Lord Carnwath CVO

Landmark Chambers, 180 Fleet Street, EC4A 2HG

To the Rt. Hon. Robert Jenrick MP,

Secretary of State for Housing, Communities and Local Government

29 October 2020

Dear Secretary of State,

Planning for the Future – White Paper August 2020

I write in response to the consultation on the recent "White Paper". I do so as one who has worked with the planning system for some 50 years, for 24 years as a specialist practitioner, and for the last 26 years as a judge hearing cases at three levels of the judicial hierarchy including the Supreme Court. I have some direct experience of previous attempts to reform the planning systems: beginning with the Dobry review in the 1970s (which I assisted), through my own 1989 report on the Planning Enforcement system (leading to the reforms in the Planning and Compensation Act 1991), and (most relevantly to the present exercise) the so-called "fundamental" reform of the system initiated by the Labour administration in 2001-4. I also have considerable experience of law reform more generally, both through my period as Chairman of the Law Commission (1998-2001), and as Senior President of Tribunals (2004-2012) leading the implementation of the Leggatt proposals for reform of the tribunal system.

I attach a paper prepared for me by Matthew Dale-Harris (a planning junior in Landmark Chambers) summarising some of the attempted reforms over the last 50 years, including the 2001-4 reforms. In 2000, as Chairman of the Law Commission, I was one of a group of planning law experts invited by the Minister to advise on potential reforms. As I recall, our joint advice was that the system was in general sound, and did not need radical overhaul, but rather targeted improvements and better funding. As noted in Matthew's paper, that advice was echoed in strong terms in 2001 in a detailed report by a Parliamentary Committee. Unfortunately, as it now appears, that advice was largely ignored by the then government, which pressed ahead with the major changes enacted in the Planning and Compulsory Purchase Act 2004. As shown by Matthew's note, there have been frequent and often inconsistent changes since then, which have achieved little more than adding to the complexity of the system. (They are critically examined in responses to your paper which I have seen from Paul Tucker QC and Richard Humphreys QC, who both have much more detailed practical knowledge than I.)

Against that background, my simple advice to government now is not to repeat the mistakes of the past. In my experience of 50 years, the planning system is soundly based and in general has served us well, but has not been assisted by frequent changes of policy direction. There appears much in principle to admire in the White Paper, such as simplifying the plan-making process, improving design quality and delivering a more responsive and modern approach to consultation and infrastructure planning, although the detail needs to be worked out. However, with respect to the Prime Minister, there is no justification for (in the words of his introduction) "levelling the foundations and building, from the ground up, a whole new planning system for England". Radical reform is rarely a sensible solution, not least because of the disruption it causes. The White Paper does not begin to make a case for it in the present context.

In short, in answer to your first consultation question, my three-word description of the present system would be: “robust, but over-cluttered, and under-resourced”. The aim should be to build on the strengths of the existing system, reduce the clutter, and ensure adequate resources, in terms of finance and personnel; and above all to provide a period of policy stability to allow the reformed system to be settle down and gain public understanding and confidence.

Yours sincerely,

Robert Carnwath

Enclosed: “Plan-making: a summary of changes since 1968”, Matthew Dale-Harris, Landmark Chambers

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Enclosure 1

Plan-making: a summary of changes since 1968

Matthew Dale-Harris, Landmark Chambers

1. In 1968, when Lord Carnwath began practice at the planning bar, the plan system established in 1947 was undergoing its first major set of formal changes as a result of the Town and Country Planning Act 1968[1]. That Act replaced the earlier development plans which the 1947 Act had mandated by introducing a new two-tiered system of structure plans and local plans. The intention was that structure plans, which were to be approved by the Minister, would set out a broader framework of policies for a period of up to 20 years, supported by key diagrams rather than detailed plans. Local detail was to be hived off to local plans which, provided that they conformed generally to the structure plans, would not need further ministerial approval[2]. This "*radical change of approach*" was said to be the only workable way of unclogging the plan-making machine and speeding up the plan-making process.[3]

2. There were significant concerns as to whether the reforms to plan-making should be made in advance of the local government organisation then being developed by the Royal Commission on Local Government in England[4]. Those reforms, finally set out in the Redcliffe-Maud Report (1969)[5], sought a rationalised framework of unitary authorities. Those proposal foundered in the wake of the 1970 general election led to the patchwork of unitary and non-unitary authorities alongside which the division of planning responsibilities sat uneasily[6].

