WHITE PAPER "PLANNING FOR THE FUTURE" – AUGUST 2020

PUBLIC CONSULTATION

RESPONSE OF THE PLANNING AND ENVIRONMENTAL BAR ASSOCIATION

Introduction

This is the response of the Planning and Environmental Bar Association ("PEBA") to the White Paper "Planning for the Future" published by the Ministry of Housing, Communities and Local Government in August 2020.

PEBA is the specialist Bar association for barristers practising in planning law and related fields.

PEBA's members undertake advocacy and advisory work in the following principal contexts:

(1) Planning inquiries/hearings under section 78 of the Town and Country Planning Act 1990 ("TCPA");
(2) Plan examination hearings held under section 20 of the Planning and Compulsory Purchase Act 2004 ("PCPA") and Schedule 4B of the TCPA;
(3) Litigation before the Planning Court and appellate courts (in order of frequency):

   (a) Section 288 challenges to Inspector/Secretary of State decisions in section 78 TCPA appeals/section 77 determinations;
   (b) Judicial review challenges to decisions of local planning authorities to grant planning permission;
   (c) Section 113 challenges to decisions by LPAs to adopt development plan documents/judicial review challenges by LPAs concerning the making of neighbourhood plans;
   (d) Judicial review challenges to decisions of the Secretary of State to publish national policy, especially Written Ministerial Statements.

PEBA's members' clients include the full range of individuals and organisations involved in the planning process, both private sector and public sector, and third party interests. A number of PEBA members are currently or have been members of the Attorney-General's Panels of Advocates, carrying out advisory and advocacy work for the Ministry of Housing Communities and Local Government ("MHCLG") and related Departments.

Individual members may focus their practice within certain areas of planning, and for particular types of client, depending on seniority, expertise and interest. However, the particular nature of planning advocacy and advisory work requires an appreciation of how all participants in the planning process access and operate with legislation, policy and guidance. Members therefore understand the diversity of interests across the planning sector.

PEBA is committed to assisting in the objective of ensuring that planning legislation and policy is therefore easily accessed by all stakeholders and the general public, practical to operate at inquiry and in court and well-understood.

PILLAR ONE: PLANNING FOR DEVELOPMENT

Q3. Our proposals will make it much easier to access plans and contribute your views to planning decisions. How would you like to find out about plans and planning proposals in the future?

OUR RESPONSE – OTHER

1. There are obvious and important benefits to broadening the range of media by which people engage in the planning process. It is important, however, that these are not seen as mutually exclusive options. Opportunities for engagement by social media and other online means are likely to generate a welcome increase in public participation in plan-making particularly by younger people (including, crucially, those who stand to benefit most from new housing and other growth, who have tended not to be proportionately represented in the planning process until now). However there will be other people (perhaps particularly older people) who may still wish to rely upon conventional means of engagement. There is no reason why innovative and conventional means of engagement cannot operate in parallel.

Q5. Do you agree that Local Plans should be simplified in line with our proposals?

OUR RESPONSE - NOT SURE

2. This question is to a considerable degree linked to Q6 because the extent of simplification described at paras. 8 of the White Paper is only achievable (and their speedy examination only practicable) if the development management content of Local Plans is streamlined as proposed at pars. 2.13-2.14 of the White Paper.

3. We do not comment on the in-principle merits of the new system outlined at para. 2.8 of the White Paper given the broad range of views on the subject within PEBA. On the assumption that this system is carried forward into legislation and policy, however, we suggest that particular care needs to be taken to ensure that the definition/characterization of *Protected* areas does not inadvertently extend the protection currently given to the categories mentioned in the third bullet of para. 2.8 of the White Paper (or other categories that are to be included in *Protected* areas).

4. There is also a tension between the description of this category and the descriptions of *Growth* and *Renewal* areas: for example, what would the position be if a *Growth* or *Renewal* area included or was proximate to a Conservation Area or Listed Buildings?

5. The descriptions of *Growth* and *Renewal* areas are in permissive terms. It is unclear what the planning position would be for sites/developments that are not supported by the Local Plan (either because they do not fall within *Growth* or *Renewal* areas, or because they fall outside the range of developments annotated by the Local Plan as being supported in those areas). Is there, for example, to be a presumption against such schemes (and if so, what is to be the force of that presumption?), or will their promoters have a realistic opportunity of making their case through a planning application and, if necessary, an appeal? Experience suggests that Local Plans can, despite best efforts, relatively quickly be overtaken by events (at least in relation to some kinds of developments and/or some sites), and therefore we would welcome clarity that the categorisations in para. 2.8 of the White Paper do not preclude, or make it excessively difficult for, developments unsupported by those categorisations coming forward via a planning application/appeal where there are good grounds for allowing them. Put another way, it would be consistent with the proposed new system that the effect of the categories be to provide a baseline for growth in the Local Plan's area, but not a ceiling.

