# Neighbourhood plans - timely or not?

**Neighbourhood plans: what is there not to like? Local communities having a real say in what is developed in their local patch. Localism empowered; development embraced. Take this vision from the adopted Exeter St James Neighbourhood Plan (March 2013).**

*"St James will be known for its strong community, rich urban character, attractive green streets and spaces and thriving natural environment. St James will become known by people at all stages of their lives as one of the best parts of the city in which to live".*

Paragraph 183 of the National Planning Policy Framework (**"Framework"**) points to neighbourhood planning giving communities *"direct powers to develop a shared vision for their neighbourhood and deliver the sustainable development they need".*

No wonder well versed and vocal parish councils are drafting their versions of the neighbourhood plans across the country. Just one little fly in the ointment: for a neighbourhood plan to be legally and policy compliant it must amongst other requirements have regard to national policy (the Framework) and be in general conformity with the strategic policies of the local plan (the Basic Conditions) and as we still have vast swathes of the country without an up-to-date local plan (a disgrace in its own right) this presents itself as a little local difficulty. How can a neighbourhood plan meet this requirement in the absence of an up-to-date (Framework compliant) local plan? Difficult. Does the Framework shed any light? No: it merely encourages up-to-date local plans being put in place *"as quickly as possible"*. No problem there then it's only nearly 10 years since new style development plans were introduced. How about the recently published BETA version of the National Planning Practice Guidance? This gives a clear pointer:

*"The neighbourhood plan should support the strategic development needs set out in local plans including policies on housing and economic development. The level of housing and economic development is likely to be a strategic policy".*

An interesting slant on this dilemma is contained in the recently published Tattenhall & District Neighbourhood Plan (Examination Version). Objections were raised to Policy 1 requiring individual developments within or immediately adjacent to the built up area of Tattenhall village to be limited to 30 dwellings. Local Plan Policy HO1 which previously set out policies relating to the scale of development lapsed when not saved in 2009. Mr Nigel McGurk, the independent examiner into the plan, reported as follows:

*"A number of house builders with specific reference to lapsed Policy HO1 of the adopted Chester District Local Plan agreed with one another that Policy 1 did not meet the Basic Conditions because it could not be in general conformity with a policy that doesn't exist. Whilst I have read Sartre, I struggled a little with the existentialist nature of this. However after contemplation with a cold towel on my head, I am satisfied that being in general conformity with something that doesn't exist is not a test relevant to this examination".*

As an initial aside any development plan examination that involves the philosophical musings of Jean Paul Sartre (as opposed to endless debates about housing numbers, demographic trends and bus timetables) is of course to be welcomed. And the Wikipedia definition of existentialism: "a sense of disorientation and confusion in the face of an apparently meaningless or absurd world" would appear to be spot on in terms of describing many aspects of today's planning system. Mr McGuirk decided that if the Tattenhall & District Neighbourhood Plan (Examination Version) would have been good enough for Jean-Paul Sartre it was good enough for him and decided it met the Basic Conditions. Several house builders perhaps unsurprisingly do not agree and have rushed off to the High Court to obtain an injunction against Cheshire West & Chester Council suspending a ballot on the Tattenhall Neighbourhood Plan.

In contrast to the Tattenhall Report, the examiner into the Dawlish Parish Neighbourhood Plan (albeit prepared in advance of the adoption of the 2012 Neighbourhood Plan (General) Regulations reported as follows:

*"Whilst DPNP (Dawlish Parish Neighbourhood Plan) is in broad conformity with the strategic policy S17 of the Preferred Options Report, there are substantive differences in terms of strategic allocations of both housing and employment land. While it may be possible to resolve these, particularly as the strategic policies remain to be settled, as currently drafted the two documents are in clear conflict."*

He went on to find that the neighbourhood plan should only proceed to a referendum once the strategic policies of Teignbridge District Council had been settled.

Until District Councils get their local plans in order and up-to-date, neighbourhood plans will continue to struggle to proceed to adoption. They can follow the lead of Thame Town Council. Their Neighbourhood Plan was examined in February 2013 and adopted in March 2013 on the back of a Core Strategy for South Oxfordshire District Council adopted in December 2012. Evidence that neighbourhood plans need to be and indeed can be timely.

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Consort EM
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# Welcome

**I would like to welcome you to the latest issue of our latest newsletter Consort EM.**

There have been some changes since the last newsletter was produced and that is reflected in the newsletter. I am delighted that Stuart Leslie has taken up the role of co-ordinator and he has written a short article explaining what he will be doing in what I am sure will be an extremely busy and challenging time ahead.

