A PRACTICAL APPROACH TO

PLANNING LAW

THIRTEENTH EDITION

Victor Moore
LLM, BARRISTER
Professor of Law Emeritus,
University of Reading

Michael Purdue
LLB, LLM (LONDON),
SOLICITOR OF THE SUPREME COURT
Professor of Law Emeritus
City University, London

Dr Ashley Bowes
LLB, PhD, BARRISTER

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HISTORICAL INTRODUCTION

A. THE GROWTH OF PUBLIC CONTROL OVER LAND USE

1.01 Before there existed any public control over the use and development of land, landowners were free to use land in any way they wished, subject only to any limitations in the grant under which they held the land and to obligations placed upon them at common law. In essence, therefore, provided an owner acted within the limitation of his estate or interest and committed no nuisance or trespass against his neighbour's property, he was free to use his land for the purpose for which it was economically best suited. Today, most societies require not only that this freedom be restricted for the public good, but also that the use to which land is put should be determined by the long-term interests of the community as a whole rather than as a consequence of the incidence and spread of individual land ownership.

1.02 Although by as early as the middle of the 19th century, public health legislation in Great Britain had been passed to remedy the worst effects of insanitary housing conditions, it was not until 1909 that an attempt was made to deal with more general land use problems such as the separation of incompatible uses or the lack of amenity land. The Housing, Town Planning etc Act 1909 was primarily concerned with housing in that it gave wide powers to local authorities to build new houses and to clear existing substandard housing. Section 54 of that Act, however, gave local authorities the power to prepare schemes:

> as respects any land which is in course of development or appears likely to be used for building purposes, with the general object of securing proper sanitary conditions, amenity, and convenience in connection with the laying out and use of the land, and of any neighbouring lands.

Here was the beginning of planning law. Yet from the start it was plagued by a number of problems, many of which have recurred and remained unresolved to the present day.

1.03 Section 54 of the 1909 Act was discretionary in that local authorities were not required to prepare schemes, merely empowered to do so. The Housing, Town Planning etc Act 1919 attempted to remedy that defect by requiring the council of every borough or urban district with a population of over 20,000 to prepare schemes for land in the course of development or likely to be used for building purposes. Despite the fact that in 1919 Parliament set a time limit for the preparation of these schemes, the time limit had to be extended on a number of occasions as authorities found that the formidable task of preparing schemes could not be accomplished within the time set for so doing.

1.04 Although in 1919 the time taken to prepare schemes may have been exacerbated by the shortage of people possessing the necessary technical skills, the problem of delay has never been satisfactorily resolved. Under the Town and Country Planning Act 1947, local planning authorities were required within three years to submit to the Minister a development plan for their area. Most authorities found they were unable to do so within that period. Then, under the Town and Country Planning Act 1968, although no time limit was laid down for the submission of structure plans to the Secretary of State, it took some 14 years before the last structure plan was submitted to him for approval. Similar delay problems have applied with regard to the preparation, alteration, or replacement of all subsequent types of development plan.

1.05 Unfortunately for the planning process, development pressures often build up faster than planners can plan. Hence the more outdated a development plan may be, the less relevant it becomes to making decisions about the use and development of land and the greater the pressure on authorities to rely on other material considerations than the development plan and to make land use decisions on an individual and ad hoc basis.

1.06 Another problem with the 1909 Act was that before a scheme could be implemented it had to be approved by central government and an opportunity given to people to object to its provisions. The difficulty in this area has always been that democracy and speed rarely go hand in hand, and if the public are to be given the right to influence the content of the scheme or plan, the preparation and approval or adoption process is by that much delayed. Later legislation has continued to give the public the right to be consulted when a development plan is being prepared and to object to policies in the plan before its final adoption or approval.