6. Finally, PEBA notes that, although Local Plans would be streamlined under the government's proposals, their importance will be significantly increased, in particular because of the consequences of designating land as a *Growth*, *Renewal* or *Protected* Area. In order for this to succeed, and in order for the new system to command public support, it will therefore be essential to ensure that there is proper public consultation and engagement at the Local Plan preparation stage, and that the decisions taken in the Local Plan are robust. Our comments above should therefore be read together with our observations (below) on the local plan examination process.

Q6. Do you agree with our proposals for streamlining the development management content of Local Plans, and setting out general development management policies nationally?

OUR RESPONSE – YES

7. There is obvious sense in this proposal for the reasons given in the White Paper. At present, because there is a requirement that Local Plans are consistent with national policy, there is a marked tendency for Local Plans to duplicate tests and criteria which

are set out in the NPPF. Not only is this unnecessary, but minor differences in wording then lead to forensic rather than planning arguments over the extent to which the development plan policies are the same as those in the NPPF.

8. Stripping out unnecessary development management policies will enable the Local Plan engagement, consultation and examination processes to focus in-depth on the remaining content of Local Plans (i.e. the White Paper para. 2.8 characterisation of areas) whilst at the same time allowing those processes to happen with sufficient speed. If Local Plans are not refocused in this way and retain their current breadth of content, then it will be impossible for them to be subject to the level of scrutiny that is needed to ensure sound policies and pubic legitimacy in anything approaching the timescale for plan production and adoption that the White Paper proposes. PEBA also recommends that a mechanism is provided to ensure consistency of application of national policy should be considered. Development plans (and specifically development management policies) should expressly incorporate national policy into the development plan. Any development plan document that promoted a development management policy that did not apply the national development management policy would need to justify itself at the preparatory stage.

9. However:

    a. There will still be a need for criteria to assess applications in Protected areas, and for those criteria to embrace the differing reasons why land is Protected. Consequently, the proposed streamlining of Local Plans will only work if those criteria or policies (or the majority of them) can still be found in some other place, such as the NPPF (as is proposed). The feasibility of streamlining Local Plans will thus be inextricably linked to the extent to which the NPPF provides adequate criteria for assessing applications in Protected Areas. Where the reason for inclusion in a protected area is because the land lies within Green Belt, an AONB or a Conservation area, the NPPF already provides clear advice on the approach to be taken. It is less obvious that it provides the necessary criteria for assessing applications in other areas which may also be Protected. The success of this proposal will thus require a review of the NPPF.

    b. There will be cases where the reasons why land is Protected depend upon matters which are particular to that site or the area within which it lies. These are details which the NPPF cannot anticipate. Consequently, where that is the case, it will be important for the Local Plan to be able to explain why land has been so designated.

Q7(a). Do you agree with our proposals to replace existing legal and policy tests for Local Plans with a consolidated test of "sustainable development", which would include consideration of environmental impact?

OUR RESPONSE – NOT SURE

10. The answer to this question depends upon what the Government seeks to achieve by redefining the test(s). If the aim is to achieve some different *standard*, then redefining the test makes sense. If the aim is to provide greater clarity and a streamlined process, then the case for redefinition is less compelling because:

    a. The current test is well understood and a redefinition will inevitably lead to debates being played out in numerous local plan examinations and court cases as to what the new test means.
    b. Procedural streamlining such as the replacement of the current Sustainability Appraisal system does not necessitate a change to the substantive test.

11. As for the proposed replacement of the current Sustainability Appraisal system with "*a simplified process of assessing the environmental impact of plans*", this is to be commended provided that the new system is compatible with the UK's international obligations. See paragraph 55 of this Response. We suggest that a focus on environmental *outcomes* (i.e. a focus on the end result) rather than *impacts* (i.e. a focus on change) would be beneficial. With that in mind, incorporating net biodiversity gain into plan-making as well as decision-taking would be welcome, as would consideration of broader natural capital approaches.

Q7(b). How could strategic, cross-boundary issues be best planned for in the absence of a formal Duty to Cooperate?

Q8(a). Do you agree that a standard method for establishing housing requirements (that takes into account constraints) should be introduced?

OUR RESPONSE – NOT SURE

12. Questions 7(b) and 8(a) are inextricably linked because the principal context in which the Duty to Co-Operate has proved controversial and challenging has been the consideration of how much housing each local planning authority ("LPA") should plan for, which the White Paper now proposes is a matter dealt with at national level.

