



Responding to Barker 2: *A Presumption in Favour of Development?* *Initial Discussion Paper*

Introduction

1. This RTPI discussion paper has been drafted to assist consideration of the recommendations of the Final Report of the Barker Review of Land Use Planning (the Barker 2 Report). It focuses on the implications of Recommendation 1 of the report for spatial planning decision-making and the delivery of sustainable development.

Recommendation 1

DCLG should revise the policy framework for decision-making, in the context of the plan-led system, to make clear that where plans are out-of-date or indeterminate applications should be approved unless there is good reason to believe the costs outweigh the benefits.

One way of implementing this would be to make clear that where an application for development is in accordance with the relevant up-to-date provisions of the development plan, it should be approved unless material considerations indicate otherwise. Where development plan provisions are indeterminate or where they are not up-to-date, the application should be approved unless there is a significant probability that the likely environmental, social and economic costs of the development will outweigh the respective benefits.

2. In the discussion leading up to Recommendation 1, the Barker 2 Report strongly endorses the retention of a broadly 'plan led' system in England. The report considers the 1990 reforms that introduced the presumption that applications should be determined in accordance with the development plan. It broadly endorses the approach taken in those reforms, but does raise concerns about circumstances in which the plan might be out-of-date or indeterminate. In such circumstances, the report proposes that there should be return to a 'presumption in favour of development', but expressly does not favour a return to the formulation in the 1971 Town and Country Planning Act, that development should proceed unless there is 'demonstrable harm to interests of acknowledged importance'. Instead, the report considers that development should proceed in such cases 'unless there is a significant probability that the likely environmental, social and economic costs of the development will outweigh the respective benefits'.
3. This paper considers the issues arising from this discussion and makes an initial recommendation for an RTPI policy direction in response.

The issues

4. In responding to this proposal, the RTPI needs to consider the following issues:
 - Is there an underlying justification for Recommendation 1?
 - Is the proposed presumption appropriate?
 - In what circumstances might a plan is indeterminate?
 - In what circumstances might a plan is out-of-date?
 - Are there any other approaches that might be applied to achieve the same broad policy objective?

Underlying justification

5. There does appear to be a partly historically valid underlying concern that Recommendation 1 seeks to address, which can be summarised in the following terms.
 - Before the 2004 legislation was passed, speed in delivery and the provision of up-to-date policies were not the strongest elements of English development plan practice.
 - Relatively cumbersome statutory processes, combined with a view of the plan as a single document made responsiveness and policy maintenance difficult and slow for local planning authorities.
 - Plan monitoring and review were also neglected and under-resourced functions in some local planning authorities.
 - This in turn translated into circumstances where some supportable development proposals that responded to new drivers were not necessarily supported by plans, leading to refusals justified on the basis of proposals being contrary to policy, or to refusals or delay based on prematurity.
 - Development types for which this can be particularly frustrating are those which are innovative and were unforeseen by the plan in force: suggesting that planning can slow development that seeks to respond to new social, economic or environmental trends and new technologies.

6. However, having recognised the validity of this critique, the RTPI contends that its only basis is in historic evidence. The criticisms arise most strongly from the post 1990 plan-making system, making little allowance for the potential benefits flowing from an effective implementation of the 2004 reforms. These, if well implemented, should deliver the following relevant changes that should largely address the concerns identified in the Barker 2 report.
 - The development plan is no longer a monolith.
 - At the local level, it has been broken up into the Local Development Framework (LDF), a basket of development plan documents.
 - These documents are intended to deliver appropriate detail, targeted to identified places and subject matters, reducing concerns about excessive and irrelevant detail in one part of the plan, as against an absence of policy in another part.
 - They are intended to be subject to more responsive and individualised review processes, reducing concerns about timeliness and prematurity.
 - They can be reinforced or explained in supplementary planning documents with relative speed, and there is a much stronger expectation that this can be done than under the previous system.
 - The development plan now includes over-arching regional content in the Regional Spatial Strategy (RSS), which ensures a broad policy coverage on most subject matters, even if local content is missing or out-of-date.