We continue to gather new members. In recent months Cherwell District Council, Doncaster Metropolitan Borough Council, Walsall Council and Stoke on Trent City Council have all joined and we welcome them all to EM LawShare. It is great that we are continuing to grow and attract new members.

The training programme continues to go from strength to strength with good attendance and very positive feedback. It really provides authorities to receive some expert training on the current hot topics which we are all facing and coming up before Christmas we have seminars on Shared Services, Commercial Update (including Insolvency), Information Management and Adult Services – you can see full details on the website. Charlotte Brown who did a brilliant role administering the programme has moved on and Senara Shapland has taken over the role. I would like to thank Charlotte for her excellent work supporting the training programme and welcome Senara who I am sure will do an equally good job!

As you are no doubt aware we have started the process of re-tendering for our legal panel. The new contract will commence in April 2014 and will run for four years.

I hope you enjoy the articles in this newsletter. They cover topical issues such as solar farms, neighbourhood plans and the perils of adjudication.

I would like to thank the partner firms who have contributed by providing their expert views and knowledge on many areas that remain topical to local authorities.

Finally, if you have any suggestions that you would like to put to the Consortium, Stuart and I would be delighted to hear from you.

Thank you once again for your continued support.

**Jayne Francis-Ward**
**EM LawShare**
**Corporate Director and Monitoring Officer**
**Nottinghamshire County Council**

## Stuart Leslie takes on Co-ordinator role

**Stuart Leslie, former Director of Legal Services at Derby City Council, has taken on the new part time role of Co-ordinator for EM LawShare.**

One of the three original founders of the consortium, with Jayne Francis-Ward and John McElvaney, Stuart has been on the Management Board since its inception in 2005.

In his new role his duties include;

- promoting the consortium
- responding to enquiries
- arranging and producing the minutes for the meetings of the Management Panel and Delivery Group.
- liaising with the leads from the Partner firms
- helping to produce and analyse the spend by consortium members

Currently he is also heavily involved in the procurement exercise to appoint firms to the new four year contract.

If you want to know more on any aspect of the consortium or raise any issue about it you can contact Stuart by emailing him at **SI.EMLawshare@yahoo.com.**

# In this issue



# Local Growth a new environment?

**Since the Treasury's call for "unleashing the power of local economies" in March of this year in response to Lord Heseltine's report "No Stone Unturned in Pursuit of Growth" (the "Heseltine Report" October 2012), the emphasis on local growth and the need for local authorities to be key partners of the private sector in this has moved to the front of government policy.**

In a recent conference Lord Heseltine has suggested that local authorities should concentrate on establishing 'wealth creating partnerships'. So does this then create the hope for local authorities (and their wider economic areas) that the Government is starting to make good on its commitment to localism? Mr Pickles' vision of power moving away from Whitehall continues however, the inevitable power struggles within central government departments may slow progress.

## The rise of Local Economic Partnerships

Local Economic Partnerships (LEPs) are now coming out of their infancy and having been given a boost last autumn with the confirmation that core funding of up to £250,000 would be available to each LEP for the next two financial years, they are keen to move forward. A number of city regions now have City Deals giving them additional powers and funding opportunities and this is set to increase with others currently being negotiated. All this means that exciting times lie ahead for local authorities if they can move outside of their more traditional remit and work hand in glove with the private sector.

The Heseltine Report and the Treasury backed up the challenges laid down to LEPs in a report of September 2012 from the All Party Parliamentary Group "Where Next for LEPs?". These were to:

- get the balance between strategy and delivery right;
- pursue wider and deeper engagement with businesses;
- explore more collaboration across LEP boundaries; and
- ask local authorities to show more leadership, particularly in using LEPs to deliver cross-authority work.

The final two are most relevant to the way in which future funding will be allocated and how central government will evaluate the success of local growth initiatives. However, they cannot be achieved without the first two and it is really important that all the partners involved in local growth arrangements consider how these can be achieved. One might suggest, that local authorities in their community leadership role could be ideally placed to lead on driving the delivery.

## Collaboration

Successful LEPs and City Deals require true partnership working between the public and the private sector within the geographical boundaries of those partnerships. In some cases, LEPs are showing the benefits of moving beyond those boundaries and working with other partnerships. Indeed locally in the East Midlands we have seen LEPs reconsidering economic pathways with the suggestion, at least, of mergers. Nationally we have even seen some defections from one LEP to another. Central government is extremely keen to see the local growth agenda evolve and see cross LEP boundary collaboration as a way to further improve the leverage of private finance in to local growth. Over time the 39 LEPs may well become a smaller number, as we see a rationalisation of economic pathways and who knows we may see more strategic regional growth areas?