13. Plainly there needs to be cross-boundary co-ordination of some kind, otherwise local politics may result in substantial overall under-provision, which will mean there is little prospect of coming close to meeting the national target of 300,000 new homes per year. The Duty to Co-Operate is one means of encouraging such co-ordination, but it is not the only way. A top-down process along the lines suggested in the White Paper is capable of working, but if it is to work it needs to be a process that (i) is properly informed and (ii) has legitimacy. We suggest that, if the proposals outlined in the White Paper are to be taken forward, an appropriate balance would be struck by a system in which:

    a. Local planning authorities are grouped into Housing Delivery Areas ("HDAs").
    b. In areas where there is a Mayor, the HDA would be comprised of the LPAs within the Mayoral administrative region.
    c. In other areas the HDA would be determined by the central Government body responsible for establishing housing requirements[1] having regard to geographic, demographic and economic considerations (but, for administrative simplicity, respecting rather than splitting LPA boundaries, unlike the current approach to Housing Market Areas).
    d. The central government body would allocate a number to the HDA and a provisional distribution to the LPAs within the HDA (having regard to constraints);
    e. The LPAs within the HDA would, if any or all of them sought to adjust the distribution between themselves have a tightly time-limited (e.g. 28 days) opportunity for conciliation (which could take place before a Planning Inspector, mediator or other dispute resolver) with the default being that if they could not agree a redistribution and any associated (e.g. financial) matters then the original central government distribution would take effect by default.
    f. The HDA conciliation process should involve a representative body of developers/land promoters.
    g. Judicial review of contested decisions in this context would be (and should remain), in accordance with long-established constitutional principles, available on the limited grounds and the tight timescales provided by public law in relation to planning decisions (which do not include challenges to the planning merits of the challenged decision).

[1] We assume this body is intended be MHCLG or a body sitting within/under MHCLG. We suggest that, whichever model us used, it would benefit from some representation from Her Majesty's Treasury too, given the fundamental economic implications of these decisions.

Q9(a). Do you agree that there should be automatic outline permission for areas for substantial development (Growth areas) with faster routes for detailed consent?

OUR RESPONSE – YES

14. If the reforms to the Local Plan system envisaged by the White Paper are progressed, then the case for this particular proposal is compelling. The associated legislation and/or policy should make clear, however, that the grant of outline planning permission for annotated development within *Growth Areas* does not mean that other development (either non-annotated development within *Growth Areas* or other development that is not positively supported by the Local Plan) is prohibited. See the final paragraph of our answer to Q3. See also paragraph 55 below.

Q9(b). Do you agree with our proposals above for the consent arrangements for Renewal and Protected areas?

OUR RESPONSE - YES

15. Please see our answer to Q5 and Q9(a).

Q9(c). Do you think there is a case for allowing new settlements to be brought forward under the Nationally Significant Infrastructure Projects regime?

OUR RESPONSE - YES

16. The current Local Plan regime has not proved to be a fit-for-purpose mechanism for testing new settlements. This is in part due to the fact that the lifetime of Local Plans is considerably shorter than the development trajectory of most new settlements, meaning that there is a mismatch between the timeline of what is being examined for soundness and the timeline of what is proposed. It is also in part due to the current approach to testing the viability of Local Plans, which is an approach that does not work well in the context of longer-term, ambitious proposals such as new settlements. The recent ill fate of two of the three proposed garden communities in the North Essex

Authorities' Joint Part 1 Local Plans is a powerful indicator of these problems. Providing the promoters of new settlements with the option of proceeding via the DCO process would provide an opportunity for such schemes to be scrutinised in a procedure which recognises, rather than extinguishes, their ambition, whilst at the same time ensuring that Local Plans continue to be subject to an appropriate degree of rigour.

17. It is important, however, that the option for new settlements to proceed by way of a DCO application is just that – an option. There are likely to be some such schemes for which the newly streamlined plan-making process will be more appropriate than the expensive and heavily front-loaded DCO process; in particular, sites such as former Aerodromes which are wholly or mainly in single ownership and which would not significantly benefit from the streamlined land acquisition process of the DCO regime. Indeed, there may some merit in liberalising the divide more generally between the NSIP regime under the Planning Act 2008 and the conventional planning regime so that in relation to any (or alternatively, at least a wider range of) NSIP, applicants have a choice between the DCO regime and the newly reconfigured conventional planning regime envisaged by the White Paper.

Q10. Do you agree with our proposals to make decision-making faster and more certain?

OUR RESPONSE - YES

18. A qualified 'Yes'. Plainly, speeding up the system and increasing certainty would be beneficial and greater user of digital technology would assist in this regard. But pursuit of these objectives should not be at the cost of plans and decisions being subject to proper scrutiny, which would undermine public and stakeholder confidence in the decision-making process as well as lead to lower quality decision-making. This is a very real concern and the lessons from how the Planning Inspectorate ("**PINS**") has responded to the Rosewell review need to be carefully considered here. Turnaround times for appeals have (pre-COVID) reduced, but appeal success rates have diminished, with a significantly higher dismissal rate in housing appeals. Simply making the decision-making process more efficient should not lead in itself to such a change in the substantive outcomes, and the increase in the proportion of appeals being dismissed needs to be seen alongside the fact that the very point of the Rosewell review was to make the planning appeal system better facilitate much needed growth.

19. Our comments above are supported by the results of a recent informal poll amongst planning practitioners which indicated that both quality and speed of decision making are considered to be of equal importance[2].
20. We suggest that these considerations apply in a broadly similar fashion to LPA decision-making and plan-making as they do to planning appeals.

