encompassing the whole plan which was inevitably self-justifying exercise;

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[3] Thirteenth Session 2001-2, vol 1 HC476-1, published 2nd July 2002. NB the DETR was the precursor to the Department for Housing, Communities and Local Government in terms of planning issues.

[4] The HC select committee was reporting on the Planning Green Paper but by the time that it had reported the Planning White Paper had been published in May 2001

- the sustainability appraisal. Documents which are well meaning, grossly over-extended, full of pseudo-science to justify what are essentially policy decisions (e.g. tables of 'traffic light' assessment), and rarely add anything to the process. They are usually only scrutinised by objectors seeking to prove that their proposal hasn't been assessed as a "reasonable alternative", or that a higher/lower housing figure hasn't been considered;
- the habitats regulation assessment. The division between project level and plan level assessment to demonstrate that a risk to a European protected area can be excluded is easily stated but seemed for a long time to require far far more than simply adding a criterion to that effect into the policy. Plans have failed because of intractable problems with the CS (in my experience the draft Liverpool CS twice). When in reality the assessment at plan level ought to be a comparatively light touch assessment to make sure that obvious inconsistencies are being avoided.

2.9 The legislation also contained some astonishing errors. The most obvious was that initially plans which could have been modified (Stafford and Lichfield at the outset) were rejected as being unsound – wasting thousands of hours of officer time; and initially if there was a legal error the choice give to the court was to quash the whole plan or not – until the power to quash in part was later introduced.

2.10 Until the 2012 Local Plan Regulations came in the logjam in the system was that core strategies had to be produced first and they took ages (supra). Mercifully the 2012 Regulations quietly buried the old Core Strategies and allowed an old style local plan to be prepared. However by then LPAs were already wedded to preparing a strategy first, thus leading to absurd delays between the preparation of local plan strategy and the allocations DPD. For example Cheshire East and Cheshire West's LP strategies have preceded their allocations plans by years, with Cheshire East's delay being particularly egregious.

2.11 The improvement was not however a radical speeding up of the process of plan preparation because by then the Government had decided in 2010 to abolish Regional Spatial Strategies and place the onus of deciding housing and employment needs ('FOAN') on district and unitary councils by establishing the full objectively assessed needs (see below), which has created a cottage industry of consultancies, and has wasted huge resources in coming up with figures within local plans, but is the antithesis of a 'locally established figure' which was the original professed intention of Government in promulgating Localism.

2.12 For example when the Sefton Local Plan was in preparation before the 2012 NPPF, but after the passing of the Localism Act in 2011, the LPA prepared an evidence base whch considered planning for a range of housing and employment figures, and also prepared a consequences document to consider what would be the effect of not delivering the full needs of the area if it were to give greater weight to other factors such as green belt release. This approach has always struck me as more transparent since it takes the requirement as a given and then allows members to consider the economic and social costs of not meeting that requirement, rather than what came to be the more usual approach – post NPPF – which was for LPA's to

argue that the requirement was as low as reasonably possible and developers to argue for the other end of the reasonable spectrum, based on the dark arts of econometrics and demographic considerations.

2.13 Essentially the introduction of the FOAN created a new battleground, a new area of complexity and a new area of delay in preparing local plans. Worse still it was a battleground introduced at a point when regional decision making was removed thereby forcing individual authorities to grapple with supra-local issues with only a toothless duty to co-operate to assist them.

2.14 The Standardised Methodology should have transformed that debate but it hasn't, partly because so many plans have been continued to come forward under the transitional arrangements and to be assessed under the old 2012 NPPF FOAN approach, and partly because the standardised methodology based on the 2014 household projections is now itself increasingly discredited since the subsequent 2016 and 2018 projections have produced dramatically differing results. At the time of writing the planning industry awaits the view of MHCLG on what should be the new SM, but the long delay in producing it has meant that more recently produced plans are being prepared in a very odd background of a SM which all parties know to be out of date.

