

Deficiencies of the 2012 National Planning Policy Framework

by Francis Bennion

This is Version 1 21 May 2012

For Conclusions see end of this report (paragraph 81).

Introductory

1. My qualifications for writing on this topic are that I am a retired Parliamentary Counsel who spent a total of sixteen years drafting Government legislation and continue to specialise in statute law, statutory interpretation and legislative drafting.¹ I am not a specialist in town and country planning legislation but in writing this report I have consulted *Town and Country Planning in the UK* by Cullingworth and Nadin.²
2. When town and country planning law was introduced into the UK there was a remarkable omission. The new law said that ‘development’ now required the permission of some authority such as the appropriate minister or a local council. But it did not say, as would be the usual legislative procedure, on what the grounds were to be upon which a grant or refusal of planning permission should be based.
3. The nearest *Cullingworth and Nadin* can get to this in relation to years before 2004 is that planning decisions must serve the public interest.³ They go on: ‘From 2004 a much wider purpose has been added: to contribute to the achievement of sustainable development.’⁴ This was effected by the Planning and Compulsory Purchase Act 2004 s. 39(2), which says that any body or person listed in s. 39(1) must exercise its functions ‘with the object of contributing to the achievement of sustainable development’. No definition of this term is given. It is not clear whether or not it is intended to correspond to the United Nations meaning of the term.
4. Over the years, the gap was gradually filled by detailed guidance documents framed by the executive, in other words the Government of the day as advised by the Civil Service. These were said not to be law, but this is misleading. If not actually law they were very like law because they were acted on, by officials such as planning inspectors, exactly as if they were law. *Cullingworth and Nadin* says ‘plans in the UK are not part of the law but are made under the law’.⁵ The same might be said of delegated legislation, but no one doubts that this is law.
5. Nevertheless the British system has been basically administrative rather than judicial, though courts have a part to play – especially by the growing use of judicial review as a check on administrative action.
6. On 27 March 2012 Mr Greg Clark MP, Minister for Planning in the Coalition Government, published the National Planning Policy Framework (NPPF)⁶ which, following United Nations initiatives dating back at least to 1972, lays great stress on

¹ See *Bennion on Statutory Interpretation* (LexisNexis), 5th edition 2008; *Bennion on Statute Law* (Longman) 3rd edition 1990; *Understanding Common Law Legislation* (Oxford University Press) 2001 (hardback), 2009 (paperback). For details and texts of my books, articles etc. see www.francisbennion.com.

² Routledge, 14th edition 2006. I refer to this book as *Cullingworth and Nadin*.

³ Page 2.

⁴ Ibid.

⁵ Page 3.

⁶<http://www.communities.gov.uk/planningandbuilding/planningsystem/planningpolicy/planningpolicyframework>.

the concept of sustainable development. It includes a summary which reads: 'The NPPF is a key part of our reforms to make the planning system less complex and more accessible, to protect the environment and to promote sustainable growth'. Following the precedent of the Planning and Compulsory Purchase Act 2004 s. 39(2), no definition of 'sustainable development' is given, except for the inadequate comment 'Sustainable means ensuring that better lives for ourselves don't mean worse lives for future generations'.

7. Forty-three pre-NPPF guidance documents are listed in Annex 3 to the NPPF. They are replaced by the thirteen sections appearing under the heading 'Achieving sustainable development'.
8. The present report analyses the NPPF critically, with particular attention to this concept (which I believe to be faulty).
9. The concept of sustainable development is worldwide and goes back a long way. On a Google search I had over eleven million hits. The United Nations has taken the lead here. In 1972 the United Nations Environment Programme (UNEP) was created by the UN General Assembly. In 1983 the General Assembly welcomed 'the establishment of a special commission that should make available a report on environment and the global *problématique* to the year 2000 and beyond, including proposed strategies for sustainable development'.⁷
10. The concept of 'sustainable development' was fully explained in a later UN document, known as the Brundtland Report.⁸ This said: 'The satisfaction of human needs and aspirations is the major objective of development. The essential needs of vast numbers of people in developing countries for food, clothing, shelter, jobs - are not being met, and beyond their basic needs these people have legitimate aspirations for an improved quality of life. A world in which poverty and inequity are endemic will always be prone to ecological and other crises. Sustainable development requires meeting the basic needs of all and extending to all the opportunity to satisfy their aspirations for a better life.'
11. The Brundtland Report goes on: 'Living standards that go beyond the basic minimum are sustainable only if consumption standards everywhere have regard for long-term sustainability. Yet many of us live beyond the world's ecological means, for instance in our patterns of energy use. Perceived needs are socially and culturally determined, and sustainable development requires the promotion of values that encourage consumption standards that are within the bounds of the ecologically possible and to which all can reasonably aspire.'
12. The Brundtland Report continues: 'Meeting essential needs depends in part on achieving full growth potential, and sustainable development clearly requires economic growth in places where such needs are not being met. Elsewhere, it can be consistent with economic growth, provided the content of growth reflects the broad principles of sustainability and non-exploitation of others. But growth by itself is not enough. High levels of productive activity and widespread poverty can coexist, and can endanger the environment. Hence sustainable development requires that societies meet human needs both by increasing productive potential and by ensuring equitable opportunities for all.'
13. What I have set out in paragraphs 3 to 5 above reproduces paragraphs 4 to 6 of the Brundtland Report. Its explanation of the concept of sustainable development continues in paragraphs 7 to 15 of the document, which need to be read to get the whole picture. I ought to give paragraph 9 in full, which I do in paragraph 14.