21. Consistent with the above, we suggest that whilst para. 2.41 of the White Paper suggests that the reformed Local Plan regime will result in "*fewer appeals being considered by the Planning Inspectorate*", the proportion of those appeals that are appropriate for the inquiry procedure is likely to be higher than the current proportion, because appeals in the future system are likely to tend to involve the harder, more complex cases where the simplified Local Plan system has been unable to provide a resolution at local level. PINS should be given the direction and resources to ensure that appeals that are appropriate for the inquiry process are indeed subject to that process. Although not a universal view, there is a concern amongst some of our members that, in order to meet targets and/or manage resources, PINS may be too ready to allocate the hearing procedure to cases that plainly need an inquiry in order to be subject to proper scrutiny. Whether or not this is the case, avoiding such impressions is vital to securing public and stakeholder confidence in the new system.

22. Our support for greater use of technology is subject to the same caveat as our answer to Q5.

Q11. Do you agree with our proposals for accessible, web-based Local Plans?

OUR RESPONSE - YES

23. We repeat the caveat to our answer to Q3. In relation to para. 2.46 of the White Paper, we suggest the proposed pilots (or at least the review of them) is not confined to PropTech companies but includes input from those with in-depth experience and expertise in relation to the consultation and examination of planning proposals and the legal principles governing them, so as to ensure that the new technological solutions are legally robust and have maximum legitimacy.

Q12. Do you agree with our proposals for a 30 month statutory timescale for the production of Local Plans?

[2] https://www.linkedin.com/feed/update/urn:li:activity:6717511801942097920

OUR RESPONSE - YES

24. A qualified 'Yes' in the same vein as our answer to Q10. The objective of considerably speeding up with Local Plan preparation and examination process is a noble one, but it must not be at the expense of proper scrutiny. Otherwise the new system will lack legitimacy in the eyes of the public and stakeholders, and its outputs will not be of the requisite high quality. The need for proper scrutiny will only be heightened by the increased significance of the designation of areas of land as a "Growth" area.

25. As a minimum, the necessary scrutiny should continue to involve public examination of Local Plans including a right for those who responded to the statutory consultation to be heard. A "right to be heard" should not been seen as a mere "right to be read" – the oral process is fundamental both for legitimacy and to ensure that plans and their policies are of an appropriately high quality. Given the increased importance of Local Plans under the new regime, there is a case for at least parts of the examination (e.g. on which sites should be *Growth* areas and what uses/developments those areas should be allocated for) to be more in-depth than the current style of plan examination hearings which can (in the opinion of some of our members) at times appear superficial.

26. Achieving the necessary level of scrutiny in the timescales outlined by para. 2.48 of the White Paper will be challenging. In order for it to be achievable:

    a. the content of plans needs to be streamlined (hence our answer to Q6); and

    b. the Planning Inspectorate needs to be adequately resourced to conduct examinations in the necessary timescale with the necessary rigour and the process needs to be subject to careful monitoring by, and leadership from MHCLG to ensure that both quality of output and efficiency of delivery are secured.

Q13(b). How can the neighbourhood planning process be developed to meet our objectives, such as in the use of digital tools and reflecting community preferences about design?

27. A significant part of the difficulties experienced in relation to Neighbourhood Plans since they became part of the planning regime has been their tendency to come forward in advance of a new/revised Local Plan for the area in question. While there are examples of Neighbourhood Plans which have been brought forward out of frustration over the lack of progress at Local Plan level, and which have responded positively to the need to identify sites, in other cases there is concern that those

promoting Neighbourhood Plans have been able to steal a march on their Local Planning Authorities and overly restrict new development in their communities (meaning either that other parts of the LPA area have to make up the deficit, sometimes in less sustainable areas, or that the overall LPA-wide growth requirements cannot fully be met). This tendency is exacerbated by the relatively "light touch" approach which independent examiners are required to take when considering whether a draft Neighbourhood Plan satisfies the basic conditions. A legal requirement that, going forward, any new Neighbourhood Plans cannot be adopted unless there is an up-to-date, new-style Local Plan in force, would provide a resolution of this difficulty.

PILLAR TWO – PLANNING FOR BEAUTIFUL AND SUSTAINABLE PLACES

CREATING FRAMEWORKS FOR QUALITY

Proposal 11: To make design expectations more visual and predictable, we will expect design guidance and codes to be prepared locally with community involvement, and ensure that codes are more binding on decisions about development.

Q17. Do you agree with our proposals for improving the production and use of design guides and codes?

OUR RESPONSE - YES

28. A qualified yes. PEBA agrees with the first clause of this Proposal. Our Members' clients are likely to welcome greater predictability in an area of the planning system which has long been relatively unpredictable. Similarly, using visual tools to illustrate good design is likely to be more readily comprehensible to a greater number of people.

