INSPECTORS' CHANGES TO DEVELOPMENT PLAN DOCUMENTS – EXPLODING SOME MYTHS

By Christopher Boyle[1]

Introduction

Where there is no light, there is darkness; and out of darkness, there comes myth. This article seeks (very humbly) to explode some myths which are beginning to be generated as to the width (or, rather, narrowness) of an Inspector's ability to recommend changes to a Development Plan Document (DPD) within his binding report - as opposed to declaring the whole DPD unsound and directing the LPA to reconsider it.

The topic is, I hope, a timely one, as there is now emerging a growing body of DPD reports, a significant number of which have resulted in DPDs being declared unsound because inspectors have felt unable to recommend changes that would overcome the unsoundness of the DPD as written.

The consequences for delivery of much needed development are obvious and, one can only imagine, contrary to the Government's objective of speeding up the plan-making process. It would be ironic if the very nature of the new system, with its deliberately introduced binding inspector's report, were to lead to a reluctance (for essentially procedural reasons) on the part of inspectors to recommend changes that they felt the *evidence* justified. It would be a tragedy if this reluctance were, on proper analysis, founded upon a myth.

The "darkness" comes despite a promise of elucidation. The then ODPM Minister of State, Lord Rooker, assured Parliament[2]:

> *"My Lords, there is a process to be used when the development plan needs to be changed significantly, and those principles will be set out clearly in the final version of planning policy statement 12."*

Sadly, far from the principles being "set out clearly" in PPS12, PPS12 is *entirely* silent on the point. The 143 page "Companion Guide" to PPS12 contains one sentence alluding to the issue[3] but setting no principle or process. Perhaps not surprisingly in the circumstances, the PINS guidance "Development Plans Examination- A Guide to the

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[1] Landmark Chambers, London, July 2007; I would like to thank The Planning Inspectorate (PINS), generally, and Leonora Rozee OBE, in particular, for reviewing this article in draft and permitting me to record their broad agreement with both its reasoning and conclusions; I would also like to acknowledge the invaluable assistance of Gwion Lewis of Landmark Chambers in the preparation of this article. The opinions and, naturally, the mistakes, are my own

[2] Official Report; Lords; 1/3/04: col. 456

[3] within para. 9.6 on p. 115

Process of Assessing the Soundness of DPDs" hurries over the matter with a magisterial vagueness[4].

Instead, there are, emerging from inspectors' Pre-Examination Meetings (PEMs), subsequent DPD reports, and (perhaps tendentiously) from LPAs, three alleged characteristics considered necessary for a change to a DPD to be recommended in the binding report. In order, they are:

(a) the change must be subject to a Sustainability Appraisal (SA);
(b) the change must have been through public consultation (variously stated to mean the Statement of Community Involvement (SCI), Issues and Options or more vaguely put);
(c) the change must be not more than "minor".

In my view, these "necessary characteristics" are, respectively: gospel truth, uncertain dogma (that, unless one is careful, will slide one into heresy) and pure myth.

The nervousness on the part of inspectors (if there be such), appears to stem from a belief that ministers recognised the potential for what one might call a "democratic deficit" and intended that inspectors would not recommend, through their binding reports, "significant" changes. As the Inspector's report is binding on the local planning authority (in the sense that they cannot adopt the DPD except in accordance with the recommendations in that report), there is potential for a democratic deficit, if the final arbiter is not the elected local planning authority, but the appointed inspector. His role must, therefore, not be seen to supersede that of the LPA.

The proper approach for inspectors to take in the exercise if their discretion will be guided by two things. The first is the law that gives them the power – that is, the primary statute and the various regulations made under it, together with relevant other legislation such as that covering environmental assessments of plans and programmes and the impact on European protected habitats. The second is the policy of the Secretary of State as to how she wishes the new power to be exercised. As the House of Lords in *Tesco*[5] observed in another context, while policy must be within the law, it may, properly, be exercised more narrowly.

As we have just observed, there is no government policy on how an inspector should exercise his discretion in including changes to a DPD in his binding report. As to the law, in the absence of High Court authority, we are left only with the terms of the legislation.