⁷ UN resolution 38/161 of 19 December 1983: see <http://www.un-documents.net/a42-427.htm>.

⁸ See A/42/427: Our Common Future: Report of the World Commission on Environment and Development, paras. 4-15, <http://www.un-documents.net/ocf-02.htm#I>.

14. 'Settled agriculture, the diversion of watercourses, the extraction of minerals, the emission of heat and noxious gases into the atmosphere, commercial forests, and genetic manipulation are all examples of human intervention in natural systems during the course of development. Until recently, such interventions were small in scale and their impact limited. Today's interventions are more drastic in scale and impact, and more threatening to life-support systems both locally and globally. This need not happen. *At a minimum, sustainable development must not endanger the natural systems that support life on Earth: the atmosphere, the waters, the soils, and the living beings.*'⁹
15. To complete my depiction of the Brundtland Report I give the following citations: 'sustainable development can only be pursued if demographic developments are in harmony with the changing productive potential of the ecosystem';¹⁰ 'large sections of the [world's] population may be marginalized by ill-considered development';¹¹ 'the world must ensure equitable access to the constrained resource and reorient technological efforts to relieve the [population] pressure';¹² 'most renewable resources are part of a complex and interlinked ecosystem, and maximum sustainable yield must be defined after taking into account system-wide effects of exploitation';¹³ 'sustainable development requires that the rate of depletion of non renewable resources should foreclose as few future options as possible';¹⁴ 'sustainable development requires the conservation of plant and animal species';¹⁵ 'sustainable development requires that the adverse impacts on the quality of air, water, and other natural elements are minimized so as to sustain the ecosystem's overall integrity';¹⁶
16. The final paragraph winds up the discussion by saying: 'In essence, sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations'.¹⁷ The Brundtland Report continues with an extended discussion of the factors which impede the spread of sustainable development, with suggestions about how they may be overcome.
17. In 1987 the General Assembly of the United Nations passed the following resolution:

'The General Assembly . . . Believing that sustainable development, which implies meeting the needs of the present without compromising the ability of future generations to meet their own needs, should become a central guiding principle of the United Nations, Governments and private institutions, organizations and enterprises,

Recognizing, in view of the global character of major environmental problems, the common interest of all countries to pursue policies aimed at sustainable and environmentally sound development,

Convinced of the importance of a reorientation of national and international policies towards sustainable development patterns,

Recalling that, in its resolution 38/161 of 19 December 1983 on the process of preparation of the Environmental Perspective to the Year 2000 and Beyond to be prepared by the Governing Council of the United Nations Environment Programme, it

⁹ Emphasis added.

¹⁰ Paragraph 7.

¹¹ Paragraph 8.

¹² Paragraph 10.

¹³ Paragraph 11.

¹⁴ Paragraph 12.

¹⁵ Paragraph 13.

¹⁶ Paragraph 14.

¹⁷ Paragraph 15.

welcomed the establishment of a special commission, which later assumed the name World Commission on Environment and Development, to make available a report on environment and the global *problematique* to the year 2000 and beyond, including proposed strategies for sustainable development . . .

Emphasizing the need for a new approach to economic growth, as an essential prerequisite for eradication of poverty and for enhancing the resource base on which present and future generations depend . . .

Notes with appreciation the important contribution made by the Commission to raising the consciousness of decision-makers in Governments, intergovernmental and non-governmental international organizations, industry and other fields of economic activity, as well as of the general public, in regard to the imperative need for making the transition towards sustainable development . . .

Concurs with the Commission that the critical objectives for environment and development policies which follow from the need for sustainable development must include preserving peace, reviving growth and changing its quality, remedying the problems of poverty and satisfying human needs, addressing the problems of population growth and of conserving and enhancing the resource base, reorienting technology and managing risk . . .