29. We recognise the potential benefits of having locally prepared design codes. However, PEBA recommends that the following matters should be considered extremely carefully.

30. First, we support the establishment of a mechanism whereby the communities are properly and effectively engaged so that the resultant design guidance and codes are truly reflective of local views. Without a level of consensus there is a danger that design guidance and codes will not achieve public support.

31. Second, the production of design codes and their role in decision taking should have a clear legislative basis, especially if they are to carry 'statutory weight'. Experience has taught us that leaving such important questions to the NPPF or Planning Practice Guidance does not produce the clarity that is required.

32. Third, one should consider the resource implications for local planning authorities so that officers overseeing the process and responsible for community engagement possess the appropriate skills to deliver an outcome that is supported by all stakeholders.

33. Fourth, any emerging policy and/or legislation should strike an appropriate balance between design responses that are popular and those which are characteristic of the

area. Whilst there may often be a considerable degree of overlap between those two concepts, there may sometimes be tension between them.

34. Fifth, it is proposed that designs and codes should only be "given weight in the planning process" if it can be demonstrated that effective input from the local community has been received (§3.8). It is therefore critically important that the procedural framework for achieving this effective input is set out clearly, preferably in legislation.

35. Finally, it is proposed that where local design codes are not in place the National Design Guide, National Model Design Code and Manual for Streets should guide decisions on the form of development (§3.8). Whilst we appreciate that this proposal is intended to encourage local planning authorities to prepare design codes, it should also be understood (unless primary legislation is amended substantially) that national policy and guidance constitute material considerations to which decision takers can attach their own weight, absent legal error or irrationality.

Proposal 12: To support the transition to a planning system which is more visual and rooted in local preferences and character, we will set up a body to support the delivery of provably locally-popular design codes, and propose that each authority should have a chief officer for design and place-making.

Q18. Do you agree that we should establish a new body to support design coding and building better places, and that each authority should have a chief officer for design and place-making?

OUR RESPONSE - YES

36. A qualified yes. There are two elements to this Proposal: the establishment of an expert body to assist in producing local design codes; and a requirement for a Chief Officer responsible for design and place-making.

Expert Body

37. In principle PEBA supports the proposal to establish a national body to assist in preparing local design codes. It is unlikely that most local authorities or communities currently enjoy the level of expertise necessary to deliver the Government's objectives and would therefore benefit from expert guidance. Whatever option is chosen it will be important to ensure that the national body is seen as facilitating the production of

design codes that reflect local preferences and characteristics rather than imposing a centralised view of good design.

Chief Officer

38. Given that good design is at the heart of the Government's reforms, it is imperative that officers in local planning authorities possess or acquire the necessary skills. In that respect, the introduction of a Chief Officer for design and place-making is to be welcomed. Nonetheless and in common with many of the White Paper's proposals, it is equally important that sufficient resources are provided to local authorities to enable this objective to be met.

Proposal 13: To further embed national leadership on delivering better places, we will consider how Homes England's strategic objectives can give greater emphasis to delivering beautiful places.

Q19. Do you agree with our proposal to consider how design might be given greater emphasis in the strategic objectives for Homes England?

OUR RESPONSE - YES

39. We recognise the potentially important and influential role that Homes England can play in driving up design and environmental standards. To this extent PEBA supports greater emphasis being given to these matters in Homes England's strategic objectives.

A FAST-TRACK FOR BEAUTY

Proposal 14: We intend to introduce a fast-track for beauty through changes to national policy and legislation, to incentivise and accelerate high quality development which reflects local character and preferences.

Q20. Do you agree with our proposals for implementing a fast-track for beauty?

OUR RESPONSE - YES

40. A qualified yes. As a general proposition PEBA supports the promotion and delivery of development which is beautiful and of high quality. This is a relatively uncontroversial objective but its achievement depends on there being a transparent, effective and robust decision taking framework which balances all relevant considerations. In this regard, PEBA makes a number of additional points below.

41. First, it is critically important that the 'fast track to beauty' is set out clearly with precise definitions, whether through national policy or underpinned by legislation. As with the production of design codes we consider that the fast track would benefit from being enshrined in primary and/or secondary legislation. All stakeholders in the planning system would benefit from a decision making process that produces predictable outcomes.

42. Second, although good (or beautiful) design is an important aspiration of the planning system there are almost invariably other considerations which determine whether a proposal is acceptable overall. *E.g.* flood risk, ecological impact, accessibility and highways. A 'fast track to beauty' is generally to be welcomed but our clients are likely to be concerned that beautifully designed developments should not receive planning permission (or benefit from permitted development rights) where there are weighty countervailing constraints. The system outlined in the White Paper should therefore ensure that decision takers can and should take these other matters into account so that beautiful design is not seen as outweighing all other considerations. A related point concerns how one will assess the environmental effects of developments considered under the 'fast track'. At present it is unclear whether or how the wider environmental impacts of 'beautiful' development will be assessed.