3. The Soundness Test

3.1 Section 20 of the 2004 Act requires an examination as to whether or not the plan is 'sound'. What is meant by that is not defined in legislation, but is explained in NPPF and expanded in PPG. It requires an overall singular judgment which the courts have held is a planning judgment[5]. As a test it is generalised and the detail has essentially been left to the Secretary of State to define. The way in which it has been defined has been at the root of the problem of the delay in plan making in the last 16 years in my view.

3.2 Before 2004 the test was established by the Courts[6], that a draft local plan was presumed to be acceptable and that the onus was on an objector to identify which part of the plan it wished to change, precisely how it should be changed and why it would be better in land use terms to incorporate that change. The consequence was that the burden was almost entirely on the objector to explain what the problem was, why it needed fixing and why the objector had arrived at the solution. Those parts of the plan to which there was no objection were not subject of consideration by the Inspector, and moreover supporters had no role in the process of plan 'examination' but could occasionally be called upon by the LPA as and when it considered their involvement to be helpful.

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[5] See Barratt Developments Plc v City of Wakefield Council [2010] EWCA Civ 897 (in paragraph 11 of the judgment of Carnwarth LJ)

[6] Electricity Supply Nominees v SOS and Northavon DC [1992] JPL 634

3.3 The approach post-2004 is that the plan is presumed to be sound, but the soundness test is then cast so wide that, in reality, everything is on the table. Indeed the requirement to produce an evidence base at the point of submission has meant that a LPA looking to produce a plan not only has to produce the draft plan but a huge volume of evidence in order to prove that the plan is indeed sound[7]. That is not to say that there is a problem with requiring decisions to be based upon evidence, but rather that the degree of evidence now required has reached disproportionate levels, and the greater the burden placed upon plan makers, the longer it takes for a plan to be adopted and the more likely it is for the plan makers to walk into bear traps. Worst still the longer that the process takes, the more likely it is that part of the evidence base will be considered to be out of date.

3.4 For example, formerly the approach when assessing whether a proposed allocation was acceptable was to determine whether there were any "in principle" objections (often described as insurmountable constraints or "show stoppers"). Thus a debate might have related to whether or not there would be sufficient road or sewerage capacity and whether planned improvements would come forward within the plan period. But if constraints weren't insurmountable then the objection would fail, and the site would be allocated[8].

3.5 Post 2004 the onus is now firmly upon the LPA to prove its case in a raft of areas, such as deliverability, viability[9], infrastructure provision etc. Since the country stopped building council houses in the early 1980s the planning system has worked on the basis that it is primarily for the market to deliver the development which the country needs, and yet, bizarrely the planning system seeks to require the public sector to prove that the market can deliver what it says it will deliver.

3.6 That has led to the paradox that schemes which the market is promoting have failed because the planning system has concluded that they are not proven to be viable or deliverable – most recently 2 out of 3 garden communities in North East Essex. Had those schemes been promoted under the pre-2004 Act it would have been for the objectors to provide evidence to demonstrate that there were in principle or insurmountable hurdles to the delivery of those schemes, and for the promoters and the LPA simply to demonstrate that the problems were not insurmountable ones.

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[7] This arises from the 'justified' aspect of the test which requires a plan to be based upon "proportionate evidence" without saying what that might be.

[8] Viewed through that prism Garden Communities would stand a far far better prospect of being endorsed at local plan level since it would be for objectors to demonstrate that there were insurmountable constraints to delivery and not the other way around.

[9] Viability being a particular problem given that the presumption is that if an allocation is promoted in a plan then it is to be presumed at application stage that the affordable housing and other infrastructure requirements would not be revisited at that stage. Thus, there is a justification for the Inspector to examine whether or not allocations are objectively viable – ie reversing the pre-2004 burden in the real world, but in respect of highly complex evidence, and a level of scrutiny which is both disproportionate and for which an examination is ill suited to scrutinise.

3.7 This differential burden of focusing on the objector's case, rather than requiring the LPA to essentially provide an evidence base for the whole plan has been the single most retrograde step in plan making and it has resulted in delay, confusion and uncertainty. Indeed putting the burden on the LPA in promoting a plan to prove deliverability/no-show stoppers/viability is grossly disproportionate – compared to the former burden of requiring objectors to prove why a particular part of the plan is objectionable and then prove why.