3. Attempts were made to patch them together, including through the creation of development plan schemes under the Town and Country Planning Act 1971. County

[1] Previous amending acts since 1947 had dealt mainly with compensation, and left the development control and development plan system virtually untouched: see
[2] See sections 6-9 of the 1968 Act as enacted.
[3] See the speech given by the Minister for Housing and Local Government (Mr Anthony Greenwood) when moving the second reading of the Bill: HC Deb (31 January 1968). vol 757, cols 1362 and 1366
[4] See HC Deb (31 January 1968). vol 757, cols 1365
[5] Cmnd. 4040.
[6] H.W.E. Davies, "Continuity and Change: the Evolution of the British Planning System, 1947-97", Town Planning Review vol. 69, no.2 (April 1998), pp.135-152, p.143

planning authorities were mandated to prepare development plan schemes which designated the local plans to be prepared within the county area, and the authorities responsible. However, the underlying consequences of a more patchwork pattern of local government caused delays and unevenness which had still not been remedied in 1982.[7]

4. The 1970s also saw the introduction of the Community Land Act 1974 and attempts to reform development control management. These included the commissioning of the Dobry Report in 1975.

5. The 1974 Act reflected a desire to nationalise planning gain, which had originally been found in the 1947 Act. The Act gave local authorities the power to acquire land by compulsory purchase as market value less any development land tax paid by the owner[8]. However, the complexity of the legislation led to major difficulties in implementation and the programme of local government retrenchment from December 1976 reduced local authority borrowing capacity, beginning a trend back to a market-led approach to development. The Community Land Act itself was repealed by the Conservative government elected in 1979 but the tensions between a state and market led approach to land-use planning persisted well into the 1980s.

6. The Dobry Report focused on proposals designed at speeding up development control decisions in the context of a development boom in the early 1970s which had led to significant backlogs with the Department of the Environment taking between 8-18 months to rule on an appeal[9]. His recommendations were in large part not taken up, but many, such as the use of standardised application forms and target timeframes have now been incorporated.

7. From the mid-1980s, plan-making was further complicated by the development of regional guidance in addition to the structure and local plans which were, by now, largely in place. Initially, regional guidance began to be promulgated by the Secretary of State on an ad hoc basis, with the primary focus on identifying broad spatial areas and specifying overall housing and employment requirements. These documents, together with the development of the planning practice guidance notes, arguably

[7] M. J. Bruton, "Local Plans, Local Planning and Development Plan Schemes in England 1974-1982", Town Planning Review, Vol 54, No. 1 (Jan., 1983), pp. 4-23.
[8] Originally 80% of gains realised, subject to an allowance for low gains.
[9] Duerksen C.J, "Dobry on Development Control in England", Real Property, Probate and Trust Journal, Vol. 11, No. 2 (Summer 1976), pp. 304-320, pg. 304.

limited local authorities' degree of independence over the content of local planning policies.[10]

8. The Planning and Compensation Act 1991 made some minor changes to the plan-making process by streamlining the procedures to be employed. It also brought about a more significant change in status by introducing what was then s.54A of the 1990 Act (now s.38(6) of the 2004 Act) which required planning decision s to be determined in accordance with the development plan unless material considerations indicate otherwise.

9. The production of regional guidance continued to expand throughout the 1990s, becoming more formalised following 1997 when the then Government brought in regional assemblies through the Regional Development Agencies Act 1998. These were charged with producing draft regional planning guidance, to be submitted for examination to the Secretary of State who then promulgated a final version of guidance. This process proved burdensome and slow and was criticised for leading to a degree unwanted repetition and overlap, particularly for documents which did not form part of the statutory development plan.

10. In December 2001, the government of the day published its Green Paper on "Planning: Delivering a Fundamental Change"[11], accompanied by 'daughter' papers on planning obligations, infrastructure and compulsory purchase. In terms which are echoed in today's White Paper, the Green Paper identified a new for "*radical reform*" on the basis of a range of broad criticisms of the planning system as it stood. These included (i) its complexity, (ii) a lack of speed in dealing with applications or updating and implementing plans (iii) a lack of predictability (iv) lack of resources available to planning departments and (v) problems with community engagement. The Green Paper proposed abolishing structure plans and local plans and replacing them with a local development framework at the district level which would involve a stepped system of policies, with core policies supplemented by specific action plans; it also sought to replace regional planning guidance with regional spatial strategies and proposed the review and simplification of national policy in the PPGs and MPGs.