43. Third, the scope of masterplans, site specific design codes or expanded permitted development rights is presently unclear. For example, internal space standards, the level of outdoor amenity space and accessibility to local services and facilities are all highly relevant to the overall sustainability of development and to its 'design' in the

broadest sense. We therefore urge the Government to consider carefully and to specify clearly the range of considerations that will determine whether proposals can benefit from fast track approval.

44. Fourth, with particular reference to Growth Areas, the White Paper anticipates a considerable amount of 'up front' work through the preparation of masterplans and site specific design codes. There is a risk that this level of preparatory work could cause delays earlier in the planning process. In this respect, we consider that the Government should set out clearly and precisely what documents should be produced and by what stage of the decision taking process.

45. Fifth, in Renewal Areas it is proposed to revive the tradition of pattern books for acceptable design. Whilst this should achieve a level of predictability it is noted that local planning authorities and neighbourhood planning groups will be able to use local orders to modify standard types of development. It is important that the circumstances in which such modifications can be made and the mechanisms used are clearly set out.

46. Finally, the use of pattern books and standard designs should not be used at the expense of diversity of design and innovation, both of which should be encouraged.

EFFECTIVE STEWARDSHIP AND ENHANCEMENT OF OUR NATURAL AND HISTORIC ENVIRONMENT

The White Paper does not include specific questions for Proposals 15 – 18. We will provide our responses under each Proposal below.

Proposal 15: We intend to amend the National Planning Policy Framework to ensure that it targets those areas where a reformed planning system can most effectively play a role in mitigating and adapting to climate change and maximising environmental benefits.

47. PEBA supports a planning system which mitigates and adapts to climate change and which maximises environmental benefits.

48. There remains a considerable amount of work to be done in these areas, including the effect of the Environment Bill (when enacted) and the England Tree Strategy.

49. Additionally, we note that the current planning system allows spatially-specific policies to identify and protect important aspects of the environment and to encourage climate change adaptability. It is presently unclear how the Government's proposals will improve that position.

Proposal 16: We intend to design a quicker, simpler framework for assessing environmental impacts and enhancement opportunities, that speeds up the process while protecting and enhancing the most valuable and important habitats and species in England.

50. PEBA supports a more transparent and proportionate means of assessing environmental impacts. There are plainly opportunities to make the process more efficient and focused, to avoid duplication of evidence and to make use of 'big data' and digital platforms. For these objectives to be achieved PEBA highlights a number of areas below in which greater clarity will be required when the Government moves to the next stage of the consultation process. We recognise that this will be a complex process the details of which will likely require several rounds of consultation.

51. First, a replacement form of environmental assessment should not be seen as 'second rate' in comparison to our current system. It is important that environmental effects are captured and properly assessed by any new mechanism so that one does not allow them to be left out of account or go unmitigated. It should be possible to produce a system which is focused and efficient but which ensures that environmental effects are properly understood and are avoided or mitigated where appropriate.

52. Second, it is unclear how the environmental impacts will be screened, scoped and assessed for a particular scheme coming forward in a *Growth Area*, particularly against the backdrop of sustainability appraisals being abolished during the making of local plans. If an environmental assessment is not carried out at the outline stage, as would appear to be the case, it is unclear whether that means a developer would have to produce the full environmental assessment at the "reformed" reserved matters stage.

53. Second, the new assessment process should be underpinned by a clear set of legal tests and principles. When undertaking an environmental assessment, developers, decision takers and the public should all know what the assessment process is seeking to achieve and the role it plays in the planning process. Without the proper legal architecture it will not be possible to know whether an environmental assessment is fit for purpose and whether decision makers are properly informed as to the environmental effects of development.

54. Third, it will be essential to align the new form of environmental assessment and its legislative framework with the Environment Bill and the Government's 25 Year Environment Plan.

55. Fourth, the Government's legal and international environmental obligations will remain after the exit from the European Union is finalised. These obligations must inform and be an integral part of the new environmental assessment. Since Local Plans will not only be setting the framework for future development consents but will, through the designation of Growth Areas, effectively be granting planning permission, particular consideration will need to be given to the interface between Strategic Environmental Assessment and Environmental Impact Assessment and where the preparation of a Local Plan will sit within these two regimes.

Proposal 17: Conserving and enhancing our historic buildings and areas in the 21st century.

56. The Government's commitment to maintaining strong protection for designated heritage assets is supported by PEBA. The legislative and policy basis for such protection is well established.

57. As with other aspects of the White Paper the ability to engage with and inform the detailed proposals will be extremely important. For example, whilst mitigating and adapting to climate change is a key objective of the planning system any change to the policy framework around historic buildings must seek to strike an appropriate balance between protecting heritage interests and addressing climate change.

58. PEBA notes the proposal to grant specialist architects 'earned autonomy' to approve 'routine works' to designated heritage assets. If such measures are introduced it will be critical to ensure that they are confined to works which will not harm the features for which the asset has been designated, that the scope of such works is tightly defined and that there is effective regulatory oversight.