The ability for local authorities to pool their retained business rates to again get more leverage from a bigger pot is now more of an exciting reality for local authorities. This could happen with Tax Increment Financing ("TIF") if it is part of a City Deal or other arrangement with the Treasury. For both of these, and particularly TIF, councils will have to consider the normal prudential borrowing requirements and, in the small number of deals where it can be outside the prudential borrowing limits, the local authority will still have to take reasoned and balanced decisions as to how it could use TIF to drive local growth. However, this really could, in appropriate situations, be a game changer for local growth and should be seriously considered for the right project where other sources of funding from central government are not going to be available.

These financial benefits will be looked at very closely by central government when assessing the ability of LEPs and other local growth partnerships to manage and drive forward growth. It is without doubt the role of the local authority to ensure that maximum benefit can come from this while retaining the control required to satisfy its auditors.

Interestingly however, the growth of importance of the 8 core cities could be starting to be divisive. Bradford MBC has become the latest city to see an application for membership of the increasingly influential 'core cities' group turned down. It will be incumbent on all partners (whether within city deals or not) to ensure that true collaboration is maintained if local growth is not to be stifled by unnecessary 'turf wars'.





## Leadership and governance

One of Lord Heseltine's successes is the Single Local Growth Fund. The Heseltine Report identified and strongly criticised the plethora of current funding streams for local growth and advocated a single pot in which up to £49 billion worth of funding would sit. The Treasury has taken a slightly more cautious approach and is initially talking about some funding for skills, housing and transport being in this single pot which will be in place from the financial year 15/16. The speed at which this is falling into place is no doubt frustrating both to Mr Pickles and more importantly those who are driving local growth.

One of the most important differences between this new funding stream and the existing ones is the requirement for proper and accountable governance structures being set up and led by local authorities. We have seen excellent examples of these in the North East with the setting up of a combined authority and in Birmingham and Solihull where a "supervisory board" comprised of elected members of the different authorities has been established. It is important to note that these will be seen as a key part of the Strategic Growth Plan, the basis on which negotiations for the new single pot will take place. Those areas that can evidence good and proportionate governance will be seen as a safer bet for larger sums of money. There will also, it is hoped, be less ongoing involvement from Whitehall.

The Treasury also expects to see a lot of the projects funded through the single pot to be delivered by local authorities and other bodies not the LEP itself. Therefore, it is incumbent on local authorities to ensure that they have the procedures and strategies in place to give confidence to the other partners and central government that they are ready willing and able to take their place in and at the forefront of the local growth agenda.

## Conclusion

Despite the government's public obsession with growth in the private sector there is no doubt that if local growth is going to be truly driven, then local authorities will have an extremely important role to play in how this is achieved. However, they may well need, as part of this to show some of that entrepreneurial spirit that Mr Pickles often alludes to. As the Treasury have shown recently, funding needs to be managed and delivered upon within strong and transparent governance arrangements. Good governance is what the public sector does and has years of experience of making these kind of arrangements work and shouldn't be afraid to say so and show that it can be a driving force for local growth.

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*"On-going training and timely advice is now more important than ever in a fast changing area of law, which carries many risks for the delivery of a Council's service objectives."*

# When does the clock begin to tick?

**Last summer, national health and social care provider, Turning Point, brought a case against Norfolk County Council following its failure to win a contract for services that the Council put out for tender. Turning Point was unsuccessful in its challenge, and the reasoning behind the Court's ruling has wider implications, not only in terms of social care procurement, but also across the public sector.**

Until recently, UK legislation imposed a three month time limit within which a public procurement process could be challenged. However, in October 2011 the Government reduced this to just 30 days for most claims. Before the Turning Point case it was thought that in most situations, it would be possible to argue that the time limit would start from when a council or any other contracting body officially awarded a contract. The Court has now clarified that the time limit for challenge could expire well before then.

The dispute between Turning Point and the Council arose as Turning Point alleged that the Council had not provided them with sufficient TUPE information regarding employee regulations and that this had consequently impacted their tender submission. The Court ruled that the time limit to bring a complaint began when Turning Point submitted its tender and potentially even as soon as they knew that the information was inadequate. It was thus ruled that the time limit to challenge the decision had since run out.

In real terms, this means that if a bidder wants to complain of unfairness arising from the evaluation criteria or from the amount of information provided in the process, proceedings may need to begin before a contract award notice has been issued.

