

# Planning in Wonderland?

Sue Chadwick argues that the NPPF presumption in favour of sustainable development undermines rather than preserves the Brundtland principles from which the term 'sustainable development' has evolved

On 20th December 2010 the Minister of State at the Department for Communities and Local Government announced plans to publish "a simple and consolidated national planning framework that covers all forms of development and sets out national economic, environmental and social priorities"<sup>2</sup>. This document would also include a presumption in favour of sustainable development, as part of a "strong basis for economic growth". The presumption imported an evaluative criterion into the legal test that – unlike the concept of development – had no formal or enforceable definition. This article argues that the Framework presumption in favour of sustainable development can be used to restrict or permit planning permission for a wide range of developments, with little regard either to previous local or national policy approaches or traditional understandings of sustainable development. This undermines, rather than preserves the Brundtland principles from which the term sustainable development has evolved.

The term sustainable development was of course already in use in a range of international and national policies. In the report 'Our Common Future' presented to the World Commission on Environment and Development to the UN General Assembly in 1987 Gro Harlem Brundtland stated that "Humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs"<sup>3</sup>. This has often been used as a 'definition' since and indeed is included in the Framework itself.

However, the Framework does not define sustainable development. Instead, paragraph 6 states that "The policies in paragraphs 18 to 219, taken as a whole, constitute the Government's view of what sustainable development in England means in practice for the planning system." The Framework refers to three dimensions of sustainable development but customises the concept through the intersecting consequences of the requirements of paragraphs six and fourteen of the Framework itself – and part of a system that Allmendinger has referred to as "rigged to promote growth"<sup>4</sup>. The Framework refers to three dimensions of sustainable development and even recites the Brundtland definition, but the essence of the concept – the need to restrict the growth of some world populations to preserve environmental capacity for others – is rarely acknowledged or applied. The sustainability or otherwise of a proposal is assessed primarily on whether it is consistent with the Framework.

'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'<sup>1</sup>

The Framework is a relevant, material consideration in the determination of each and every application for planning permission. The meaning of 'sustainable development' within the Framework is being considered daily as the benchmark for whether or not planning permission should be granted in relation to a wide range of proposals by planning officers, planning committees, planning inspectors, and the secretary of state. The term has many meanings in the planning context –

and none. The definitional possibilities of sustainable development are ring-fenced by the content of the Framework itself and whether a development is considered sustainable is entirely dependent on the constantly mutating interaction between the development

proposed, local circumstances and the policy context.

In theory, there are a very wide range of actors involved in the planning process including planning officers, local authority members, and the community affected. Technically, all should have a say in whether or not a development is sustainable. In practice, particularly in relation to larger scale and more contentious proposals, the assessment of sustainability can easily be taken out of the hands of the local authority, by the use of the Secretary of State's powers of recovery or call in. In these cases, the exercise of planning judgment, including the determination of whether or not the proposal constitutes sustainable development in the terms set out in the Framework, is carried out by a planning inspector or the Secretary of State himself. Appeals are determined on a case-by-case basis with no consistent evaluative standards applied so that assessment of sustainability is a qualitative, individual exercise entirely dependent on the unique combination of the proposal, its locality and the planning policy context. The judiciary, unwilling to interfere with the decision maker's discretionary scope, also generally limit their consideration of sustainable development to whether or not conformity with the Framework has been properly considered.

The 2010 statement introducing the Framework stated that it would be "used as a mechanism for delivering Government objectives only where it is relevant, proportionate and effective to do so". However in practice the Government has demonstrated a strong selection bias in the use of recovery powers to intervene in the decision making process relating to renewables and traveller developments. The 2010 statement said that the Framework would provide "clear policies on making robust local and neighbourhood plans and development management decisions." However, because sustainability is assessed based primarily on conformity with the Framework a number of Framework policies, most



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notably paragraph 4, have proved very difficult to interpret so that a simple phrase such as 'policies for the supply of housing' has recently been debated in the Supreme Court.

In the 2012 Tesco case Lord Reed asserted that "planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean"<sup>5</sup>. This may or may not be true in relation to local authorities and development plans; in relation to sustainable development, the combination of the wide discretion available to the decision maker and the vague, contingent way in which that term is defined and employed in this particular context facilitates what can only be described as a 'Humpty Dumpty' approach to decision making. As the maker of policy, and with the scope to insert himself as decision maker into any planning consent process, the Secretary of State is the 'master' of the relevant discretionary space, the decision maker "sitting at the apex of the planning system"<sup>6</sup>. Securely perched at the top of the decision-making hierarchy the Secretary of State is indeed the master of planning and able to adopt a Humpty Dumpty approach to the meaning of sustainable development.