Now, as the reluctance, nervousness, or what you will, appears to stem from ministerial statements, I have (without prejudice to its admissibility under the *Pepper v. Hart* doctrine) investigated the Hansard reports to see the extent to which it is justified. The

[4] see para's 1.3 and 1.5.6
[5] *Tesco Stores Ltd v. SSE* [1995] 2 All ER 636

T&CP (Local Development) (England) Regulations 2004[6]. PPS 12 and its Companion Guide passed from the Department without any debate or comment that I can find recorded in Hansard. The provisions of the 2004 Act, however, were, naturally, debated.

The first thing to note is the reason given for introducing the concept of binding reports. This was given by the minister in committee as:

> "binding reports are a key to speeding up the plan making system and enhancing community involvement in it … If a further inquiry into a modification is needed, that process can take six months or longer".[7]

Thus, the first express purpose was to remove the old Modifications procedure. This would, it was thought, save time. However, it brings with it the possibility of democratic deficit; hence the irony if the removal of the Mods process actually just results in DPDs being declared unsound, and the whole process slowing down immeasurably.

As the Bill passed through Parliament, the issue of democratic deficit was squarely raised with the Government. In the House of Lords debate,[8] Baroness Hanham sought to amend the Bill to prevent Inspector's reports being binding, precisely for this reason. Baroness Hamwee, supporting the amendment, cited the ministerial justification of speed, given for introducing binding reports. Both Baronesses were concerned that speed should not be at the expense of democratic accountability and that local authorities should be the ones to make the final decision.

Lord Rooker, for the Government, (unsuccessfully, as it happens) resisted the amendments. His initial response is so informative as to how the Government saw the new plan-making process working that it is worth quoting extensively so that it becomes widely available to the planning world as a whole. When Keith Hill came to overturn the Lords amendment in the Commons, his response was merely a paraphrase of Lord Rooker's speech. It is therefore important to read Lord Rooker's statement with extreme care.

Lord Rooker said:

> *"The picture that has been painted is that of the local authority's legitimate wishes versus the uninformed wishes of a creature of central government, with the community's views squeezed out. That is not a fair picture of what we propose. First, the key feature of the new system is front-loading. The planning authority will reach decisions on the key matters early in the plan-making process. The local planning authority will start by identifying and taking interested parties' ideas and views on all the potential options, and will then decide what it thinks best for its area. Its job is to devise policies and proposals for the development plan document for the area, fully involving the community in the process.*

[6] apologies to viewers in the Principality; but you have your own system
[7] Official Report; Lords: 27/1/04; col 147
[8] Official Report; Lords 1/3/2004; col. 451

Representations made to the authority on its preferred options will be considered by the local planning authority. No inspector will be involved at that stage. From that consideration, the authority will prepare its development plan document to submit for independent examination.

"We believe that the local planning authority is well placed to do that. It knows its local area best. The procedures that we are introducing will ensure early debate and decisions. There will be a strong disincentive for anyone to put off raising controversial proposals in the hope that they will have a better chance of succeeding if sprung on people at a late stage. This applies equally to local authorities or to others, such as developers, or if an authority wishes to avoid coming to a difficult or potentially unpopular decision. It will not be able to do that under the proposed system.

"Secondly, the investment by the community and others in making representations on a development plan document, and participating in the independent examination will now always be worth while. There will be a positive action, and people will put investment into it. No longer will the community and others face the unjustifiable position in which all its input is taken forward through the inspector's recommendations and then ignored by the authority, which can do something entirely different. That would undermine our intention to give communities a greater say in plan-making and secure buy-in.

"Finally, the independent inspector's job is to determine whether a development plan document satisfies the legal requirements on its preparation and whether it is sound. The starting point will be that the development plan document that the authority has submitted is sound unless there is evidence that it is not. Anyone seeking a substantive change to a development plan document will need to show that it is unsound without the change and that the change will render it sound. That includes the inspector as well. Therefore, changes that the inspector recommends will not simply be his view rather than the local authority's. The changes will be needed to achieve a sound plan and be tested against the criteria for soundness that the plan itself must meet.

"If, as a result of his consideration of soundness, the inspector believes that the development plan document ought to be changed significantly, that can happen only if the examination is reconvened, or if the development plan document is referred back to the planning authority for further consideration. If there is still insufficient evidence for the inspector to recommend a change that he thinks should be made to a development plan document, he will not be able to recommend that change in his report. If that happens, the inspector will only be able to advise the authority of his view that it should revise its development plan document or prepare a fresh one to take the matter forward. Those principles will be set out clearly in the final version of planning policy statement 12.