3.8 To revert back to the pre-2004 system would not however require legislation. The requirement to provide the morass of information in support of the plan does not derive from the legislation (reg 22 of the Town and Country Planning (Local Planning)(England) Regulations 2012 is written in general terms) but from guidance in NPPF and PPG and from the knowledge of the LPA that is essentially being required to prove its case at an examination whose reach could cover any aspect of the plan.

3.10 The problem arises from paragraph 35 of NPPF which sets out the test of soundness, whose terms, as drafted, superficially appear to do no more than to set common sense thresholds. However the policy test of soundness lacks a clear procedural preamble which focuses the debate at examination upon individual objections and puts the burden on the objector to prove its case as to why that part of the plan fails those four seemingly simple test.

3.10 Thus, there is no need to abolish the soundness test in law, there is a need to recast what it means in policy, and to revert to the position before all of the plan was essentially put in issue at examination

3.11 The evolution of a system which requires a plan to prove that its proposals are viable and deliverable and that infrastructure is likely to be in place to assure delivery imposes an unwarranted burden on plan preparation to essentially prove everything up front. The former, pre-2004, process which involved an element of 'suck it and see" may have been less intellectually rigorous but the process of objector's scrutiny tended to flush out any serious problems in any event, and obviously hopeless allocations could be reviewed out in reviews of the plan in any event. Looking with those eyes at proposals such as the North Essex Garden Communities proposals would have probably led to a very different outcome.

4 The Duty to Co-operate and the Assessment of Needs

4.1 The experience of the last decade has definitively established that it is a wholly disproportionate burden to place upon LPAs and then the examination process to determine what the objectively assessed needs of its own area, let alone a region might be.

4.2 The process of determining a FOAN proved to be a grossly over-complex exercise causing months and sometimes years of delay with often unsatisfactory outcomes. Whilst the 2011 Localism Act and NPPF 2012 aimed to devolve such decisions to individual local authorities there was a failure to recognise just how difficult such an exercise actually was. The introduction of the standard

methodology has helped but debates still continue (often about the uplift) and the evidence base produced for Local Plans has barely reduced.

4.3 More fundamentally the duty to co-operate has not resulted in the level of cross border working being as successful as presumably was hoped by Government back in 2012. With the abolition of RSS, regional and sub-regional issues such as the distribution of B8 logistics sites and the need for green belt review have been all too often ducked by district and Unitary authorities[10]. That is hardly their fault (since local politics are bound to be an issue), when the only real sanction for a failure of the duty is for a draft plan to fail. Other than in an extreme case such as South Oxfordshire, where the Secretary of State finally intervened there is no mechanism which can be deployed to essentially overrule LPAs or even to make an over-arching determination for them. Growth Boards and Combined Authority areas are okay in principle until cross boundary issues have arisen which are all but intractable in political terms.

4.4 The solution is, with respect, obvious. The White Paper suggests a return to the former system of figures being provided centrally, with a mechanism to resolve distribution issues if figures are provided to Counties or City Regions.

5. Model Policies & slimmed down text

5.1 Another commendable innovation from the White Paper which is long overdue is the production of model policies which can simply be adopted by LPAs. This is an approach that I have long advocated and I remain baffled that it hasn't been proposed before (just as I remain baffled that model conditions still haven't been produced to replace circular 11/95[11]).

5.2 In the 1990s every LPA sought to reinvent the wheel in a slightly different way by redrafting policies to reflect large portions of national guidance. Those were regularly scrutinised in detail and became the subject of pointless consideration at local plan inquiries. That delayed the production of development plans unnecessarily as did the fact that until comparatively late in the process the Inspector had no power to oblige objectors to determine their objections by written representations or informal hearings (see below), rather than a formal inquiry session.