Proposal 18: To complement our planning reforms, we will facilitate ambitious improvements in the energy efficiency standards for buildings to help deliver our world-leading commitment to net-zero by 2050.

59. Energy efficiency and carbon reduction have long been aims of the planning system. PEBA welcomes the Government's renewed focus on seeking to achieve net-zero by 2050 and the role that the planning system could play in making that a reality. At

present, however, it is unclear how the planning system will be reformed to support this objective and we would welcome the opportunity to comment further when details become available.

PILLAR THREE – PLANNING FOR INFRASTRUCTURE AND CONNECTED PLACES

Preliminary Observations

60. PEBA makes the following preliminary remarks prior to considering Q22-26.

Accompanying Report

61. First, PEBA notes the accompanying Report: "*The Incidence, Value and Delivery of Planning Obligations and Community Infrastructure Levy in England in 2018-19*". This provides a very thorough exploration of the myriad practical and legal complexities of the current system.

62. Without wishing to endorse the Report in full, PEBA agrees with its various central premises that the current legal and policy framework is presently characterised by complexity, inconsistency and delay.

Legislative Reform

63. Second, the proposals in the White Paper will require major legislative reform and substantial accompanying policy and guidance. The precise details of that legislative reform will require very careful drafting. This is perhaps the most complex legislative task proposed by the White Paper.

64. The Community Infrastructure Levy is notable for the complexity of its provisions, for example those relating to liability, trigger points, and exemptions.

65. On the other hand, Section 106 of the Town and Country Planning Act 1990 presently allows for considerable flexibility (albeit with accompanying inconsistency and administrative burden). The proposals would be revolutionary in removing that flexibility in promoting a standardised framework.

66. The White Paper is somewhat limited in detail on such legislative matters, describing instead certain very high-level principles.

67. PEBA therefore recommend that the Government consider a further detailed consultation on specific proposals prior to proceeding to primary legislation.

Funding

68. Third, PEBA do not seek to comment on the viability or other financial of the proposals, notably in respect of affordable housing and infrastructure.

69. These questions are primarily best addressed in an overarching way by the specialist professional bodies: RICS and RTPI, and the respective individual consultees: e.g. housebuilders, development promoters, LPAs, housing associations etc.

70. Moreover, as PEBA's barrister members represent both private and public sector clients, PEBA does not seek to adopt a single position on the "merits" of the policy.

71. PEBA's primary concern remains legislative and policy clarity. It is through clarity that the Government are most likely to achieve their aims of efficacy and speed. Such clarity is in turn generally assisted by broad consultation and transparency as Government's data sources, for example, through worked example calculations.

Q22. When new development happens in your area, what is your priority for what comes with it?

OUR RESPONSE – OTHER

72. PEBA considers that each of the identified categories is an important priority for various different participants in the planning process.

73. PEBA notes that, in practice, discussions over affordable housing and infrastructure are the predominant considerations in s78 appeals – both by cost and complexity.

74. In practice, Government should therefore look to focus on these aspects first in seeking to reform the system. However, this need not be to the exclusion of design, commercial or green space considerations.

Proposal 19: The Community Infrastructure Levy should be reformed to be charged as a fixed proportion of the development value above a threshold, with a mandatory nationally-set rate or rates and the current system of planning obligations abolished.

Q23(a). Should the Government replace the Community Infrastructure Levy and Section 106 planning obligations with a new consolidated Infrastructure Levy, which is charged as a fixed proportion of development value above a set threshold?

OUR RESPONSE – NOT SURE

75. PEBA agrees with the first half of this proposition that there is scope for and likely practical merit in the establishment of a consolidated Infrastructure Levy.

76. As the accompanying Report details, the fragmentation of the current system, with incomplete coverage by CIL and continuing requirement for individual negotiation of s106 agreements promotes inconsistency and delay.

77. PEBA cannot comment at the present time as to whether this should be in the form of a "*fixed proportion of development value above a set threshold*", in the absence of sight of the detailed proposals – notably the mechanism through which the "fixed proportion" and "threshold" will be set.

Q23(b). Should the Infrastructure Levy rates be set nationally at a single rate, set nationally at an area-specific rate, or set locally?

[Nationally at a single rate / Nationally at an area-specific rate / Locally]

78. All three proposals have different advantages and disadvantages.

79. PEBA suspects that a national-specific single rate could prove to be inflexible and non-responsive to the variation of local circumstances, requiring further legislative or policy reform.

80. However it is recognised that the more local the measure, the greater the administrative burden of setting the level – as experienced under CIL through preparation and examination.

81. In summary, considerable care will be required in designing the mechanism whereby the rate is set – balancing certainty (to guide investment decisions and instil market confidence) with flexibility (to adapt to rapid changes in circumstances).

Q23(c). Should the Infrastructure Levy aim to capture the same amount of value overall, or more value, to support greater investment in infrastructure, affordable housing and local communities?