7. To the extent that the new system is not yet seen as delivering a reduction in delay and refusal due to out-of-date policy or prematurity, this is because:
 - The new development plan system is not yet widely in force.
 - Local planning authorities are still bearing the transitional pressures and costs of implementing the new system, as opposed to administering it in 'business as usual' mode.
 - Despite the improvements achieved through the Planning Delivery Grant (PDG), underlying questions of the adequacy of resources for plan making, monitoring and review at the local government level have still to be fully addressed.

8. Taking these issues forward, the RTPI view is that, subject to effective implementation and monitoring of the new development plan system for England, there is no demonstrated justification for a change to the presumption in favour of the development plan of the type contemplated in Recommendation 1. This view is amplified further in the following discussions.

Appropriateness

9. The above analysis makes clear that there is no evidenced necessity for the presumption in favour of development sought by Recommendation 1. However, if one assumes that such a presumption is or becomes at some future time justified by the evidence, it still remains important to consider the appropriateness and potential effects of the formulation that has been proposed.

10. The starting point must be that the formulation set out in the Barker 2 report is somewhat vague. The report states:

Building on recent reforms aimed at supporting positive planning, a more helpful formulation would be to make clear that development should be allowed unless there is good reason to believe that the environmental, social and economic costs of the development outweigh the benefits. Decision-makers would still, as now, need to assess the likely environmental, social and economic impact of development and where there is good reason to believe that the costs outweigh the benefits then the application should be turned down.¹

11. The precise meaning and an effective test by which to determine whether there is a 'good reason to believe...' require to be robustly set out, if such a formula is not to provide a foundation stone for dispute, litigation and delay.

12. It is also necessary to understand whether this formulation turns strictly on economic understandings of benefit and cost, as employed in classical analyses of cost-benefit. If so, the RTPI expresses considerable concern at the deployment of such methods without the inclusion of matters that are highly relevant to spatial planning decision outcomes but are not subject to routinely accepted and acceptable techniques of economic evaluation, ranging from quality of life through visual amenity and biodiversity to (until the heroic efforts of Sir Nicholas Stern's recent report on climate change) atmospheric gas balance and climatic stability, to provide but a few immediate examples.

13. The RTPI considers that such a broadly defined presumption in favour of development could lead to manifestly perverse outcomes, where national policies and imperatives could be overlooked and adverse social or environmental consequences flow, simply consequent on the fact that a plan was argued to be indeterminate or out-of-date. Whilst it can be argued that such effects would provide a clear incentive to local communities and planning authorities to attend to the serious task of making up-to-date plans, it appears most inappropriate that the nation or humanity as a whole should then have to shoulder the costs and burdens of manifestly unsustainable and inappropriate development that might opportunistically eventuate in locations with less well developed planning frameworks.

14. It is in response to these considerations that other governments and planning systems faced with the same dilemma have turned to the concept of 'net community benefit'. This broad concept enables the balanced evaluation of a range of social, economic and environmental effects, including those not conventionally capable of monetary or quantitative analysis, but yet relevant to spatial planning and other decision making. Net community benefit considers the balance of a broad range of factors, for example:

(G)overnments take into account the following factors when assessing the merits, or appropriateness, of reforms:

- government legislation and policies relating to ecologically sustainable development;
- social welfare and equity considerations, including community service obligations;
- government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- economic and regional development, including employment and investment growth;

¹ At paragraph 1.12

- the interests of consumers generally or of a class of consumers;
- the competitiveness of [...] businesses; and
- the efficient allocation of resources.

The list is non-exhaustive, meaning that any other relevant matter may also be considered...²

15. More directive approaches, setting over-arching objectives for use in planning decision making can be found in some overseas legislation, for example:

- To provide for the fair, orderly, economic and sustainable use and development of land.
- To provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity.
- To secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria.
- To conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value.
- To protect public utilities and other assets and enable the orderly provision and coordination of public utilities and other facilities for the benefit of the community.
- To facilitate development in accordance with the objectives set out in the points above.
- To balance the present and future interests of all Victorians.³

Net community benefit can also take into account relative policy weightings and make these transparent.⁴

16. The RTPI takes the view that if there is to be a renewed presumption in favour of development, this should be subjected to a test of 'net community benefit' or a similar integrating requirement, which takes express account of a defined range of planning and sustainable development objectives. It should not be an open or unbounded cost-benefit test. Nor should it be open to arguments that it only considers those factors capable of classical cost-benefit analysis. Guidance to its application should be provided, to make these issues clear.