Calls upon all Governments to ask their central and sectoral economic agencies to ensure that their policies, programmes and budgets encourage sustainable development and to strengthen the role of their environmental and natural resource agencies in advising and assisting central and sectoral agencies in that task . . .

Reaffirms the need for additional financial resources from donor countries and organizations to assist developing countries in identifying, analysing, monitoring, preventing and managing environmental problems in accordance with their national development plans, priorities and objectives . . .¹⁸

18. The General Assembly of the United Nations has not attempted a fully reasoned definition of what it understands by the term 'sustainable development'. As an experienced legislative draftsman I venture to put forward the definition in paragraph 19 for this purpose.
19. 'Sustainable development is development which respects the planet as the environment within which all living and future human beings dwell or will dwell, and from which they draw or will draw their sustenance. In particular, but without prejudice to the generality of the forgoing, sustainable development-
 - i) does not deplete or damage unduly the living beings, atmosphere, waters, rocks, metals, soils, and other natural resources of the planet (allowing for any replacement resources which have been, or are to be, provided by or at the instance of the developer);
 - ii) has due regard to the requirement which governs us as human beings to relieve sickness and poverty in developing countries, to cater for the general needs of the people of those countries, and to remove or mitigate inequalities between nations;
 - iii) uses appropriate energy resources, and does so to a reasonable extent and in an acceptable manner, having regard to the need to protect the climate;
 - iv) provides for economic growth to the extent that may be is requisite;
 - v) has regard to the need to avoid over-population of the planet'.

¹⁸ United Nations General Assembly A/RES/42/187 (11 December 1987).

20. In 1999 the UK Labour government set out their strategy to help deliver a better quality of life through sustainable development. In 2005 they reviewed that strategy to take account of certain changes within the UK – devolution to Scotland and Wales, and delegation to regional bodies and local government. Sustainable development was explained in 2005 by Prime Minister Tony Blair in *The UK Government Sustainable Development Strategy*¹⁹ He said:
21. ‘Make the wrong choices now and future generations will live with a changed climate, depleted resources and without the green space and biodiversity that contribute both to our standard of living and our quality of life. Each of us needs to make the right choices to secure a future that is fairer, where we can all live within our environmental limits. That means sustainable development.
22. ‘This is an agenda for the long-term. There is no magic wand that government or any one else can wave to make sustainable behaviour and activity the norm overnight. We will only succeed if we go with the grain of what individuals and businesses want, and channel their creativity to confront the environmental challenges we face. Development, growth, and prosperity need not and should not be in conflict with sustainability.
23. [The next paragraph deals with the global effort to tackle climate change. Then comes the following.]
24. ‘Although climate change is the most serious global environmental threat, promoting new, modern, sustainable ways of living, working, producing and travelling also stand to achieve wider benefits to human health and well being. We need to maintain our duty of care towards our natural resources, for our own benefit and for the benefit of future generations.
25. [Our new strategy contains not only a commitment to create sustainable communities but a commitment to give a new focus to tackling environmental inequalities as well.]
26. ‘. . . So the strategy includes clear actions to promote sustainability by involving people, leading by example and by demonstrating our commitment to deliver . . . We want to ensure that we spend your money sustainably, starting with a commitment to buy cleaner cars and by our new offsetting scheme to reduce the carbon impacts of unavoidable air travel . . . [we will] hand that task over to a strengthened Sustainable Development Commission, which will act as the independent “watchdog” of government progress²⁰.
27. ‘This is a truly challenging agenda. It will involve working across departmental boundaries and through all levels of government – from the neighbourhood to the United Nations. It involves channelling the power of business by stimulating the market to innovate and to produce more cost effective and sustainable options for all purchasers. It needs the commitment of voluntary groups, and it involves influencing the individual everyday choices we all make. Most of all, it means focussing on long-term solutions, not short-term fixes . . . We have spent a long time getting to grips with the concept of sustainability . . . I want this new strategy to be a catalyst for action to secure our future.’
28. In Mr Blair’s above account we see the concept of sustainability applied not only to development but also to growth and prosperity, ways of living, working, producing and travelling, the running of communities, and the expenditure of money. The overall purpose is the defence of the environment, coping with climate change, not depleting natural resources unduly, protecting green spaces and biodiversity, etc. Behind it is the idea that we have a duty of care to the planet, keeping it in good

¹⁹ Cm 6467, March 2005.

²⁰ This was not in fact done.

condition for the benefit of our heirs and successors as well as our present generation. For obvious political reasons connected with the UK electorate, Mr Blair plays down the United Nations aspect, which stresses the need to consider the less developed nations of the world.