> *"The binding inspector's reports are a key mechanism for speeding up the plan-making system. They are not a procedure for keeping the public out or for keeping out anybody who has views on the plan – far from it. They are pulled in early in the system to get their five pennyworth, as it were. They are also a device for making sure that major changes are not sprung on the public at the last minute. We think the system will be faster. We want the process to be fairer, but we also want it speeded up.*
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> *"I shall give some examples of when an inspector may consider that a development plan document meets the test of soundness. The plan must generally conform with national and regional policy. That is self-evident. Secondly, the plan must be supported by a sound evidence base. It is important for the authority to provide that. The local planning authority must comply with its own statement of community involvement, and it must undertake a suitable sustainability appraisal and a strategic environmental assessment."* [9]

It can readily be seen that, although he was responding to an amendment in respect of the binding nature of inspector's reports, Lord Rooker, in fact, gave a thumb-nail sketch of the envisaged workings of the whole new plan-making system. The inspector's examination is the process by which it is ensured that the system is being operated properly. It is made binding in order to give it teeth. The fact that it has teeth should ensure that LPAs and others do operate the system properly.

Following the order of Lord Rooker the following points can be deduced from the legislation:

1. By the duty to comply with its statement of community involvement ("SCI"), under s. 19(3) of the Act, the local planning authority cannot formulate its DPD other than in very close consultation with "the community and others" – the principle of "front loading";

2. By requiring that the DPD must be subject to a sustainability assessment (s. 19(5) of the 2004 Act, and also the Environmental Assessment of Plans and Programmes Regulations 2004) proposals must have their sustainability assessed – this will necessarily include assessment of alternatives - and also have that assessment consulted upon, meaning that local planning authorities cannot make late alterations;

3. Equally, developer proposals must be presented early if they are not to miss the SA/SEA boat; if they do so, the developer must undertake the assessment/consultation himself; this, together with the consultation required under Reg. 32 of the T&CP (Local Development) (England) Regulations 2004 to consult the public on suggested alternative sites (which can then be combined with a revised SA/Strategic Environmenal Assessment (SEA) combine to ensure that nothing is "sprung on people at a late stage";

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[9] Official Report; Lords: 1/3/04; col's 454-455

4. The requirements that alternatives be assessed, and consulted upon and that the choice preferred must be supported on a sound evidential base should also prevent an authority avoiding coming to a difficult or potentially unpopular decision (ie maintaining an electorally popular, but objectively unfounded, position)

These different aspects of the system are required by different parts of the legislation, but the discipline is then imposed by the resulting DPD being made the subject of independent examination. The moment when it is checked that these strands have been followed comes when the document is taken out of the hands of the LPA and placed into the hands of the inspector.

That discipline would, according to the Government, be seriously compromised if, following the examination, the recommendations could (as under the plan-making system of the 1990 Act) simply be ignored[10] by the authority. In a later debate on the amendment[11] Lord Rooker expressed the sense of frustration at and gave examples of instances where good plan making was delayed or frustrated by authorities refusing to accept the recommended changes from a Local Plan inspector. To continue to allow this would be, as Lord Rooker had put it to "undermine [the] intention to give communities a greater say in plan-making and secure buy-in"[12]

Very importantly, it can be seen, therefore, that although the Government sought to introduce binding inspectors' reports, in part, to cut out the old modifications stage and save time in the process, it also saw the independent examination as an important mechanism to ensure compliance with the requirements of the new system.

To understand the extent of discretion available to an inspector, we must first understand the nature of the task he is embarked upon. The statute both provides the power and sets its parameters.

Section 20(5) of the 2004 Act is as follows:

> *"(5) The purpose of an independent examination is to determine in respect of the development plan document –*
>
> *(a) whether it satisfies the requirements of sections 19 and 24(1), regulations under s. 17(7) and any regulations under section 36 relating to the preparation of development plan documents:*
>
> *(b) whether it is sound."*

[10] Of course the recommendations cannot be "simply ignored" as reasons must be given
[11] Official Report; Lords 26/4/04; col's 587, and 591-592
[12] loc.cit. fn9

It may, for ease of analysis be helpful to divide the task of the examination into two: "procedural" for s. 20(5)(a); and "substantive" for s. 20(5)(b).[13] This distinction is particularly important to bear in mind given that, rather confusingly, PPS12, para. 4.24, wraps up nine tests embracing both s. 20(5)(a) and (b), all under the heading of "soundness". Although that term only appears in s. 20(5)(b), it is becoming general practice to use it in relation both to procedural and substantive matters.

