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Planning and the Rule of Environmental Law

Text of a talk given by Dr John Constable, Director of Renewble Energy Foundation,[1] to the Young UKELA Seminar: *Renewables: Regulating the Third Industrial Revolution*, held at 39 Essex Street Chambers, 28 February 2012.

1. Thank you for the opportunity to speak today about the limits of the planning system, which I shall approach through the differing perspectives of the public, on the one hand, and government on the other.
2. The general public thinks that planning is a system of environmental protection, and is extremely dissatisfied with its performance as such. The government believes it is a policy delivery mechanism that simply doesn't work fast enough.
3. My sympathies are with the public, but the public is wrong in its beliefs, because they have forgotten the history of the system. However, their misconception is a powerful indication of what they wish it to be, and what it will, sooner or later, in the face of public pressure have to become.
4. What the public has forgotten, but I daresay is well known to all of you, is that the planning system is a living descendant of the Attlee government's program for economic planning. It was not conceived, principally, as a means of protecting the environment or of mitigating the impact of development on neighbours. On the contrary, it was a substitute for the nationalisation of land.
5. Policy documents in the late 1930s, *Labour's Immediate Program* of 1937, had expressed an interest in the public ownership of land, and it featured prominently in the 1945 manifesto, which confidently stated that "Labour believes in land nationalization".[2] But there were many practical obstacles to achieving that goal. Nevertheless, a ready solution was found. The state did not, after all, require an asset, it wanted control over land development for the purpose of planning the allocation of national resources. And the 1947 Town and Country Planning act is a compromise, delivering many of the goals of land

[1] REF is a UK charity publishing data on the UK energy sector. It is supported by private donations and has no corporate members or political affiliation. See www.ref.org.uk.
[2] See http://www.labour-party.org.uk/manifestos/1945/1945-labour-manifesto.shtml.

nationalisation (control over economic resource), without exposing the government to the political difficulties of nationalisation, or the economic risks of ownership.

6. The UK Planning System is, historically, an instrument of central economic planning, and in the legal sense it is still so; it is, notoriously, "plan led". To the government, that history is present reality, and they have regarded the planning system as a control mechanism, a means of channelling economic activity to deliver policy objectives.
7. However, that is not how the public regards it today, and it is arguable that they never saw it in the quite same light as Mr Silkin and others in the Labour Party in 1947. What we can be sure of is that there has been gradual change in the way that the general public perceives the system, which they certainly now increasingly see as *the rule of law for the purpose of environmental protection*. That is to say, as a legal system by which various environmental values, architectural, ecological, social, physical, are protected from harm.
8. This divergence of perspectives has led to deep dissatisfaction with the system amongst the public, which sees successive planning guidance documents as the exercise of arbitrary power, rule changing in mid game, in order to secure the delivery of desired ends, renewable energy targets for example, with scant regard for environmental protection.
9. However, while public dissatisfaction with the system is notorious, the character of the point at issue has not been widely recognised by politicians or the civil service; indeed it has been misunderstood as resentment at the *origin* of the plans, with the consequence that attempts to reform the system, such as the Open Source Planning initiative,[3] and the proposals clustered around the Localism Bill, have offered local populations the potential to create their own development *plans*.
10. But it is open to doubt whether people want *plans* at all. Indeed, I suggest that if we reflect on our knowledge of local planning meetings and public inquiries we can see that what the public requires, and mistakenly believes is provided by the planning system, is environmental protection via the rule of law.
11. I said the public's view is mistaken, but of course it is not a fantasy without evidence. However, insofar as it has a basis, this is found in the balancing of benefit against harm to interests of acknowledged importance, which while a fundamental principle is one which a 1947 'planner' would have regarded as

[3] http://www.conservatives.com/~/media/Files/Green%20Papers/planning-green-paper.ashx

being at the service of the plan and the benefits claimed and therefore established by that plan. There is much evidence that this is how the planning profession tend to see it today.

12. And that, of course, is why the planning system is fundamentally unsuited to act as an environmental protection system; it is "plan led", the plan comes first, the environment second, and if environmental regulations, such as they are, are contravened, then government urges the benefits of the plan (which the public frequently regards as dubious), and issues statements of need and other similar documents to tilt the balance in favour of the plan and its objectives.
13. This has led the system into general contempt. Bluntly, the public regards Planning as a corrupt process, owned by government and their collaborating agents. This of course results in real friction between local authorities and their electorates, since it is the authorities who must often enough take the blame for acting as the executive intermediaries of central plans that have unpopular local consequences.)
14. My own view is that the public are correct in their intuitive dislike, and in their belief that the current "planning" system, never successful, is now counterproductive and harmful. Certainly, it has few friends. This general dissatisfaction is not of the mild kind that accompanies a compromise between various interests, but is of the vigorous variety suggesting fundamental dysfunction. It simply doesn't work for anybody.
15. Developers find themselves confronted with a shifting, restrictive, and cumbersome set of imperatives. They detest it, but can afford to drive their way through it. Local populations on the other hand, see that in spite of the intricate process and web of policy restrictions the immediate and wider environment is routinely sacrificed.
16. The development of the renewable energy is a prominent case in point. While the renewables industry complains of problems of planning, the facts tell a different story.
17. Using REStats data we find that for every MW of onshore wind that is refused by the planning system, 2 MWs have been consented. Specifically, 10.2 GWs have been consented, 5.4 GWs have been refused, an approval rate of 66%.[4]