[10] Davies, above, pg 149
[11] Planning Green Paper: Planning: Delivering a Fundamental Change (19 December, 2001).

11. The level of opposition to the proposed changes was substantial. In particular it is worth noting the report of the Transport Local Government and the Regions Committee[12], which heard evidence from a wide range of users and produced a report in unusually damning terms.

12. In relation to the proposals for local development frameworks, the Committee said that they:

> "have many failing and lack many of the advantages of Unitary Development Plans and Local Plans. The new Local Development Frameworks may be quicker to draw up but they are unlikely to be as clear."

13. They recommended the retention of the UDP/local plan system, which they said was now almost complete[13] but made suggestions for improvement including the removal of repetition and imposition of stricter timetables for plan preparation[14].They also observed that:

> "209… There is a substantial price to pay in the transition for any new procedures, only worth paying if the resulting framework is a substantial improvement over the existing one. We have found little evidence that it would be.
>
> 210. We conclude that the Government's proposals are unworkable as a whole. We share the Government's enthusiasm for clearing the stuffy air which surrounds planning. We wish to encourage innovation and enthusiasm for the immense positive contribution which planning can make to public life. Yet the Green Paper shows a lack of grasp of the real issues over outward appearances…
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> 211. The Committee was astonished by the lack of attention to the most obvious problem facing the delivery of an effective planning service, namely its under-resourcing. There is a shortage of professional and experienced planning staff in most local authorities, low morale and a recruitment problem. Ministers' obsession with shaming authorities with poor performances, measured largely in terms of speed rather than quality of decisions, has no doubt contributed to this. Meanwhile, local authorities divert money away from planning to other more politically attractive uses."

14. The government responded to the Committee's report in terms which largely re-emphasised the case that had been made in the Green Paper.[15] While significant amendments were later made during the Bill's passage through Parliament, the central

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[12] Transport, Local Government and Regional Affairs Committee's 13th Report, Vol 1: Report and proceedings of the Committee, HC 471-1.
[13] Para 61
[14] Recommendation (j), pg 44
[15] Cm. 5625. Government's Response *to the* Transport, Local Government *and* Regional Affairs Committee's 13th Report

features of abolishing structure plans and creating regional spatial strategies out of the former planning guidance remained in place.

15. The disruption caused by the 2004 Act to the process of creating of a complete suite of development plan documents for England was significant. First, the replacement of the old local plans with local development frameworks caused many local authorities to abandon their emerging plans in order to focus on the new system. Second, the new system – of 'thin' core strategy, to be followed by more detailed allocations plans and development management plans or action plans – turned out to be more time consuming and contentious than anticipated. In particular, arguments about housing need figures proved difficult to resolve quickly and plans stalled at the core strategy stage, acquiring extra detail and complexity in the process.

16. It is telling to consider the assumptions of the Government as evidenced in the transitional provisions to the 2004 Act. Schedule 8 kept plans made under the previous regime in force for 3 years, with a reserve power to direct older plans to remain in force for longer. Strikingly many local authorities have still not yet adopted "new" plans under the 2004 regime and still benefit from these "saving directions".

17. Since 2004, there have continued to be significant changes to both the legislative structure of plan-making and the applicable policy on a regular basis.

18. In 2004, the Barker Review of housing supply[16] identified a need to combat rising housing unaffordability and the need to deliver more housing. Kate Barker made a series of recommendations – specifically around the need for the planning system to take account of and use market information – and also proposed a stronger role for regional planning bodies as a means to set out advice on affordability targets and housing numbers[17]. These recommendations led to the publication of Planning Policy Statement 3: Housing, which sought a much higher level of housing delivery, although there was significant delay between the publication of the draft PPS3 and its coming into effect: it was not treated as capable of superseding extant development plan policies until April 2007.

19. The Barker Review's endorsement of regional planning as a route to the delivery of housing numbers was then contradicted by the policy changes which led to the attempted revocation of regional spatial strategies following the Local Democracy

[16] Barker Review of Housing Supply, (17 March, 2004)
[17] See Executive Summary at paragraphs 20-24.

Economic Development and Construction Act 2009. This step moved the onus of determining housing and employment needs (one of the central aspects of the approach under PPS3) to the district level, leading to a significant increase in the technical burdens associated with district level plan-making – as well as giving rise to substantial political controversy at a local level.