In a scheme of legislation which has not brought universal encomiums down upon the heads of its authors, I would here pause to pay tribute to the draftsmen. By the provision of s. 20(5)(b), Parliament has carefully preserved the democratic principle. The Inspector does not sit as an appellate body, adjudicating between two sides. Nor does he sit, as on a s. 78 appeal, as "the local planning authority". He is given two tasks – (1) to check that the procedures have been followed and (2) to consider whether the DPD is "sound". In an environment where there may be a number of conclusions properly arising out of a consideration of the evidence – each different but each "sound" - it is not for the inspector to re-write a sound DPD in his own way; he must not simply replace the LPA's view with his own.

This preservation of the democratic element is carefully set out by Lord Rooker in the middle part of the passage cited above: "the independent inspector's job is to determine whether a [DPD] satisfies the legal requirements on its preparation and whether it is sound." The changes must be because the plan is unsound as written and the changes will make it sound. The changes "will not simply be [the inspector's view] rather than the local planning authority's".[14]

Interestingly, Lord Rooker was unable to point to a similar legislative use of the word "sound", as used in s. 20(5)(b). "Soundness" is not defined in the 2004 Act; it therefore maintains its ordinary English meaning. The use of the word "sound" imports the sense that different people may rationally take different positions on the same evidence. Essentially, what is being asked under s. 20(5)(b) is whether the policy or proposal is a rational one based rationally on a full understanding of the material circumstances.[15]

By giving the inspector the task of examining the "soundness" of the DPD, the Act limits his role of review. By (a, perhaps, imperfect) analogy with the approach long familiar in Administrative Law, one party (the local planning authority) is empowered to adopt an initial position, while the reviewing party (the inspector) is only
empowered to alter that position because it is not soundly based – not merely because he would have come to a different view on the same facts.

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[13] although one of the requirements in s. 20(5)(a) does directly impinge on the contents of the DPD – ie s. S24(1) "general conformity with the RSS"; and s. 19(2) "duty to have regard to various documents" will have a bearing on the evidential base for the contents.

[14] loc.cit. fn9.

[15] although only policy not law, PPS 12 tests 6-9 at para. 4.24, headed "Coherence, Consistency and Effectiveness", are, perhaps, as good a framework as any to test it. Test 7 (sound evidential base) is the one most likely to form the focus of debate in a public examination.

Substantive Unsoundness.

Before a change can be made (ie recommended in the binding report), the plan must first be shown to be "unsound" in that relevant aspect. Thus for an objector to be able to persuade the inspector to include a change, he must first persuade the inspector that the existing wording is unsound. In addition, unlike the system under the 1990 Act where the Local Plan Inquiry was only into "duly made objections", under the 2004 Act, the inspector both can and should apply his independent thoughts to the question of soundness. Thus, as Lord Rooker observed, the need first to find the DPD unsound before proposing changes to it applies as much to the Inspector as to objectors.

The consideration of the soundness of the DPD as written will be conducted on the evidence. There are three possible outcomes to proposed change to a DPD or policy. These are:

1. The inspector may decide, on the evidence, that the policy is sound as written (this can be so even if he, personally, would have chosen a different policy);

2. The inspector may agree, on the evidence, that the policy is unsound as written, and further, that the suggested change would remedy that unsoundness; or

3. The inspector may agree, on the evidence, that the policy is unsound as written, but be unconvinced that the suggested change is, itself sound on the evidence before him.

For outcome 1, the inspector could not recommend the change in his binding report. The DPD is sound and he may not change it. For outcome 3, the inspector cannot recommend that the plan as written is adopted, as it is unsound. Nor can he recommend a change as he has no sound change to recommend. He must either pause the process to allow evidence to be brought to him to assess a sound change that might be made, or, presumably if he considers the matter sufficiently complicated as to involve considerable delay, declare the plan unsound and ask the LPA to reconsider it.

The consequences flowing from these two outcomes are not controversial; of real interest is what faces the inspector who finds the plan unsound and the change evidentially justified (ie outcome 2).

Here, Lord Rooker's words quoted above need a little care. He states "if, as a result of his consideration of soundness, the inspector believes that the development plan document ought to be changed significantly, that can happen only if the examination is reconvened, or if the development plan document is referred back to the planning authority for further consideration."