1.07 The third problem to arise under early planning legislation came to be known as the compensation/betterment problem. Planning control can affect property values for better or worse, and the problem that needed to be solved was how to treat those whose land had either decreased in value (the compensation aspect), or increased in value (the betterment aspect) due to a scheme. The early legislation allowed local authorities to recover from owners 50 per cent of any increase in the value of land due to the making of a scheme. At the same time, it gave owners a right to receive compensation from the authority for any decrease in the value of their land. Under the Town and Country Planning Act 1932, the amount of betterment which a local authority could recover from owners was increased from 50 to 75 per cent. In addition, however, the owner was given the right to require payment to be deferred until he had actually realized the increased value through the sale of the land or its development. If this did not happen within five years as regards land zoned for industrial or commercial purposes, or 14 years in any other case, no betterment at all was payable.

1.08 The operation of these financial provisions proved disastrous. A local authority wishing to control the development of land in its area might find itself faced with a heavy liability for compensation which it would have difficulty in meeting unless it was also prepared to allow some development in the area. On the other hand, a local authority not wishing to restrict development in its area might hope to obtain a considerable sum by way of betterment from owners, without any liability to pay compensation. As it turned out, however, the collection of betterment proved to be almost impossible, mainly because of the lapsing provisions previously referred to.

1.09 The failure to deal satisfactorily with the financial consequences of land use planning meant the failure of land use planning itself. It has been estimated that after more than a quarter of a century of effort the number of schemes which were prepared and

approved under the 1909 Act and subsequent legislation could be counted on the fingers of one hand!

1.10 The advent of the Second World War presented an opportunity to consider whether a more effective system for the control of land use could be found. The opportunity had been taken to set up a number of bodies charged with investigating particular facets of the land-use system. The three main reports produced by this exercise were the Barlow Report, the Scott Report, and the Uthwatt Report.

The Barlow Report This was the report of the Royal Commission on the Distribution of Industrial Population (Cmd 6153). Set up in 1937, it was to inquire into the causes of the geographical distribution of the industrial population, and to consider the social, economic, and strategic disadvantages resulting from the concentration of industry and industrial population in cities and regions. It was also to consider what methods should be taken to counteract them. The report advocated the dispersal of industry from congested urban areas and the progressive redevelopment of those areas wherever necessary.

The Scott Report This was a report of a Committee on Land Utilisation in Rural Areas (Cmd 6378). The Committee was asked to consider the problems of piecemeal development of agricultural land and the unrestricted development of the coastline.

The Uthwatt Report This report, perhaps the most influential of the three, was by the Expert Committee on Compensation and Betterment (Cmd 6386) under the chairmanship of Uthwatt J. The main feature of this report was an examination of the problem of compensation and betterment. In so doing it identified the twin concepts of shifting value and floating value.

1.11 The idea behind the concept of shifting value was that planning control does not reduce the total sum of land values, but merely redistributes it by increasing the value of some land whilst decreasing the value of other land. Because of this it was possible for one authority to find itself paying compensation for restrictions on development, whilst a neighbouring authority could recover betterment because of those restrictions. The lesson to be learnt, therefore, was that financial arrangements to deal with the compensation/betterment problem could not be dealt with at a local level.

1.12 The idea behind the concept of floating values was that potential value is by nature speculative. Development may take place on land parcel A or parcel B. The prospect floats over both parcels. The value of any parcel of land is obtained by estimating whether the development is likely to take place on one parcel of land or on another. Where planning restrictions are imposed on land and owners are given the right to claim compensation for any loss so caused, they will tend to assume that but for those restrictions the floating value would settle on their land, rather than on the land of their neighbours. The result was that owners claiming compensation would tend to overestimate the prospect of the development taking place on their land, so that in total, all claims for compensation over an area could far exceed the actual loss of development value suffered.

1.13 All three reports contributed significantly to the system of land-use control established by the Town and Country Planning Act 1947. The Act came into effect on 1 July 1948. The essential features of that Act were as follows:

(a) It created local planning authorities and required each authority to prepare a development plan for its area indicating the manner in which it proposed land in its area should be used, whether by development or otherwise, and the ways in which any such development should be carried out.