Indeterminate plans

17. Turning to more detailed considerations, one concern expressed in the supporting text to Recommendation 1 is that plans might be indeterminate in respect of proposals, which should therefore benefit from a presumption in favour of development.

18. The RTPI considers that it is important to consider what 'indeterminacy' means. The Barker 2 Report is not clear and in respect, there are two broadly applicable meanings.

- A plan may be considered indeterminate if, having regard to the balance of its policies, it contains none that are at all relevant to the decision at hand. The RTPI refers to this as the 'silence' of the plan.
- A plan may alternatively be considered indeterminate if, having regard to the balance of its policies, it contains relevant policies, but these conflict to the extent that they could be seen as being self cancelling or neutral in net directive effect. The RTPI refers to this as the 'competing policy balance' question.

² The net community benefit test for the purposes of national competition policy (NCP) administered by the Commonwealth Government of Australia, under clause 1(3) of the Competition Principles Agreement.

³ Section 4(1) of the Planning and Environment Act 1987, Victoria, Australia, as extracted in the Victoria Planning Provisions (VPP).

⁴ See for example the Panel Report into Moira Amendment C6: the Strathmerton Deviation of the Goulburn Valley Highway, Planning Panels Victoria, Australia, 26 February 2001.

In all other cases a plan should be determinate, in that it should provide a net policy direction to inform the decision maker.

Silence

19. The RTPI observes that in the post 2004 planning system, the development plan should seldom be silent, for the following reasons.
 - Regional Spatial Strategies (RSS) (including the London Plan in London) are now part of the development plan.
 - This means that all areas of England have high level, strategic and spatially directed policy that should be up-to-date and maintained as such.
 - The pre-2004 circumstance of a 'backsliding borough', subsisting on a 1947 Act development plan as its sole source of policy is no longer relevant to planning decision-making.
20. If an individual local government area persists in failing to renovate the local content of its planning policy framework, the RTPI considers that in most case, the RSS will contain broadly relevant strategic direction and that there should continue to be a presumption in favour of the application of these policies as part of the development plan.
21. For this reason, the RTPI considers that it will be genuinely rare that the development plan as a whole will be silent in respect of any significant proposal. If this is the case, the proposal is likely to be one that is significantly innovative or audacious, and in either sense unforeseen and requiring careful consideration, not presumptive determination.
22. The RTPI agrees with the Barker 2 analysis that such circumstances should not give rise to a presumption against development. However, neither should they give rise to a simple presumption in favour of development. It should always be necessary to have regard to the thrust of national policy including any statutory purposes or objectives of planning to deliver sustainable development and the policies set out in Planning Policy Statements (PPS). The RTPI argues that these give rise to a strong 'default policy setting', which should always apply to proposals where the development plan is genuinely silent. There will be very few cases indeed in which this framework throws no directing light to assist the decision maker.
23. To the extent that this might be argued to be necessary to achieve this end, the RTPI would support a proposal that PPS policy could obtain an equivalent standing to or even form part of the development plan itself. Legislative amendment would be required, but would be relatively minor and simple. Such an approach may sound radical, but in reality is little different to the 2004 decision to transform Regional Planning Guidance (RPG), a statement of regionalised government policy taking effect as a 'material consideration,' into a component of the development plan. The only decision of major relevance to government would be whether to enable PPS policy to undergo an 'examination' prior to approval, or whether to accept the existing conventions of consultation as being adequate to stand in place of a more formalised approach.
24. Irrespective of action on this proposal, the RTPI considers that the decision maker should in any case retain the capacity to consider 'other material considerations', a capacity that is most valuable when the development plan is genuinely silent. This formulation is well understood and case law since 1947 has settled most foreseeable concerns about its application. It has the effect of ensuring that decisions are not taken in a perverse manner or leading to demonstrably harmful or net unbeneficial outcomes. It acts as a control of 'common sense' over audacity and ensures that arguments over the silence of plans do not become justifications for forms of use or development that would be manifestly unacceptable in any well-planned location. Additional guidance to support this role of the decision maker could be provided if deemed necessary.

