

DESIGN CODES

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Karen Cooksley, Head of Planning and Regeneration,
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The legal opportunities and pitfalls of Design Codes in
existing and emerging planning law.

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Bevan Ashford are currently working with EP to review legal mechanisms by which codes can be used in relation to their land and work to improve design quality and speed of delivery.

1. INTRODUCTION

The legal mechanism chosen for code delivery will always require to be selected carefully in order to deliver objectives such as improvements design quality and, at the same time, speed up the planning process. This is something which may differ – indeed is likely to differ – from area to area and from site to site. It will also depend upon who is promoting a code eg EP, LPA, private sector.

2. FACTORS IN SELECTION OF DELIVERY MECHANISM

A number of factors require to be considered when selecting the appropriate mechanism. For example, just thinking of 6 points to take into account:

2.1. The need for flexibility

What is meant by this? In my view there are a number of senses in which flexibility is important. They include:

- the fact that there are often long lead in and build out times, especially where large sites (which will be the ones where coding is relevant) and consortia are involved. The code must be able to change and adapt over time. What is appropriate in 2004 may be refined through changing living habits, demographics or simply experience in practice, and need changing by 2009 or 2014
- quality of design should not be taken to mean uniformity of design

2.2. The degree to which speed of process – the requirement for the code to be in place by a given date – is relevant.

There may be sites where a lengthy process could be started now, with a view to the code being in place and used some years hence and where long and lengthy consideration does not have significantly adverse impact. But there will be more where short to medium term “adoption” (for want of a better word) of the code is vital.

The current local plan making process is cumbersome and lengthy. It is unlikely that we can wait that long if codes are to be useful now in the Growth Areas.

As for the new plan making process the only people who do not appear cynical as to its ability to speed up the planning process appear to be the Ministers responsible for promulgating the new regime.

2.3. The improvement of deliverability

The possibility of speeding up/simplifying planning process (obviously in a way which is consistent with good design) is for the private sector potentially the most exciting feature of codes.

There is real incentive for developers (and incentive is of course a major driver for those who run businesses for profit) if, as a result of coding, a planning application can be processed and determined in weeks rather than years and if there is a presumption in favour of code-compliant schemes. It is plain that codes require "front-loading" in terms of time and expense. But development is increasingly frontloaded in any event for any number of reasons e.g environmental impact assessment. The issue which will be of particular relevance for developers in relation to codes is that frontloading should have a direct and immediate benefit ie result in a speedier, more certain route to permission (and therefore to sales).

2.4. Enforceability

This is especially important for public bodies and key for third parties especially public.

Difficulties and weaknesses have previously been experienced with monitoring.

Any consideration of legal mechanisms must deal with this to some extent to provide credibility for the public.

But again, enforcement regimes require to be used not merely as a stick but also as a carrot for developers e.g. the degree to which a developer who complies with/ exceeds code quality parameters may be rewarded (future invitations to tender etc.) in a way which is consistent with public procurement regulations.

And ODPM and others in the public sector need to recognise that monitoring and adaptation is a two way process. Developers who participate in code making will need to be reassured that LPAs will likewise invest proper resource in the exercise and will comply with their part of bargain when it comes to prompt and positive decision making.

That means also that all parts of e.g. the planning/highways authority buy in. Not just at highway design – also at s38 at adoption level. Members may need to take initiative.

2.5. Another factor in terms of choice of legal delivery mechanism which relations to this issue of code credibility is that cannot be to anyone's advantage (member of public, authority, funder, developer, promulgators of codes eg CABE, EP) that a code should become just another layer of guidance. No-one wants another door prop/waste paper. A code requires to be of real use, a real tool for change and delivery.

2.6. Additionally a code must not be so prescriptive as to stifle either, design innovation/interest or entrepreneur ship/incentive.

3. Bearing these (and other factors in mind) I will now turn to some

Possible Legal Mechanisms.

(a) Primary legislation

- could be changed to provide statutory status to design code BUT would need to consider very carefully how this relates to s54A of the Town and Country Planning Act.
- planning is not just about design.
- what makes design a greater priority than eg affordable housing such that it should be given statutory priority s54A and plan led?

(b) National policy

- Circular
- PPG/PPS
- Enhance status of policy – weight as material planning consideration

(c) Development Plan

- mentioned already that existing and new plan making processes lengthy
- not of binding nature. Even though presumption in favour of plan, other material considerations can outweigh
- not especially flexible – though new system may prove more so.

(d) SPG but must be supplementary to local planning policy. Cannot just adopt on basis of a woolly catch all needs to be prepared in accordance with proper process

(e) S106

- Has the advantage over policy of being binding
- Contractual element
- But we all know that this can be one of the most time consuming elements in whole planning process.
- Concerns re flexibility
Variation by agreement otherwise developer has to wait at least 5 years
– and the Lands Tribunal not qualified to deal with issues of design

(f) Land Ownership Mechanisms

- restrictive covenants
- development agreements
- output spec and benchmark

(g) Funding systems and allocation of public grant/requirements on public authorities to achieve best value - ? code impact on land value if lowers
– will it conflict?

CHALLENGE

- Rapidly increasing area of development lawyer's practice = JR and statutory challenge
- Cheap and quick tool for challenger
- Can cause considerable delay, expense etc at Government, local government, developer level.

Need to ensure that having gone through front loaded process the result is as challenge proof as possible.

- the public will be rightly disgruntled if they have input and then the code is disregarded
- public bodies need to ensure the proper processes and procedures are followed, careful consideration of decisions, reasoned justification for deviations
- developers who must often have most to lose work with public authorities to assist.