[4] For details see: http://www.ref.org.uk/press-releases/250-in-spite-of-opposition-70-of-onshore-wind-farm-applications-are-approved; and
http://www.rtpi.org.uk/download/13943/10-FEB-2012-J-CONSTABLE.pdf

18. Of that consented about 4.5 GWs of onshore wind is operational, while 5.7 GWs is awaiting construction. This is an industry that cannot keep pace with the consents that it is obtaining.
19. Yet, because the application process is driven in large part by front-end property development businesses, obtaining and selling consents, there is a significant pipeline of developments, about 7 GWs (3,500 wind turbines) in the planning system.
20. It is not surprising, therefore, that the public perceives this as all but uncontrolled development, with the planning process having only a moderate braking effect.
21. This is now, of course, a political issue, and one that is set become still more prominent as we see rapid growth in proposals for the expansion of both the transmission and distribution networks – pylons, wire in the air, and substations – all needed to accommodate wind power.
22. In view of public expectations, and growing demands, we will, and *should*, abandon the attempt to plan the development of land use; instead we will and *should* move to the regulation of development through a system of environmental protection laws.
23. Unfortunately, there can be no easy transition. The existence of the land use planning system has resulted in a legal vacuum; aside from that borrowed from the European Union (the EIA Directive, the Habitats Directive), we have little environmental protection legislation that is not a creature of the planning system, and distorted by its imperatives.
24. The inadequacy of the noise regulations applying to wind turbines is a good example, the recommended noise guidance being ambiguous, riddled with errors and *lacunae*, and by its own admission the guidance permits noise levels that damage the amenity of near neighbours.
25. Furthermore, subsequent variations to assessment methodologies adopted by acoustic experts add layers of technical complexity that place unreasonable burdens on the local authority Environmental Health Officers tasked with validating the noise element of applications.
26. Consequently, noise assessments are inconsistent from case to case, and the degree to which the noise issue is addressed during the consenting process is variable both in depth and quality.
27. It is no surprise, therefore, that a number of disgruntled neighbours have resorted to the Courts following planning decisions which they believe are unfair

and fail to accord them proper noise protection, or even the same degree of noise protection afforded to neighbours at other wind farm sites.

28. However, they are frequently failed by the legal system, where there is an understandable lack of competence in technical matters involving data and a forgivable though unfortunate reluctance to engage with complex acoustic detail. I will provide two illustrations:
29. In the Den Brook case, the claimant was refused access to the raw noise data collected on his own property, which he wanted to see in order to check that the analysis had been done correctly. The judge in the case mistakenly believed that on the basis of studying summary data in graphical format he could determine whether there were any significant problems with the analysis. As it happens, the developer in this case very creditably released the data to the claimant even though the claim failed. Subsequent checking of that raw data revealed that the analysis had not been done correctly, and the planning permission was subsequently quashed by the Court of Appeal.[5]
30. In the Armistead case, the developers' counsel argued successfully that no noise condition was required to protect the neighbours from tonal noise – squeaks, hums, whines – which might arise from one or more turbines in their 20 year lifespan. This is in spite of the fact that such a condition is utterly routine for wind farms because the occurrence of such noises is well documented. The argument advanced was that the manufacturer could show that a single turbine fresh from the factory did not exhibit tonal noise. This is equivalent to asking someone to believe that a car will never rattle in its lifetime because one new car at the factory does not.[6]
31. With regulation of this manifest inadequacy, it is no shock to find that as more wind farms come on line, the number of noise complaints is increasing – Fullabrook, Glyndebourne, Kessingland, to name but a few – and I would anticipate more court cases and more public disillusion with the system before things improve.
32. Clearly, the planning system is to a large degree dysfunctional, and there is a need and a public desire to replace it with a body of law to prevent environmental harms. But we have to be practical. If we were to delete at a

[5] http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2008/637.html&query=hulme&method=boolean

[6] http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2010/1742.html&query=armistead&method=boolean

stroke the requirement to secure consent before construction much unacceptable environmental damage would result.

33. We cannot repeal the planning system unless we have a body of environmental law to put into its place. Unfortunately, there is no such body of law, and it is not feasible, overnight, to compensate for the nearly seventy years of lost evolutionary growth in environmental law resulting from the planning system, and the special regulations of the Second War.
34. A practical solution would be for Parliament to legitimise the public impression of the planning system, so that it becomes a *consenting procedure guided by environmental impact*, with the fundamental balancing of benefit and harm taking place at local level in the absence of any distorting influence from central or even local governmental economic planning statements. It would not be plan led, it would be the rule of environmental law.
35. The planning inspectorate should cease to have a role; in other words, there should be no intermediate stage between local authority consenting and the courts. This would be simpler, cheaper, and entirely consistent with the principles of localism. Indeed, the abolition of the inspectorate could be instituted immediately with real benefits in terms of public confidence, democratic accountability, clarity, and cost reduction.
36. The revisions I am suggesting would be piecemeal, messy, and doubtless less than perfect, but they would serve as a stopgap, and thus provide a framework permitting the growth of a body of case law dealing with any emergent environmental problems, refusing consent to those that are unacceptable and seeking to limit the harms of others.
37. We may anticipate that developments causing environmental harm subsequent to construction would be more often challenged as nuisances by those affected, thus forming an effective deterrent to damaging development.
38. But the details of this future revision are not for me to speculate further upon at this time. My purpose in this paper has been to draw your attention to the growing need for environmental protection by the rule of law, rather than an obsolete plan-led system that is now perceived, in renewable energy as much as any other sector, as more of a threat than a safeguard.