20. Further disruption accrued from the way in which the revocation was carried out. The Secretary of State's attempts to revoke the strategies in effect by first letter informing planning authorities of his intention to revoke under the 2009 Act and then again by letter referring to the relevant clause in the draft Localism Bill were subject of a number of claims; with the first being quashed by the High Court in ***R. (Cala Homes (South) Ltd) v SSCLG*** [2010] EWHC 2866 (Admin) and the second upheld on appeal in [2011] EWCA Civ 639. In the interim, a great deal of uncertainty was produced in relation to the status of the still extant strategies – giving rise to argument for the local authorities seeking to bring forward plans in consistency with them.

21. The Localism Act 2011 finally resolved this complication but introduced others. A new tier of development plan (the neighbourhood plan) was created which is also capable of allocating sites but able to do so on the basis of a materially less exacting examination process (compliance with the basic conditions rather than soundness).

22. The 2011 Act also introduced the duty to cooperate. This duty, in its draft form, was criticised by the Communities & Local Government select committee who said in 2011[18] that:

> "69. The language of this proposed provision combines the vocabulary of aspiration and encouragement, which would seem to have little place in law, with vague and imprecise references to future central Government guidance. The courts could be asked to decide whether people are engaging "constructively" and whether their responses are "substantive"; meanwhile, people will have to "have regard to" the Secretary of State's guidance about how the duty is to be complied with. This strikes us as bad law, poorly conceived, shoddily drafted, and opening the door to judges, rather than democratically-elected representatives, deciding on how the planning system operates. "Constructive, active and ongoing engagement" between authorities on planning issues would be welcome, certainly: but there remains doubt as to whether the duty as defined in the Bill will have the effect of encouraging local authorities to work together to help deliver priorities that cannot be delivered within a single authority's area. The Bill does not define a failure to co-operate, does not refer to the resolving of conflicts when local authorities cannot resolve them by themselves and does not specify any sanctions for failure to co-operate."

[18] At paragraph 69

23. The duty has become a significant hurdle to successful plan promotion, in large part because it is not possible to remedy any deficits once a plan has been submitted for examination: ***Samuel Smith (Tadcaster) v Selby*** [2015] EWCA Civ 1107 at 46. The broad terms in which the duty has drafted have also led to unpredictable application – with Inspectors being called upon to undertake a "rigorous examination" of the documentation demonstrating 'constructive engagement': ***R(Central Bedfordshire) v SSCLG*** [2015] EWHC 2167 (Admin) – rigorous examination often leading to findings of breach as experience of recent inspectorate rulings[19] shows.

24. A simpler, and possibly more successful reform came through the introduction of the Town and Country Planning (Local Planning) (England) Regulations 2012 which freed authorities from a requirement to produce separate core strategies.

25. 2012 also saw the introduction of the NPPF – in the place of the more extensive but also more detailed PPSs. While the expressed aim of simplification was achieved in one sense, through a much slimmer document, the brevity of the document generated some additional problems by reducing certainty for both decision-taking and plan-making. For example, cases like ***Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government*** [2015] P.T.S.R. 274 arose by reopening old questions that had previously been clear under the old planning practice guidance (in that case the approach to the green belt policy balance); while cases on the application of the presumption in favour of sustainable development continue to trouble the courts, even after the decision of the Supreme Court in ***Secretary of State for Communities and Local Government v Hopkins Homes Ltd*** [2017] 1 WLR 1865.

Conclusion

26. Standing back for the overview it is clear that significant, even "radical" reforms have been a regular (if not quite constant) feature of the English planning system. While it is beyond the scope of this analysis to say whether the system has worked *well*, it is clear that the central themes of encouraging growth, speedy resolution of disputes, engendering certainty and opening up public participation have been constant goals across each generation of reformers; and that the changes which those reformers have brought about have not always been beneficial. This seems to have been especially so where the changes were brought precipitously, or where they have not supported by

[19] See for example Chiltern and South Bucks (7 May 2020); St Albans (14 April 2020); Sevenoaks (13 December 2019); and Wealden (20 December 2019)

adequate preparation or resources. It is also seems to me that, looking at the history of the last 70 years as a whole, the story of English land use planning has had a number of successes and it is far from clear that any comparable nation has achieved an unequivocally better balance between the competing interests of citizens, businesses and the natural environment.

27. In this respect it is the radicalism of the White Paper which gives particular cause for concern – founded as it seems to be on a critique which overstates the problems of the present system.

29 October 2020.