5.3 It would be eminently possible therefore for Government to produce a list of model development management policies as an additional chapter of PPG now and for LPA's to simply be able to adopt those for their local area as part of their development management plan, thereby gaining s.38(6) status as part of the development plan. The adoption of a policy which either matched or did not materially differ from the model policy could also be irrebuttably presumed to be sound, thereby avoiding at a stroke the need for statutory consultees and Inspectors to waste time scrutinising the

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10 Albeit with exceptions, such as West Northants.

11 This is a serious omission in the development management process and should be urgently addressed. It wastes time in the process. Just as the absurd requirement to ask developers to confirm their acceptance of pre-conditions is a pointless innovation – a developer will never wish to take a refusal as an alternative to "agreeing" to a pre-condition which is considered by the LPA to be necessary.

minutiae of dozens of individual plan policies to ensure consistency with national guidance. Only material departures from national policy would need to be justified and tested.

5.4 It remains odd that local plan policies which are intended to do no more than reflect national policy can be so radically different from one LPA to another.

5.5 Finally local plans are filled with text which is often pointless and makes reading and understanding the plan daunting. The preamble is filled with the need to specify a vision, a spatial portrait and strategic objectives. All of this wastes hours of drafting and discussion all to no real purpose. Whilst a preamble is a good idea it would be even better if NPPF could set out more clearly the national objectives of the planning system (without hiding behind wording which obfuscates meaning) which can be locally adopted and then the preamble could simply explain what the plan seeks to do locally which seeks to deliver those national objectives. There may be logic in publishing explanations for policy to aid understanding, but it is difficult to see how very much of the text which finds its way into local plans is needed. My view would be to include a test of necessity for text to be in the plan – ie the LPA can publish its own guide to local plan policy if it wishes, but the only text that ought to be in the local plan should be that which is needed to be there. Again this could be readily achieved in an additional line of policy

6 Review

6.1 Currently plans have to be reviewed every 5 years, which essentially means that the cumbersome process of plan preparation starts as soon as a plan is adopted. A plan process where the figures are given, where the text is reduced to its essentials and where model policies are adopted ought to be quicker and easier to prepare and would allow the local plan to focus on the role of actually allocating land where development is needed, or where change is required or where protection is essential.

6.2 At the moment caselaw has concluded that it is a matter of the soundness judgment to take account of a commitment to review a local plan[12]. That has been translated into PPG and it is often the case that when shortcomings in the plan are identified that LPAs will 'commit' to a review, sometimes an immediate review.

6.3 Such a commitment is all too often an exercise in smoke and mirrors to avoid necessary modifications to make a plan sound, and moreover the supposed commitment to a review is almost entirely toothless. The only instance that I am aware of where a review policy included a consequence within the policy itself was in NW Leicestershire where the review policy S1 committed the LPA to a review within 3 years otherwise the plan was deemed to be out of date. Regrettably the LPA did not manage to complete a review within that timescale but instead promoted a plan review to review the mechanism out of the review policy so as to remove its consequence[13] – the

12 GUI v Dacorum [2014] EWHC 1894 (Admin)

13 https://www.nwleics.gov.uk/pages/local_plan_review

Inspector's report on that issue is awaited. It would be hard to make up a less Kafkaesque approach to plan making

6.4 With respect to all of the instances where LPAs have argued that it is better to get a plan adopted and that a review mechanism speeds the process of adoption – all that really does is to kick the can down the road. It may be that a plan cannot take account of every change which is needed in order to be adopted, since matters change rapidly, however where a review is promised it should only be taken into account if there are consequences, such as those endorsed by the earlier Inspector in NW Leicestershire. An open ended commitment to a review which leaves loose ends and no impetus to tie those rapidly is the antithesis of good planning.

7 Scrutiny

7.1 In the 1990s local plans took forever to prepare and adopt for a host of reasons:

- almost all objections of significance were undertaken by way of an inquiry process, of what was described as a local plan inquiry.
- the Inspector's report had to address all issues and took forever to write;
- the Inspector had no power to oblige objectors to determine their objections by written representations or informal hearings so much of the time was taken up by pointless inquiry sessions;
- there were two formal stages of draft plan which were then considered; and
- the Inspector's report was merely a recommendation which the LPA could take or leave.