In December 2014 The Communities and Local Government Select Committee published its report on the NPPF. The first recommendation was that paragraph 6 - the statement that the policies in paragraphs 18 to 219, taken as a whole, constitute the Government's view of what sustainable development means in practice - should be removed, and that the page 2 definition - clearly referencing Brundtland - should "stand on its own." The Government response, published in February 2015, rejected that recommendation, stating instead that it was for the planning system to look for environmental, social and economic gains, depending on the particular development in its specific context<sup>7</sup>. The government also rejected opposition proposals for statutory definitions of sustainable development in the committee proceedings prior to enactment of 2016 Housing and Planning Act and currently underway for the Neighbourhood Planning Bill.

The government shows no appetite for changing the current definition of sustainable development in the Framework or for adopting a new definition in any of the emerging legislation. A definition is nevertheless required. There are already two legislative examples - section 39 of the 2004 Act or section 2 of the Wellbeing of Future Generations (Wales) Act 2015. Alternatively the Government could adopt sustainable development goals for planning that would enable a sustainable development 'scorecard' to be produced for proposed developments.

It seems unlikely that the Government will introduce either a statutory definition of sustainable development or any kind of empirical analysis of the sustainability of particular proposals. Unfortunately this leaves judges, rather than policy makers

and communities, as the individuals who consider and rule on the meaning of sustainable development. Even more unfortunately this seems likely to produce outcomes like that of paragraph 53 of Mr Justice Green's judgement in East Staffordshire - part of which is set out on below<sup>8</sup>.

The Inspector has not explained why the Proposed Development is "sustainable" when it prima facie is inconsistent with significant policies in the Local Plan. There is one aspect of the argument that has caused me some hesitation. The Inspector says that the proposal was a "sustainable development". This is expressly set out in the second sentence of paragraph [40] of his Decision (see paragraph [18] above). I agree with Mr Justice Jay in Cheshire at paragraph [24] where he states that the point of paragraph [14] is to lead decision makers "... along a tightly defined and constrained path, at the end of which the decision must be: is this sustainable development or not?". The reference to "or not" is a reference to the binary outcome of the paragraph [14] process. But that conclusion is not decisive because (as was also recognised by Mr Justice Jay) it is accepted that there is a discretion outside of paragraph [14]. It is therefore, in principle, open to a decision maker to approve a proposal which is not, technically speaking, "sustainable development" within the meaning of paragraph [14]. In all probability if a development was approved outside the scope of paragraph [14] it would have to be "sustainable" else it is hard to see how or why it could or would have been properly approved. Mr Choongh for the Developer gave an illustration of a site that might he argued theoretically fall outside of a Local Plan but would nonetheless be "sustainable". He hypothesised a scenario whereby ten sites were initially submitted to the authority as possible sites for development. Each of these sites was eminently sustainable in a physical sense. However the authority chose only 8 of the 10 sites upon the basis that only 8 sites were needed when set against the present economic and policy based assessment of housing need. It was argued that this would not, without more, indicate that sites 9 and 10 were "unsustainable". They would have been rejected for reasons other than their intrinsic "sustainability". As such, he argued that paragraph [14] could not lead, inexorably, to a conclusion that any proposal inconsistent with the Local Plan was for a site which was necessarily unsustainable. However, counsel for both the Local Authority and Secretary of State declined to pin their forensic colours to an endorsement of this proposition. Both considered that it would be highly unlikely that a development on an unplanned site would be acceptable or "sustainable" and they pointed out that under paragraph [7] NPPF a site might well be defined as unsustainable for a variety of micro or macro-economic, social or environmental reasons such that Mr Choongh's example they considered begged more questions than it answered. I see some force in this argument but it does not wholly explain how one categorises a development which is inconsistent with a Local Plan yet is still, quite properly, to be approved: would such a development not, ex hypothesi, be sustainable?

If this is the 'meaning' of sustainable development then the planning system is indeed heading for Wonderland. ■

#### FOOTNOTES

1 Lewis Carroll, *Through the Looking Glass* (Collins Classics 2010) 83

2 *HC Deb 20th December 2010 Col144WS*

3 *World Commission on Environment and Development Our Common Future* (OUP 1987)

4 Philip Allmendinger *Neoliberal Spatial Governance* Routledge p18

5 *Tesco Stores Ltd v Dundee City Council* (Scotland) [2012] UKSC 13 (21 March 2012) para 19

6 Clive Moys "Has the Town and Country Planning Act 1990 stood the test of time?" J.P.L. 2016, 5, 447-456

7 *CLG Committee Inquiry into the operation of the National Planning Policy Framework Government response* (CM 9016 February 2015)

8 *East Staffordshire Borough Council v Secretary of State for Communities & Local Government & Anor* [2016] EWHC 2973