Many councils are no doubt hopeful that this ruling will mean fewer claims, with the expectation that bidders will not want to raise issues half way through a procurement process. However, feedback from some national contractors suggests that, if it is a choice between bringing a claim before the process is even complete or not bringing a claim at all, many would choose the former.

In limited circumstances Judicial Review can be an alternative route for challenge by bidders. However, the Government has also recently reduced the time period for seeking a Judicial Review of public procurements so that these are brought into line with the 30 day time limit imposed by the EU procurement regulations.This step has been taken with the declared intention of reducing the number of decisions reviewed but time will tell whether it is successful or whether reviews are also sought earlier in the process.

The difficulty now for procurement teams is knowing how to successfully steer their organisations through this rapidly changing legal landscape. There is the risk of procurements being derailed by bidders at a far earlier stage and therefore it is essential for housing providers to keep in mind the fundamental principles of transparency and non-discrimination. When bidders raise concerns during the process, these should be taken very seriously. If the issues are not addressed fairly and promptly, the risk of challenge at an earlier stage is now significantly increased.

On-going training and timely advice is now more important than ever in a fast changing area of law, which carries many risks for the delivery of a Council's service objectives. Nevertheless, it is not all bad news for local government. The chances are that more challenges will be out of time and so can be dealt with outside of a Court setting. However, nothing should be left to chance and councils need to develop a tactical awareness of how procurement processes can be shaped to avoid challenges being made part way through and not just when the contract award decision has been made.

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# The Perils of Adjudication

*"For local authorities, the main advice that can be given is that they should be alive to the potential dangers, so that they are not caught unawares when a contractor decides to press the adjudication button."*

Before the recession, civil engineering contractors were loath to become embroiled in disputes with highways authorities. Public sector work was seen as a reliable source of income, and one that was important for a contractor's CV. No one wanted a reputation for being "claims-orientated" in a world where repeat business was important.

However, an economic downturn can change attitudes. Contractors are no longer able to augment their relatively low profit margins (1%-2% at best) by making money on large cash holdings in the way that they used to, because those cash holdings have diminished. The construction industry continued to decline in the first part of 2013. Industry giants such as Kier, Carillion and Galliford Try all recently reported double-digit percentage falls in revenue.

The upshot is that contractors have been under pressure from their finance departments to get cash in more speedily. Proceedings, including adjudication, are no longer a last resort.

For an ill-prepared authority, adjudication can be an unpleasant surprise. Once a notice of adjudication is given, things move fast. The responding party will typically only have a week, or two weeks at most, to answer a claim that the contractor may have been preparing for months. This may contain evidence of witnesses, including experts, that the authority will not have previously seen. An adjudication decision is binding and must be paid up on, though it can be challenged in later litigation or arbitration proceedings.

Over the years, efforts to avoid enforcement of adjudication decisions have largely proved ineffective. In a recent example (*Willmott Dixon Housing v Newlon Housing Trust, April 2013)* the Trust tried to argue that it was unlawful to commence two adjudications against them simultaneously. The judge rejected these arguments, and enforced the decisions for a combined total of over two million pounds. There was nothing in the Construction Act, said the judge, to prevent a party commencing multiple adjudications against a party simultaneously.

Similarly, courts will enforce decisions even if they contain errors of law, or the adjudicator has breached natural justice (unless the breach is particularly serious). As the Technology and Construction Court recently reiterated *(Farrelly (M&E) Services Ltd v Byrne Brothers (Formwork) Ltd, May 2013)* the adjudicator needs to have gone off on a "frolic of his own" before the court will treat his decision as unenforceable.

For local authorities, the main advice that can be given is that they should be alive to the potential dangers, so that they are not caught unawares when a contractor decides to press the adjudication button. Putting one's case firmly in correspondence is also important. Most adjudications are decided without a hearing and contemporaneous letters and emails are often what an adjudicator wants to read first. Finally, it is advisable to prepare one's defence well before the adjudication starts. There is not much time to act once an adjudication begins, particularly if a notice arrives at the beginning of a holiday period. Whether by accident or design, those preparing contractors' claims often seem to finish the task just before the Christmas or summer holidays.

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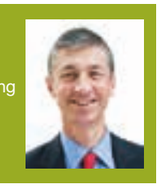

## EM LawShare MJ Award nomination

EM LawShare was nominated for the legal services award for the MJ Awards 2013. The award was to recognise and reward a council legal department, which demonstrates exceptional value for money for the council by delivering on a (or a series of) great contribution(s) which make a long lasting and real difference to people, the local economy, the law and/or the legal profession.