Read strictly (and this may, in part, be the origin of the "nervousness", if any), that observation would indicate that an objector at the public examination, who persuades an inspector that the DPD as written is unsound (his first hurdle) cannot expect the changes

he proposes to be recommended (his ultimate aim) – rather, the plan examination will be reconvened or the DPD sent back as unsound. The former makes little sense; the latter will incur the delay this system was intended to avoid, and may well be far from the desired outcome of the objector.

It is my opinion that Lord Rooker was, here, referring to the inspector's own (as opposed to the objector's) consideration of soundness. For him to recommend a change, he would have to have evidence upon which to decide what change and why. That is why he might contemplate reconvening the examination – to receive such evidence[16]

Support for this comes in the next sentence of Lord Rooker that "If there is *still* insufficient evidence …" (emphasis added). Naturally, when it is an objector who is bringing a case of unsoundness, coupled with a suggested change, the objector would certainly aim to provide evidence to support both the allegation and the suggested solution.

Perhaps realising that his earlier comments had not quite accurately portrayed the process Lord Rooker clarified the matter in a later debate[17] re-iterating what he had earlier said and stating "The inspector will be able to recommend a substantive change to a development plan document only if people have had the opportunity to make representations on it, ***or*** *if it has been considered at an examination* ***and the representations or debate support that change***" (emphasis added).

Further, when the Lords amendment returned to the Commons (there to be overturned), the Minister, Keith Hill, apparently paraphrasing the same briefing note as Lord Rooker, twice emphasised the fact that reconvening the examination or referring the DPD back to the local authority would be "if there is *still* insufficient evidence for the inspector to recommend a change."(emphasis added) [18]

From this, it is clear, in my opinion, that:

(i) where an inspector is persuaded the DPD as written is unsound, he can recommend a change in his binding report, if he considers that change would, itself, render the DPD sound (within the meaning of s.20(5)(b)),

but that

(ii) he must, necessarily, have appropriate evidence to support it;

and that

[16] This was done in Ryedale, although the inspector did, in the end find, the CS unsound [Rydale BC Core Strategy Report, Inspector Stephen Pratt, 8.1.07]
[17] Official Report; Lords 26/4/04; Col. 587
[18] Hansard; 19/4/04;Col 73

(iii) that evidence can be received by him as a result of objectors taking part in the public examination.

Provided he has been given the necessary evidence to enable him rationally to recommend the change to overcome his findings of unsoundness in respect of the DPD as written, the inspector can, in my opinion, recommend that change in his binding report, consistent with his duty under s. 20(5)(b), no matter how "significant" the extent of the change might be.

Procedural Requirment: SAs and Consultation.

As we have seen, s. 20(5)(a) is concerned to ensure compliance with s. 19 (which would import Regulations made under s. 19(5)), s. 24(1) (general conformity with the RSS), and Regulations under s. 17(7) and under s. 36.

The one procedural matter that, in my opinion, sits outside the general run is the obligation to do an SA/SEA. Here, the requirement in respect of the local planning authority is found in s. 19(5). There is no similar obligation on the inspector, who does not sit as local planning authority. However, it is the case, by the EAPP Regs 2004, that the local planning authority cannot adopt the plan without having undertaken an SEA. As the recommended change in fact removes the discretion from the local planning authority (which discretion would ordinarily be exercised after sight of the SA/SEA), it would seem to follow that the inspector must, before including a change, have been able to consider an SA/SEA which reflected the change.

The important aspect of a SEA is that it has been consulted upon. This could be achieved through Reg. 32 in respect of 'site allocation objections' or otherwise through the actions of the objector or the LPA. Either way, in my opinion, it must be done if the inspector is able to recommend the change in his binding report.

Identification of whether or not the procedures have been followed should generally be susceptible to objective judgement. Although an inspector might start by assuming that they have been followed (a species of the presumption of regularity) where it comes to his attention – through his own reading or through the representations of others – that the procedures have not been followed, he would be required to identify that as part of his exercise under s. 20(5)(a).

It is, of course, the case that there may be grey areas calling for judgement, such as when failure to follow procedures is accompanied by a conspicuous lack of prejudice, or where it is alleged that while there was, for example, an SA/SEA, it was not a *proper* SA/SEA.

Faced with failings of procedural soundness under s. 20(5)(a), there may be little scope for the inspector to introduce changes. He may have to suspend the examination until the procedures have been followed, or recommend that the DPD be withdrawn until they have been followed.