29. Turning to the *Oxford English Dictionary* (2nd edition), we find that the most helpful of three definitions of 'sustainable' is: 'Capable of being maintained at a certain rate or level'. There is a quotation from the 1965 *McGraw-Hill Dictionary of Modern Economics*: 'Sustainable growth, a rise in per-capita real income or per capita real gross national product that is capable of continuing for a long time. A condition of sustainable economic growth means that economic stagnation will not set in.' Another quotation is: 'The achievement of a sustainable, stationary population'.²¹
30. Planning law defines 'development' as meaning the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.²² This is clear enough. What is not clear is the meaning of 'sustainable' as used in the United Nations formula. Many criteria which are embodied in that formula do not involve sustainability in its normal meaning. Moreover many development projects also require criteria to be considered which are plainly outside the United Nations formula.
31. In 1995 the House of Lords Select Committee produced a lengthy report on the meaning of sustainable development. *Cullingworth and Nadin* devotes considerable space to the concept.²³ and box 7.2 sets out various definitions of 'sustainability'.²⁴ The authors more or less admits defeat with this passage:

'Words cast a spell which can, at one and the same time, command respect and create great confusion. No word illustrates this better than the ubiquitous 'sustainability'. There is a view that the word has been so badly abused and misused that it has lost any useful meaning; it now serves to obscure rather than reveal the real issues. General public awareness and understanding of the concept remains low.'²⁵
32. The authors conclude that the concept is 'political, vague and uncertain'.²⁶
33. My own conclusion is that 'sustainable' as used in the United Nations formula is intended to be given a special meaning. This is not unusual in legislation, where what counts is the legal meaning of the term in question, which may be different to its ordinary meaning.²⁷ But it has to be asked why it was thought sensible to adopt a term which has to be used in a special way, and which has caused much confusion and misunderstanding, when more suitable terms are available. It would be much closer to the intention behind the United Nations formula to refer instead to 'responsible development' or 'ethical development'.

The legal meaning of a term

34. Here I need to draw on my textbook *Bennion on Statutory Interpretation* (referred to below as the Bennion Code). This is in terms of 'enactments', that is parts of an Act of Parliament. The same interpretative principles apply to delegated legislation and to

²¹ *The Times*, 4 August 1976.

²² Town and Country Planning Act 1990, s. 55(1).

²³ See chapter 7, pp. 248-287.

²⁴ See p. 251.

²⁵ Page 250.

²⁶ *Ibid.*

²⁷ See paragraph 35 below.

official guides, such as the NPPF, which are intended to be acted on in the same way as law, though always subject to actual law.

35. The Bennion Code says ‘The interpreter’s duty is to arrive at the legal meaning of the enactment, which is not necessarily the same as its grammatical meaning. This must be done in accordance with the rules, principles, presumptions and canons which govern statutory interpretation (in this Code referred to as the interpretative criteria, or guides to legislative intention).²⁸
36. The Bennion Code goes on to say that if the term in question is ambiguous in its application to the facts of the instant case, the legal meaning will be in doubt. Two possible and conflicting meanings of the term ‘sustainable development’ are shown by *Cullingworth and Nadir* in discussing a comment by Shiva²⁹.
37. Even where the term is not ambiguous, there may be real doubt as to the legal meaning because the relevant factors drawn from the criteria laid down by law as guides to the legislative intention tend in different directions.³⁰ This requires a balancing exercise. The basic rule of statutory interpretation is that ‘the legislator’s intention is taken to be that in any case of doubtful meaning the enactment shall be construed in accordance with the general guides to legislative intention laid down by law; and that where these conflict the problem shall be resolved by weighing and balancing the interpretative factors concerned’³¹.

Analysing the NPPF

38. In a foreword to the NPPF the Minister for Planning says:
39. The purpose of planning is to help achieve sustainable development. Sustainable means ensuring that better lives for ourselves don’t mean worse lives for future generations . . . Our natural environment is essential to our wellbeing, and it can be better looked after than it has been. Habitats that have been degraded can be restored. Species that have been isolated can be reconnected. Green Belt land that has been depleted of diversity can be refilled by nature – and opened to people to experience it, to the benefit of body and soul.
40. Our historic environment – buildings, landscapes, towns and villages – can better be cherished if their spirit of place thrives, rather than withers. Our standards of design can be so much higher. We are a nation renowned worldwide for creative excellence, yet, at home, confidence in development itself has been eroded by the too frequent experience of mediocrity. So sustainable development is about positive growth – making economic, environmental and social progress for this and future generations. The planning system is about helping to make this happen.
41. Development that is sustainable should go ahead, without delay – a presumption in favour of sustainable development that is the basis for every plan, and every decision. This framework sets out clearly what could make a proposed plan or development unsustainable. In order to fulfil its purpose of helping achieve sustainable development, planning must not simply be about scrutiny. Planning must be a creative exercise in finding ways to enhance and improve the places in which we live our lives.
42. This should be a collective enterprise. Yet, in recent years, planning has tended to exclude, rather than to include, people and communities. In part, this has been a result of targets being imposed, and decisions taken, by bodies remote from them.