7.2 Just before the replacement of the existing system in 2004 however the process had dramatically improved:

- the Inspector's report was in short form;
- the Inspector had the power to decide how each objection should be considered with only a few dealt with orally and only rarely by inquiry;
- the first deposit draft was not to be examined; and
- the process of review of an already adopted plan was much more rapid since it essentially just rolled forward the allocations to a later end period and reviewed policies that were out of step with national policy[14].

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[14] A point described clearly by the HC report (supra) in 2002, para 52: *"The drawing up and agreeing of Local Plans and UDPs was initially slow. …After ten years it is almost complete. And the process is much faster. David Lock chairman of the TCPA told the committee:*

It has been terribly slow, very expensive and unsatisfactory in many ways but we have been through that great loop, and amendments revisions, updating of local plans are happening now very quickly. Many years of investment are now yielding results""

7.3 My experience was that of the Sefton UDP review which I did in the early 2000s where the plan period was rolled forward by 10 years, there were 3 formal inquiry sessions which took just over a week and a week of informal hearings and the whole process of plan review took just over a year. My experience of the Walsall UDP review at the same time was very similar. In other words by the time that the last system was abolished it had started to work properly. At the time of the passage through Parliament of what became the 2004 Act I had drafted an article making exactly this point, but was discouraged from sending it by a more senior member of Chambers – with hindsight I bitterly regret not having made this point to legislators based on my experience at the coal face of local plan preparation.

7.4 The stand out point from the process of review of the pre-2004 system was not its speed, but that where there was a need for scrutiny and proper testing of the evidence then that was done, and on occasion done through the medium of cross examination. And where round tables were appropriate (such as demonstrating how the housing requirement was met) then they too took place. The new system of examination however has a glaring and serious problem at its heart which is the level of testing of the evidence is problematic.

7.5 Sometimes searching questions are asked by the Inspector, but the practice now is that questions are posed by the Inspector in advance, and that a "discussion" takes place which often results in little more than parties restating their cases and almost no probing questions taking place, since there is no real inquisitor. That is absolutely not a criticism of individual inspectors nor the advocates who appear before them, since the Inspector has to be seen to be impartial and there is an active discouragement to probe the other sides case by cross examination or anything close to it. However the consequence is that some of the most important decisions for local communities are made without even the semblance of the evidence being tested.

7.6 Parliament has included the power to allow cross examination at local plan examinations[15], but it is never exercised by Inspectors in my experience. When the system was changed there were many public statements by the then Secretary of State attacking the involvement of affluent planning lawyers, which may have been the political motivation for this dramatic change in process. However given the importance of these decisions I remain baffled as to why cross examination has been abandoned in all contexts in plan preparation given its obvious utility in a system where Inspectors are trained to avoid entering the arena as a judge in the continental legal system might do. Indeed the report of the House of Commons DETR Select Committee in 2002 (supra) is instructive on this point:

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[15] Town and Country Planning (Local Planning) (England) Regulations 2012/767 regulation 24 leaves the conduct of the examination to the Inspector. Paragraphs 9.10 and 9.11 of the "Procedure Guide for Local Plan Examinations", PINS 5th edition June 2019, makes it clear that formal presentation of cases and cross examination will only be permitted "rarely" and where technical issues are "unusually complex" or there are disputes over "crucial issues of fact".

"91. The existing right of third parties to object to draft policies in Local Plans and UDPs, and to pursue these to inquiry in front of an independent Inspector if unresolved by the local authority, is a vital third party right"

7.7 Again this power exists and ought to be exercised, and if my view that there should be a reversion to testing objections is taken up, then targeted cross examination is the best tool in the armoury of both sides to probe the merits of a case in such circumstances. That is not to say that it should be ubiquitous, but that in a limited number of instances it is the only way to resolve proper scrutiny. My point is absolutely born out of acting for both sides and the frustration at not being able to probe cases is one that arises from acting from both the public and the private sector.