Our entry demonstrated a market-leading approach to the creation of EM LawShare and its development into a consortium of 59 members and has achieved savings of £3.5 - £4 million since its foundation in 2006. This is combined with supporting the education and development of in-house lawyers and access to knowledge and precedents through an improved website.

# Seeing the light - income generation from solar farms

*"...if the Council is both the landowner and planning authority it will need to consider the regulations that affect these sorts of planning applications and on a practical level the possible conflict of interest in the Council wearing 'two hats' – landowner and local planning authority."*

**Local authorities are under increasing pressure to find new revenue sources as public funding dries up. A topical idea for local authorities with plenty of land is to cover some of it with solar (photo-voltaic "PV") panels and sell the electricity, but what are the pitfalls and key issues to consider along the way?**

## Powers and why do it?

The Sale of Electricity by Local Authorities (England and Wales) Regulations 2010 permits local authorities to sell solar generated electricity. If the activity is carried out in conjunction with other trading activities this could be achieved by taking advantage of the provisions in section 95 Local Government Act 2003, which permit trading through a local authority's functions where the activity is conducted through the medium of a limited company. Similar provisions are contained in section 4 Localism Act 2011, although the Localism Act does not require that the trading is linked to a function. Other than making a profit there are, of course, other benefits including the environmental ones, for example, depending on location, a typical 5MWp solar farm will generate enough green electricity to supply up to 1200 homes.

## How much land is needed?

You will need a sufficiently large parcel of land to make it worthwhile and, ideally, it should be flat or gently sloping and the statistically sunnier parts of the country are obviously favoured. A typical 5MWp solar farm covers approximately 25-30 acres. If the power is not being used on-site, the plant will need to be connected to the local electricity distribution system. The costs for this grid connection can be prohibitive and so proximity to the grid is a key consideration, as are the costs of any consents and wayleaves that may be required from third parties to get the electricity from the plant to the grid. Planning permission will be needed. They may not be as visually intrusive as wind turbines, but nonetheless they do have their detractors and if the Council is both the landowner and planning authority it will need to consider the regulations that affect these sorts of planning applications and on a practical level the possible conflict of interest in the Council wearing 'two hats' – landowner and local planning authority. If the project involves a land disposal (excluding short leases of 7 years or less) then there will be a legal duty to demonstrate that the disposal is at the best consideration that can reasonably be achieved. If there is no land disposal the land will still need to be appropriated (transferred) to a solar farm use/function.

## Structures, procurement and finance

There are a number of options; at one end of the spectrum, it might involve leasing the site to a developer and charging rent based on the income generated by the plant. The typical period for a lease of this type is 25 years, often with the right to extend. At the other, the Council could generate and sell its own electricity either on its own or through a wholly/jointly owned company.

In some form or another, the European procurement rules are likely to come into play whether through the process of procuring a partner or the just the kit (together with the operating and maintenance services).

As to finance, the Local Government Act 2003 gives local authorities broad powers to borrow subject to the Prudential Borrowing code. If a company were involved, any investment in the form of taking an equity stake or lending to the company would have to address any State aid implications, not to mention the general need for the project as a whole to have a sound business case.

## How does it pay for itself?

The cost of generating electricity from renewable sources is greater than from non-renewables. As part of the Government's commitment to the target of 15% of energy coming from renewable sources by 2020 there are a range of subsidies in place to help make this happen. For power generation of up to 5MW, there are Feed in Tariffs (FiTs). The rate depends on the technology and the size of the installation. For a ground mounted solar PV park the generation tariff (as of 1 May 2013) is 6.85 pence per kWh and there is an additional 4.64 pence per kWh for each kWh exported. These rates are fixed at the time the plant is built (indexed annually on a RPI basis) and are paid for 20 years. Typically these schemes do pay for themselves well within the 20 year period and as fossil fuels become more expensive they become ever more attractive!

For larger schemes (over 250kWh) there is the Renewable Obligation Certificates (ROC) system, under which renewable generators are issued with certificates which they can sell. The scheme is structured so as to encourage renewable projects to be built but the price at which ROCs can be sold is subject to market demand and so it does vary.

The Government has, for a number of years, 'tinkered' with both the FiTs and ROC schemes leaving investors feeling nervous. It has now recognised that in order for the market to grow, and contribute to the overall renewable energy target, greater certainty is required and recent changes to the schemes have introduced much greater certainty.

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