²⁸ Bennion Code s. 2(1).

²⁹ See pages 250-251.

³⁰ Bennion Code s. 150. For a fuller explanation see the Comment on s. 150 at pp. 441-443.

³¹ Bennion Code s. 193.

Dismantling the unaccountable regional apparatus and introducing neighbourhood planning addresses this.

43. In part, people have been put off from getting involved because planning policy itself has become so elaborate and forbidding – the preserve of specialists, rather than people in communities. This National Planning Policy Framework changes that. By replacing over a thousand pages of national policy with around fifty, written simply and clearly, we are allowing people and communities back into planning.³²
44. The NPPF goes on to say that Resolution 42/187 of the United Nations General Assembly defined sustainable development as ‘meeting the needs of the present without compromising the ability of future generations to meet their own needs’.³³ The NPPF says that its wording ‘must be taken into account in the preparation of local and neighbourhood plans, and is a material consideration in planning decisions’.³⁴ The NPPF points out that it ‘does not contain specific policies for nationally significant infrastructure projects for which particular considerations apply. These are determined in accordance with the decision-making framework set out in the Planning Act 2008 and relevant national policy statements for major infrastructure, as well as any other matters that are considered both important and relevant’.³⁵
45. The NPPF then says: ‘The UK Sustainable Development Strategy *Securing the Future* set out five “guiding principles” of sustainable development: living within the planet’s environmental limits; ensuring a strong, healthy and just society; achieving a sustainable economy; promoting good governance; and using sound science responsibly’.³⁶ This is perhaps the widest definition of sustainable development so far put forward and shows how incoherent the concept has become. Yet the NPPF later says that this incoherent mish-mash³⁷ should be seen ‘as a golden thread running through both planning and decision-taking’.³⁸
46. Later the NPPF switches to a concept described as ‘sustainable economic growth’ as if this were equivalent to ‘sustainable development’, which it plainly is not.³⁹ It uses vague language such as ‘an economy fit for the 21st century’ (as though a mere calendar change had substantial significance).
47. The NPPF points out that planning law requires that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise⁴⁰. It creates a presumption in favour of ‘sustainable development’, once again calling it a ‘golden thread’.⁴¹

Reactions to NPPF

³² This is a very doubtful proposition. The ‘thousand pages of national policy’ consist of detailed guidance that has been carefully worked out from experience over many years. To replace them with ‘fifty pages written simply and clearly’ is likely to rob those concerned of precise answers to their particular problems. It is like the delusion that complex statute law can be painlessly replaced by much shorter formulations written in so-called ‘plain English’.

³³ Page 2.

³⁴ Page 1.

³⁵ Ibid. This illustrates the fact that so-called ‘sustainable development’ is far from being the only consideration in most planning decisions.

³⁶ Page 2.

³⁷ See my letter in *Private Eye*, paras. 79 and 80 below. The OED defines ‘mish-mash’ as ‘A confused mixture; a medley, hodgepodge, jumble’.

³⁸ Page 4.

³⁹ Page 6.

⁴⁰ Town and Country Planning Act 1990 s. 70(2); Planning and Compulsory Purchase Act 2004 s. 38(6).

⁴¹ Pages 3-4.