7.8 At all events I would be interested to know the degree of public and professional satisfaction at the level of scrutiny which takes place at examinations – since anecdotally it is not high. Again this is complaint about the system not individual inspectors who are in my experience often the most talented people in the room.

8. Process

8.1 Where there is a clear need to reform the system which will require legislative intervention is in the process of plan drafting. Back in the early 2000s it was recognised that local plans should have one deposit draft which should be examined and that the local plan inquiry/examination should take place rapidly after that point. Instead of taking that experience forward, the 2004 Act and then the 2012 regulations bequeathed a system which involves an issues and options stage, a pre-publication stage, then a publication and finally a submission stage. Often stages are repeated and often draft plans are pulled or delayed at these stages. Literally years pass whilst the draft plan stage is undertaken.

8.2 My strong view is that there should be only one formal stage of consultation for a plan that is then rapidly subject to an examination. Once a LPA has committed to promoting its plan it should be committed to see the plan through to the end of the process including adoption. The delays between issues and options and the examination itself take years and amazingly the time between submission and examination can also be considerable – which is a particular problem when hearing statements are meant to be short and where reliance is to be placed upon representations made at the submission stage which can be years in advance of hearing statements being published[16].

8.3 Finally on process, all too often draft plans are delayed because of changes in national policy or different demographic information etc. This happens repeatedly and in part because NPPF is drafted so as to encourage plans to be as up to date as possible. I would suggest that clarification should be added that 'up to date' should not mean that changes in policy, or other information post-submission means that a plan should not be treated as unsound as a result of information received

[16] In the recently completed Liverpool Local Plan examination the representations before the Inspector were made in 2018, with the examination taking place in late 2020 for example.

after the point of submission. Again this is only appropriate if submission is rapidly followed by examination.

9 Omissions from the White Paper

9.1 Any new system has to grapple with two matters that are not dealt with at all under the White paper, namely green belt and neighbourhood plans, both of which have gained a political prominence which warrants proper consideration of both in order to set up a beneficial system.

9.2 Green belts will need to be reviewed from time to time as the national need increases. LPAs have only rarely put sufficient areas of safeguarded land in place to avoid reviews within the foreseeable future. Some guidance on the longevity of green belt before reviews become necessary would transform the way in which the system operates in practice. For example at the time of the adoption of the Chorley Local plan which was prepared in 1992/93, the guidance was that green belts boundaries were expected to endure for 2.5 plan periods, requiring Chorley to plan for its needs for the ten years of the local plan and to make provision for safeguarded land for a further 15 years thereafter. Those areas of safeguarded land have indeed come forward in the last few years (one in Euxton was recently consented on appeal) and the longevity of the exercise conducted back in 1993 has stood the test of time. Tragically that is both the first and last local plan in which I have been involved that actually planned to an end point for the review of the green belt inner boundary.

9.3 The second omission is that of neighbourhood plans. Whilst these are politically well received they involve they are not properly scrutinised at an examination where not even the flawed test of soundness is used as the yardstick, and worse, the promoters get to choose their examiner. Thus, there is a temptation for such promoters to undertake examiner selection based upon the degree of rigour of their scrutiny of past plans.

9.4 That is not to decry the work of many local communities who work very hard to promote visions for their areas. But rather that there is a need to properly scrutinise the content of such plans if they are to be part of the plan system. I recognise that amendments to how neighbourhood plans are examined requires a legislative change. However putting the legislation on NPs on a proper footing is urgently necessary in any event. The Parliamentary draftsmanship which has led to the legal framework for such plans is Byzantine and requires urgent review. A light touch assessment of the Basic Conditions is not a satisfactory approach to plan making.

10. Refusing Allocated Sites

10.1 The central proposal in the White Paper proposes three zones. For allocations – ie areas of growth the presumption is that an allocation could gain a permission in principle or outline consent. The mischief that this is intended to avoid is the capricious decision of a local authority to go behind its own allocation and delay and/or refuse permission upon an allocated site, with the quid pro quo being that it would be harder for a developer to ‘go behind’ the plan making process as it happens now.