OUR RESPONSE – NOT SURE

82. PEBA expresses no view on the question of "amount" or "value" which involves detailed financial and political considerations. Our members' clients will have different views on these issues.

Q23(d). Should we allow local authorities to borrow against the Infrastructure Levy, to support infrastructure delivery in their area?

OUR RESPONSE – NOT SURE

83. PEBA sees some practical merit in this proposal, given the change at the point at which the IL will be payable. In particular, there are many cases where local authorities wish to assist the delivery of new development through the early provision of infrastructure, but are currently hampered in their ability to do so by the lack of certainty that they will be able to recover the costs of that infrastructure from developers at a later date.

84. In practice, it will however require careful legislative drafting and additional research on local authority finance to ensure that local authorities do not over-borrow and over-spend.

Proposal 20: The scope of the Infrastructure Levy could be extended to capture changes of use through permitted development rights

Q24. Do you agree that the scope of the reformed Infrastructure Levy should capture changes of use through permitted development rights?

OUR RESPONSE – NOT SURE

85. PEBA agrees with this proposal – subject to precision in the statutory wording as to the point at which the IL will become due. In particular, the recent extensions of permitted development rights to allow new residential development through either the upward extension of existing buildings, or the conversion or demolition and rebuilding of commercial buildings has the potential to place significant pressure on local infrastructure, which this proposal would help ameliorate.

Proposal 21: The reformed Infrastructure Levy should deliver affordable housing provision

Q25(a). Do you agree that we should aim to secure at least the same amount of affordable housing under the Infrastructure Levy, and as much on-site affordable provision, as at present?

OUR RESPONSE – NOT SURE

86. PEBA expresses no view on the question of "amount" which involves detailed financial and political considerations. Our members' clients will have different views on these issues.

87. As a matter of general principle, PEBA recognises the broad public support for affordable housing, as a benefit to which the Secretary of State and Inspectors routinely accord "significant weight".

Q25(b). Should affordable housing be secured as in-kind payment towards the Infrastructure Levy, or as a 'right to purchase' at discounted rates for local authorities?

OUR RESPONSE – NOT SURE

88. PEBA notes the potential complexity of these proposals, notably how the "in kind payment" or "discounted rate" would be calculated. Echoing observations above, this is a matter that would benefit from a further detailed consultation with specific proposals and worked examples.

Q25(c). If an in-kind delivery approach is taken, should we mitigate against local authority overpayment risk?

OUR RESPONSE – NOT SURE

89. Following from the above, PEBA recognises some practical benefits in this proposal – but considers that it would require significant precision in the statutory framework. The current s106 regime allows for greater flexibility in this respect.

Q25(d). If an in-kind delivery approach is taken, are there additional steps that would need to be taken to support affordable housing quality?

OUR RESPONSE – NOT SURE

90. PEBA expresses no view on "quality" which involves detailed financial and political considerations. Our members' clients will have different views on these issues.

91. If additional steps are proposed, then considerable care should be taken in identifying how such monitoring would take place.

Proposal 22: More freedom could be given to local authorities over how they spend the Infrastructure Levy

Q26. Should local authorities have fewer restrictions over how they spend the Infrastructure Levy?

OUR RESPONSE – NOT SURE

92. PEBA expresses no view on the categories of "restriction" which involves detailed financial and political considerations. Our members' clients will have different views on these issues.

93. As a matter of general principle, the flexibility as to what can be covered by s106 payments would have to be replicated under the new system.

94. PEBA recommends that care is taken on the proposed concepts of "improving services" or "reducing council tax". The common law has generally recognised the practical problem of ensuring that financial contributions relate to planning considerations: see *Wright v Forest of Dean DC and Resilient Energy* [2019] UKSC 53:

> *39. A principled approach to identifying material considerations in line with the Newbury criteria is important both as a protection for landowners and as a protection for the public interest. It prevents a planning authority from extracting money or other benefits from a landowner as a condition for granting permission to develop its land, when such payment or the provision of such benefits has no sufficient connection with the proposed use of the land. It also prevents a developer from offering to make payments or provide benefits which have no sufficient connection with the proposed use of the land, as a way of buying a planning permission which it would be contrary to the public interest to grant according to the merits of the development itself.*

95. PEBA therefore agree with the general concept that there should be "fewer restrictions", but consider that there could be practical difficulties should IL be unrestricted.

96. PEBA welcomes the recommendation of enhanced digital engagement – which would be consistent with public participation and accurate record-keeping, and overall transparency in the planning process.

Q26(a). If yes, should an affordable housing 'ring-fence' be developed?

OUR RESPONSE – NOT SURE

97. PEBA expresses no view on the merits of a "ring-fence" which involves detailed financial and political considerations. Our members' clients will have different views on this issue. PEBA re-emphasises the importance of legislative clarity in this respect.

Timothy Mould QC
On behalf of the Planning and Environmental Bar Association
29 October 2020