(b) All land was made subject to planning control, not just land within a scheme prepared by the authority. As a result, apart from minor development, any person wishing to develop land had first to obtain express planning permission to do so from the local planning authority. In deciding whether to grant or refuse permission, the authority was to be guided by the provisions of the development plan.
(c) Wide powers were given to local planning authorities to deal with development carried out without planning permission.
(d) Wide powers were given to local planning authorities to secure the preservation of trees and buildings of architectural or historic interest and to control the display of advertisements.
(e) If a person was granted planning permission for any development falling outside the existing use of his land, he had to pay a development charge to the state equal to the value of that permission.
(f) If a person was refused planning permission for such development, no compensation was paid for that refusal.
(g) To compensate landowners affected by (e) and (f) above who may perhaps have purchased their land before the Act came into force at a price reflecting its value for development, the Act set up a fund of £300 million. Any owner who could prove that his land had depreciated as a result of the 1947 Act could make a claim against the fund for the difference between the value of the land for existing use purposes and its value on the assumption the Act had not been passed. Payments from the fund were to be made in 1954.

1.14 It will be seen that the financial provisions of the Act (e) to (g) above) attempted to solve the problems examined by the Uthwatt Committee. The sum of £300 million was an estimate of the total development value of land nationally, and claims against the fund were, if necessary, to be scaled down, so that in total they added up to that sum.

1.15 Furthermore, since the fund was administered by central government, local planning authorities were left free to make planning decisions without any regard to the economic or financial consequences of so doing.

1.16 Most of the financial provisions of the 1947 Act have now been dismantled. In particular, the Town and Country Planning Act 1953 abolished the development charge. Although further attempts were made by the Land Commission Act 1967 and the Development Land Tax Act 1976 to recoup for the community part of the development value of land which would otherwise accrue to the owner, no special tax on development value now exists, although an owner may be liable to pay capital gains tax on such value if he realizes a capital gain on the disposal of his land. One further point should be noted. Today, developers may be required to contribute to some of the external costs borne by the community as a result of their proposals, through the use of what is known as planning obligations and the new Community Infrastructure Levy.

1.17 It will be remembered that the 1947 legislation contained no provision for the payment of compensation to a landowner refused planning permission for development which fell outside the existing use of his land. When the development charge was abolished in 1953, it was decided to maintain that rule, so that in general since the 1947 Act no compensation has been payable for any loss incurred by the refusal of planning permission for such development, or indeed for the grant of planning permission made subject to conditions.

1.18 This general rule, however, was subject to one exception. An owner could claim compensation if he or his successors in title could show the existence of a claim made under

the 1947 Act against the £300 million fund in respect of loss suffered as a result of the Act. In such rare cases, the compensation was limited to the amount of the claim or the amount of the loss due to the planning decision, whichever was less. Even this exception, however, has now been abolished. The Planning and Compensation Act 1991 repealed almost all existing statutory provisions providing for the payment of compensation for adverse planning decisions.

1.19 With regard to the non-financial provisions of the 1947 Act however, the elements of the system established at that time have withstood the passage of time. Although numerous changes and improvements have been made to the statutory provisions since that date, the basic scheme of the legislation remains the same.

1.20 Among the many changes made to this basic scheme since 1947 mention might be made of:

(a) a number of major reorganizations of local government, which have led to changes in the number and size of local planning authorities and their respective functions;
(b) a fundamental changes to the development plan system;
(c) the progressive strengthening of the provisions for enforcing planning control, and of the provisions relating to the preservation of buildings of special architectural or historic interest;
(d) the introduction of environmental impact assessments in making decisions about major development proposals.