10.2 My very strong view is that such radical reform of the consenting regime simply isn't needed, but rather that the costs regime should be more astutely deployed. Thus, PPG could be readily amended to include an element of unreasonable behaviour for a LPA to refuse outline permission on an allocated site unless the application clearly deviates from the scope of the allocation. There are many instances where the costs regime ought to be more shrewdly deployed which could be done by amending PPG. A LPA could not then refuse permission on an allocated site with impunity if they knew that to do so would risk the costs of an appeal.

11. CIL and s.106 Obligations

11.1 The current system of CIL and s.106 obligations is a dogs breakfast.

11.2 LPAs all too often seem to view s.106 as a power to require a developer to meet a shopping list of aspirations with only lip service paid to the requirements of regulation 122(2) of the 2010 Regulations, and in particular that of necessity. At the point of an application there is an active incentive on the part of a developer to concede contributions however outlandish and it is only those rare cases which go to appeal where any real level of scrutiny takes place.

11.3 Given that the same issues arise time and again there is an urgent need to issue more guidance in PPG as to the sort of things which are warranted under a s.106 obligation and which can be taken into account.

11.4 To that end annex N of the Planning Inspectorate Procedural Guidance in respect of appeals provides what is said to be "good practice" in relation to consideration of planning obligations (see §N.1.2). Paragraph N.3.1 sets out that it is unlawful for a decision maker to take into account[17] covenants within a planning obligation which do not meet the threefold test of regulation 122(2) of the CIL regulations. This guidance is right as a matter of law and chimes with the guidance from the Department for Education cited above. Paragraph N.3.3 provides:

"The following evidence is likely to be needed to enable the Inspector to assess whether any financial contribution provided through a planning obligation (or the local planning authority's requirement for one) meets the tests:

- *the relevant development plan policy or policies, and the relevant sections of any supplementary planning document or supplementary planning guidance;*

[17] The academic debate as to whether there is a distinction between whether such an obligation would be an immaterial consideration or merely not a "reason for the grant of planning permission" was considered in the case of Working Title Films v Westminster [2016] EWHC 1855 (Admin). In that case Gilbart J. concluded that the terms were essentially synonymous (see paragraphs 20 to 25).

- *quantified evidence of the additional demands on facilities or infrastructure which are likely to arise from the proposed development;*
- *details of existing facilities or infrastructure, and up-to-date, quantified evidence of the extent to which they are able or unable to meet those additional demands;*
- *the methodology for calculating any financial contribution necessary to improve existing facilities or infrastructure, or provide new facilities or infrastructure, to meet the additional demands;*
- *details of the facilities or infrastructure on which any financial contribution will be spent."*

11.5 This guidance ought to form part of PPG and should be used to inform the content of s.106 obligations. If examples were given as to what was appropriately contained in a planning obligation and what was not then it would help to address some of the more obvious problems in the current system.

11.6 Part of the problem with the current system is not merely the substance of a planning obligation but also its form. It remains baffling that seemingly every LPA and every solicitor has their own standard form of s.106 enforceable as a freestanding agreement or deed. The publication of standard terms for a s.106 by the Law Society endorsed in PPG would substantially improve this process.

11.7 It would be possible to write at length about the shortcomings of the CIL regime. Suffice to say that it is flawed in terms of how the schedule is arrived at, how it is examined, how it is collected and worst of all how it is spent. Indeed the latter is a real world problem since there is a disconnect between the payment by developers of millions of pounds and the delivery of infrastructure which is needed to accommodate that development.

11.8 My own view is that CIL is an overly bureaucratic, complex, inflexible and complex system which should be revoked, at least outside of the capital, and instead replaced by a direct local tax on the sale of land which has the benefit of an unimplemented planning permission, which would be hypothecated to the delivery of infrastructure.

11.9 That said there is a need to amend s.106 to enable positive rights to be extracted from developers. For example to require developers of allocations in multiple ownerships to provide rights over their land to accommodate, without ransom, the delivery of other parts of the allocation.