Competing policy balance

25. The RTPI would be strongly concerned at a proposal that may have the effect of applying a presumption in favour of development in circumstances where a plan contains relevant policies, but it is argued that the effect of conflict between these is to lead to a balance of policy neutrality. Such an approach could only lead to obfuscation and the drawing of legalistic distinctions in policy analysis which would in turn cause delay and fuel disputes.
26. The balancing of competing policies is a core professional skill of planners, but applicants and the public are entitled to know how this skill is exercised in practice. Reports for decision should make clear the policies that are relevant. To the extent that relevant policies compete, reports should make clear which have been found to take precedence, and why.
27. If any reform is needed in this area, it should be to achieve greater methodological clarity, consistency and transparency in planners' approach to the balancing of competing policies. The RTPI would be happy to engage with government and planning researchers to develop further guidance in this critical area of practice.

Out-of-date plans

28. As will be clear from the preceding paragraphs, once the post 2004 development plan system is past its transition implementation stage, the RTPI considers that out-of-date plans should be rare indeed. The approach to circumstances in which an element of a plan is out-of-date should be as follows.
 - Where a relevant Development Plan Document (DPD) is out-of-date, an application should be determined having regard to underlying policy in the LDF Core Strategy. This process could be assisted by reference to a relevant and up-to-date Supplementary Planning Document (SPD).
 - Where all LDF documents, including the Core Strategy and any relevant SPDs are out-of-date, an application should be determined having regard to underlying policy in the RSS.
 - Where the RSS is also out-of-date, an application should be determined having regard to legislative planning objectives and PPS policy. Again, if it would assist, PPS policy could become part of the development plan or be provided with a statutory status equivalent to development plan policy for this purpose.
29. In such a context, there will very rarely be an entirely 'out-of-date' development plan. The only significant likelihood is that the LDF may lack otherwise beneficial elements of local specificity: and in the context of reasonable resource availability, the RTPI considers that the risk of this position can fall on the local government area that has failed to maintain it. In that there is a risk that local considerations that an up-to-date plan might have identified remain unidentified and are hence not considered, this does appear to be an appropriate incentive to local planning authorities to maintain up-to-date local policies.
30. It follows that the RTPI does not consider that it will be necessary to design a specific presumption to benefit circumstances where the plan as a whole is 'out-of-date'.
31. Further, if such a presumption were to be designed, care would be needed in achieving a clear description of what is meant by 'out-of-date'. Unless some clarity is provided, dispute and delay would be fuelled by essentially sterile arguments about the degree to which a few weeks or a few months slippage in anticipated Local Development Scheme (LDS) delivery entitled an applicant to benefit from a presumption such that otherwise relevant and weighty LDF policies could be disregarded.

Recommendations

32. It appears from the above that once sound, continuously monitored and improved Local Development Frameworks are in place over much of England, the concerns underlying Recommendation 1 of the Barker 2 Report will cease to be seen as significant, to the extent that they justify the application of a new 'presumption in favour of development' as opposed to a presumption in favour of the development plan.

Recommendation 1: To achieve the end sought by Barker 2 Recommendation 1, the government should continue the trajectory of the 2004 reforms to:

- **change the culture and skills of planners to deliver the expectations of the new system, through initial training and lifelong learning;**
- **identify and share best practice in LDF plan making, monitoring and review; and**
- **address the systemic under-resourcing of plan making at the local level.**

33. The RTPI will continue to work in partnership with government entities such as CLG, IdeA, PAS and ASC to deliver these outcomes. It will continue to forge closer links with professional and sectoral bodies such as RICS, POS and the LGA to the same ends.

Recommendation 2: To reinforce the up-to-date and determinate nature of development plans in all but a very few cases, the government should consider:

- **including PPS policy within the statutory definition of the development plan; and**
- **providing clear guidance on the preferred approach to the balancing of competing planning policy interests.**

Recommendation 3: If government considers it necessary to introduce a new presumption in favour of development, it should not be introduced in the terms of Barker 2 Recommendation 1. Any new presumption should expressly refer to the concept of 'net community benefit' or a similarly defined system of integrative policy consideration. It should require the achievement of defined over-arching planning objectives.

34. The RTPI will gladly assist government with the further development and refinement of the concepts outlined in this paper.