Extracts from article by Edward Fennell in The Times Law 5 April 2012

48. The publication by Planning Minister Greg Clark of the final version of the National Planning Policy Framework (NPPF) was greeted positively by both sides in the long-running planning policy saga. Champions of the environment expressed relief that the right kind of safeguards were in place while developers seemed satisfied that they could start investing again in commercial and housing projects. Had gregarious Greg magically managed to square the circle of pleasing all parties?
49. Not quite. Predictably, it was the lawyers who were the awkward squad, pointing out that while the NPPF had quite a lot to commend it, there were still major issues that had been glossed over. As Tim Johnson, of DAC Beachcroft, observed: 'The NPPF seeks to achieve a balance . . . however, we continue to wonder whether it has resulted in policies that, in trying to satisfy all, will end up satisfying nobody. It is potentially a document that will need to be subject to some quick revisions.'
50. Christopher Stanwell, of Nabarro, agrees that there is a danger that the broad and fastidiously balanced terms in which the framework is expressed means that each side can read their own interpretation into it: 'That there was backing from both developers and environmentalists did worry me.'
51. Already the framework's usefulness is being challenged in the context of next month's local elections. 'Local councils will have to check that every decision they make complies with the new NPPF,' says Denis Archdeacon, a Labour activist and a candidate for a seat on Winchester City Council. 'It takes effect immediately and could well hinder the local plan process already under way. Reducing more than 1,000 pages of planning guidance to just 50 pages may sound helpful, but the inevitable ambiguities in this slimmed-down document will create a lawyers' paradise. It will lead to more planning matters being determined by the courts instead of being decided by local people.' This is the exact opposite of what had been intended.
52. The threat of an escalation of cases going to appeal and then judicial review — at least during a transition period — is a concern. The Government maintains that there should be 'a powerful presumption in favour of sustainable development that underpins all local plans and decisions'. But, says Stanwell: 'It's totally up for grabs what 'sustainable development' means.' Or as Tim Taylor, of Forsters, puts it, 'By simplifying the rules you are opening up the scope for wider disputes. Condensing guidance down to 12 core principles sounds attractive. But what do those 12 principles mean in practice? It is all about the weight that you attribute to the various factors.'
53. Alistair Watson, of Taylor Wessing, says that 'three or four' major test cases will be required before it is possible to see how the framework will shape the planning landscape in the medium-to-long term. The main focus of interest will be on how the economic, social and environmental factors are calculated in the evaluation of 'sustainability'.
54. But Ian Trehearne, of BLP, observes: 'Sustainability is a very elastic concept — there's a real problem in how to define it.' It may well boil down to 'subjective judgments' made by judges who, as Tim Johnson says (given the shortage of specialist planning judges) could adopt individualistic approaches.
55. But, Trehearne says, the NPPF does provide an opportunity for local authorities to 'stop moaning — which has been their ingrained attitude — and to start leading'. Or, at least, leading as far as their competence permits. Alistair Watson, of Taylor Wessing, says that large infrastructure projects such as power stations, ports and airports will not be covered by the NPPF; they will have their own specific National Policy Statements. 'Local communities should not, therefore, take the NPPF to mean

that it is a policy document that can overrule or overcome National Policy Statements on large infrastructure projects.’

56. So it is all more complicated than the original reactions last week suggested. But perhaps to imagine that any Government could come up with a simple cure-all for our planning problems was always going to be illusory. As Tim Johnson put it: says: ‘Britain is a small country with great pressures on land and there is inevitable conflict between those who want to conserve and those who want to develop. There is never going to be an easy answer to these conflicts so matters have to be resolved by discussion and in some cases the legal process.’
57. In practice, all Greg Clark could do was slim down the dizzyingly complex panoply of regulation while speeding up the painfully slow planning process. In this respect, as most lawyers acknowledge, he has done a pretty good job. Or as Christopher Stanwell says: ‘Greg Clark was the only Government minister to emerge from last week with any credit.’

Letter from Francis Bennion published in The Times on 9 April 2012

58. Praise should be given to the article by Edward Fennell (Law, 5 April) on the new National Planning Policy Framework. It ably shows the wide disquiet felt about this document, particularly its reliance on the faulty concept of ‘sustainable development’. With wide experience as a parliamentary draftsman accustomed to framing statutory definitions, I am astonished that heavy weight should be placed on such an inadequate term. It will cause prolonged argument at almost every future planning hearing.
59. The document contains no proper definition of the term ‘sustainable development’. It says ‘Sustainable means ensuring that better lives for ourselves don’t mean worse lives for future generations’. What sort of definition is that?
60. The document also says ‘Resolution 42/187 of the United Nations General Assembly defined sustainable development as meeting the needs of the present without compromising the ability of future generations to meet their own needs.’ That is no better as a definition.
61. The document adds: ‘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.’ Are planning hearings really going to have to plough through over two hundred paragraphs of this document every time there is argument about whether a proposed development is ‘sustainable’?
62. The government should think again.

Letter from various bodies published in The Times on 13 April 2012

63. In our letter (‘Planning for a sustainable future’, 14 March 2012), we anticipated the publication of the Government’s proposals for planning reform, and called for these to move away from the sterile and misleading debate that pits growth against the environment. We set out a number of yardsticks for success, which would make the difference between a strong, sound and sustainable planning policy and one that would open the way for rancour, dispute and the degradation of our priceless natural and historic environments.
64. We are therefore pleased that the Government has listened to many of our concerns. The definition of sustainable development has been strengthened, protection for designated sites is retained, there is recognition for local wildlife sites and the intrinsic character and beauty of the countryside, and a new emphasis on

environmental enhancement and restoration. The importance of development taking place on previously developed (brownfield) sites, provided they are not of high environmental value, is recognised, alongside strengthened policies to bolster town centres.