3.11 For my part, the revocation of the system of CIL and its replacement by a simple Infrastructure Levy may very well be the solution, provided that it is simple and that funds are clearly directed towards local infrastructure. At present there is a clear disconnect between the payment of CIL and the ability to predict when the infrastructure which it is directed towards will actually be built. That said, given the lack of clarity in policy in case law[18] as to the appropriateness of pooled resources secured

by multiple s106 obligations – some additional guidance upon such pooled resources would plainly be beneficial.

4. Overall

4.1 Fundamentally much of the above does not need primary or even secondary legislation but could transform our current system. Minor surgery which could be undertaken comparatively rapidly ought to be tested before a more major intervention is tried which could rip the heart out of the system, at a time when the nation needs a system which works.

4.2 I have said nothing about pillar 2 since there is little to really reflect upon. I would observe that it is only in the last 20 years that design has been a legitimate planning concern so far as to national policy is concerned. Thus the 1988 and 1992 versions of PPG1 made it clear that design was not a matter for the planning system save that obviously bad design was to be resisted. That changed in 1997 with a further version of PPG1, and in 2001 with the publication of "By Design" by the DETR, which set out a series of "good practice" factors to which good design should conform. The withdrawal of that guidance has been a deeply retrograde step since it provided a touchstone to judge schemes. It also made it clear to LPAs that design is a matter upon which anyone may have a subjective judgment, but it is actually a matter upon which expertise matters, and it encouraged the auditing of schemes where design might be in issue. That process of audit by an independent expert resulted in very many appeals being avoided in my experience and it is a shame that its endorsement is nowhere to be found within national policy.

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[18] See Manor Oak v Secretary of State for Communities [2019] EWHC 1736 (Admin)

APPENDIX 2

PAUL G TUCKER QC'S LOCAL PLAN EXPERIENCE

In terms of local plans, I have promoted the following:

Garstang and Over Wyre LP Inquiry 1992;

Chorley LP Inquiry 1993 and its review in 2001;

Stafford LP Inquiry 1994

South Lakeland LP Inquiry 1996

Alyn and Deeside LP Inquiry 1995;

Scarborough LP Inquiry 1996

Ryedale LP Inquiry 1999

Lancaster LP Inquiry 1998

Lancaster Core Strategy Examination 2006

Northumberland National Park LP Inquiry 1995

Fylde LP Inquiry 2001

Blackpool LP Inquiry 2004

Blackburn LP with Darwen Inquiry2010

Blackburn Core Strategy Examination 2010

Sefton UDP review Inquiry2004

Walsall UDP review Inquiry 2006

East Riding of Yorkshire LP Part 1 & 2 Examination 2015

I have also appeared in the following acting for objectors (dates are approximate dates of appearance):

East Riding of Yorkshire LP 1993

West Lancashire 1994 & 2013

Trafford UDP 1995

Macclesfield Local Plan 1997 & review 2003

Vale Royal Local Plan Review 2000

Lancashire Minerals and Waste LP 1998

Cheshire East Local Plan Strategy 2015 (multiple objectors)

Cheshire West LP (pt1) 2013

Halton LP 2012

Leeds UDP 2001

North Shropshire 2010

St Helens 2015

Grantham AAP 2016

Stratford on Avon 2017

NW Leicestershire

N Warwickshire 2018

North Devon 2019

York LP 2019

North Essex Authorities Joint LP examination 2020

South Oxfordshire LP 2020

I am presently instructed in promoting or advising upon the following Local Plans:

Warrington LP (submission now delayed but had been due to be submitted 2020);

Liverpool LP (at examination at the time of writing)

Eden LP review (2020)

Leicester LP (not yet submitted)

Stoke on Trent & Newcastle under Lyme Joint LP (not yet submitted)

I have also advised upon the following on behalf of the LPA, although other counsel promoted the LP:

Wyre LP Review 2019

Sefton LP 2017

I have not included the CIL charging schedule examinations I have been involved in, which raise similar issues in terms of the lack of scrutiny of the process. Nor have I included those instances where I advised an objector but ultimately did not attend the examination/inquiry.

November 2020