That need not be the outcome, however. I note from the South Cambridgeshire Core Strategy (CS) report[19], that the Inspectors considered that there were procedural failings in that the SA/SEA had not assessed specific allocations. Rather than asking that the SA/SEA be undertaken again, or recommending that the DPD be reconsidered, they decided that while the failings meant that it would be unsound to include certain allocations, they could overcome the failings by deleting the specific site allocations, while keeping the strategy as a whole[20].

In respect of the other procedural arguments in s. 20(5)(a), first, let us consider changes promoted by objectors, in the face of opposition from the local planning authority. Other than the duties imposed in respect of the content of DPDs by s36 (which provides for the power to make regulations as to the procedures) and s. 19(1) (which provides for LDDs to be prepared in accordance with the local development scheme), it is a moot point as to whether the other matters impinge on the actions of the inspector at all. This is, first, because they are all directed to what the local planning authority must do; and, secondly, because they are directed to earlier stages of the process. The SCI, for example, and the procedural requirements in the Regulations concern the production of the DPD *up to* the examination stage.

It is of course possible that SCI does actually set a procedure for consulting on or publicising any changes proposed at the examination or by the inspector. Were this to be the case, that procedure would need to be followed, may be after the examination in public, but before the issuing of the binding report.

Now, let us consider changes suggested by the local planning authority. Here, it is my opinion, there may well be procedural impediments to the inspector making changes. This is because it is less likely that the DPD the subject of late changes by the local planning authority can claim to have been produced following the procedures in the Regulations or the SCI.

Astoundingly, it appears that every DPD submitted to date has been subject to post-submission changes by the LPA[21]. This may reflect LPAs struggling to get to grips with the significantly different processes of "front-loading" and "stakeholder involvement" and "Continuous Community Consultation"[22] underpinning the new system compared with the 1990 development plan regime.

The Planning Inspectorate is particularly trenchant in its attitude to LPA promoted "post-submission" changes. It, rightly, points to the fact that LPAs are supposed to submit to the Secretary of State DPD which it considers to be sound and, therefore, ready for examination. The soundness is meant, as we have seen, to spring from the evidential

[19] Inspectors Cliff Hughes and Terry Kemmann-Lane, 9.11.06
[20] ibid; para. 3.32
[21] Leonora Rozee OBE, pers.com.
[22] At the risk of being considered "off message", it might be observed that the acronyms and buzz-phrases of the 2004 system are more the stuff of *Yes Minister* (which, we will recall, was supposed to be satire not reportage) than that of a grown-up legislative code; perhaps they are children of their time.

base gathered in the front-loading system *up to* submission. It does not fit at all well with that model of the system for the LPA to be promoting changes to its own DPD after submission. The necessary implication is that the submission version of DPD was not and is not sound.

While I see force in the disciplining effect of this approach, I would strike a note of caution against *too* rigid an attitude to post-submission changes promoted by the LPA.

Planning policy and planning circumstances are not frozen in time when the submission DPD goes to the Secretary of State. There may well be cases where circumstances lead to a submission DPD becoming un-sound post-submission and the LPA proposing new wording. It would require careful justification, in my view, for an inspector to insist on examining the old wording, with the perhaps inevitable result that it be found unsound. Further, there would be an artificiality introduced if, upon receipt of objectors representations, or more detailed consideration of them at the examination, the LPA were to be absolutely barred from conceding a good point well made, but forced instead to maintain its original stance.

On the other hand, there is good public policy for this distinction between LPA-promoted changes and objector-promoted changes. As with the 1990 system, there is no entitlement to appear given to supporters of the plan. Those who stand in common cause with the LPA are expected to be content with the LPA's defence of their common position. Where an objector promotes a change in policy, the LPA is expected to defend the plan from the change. For the LPA to adopt the objector's position would be to promote a materially different plan, and others, who might be opposed to the change, are then left out of the process their point of view unheard[23].

This distinction, between objector-promoted changes and LPA-promoted changes, is reflected in the CS reports that I have been able to review. Quite properly, inspectors warn against post-submission (or "pre-hearing") changes on behalf of the LPA unless they are insubstantial. Anything more must be re-consulted upon. No doubt there is a spectrum of significance and re-consultation proportionate to the potential for prejudice. Where objectors promote changes, however, provided they are accompanied by an amendment to the SA/SEA, the proper process is seen to operate, and the inspector, if he is given enough evidence to make an informed choice (substantive soundness), can include the change in his recommendations.