65. The ultimate proof of the framework will be how it works in practice, and whether it allows for the sustainable development the Government wants while protecting what Greg Clark, the Planning Minister, rightly described as ‘what we hold dear in our matchless countryside and in the fabric of our history’. Our organisations will work across the country to try to ensure that it does.

Peter Waine, Campaign to Protect Rural England
Paula Ridley, Civic Voice
Lloyd Grossman, The Heritage Alliance
Simon Jenkins, National Trust
Ian Darling, RSPB
Paul Wickham, The Wildlife Trusts

Letter dated 13 April 2012 from Francis Bennion to The Times (not published)

66. The joint letter (Letters, 13 April 2012) by Campaign to Protect Rural England, Civic Voice, The Heritage Alliance, National Trust, RSPB, and The Wildlife Trust says approvingly that in the National Planning Policy Framework (NPPF) the definition of sustainable development has been ‘strengthened’. Evidently the text of the joint letter was agreed among these six bodies before publication of my letter of 9 April and the article by Edward Fennell (Law, 5 April) to which I refer in it. Both these contain strong adverse criticisms of the definition, which require an answer from the Government. So far no answer has been forthcoming, which suggests the criticisms are justified.
67. There is a further question about the status of the NPPF. It lists 43 policy documents which it says it replaces. All these, and the NPPF itself, are worded as if they were law. But they are not law, and their origins have none of the safeguards provided by proper law-making procedure. The rule of law requires that what is effectively law should not be disguised in this way.

Letter dated 25 April 2012 from Francis Bennion to CPRE

68. I am a life member of CPRE.
69. I am writing about the joint letter in *The Times* of 13 April last which was signed on behalf of the CPRE, of which my wife and I are members. The letter says approvingly that in the National Planning Policy Framework the definition of sustainable development has been ‘strengthened’. However a few days earlier *The Times* had published my letter of 9 April. This, and the article by Edward Fennell (Law, Apl 5) to which I refer in it both contain strong adverse criticisms of the definition, which require an answer from the Government. So far no answer has been forthcoming, which suggests the criticisms are justified. I include a copy of my letter below. [See above.]
70. I am an experienced parliamentary draftsman, and am very unhappy about the concept of ‘sustainable development’. It seems to me to have virtually no meaning, and yet it is intended to use it extensively in deciding planning appeals. I would like to be put in touch with someone on the CPRE staff who is competent to discuss this difficult matter with a view to persuading the CPRE to try and get it remedied.
71. My Times letter published on 9 April read: [See above.]

72. I would like to expand the argument given above by giving the following example based on a local case in Exmouth.
73. The East Devon District Council wish to procure the building of a supermarket on the rugby ground near the Exe Estuary which is adjacent to the Imperial Recreation Ground. This brings into play paragraphs 73 and 74 of the National Planning Policy Framework, which run as follows:
74. '73. Access to high quality open spaces and opportunities for sport and recreation can make an important contribution to the health and well-being of communities. Planning policies should be based on robust and up-to-date assessments of the needs for open space, sports and recreation facilities and opportunities for new provision. The assessments should identify specific needs and quantitative or qualitative deficits or surpluses of open space, sports and recreational facilities in the local area. Information gained from the assessments should be used to determine what open space, sports and recreational provision is required.
75. '74. Existing open space, sports and recreational buildings and land, including playing fields, should not be built on unless an assessment has been undertaken which has clearly shown the open space, buildings or land to be surplus to requirements; or the loss resulting from the proposed development would be replaced by equivalent or better provision in terms of quantity and quality in a suitable location; or the development is for alternative sports and recreational provision, the needs for which clearly outweigh the loss.'
76. Building a supermarket on this site would only be 'sustainable development' within the intended meaning of that term if the requirements of these two paragraphs are met. But in ordinary language the question whether a supermarket on this site would be 'sustainable' has nothing to do with paragraphs 73 and 74. It depends on whether Exmouth needs and can support another supermarket in its centre. That illustrates the fact that the term 'sustainable development' is highly misleading and should be replaced.
77. The above does not embrace all the complexities that surround this issue, but is intended as a broad statement. Detailed work would be needed to translate it into actual amendments to the Framework document.
78. My textbook is *Bennion on Statutory Interpretation* (LexisNexis), 5th edition 2008. A new edition is coming out later this year. I would be happy to assist CPRE in taking the matter further if desired.⁴²