Personally, I would be unwilling to go further. The Planning Inspectorate's second 'Lessons Learned' document[24] refers to 'natural justice' as being a reason why, procedurally, a recommendation that might otherwise have been made might not be.

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[23] Those who made representations in support of the original wording could, theoretically, be invited, by the inspector, to comment if the LPA alters the wording; those whose contentedness with the old wording was accompanied by silence could not be identified without general re-consultation.

[24] PINS, June 2007.

No authority is cited for this and while it is the case that 'natural justice' is a concept that always hovers at the back of the administrative process, we must recall how the Courts like to emphasise the comprehensive nature of the legislative code. The very extensive requirements of consultation up to an examination, the duty to follow the SCI, the duty to consult on the SA/SEA and the duty to consult again on 'site allocation objections' provide so comprehensive a requirement of consultation that, in my opinion, it leaves little or no room for additional duties to be reposed by pleading 'natural justice'. This is most obviously so with objector-promoted changes.

With LPA – promoted changes, the procedural failing which I would plead is not "natural justice" but "failure to follow the SCI" (i.e. s. 20(5)(a)). For objector-promoted changes, the statute provides for further consultation in respect of what are termed 'site allocation objections'. In respect of other proposed changes there is no such requirement. Parliament has chosen to make the distinction and there is no call for the common law to intervene. Moreover, all changes will have to be accompanied by an appropriately amended SA/SEA which will, itself, have to have been consulted upon. Again, there is no need to introduce a non-statutory consultation requirement based on natural justice.

It is for these reasons that I consider the alleged 'necessary characteristic' (see above) of public consultation to be a potentially dangerous dogma liable to lead the unwary into error.

Principles:

From the above, some principles may, perhaps, be distilled:

(1) the DPD must reach its "submission" state having followed the procedural requirements that will be tested under s.20(5)(a);
(2) the DPD is unlikely to be able to be changed by the local planning authority ("pre-hearing changes") without contravening the procedural requirements, no matter how meritorious those changes are considered to be;
(3) at the examination (in and outside the public sessions), the inspector is to examine both that the procedure has been followed [s.20(5)(a)] and that the contents are (substantively) "sound" [s. 20(5)(b);
(4) as his remit is, thereby, limited, he can only recommend changes to the contents of the DPD if he first finds that the DPD as written is (substantively) unsound;
(5) any change must itself not render the plan procedurally unsound, but that will, most commonly, be limited to ensuring that the change is reflected in an SA/SEA (which imports a requirement for consultation);
(6) moreover, the change must itself be substantively sound – inter alia, founded on proper evidence;

(7) where the inspector is satisfied that the DPD as written is (substantively) unsound, he cannot recommend that it be adopted in its current form;

(8) his choices are:

(i) he can recommend that it is adopted with changes where he has the evidence to support those changes, including an SA/SEA; or

(ii) he can delay consideration to enable evidence (and/or SA/SEA) to be presented to him; or

(iii) he can inform the local planning authority to re-consider the DPD in the light of his comments.

(9) in principle, provided the evidence indicates that the DPD without the change is unsound and the evidence indicates that the DPD with the change would be sound, and the inspector has considered an SA/SEA which properly reflects the change (and has itself been consulted upon), he may recommend that change, within his discretion, no matter how "significant" the change may be.[25]

We must recall the purpose of introducing binding reports and removing the modifications stage. It was twofold: (i) to ensure that the plans were objectively assessed and (ii) to speed the process up. That purpose would be frustrated if, having objectively assessed the DPD, the inspector did not proceed to recommend the changes that he felt were supported by that objective assessment but, because of misplaced concerns about procedural matters, sent the DPD back to the LPA instead. This would only occasion delay in delivery of the development required by strategic policy. It would have to be justified by clear legislative intent showing that those concerns were not misplaced.

For the reasons given above, that intent is only apparent in the EU-derived requirement of an SA/SEA. Public involvement will generally have been secured and should not be elevated to a degree beyond that required by the statute. 'Significance' is not, in principle, a relevant factor at all.

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[25] it might be observed by way of caveat to (9), that the cogency of the evidence required to persuade the inspector that the change is itself sound may well increase with the significance of the proposed change