Extract from letter from Francis Bennion published in Private Eye on 17 May 2012

79. Stewart Baseley of the Home Builders Federation says it was a rival trade association, the House Builders Association, and not his own lot that described the Government's National Planning Policy Framework (NPPF) as a mish-mish. I am reluctant to intrude on a private argument, but I have to side with his rivals. The NPPF really is a mish-mash, and a particularly horrible one at that.
80. I also have to find fault with Baseley's outfit for asking the government to introduce the presumption in favour of sustainable development immediately. As a parliamentary draftsman of many years' experience I can say that it is a lousy concept, empty of meaning.

⁴² This letter was sent by first class post to CPRE, 5-11 Lavington Street, London SE1 0NZ. No reply was received to this letter, though there has been later correspondence with CPRE. A letter in similar terms was sent to Sir Simon Jenkins, Chairman of the National Trust (of which I am also a member) to which a reply was received on 17 May 2012.

Conclusions

81. The conclusions I draw from the above are as follows.

- (1) From at least 1972 the United Nations (UN) has been justifiably concerned about the following: (a) irresponsible development that endangers the planet and (b) unjustified inequalities between nations.
- (2) To meet these concerns the UN has adopted a policy of encouraging what it calls 'sustainable development'.
- (3) The term 'sustainable development' as so used is unsatisfactory because it is undefined, ambiguous and misleading, and does not accurately convey the actual objectives. It has been dismissed by *Cullingworth and Nadin* as 'political, vague and uncertain'.
- (4) A possible definition that would be satisfactory in meeting the United Nations requirements is the following: 'Sustainable development is development which respects the planet as the environment within which all living and future human beings dwell or will dwell, and from which they draw or will draw their sustenance. In particular, but without prejudice to the generality of the forgoing, sustainable development-
 - i) does not deplete or damage unduly the living beings, atmosphere, waters, rocks, metals, soils, and other natural resources of the planet (allowing for any replacement resources which have been, or are to be, provided by or at the instance of the developer);
 - ii) has due regard to the requirement which governs us as human beings to relieve sickness and poverty, particularly in developing countries, and to remove or mitigate inequalities between nations;
 - iii) uses appropriate energy resources, and does so to a reasonable extent and in an acceptable manner, having regard to the need to protect the climate;
 - iv) provides for economic growth to the extent that it may be requisite;
 - v) has regard to the need to avoid over-population of the planet'.
- (5) More appropriate terms than 'sustainable development' would be 'responsible development' or 'ethical development'.
- (6) The term 'sustainable development' is well established in UN usage and I do not suggest that any attempt should be made at this stage to have it defined or altered by the UN. This report is concerned only with the NPPF.
- (7) The NPPF is defective in a number of ways-
 - i) It uses the objectionable term 'sustainable development' without defining it or attempting to explain its intended meaning in the NPPF, which is not in all respects the same as the United Nations meaning (expressed in the suggested definition given above);
 - ii) In paragraph 12 it acknowledges that the Planning and Compulsory Purchase Act 2004 s. 39(2) says that any body or person listed in s. 39(1) must exercise its functions 'with the object of contributing to the achievement of sustainable development' but does not clear up the doubt about the legal meaning in s. 39(2) of the term 'sustainable development'.⁴³ In practical terms, the position is that existing Local

⁴³ See paragraph 3 above. I appreciate that there is no power to amend in the NPPF the terms of an Act

Plans, while they should comply with s. 39(2) and mention the need for sustainable development, are using a term whose legal meaning is uncertain.

- iii) It creates a legal presumption in favour of ‘sustainable development’ which is unjustified considering its uncertain meaning;
 - iv) It is a mish-mash which mixes up the term ‘sustainable development’ with other concepts such as ‘sustainable economic growth’;
 - v) It boasts of ‘allowing people and communities back into planning’ because it has ‘replaced over a thousand pages of national policy with around fifty. This is likely to rob those concerned of precise answers to their particular problems, a highly dangerous thing to do.
- (8) I propose that, when the wording of this report has been agreed (with or without alteration) by the CPRE, that body, together with any other bodies of a similar opinion, should forward it to the Minister for Planning, Mr Greg Clark MP, with a request that the NPPF be suitably amended.

© Francis Bennion 2012

www.francisbennion.com

© 2011 F A R Bennion
Doc. No. 2012.012

Website: www.francisbennion.com
Published only on this website

Any footnotes are shown at the bottom of each page
For full version of abbreviations click ‘Abbreviations’ on FB’s website

References:

None