Yet despite the continued reverence of the law to the basic elements of the system as introduced in 1947, the law has become not only more complex, but also considerably more disparate in its application. Today, quite apart from the normal technicalities of the law and its procedures, a landowner wishing to develop his land may have additionally to consider such matters as: whether his land is within a simplified planning zone, a national park, an Area of Outstanding Natural Beauty, a conservation area, or a site of special scientific interest; what plan or plans constitute the development plan for the area; whether the development proposed is permitted under a special development order, a general development order, a local development order or a neighbourhood development order; whether the proposed development is subject to environmental impact assessment; and whether there is a building on the land of special architectural or historic interest, or a tree protected by a tree preservation order, or the land contains a scheduled monument.

B. LATER LEGISLATIVE LANDMARKS

1.21 Town and Country Planning legislation was first consolidated in 1962, and then again in 1971. However, this consolidation legislation continued to be subject to frequent amendment. So much so, that in 1989, the Government decided to ask the Law Commission to consolidate the legislation yet again. It was decided that the consolidation should involve four separate Acts of Parliament. Consolidation of legislation does not normally involve changes in the substance of the law. In this case, however, the opportunity was taken to correct a number of anomalies and inconsistencies of a technical nature. Subject to these changes however, the Acts restated the then existing law. The four Acts, which all received the Royal Assent on 24 May 1990, were:

(a) the Town and Country Planning Act 1990. This Act consolidated certain enactments relating to town and country planning;

(b) the Planning (Listed Buildings and Conservation Areas) Act 1990. This Act consolidated certain enactments in relation to special controls in respect of buildings and areas of special architectural or historic interest;
(c) the Planning (Hazardous Substances) Act 1990. This Act consolidated certain enactments relating to special controls in respect of hazardous substances;
(d) the Planning (Consequential Provisions) Act 1990. This Act made provision for repeals, consequential amendments, transitional and transitory matters, and savings in connection with the consolidation of enactments in the Acts mentioned above.

1.22 With the exception of the Planning (Hazardous Substances) Act 1990, most of the provisions of the Acts came into force on 24 August 1990. Hereinafter, in this text, the main Act, the Town and Country Planning Act 1990, will often be referred to simply as 'the 1990 Act'.

These reforms were followed up by the Planning and Compensation Act 1991 which received the Royal Assent on 25 July 1991. It amended the law relating to both planning and to compulsory acquisition procedure and to the assessment of compensation for the compulsory acquisition of land.

1.23 Significant post-1991 changes to planning legislation have been made by the following Acts:

Environment Act 1995 This Act created the Environment Agency for England and Wales and a Scottish Environment Protection Agency, along with other measures to improve the protection and management of the environment. In the land-use field, the Act made provision for the existing National Park boards to be wound up and replaced by new National Park authorities, which are now the local planning authority for the area of the Park. In addition, the Act provided for an initial review and updating of mineral planning permissions granted in the 1950s, 1960s, and 1970s, and the periodic review of all mineral planning permissions thereafter.

Scotland Act 1998 and the Government of Wales Act 1998 These Acts began a process whereby many of the planning powers previously exercised by the Parliament of the United Kingdom on a national basis were transferred to the Scottish Parliament or to the National Assembly for Wales.

Human Rights Act 1998 This Act, which came into force on 2 October 2000, incorporated into domestic law the provisions of the European Convention on Human Rights. Its provisions are dealt with in Chapter 19.

Greater London Authority Act 1999 This Act established a Mayor and a Greater London Assembly for the Greater London Area, and contained wide powers which gave the Mayor a major role in the determination of planning applications for the more important development proposals in the London Area.

Planning and Compulsory Purchase Act 2004 This Act received the Royal Assent on 13 May 2004. Its provisions were based on a consultation paper issued by the Government in December 2001 entitled *Delivering a Fundamental Change*. The Act introduced important changes to many areas of planning law, including changes to the development plan system and to planning control. Changes to the development plan system included the creation and use of regional spatial strategies and local development schemes to replace existing development plans. Changes to the planning control system embraced the abolition of crown immunity; changes to the basis of planning obligations; a restriction on the practice of twin-tracking; a requirement that development be commenced within three

years; a strengthening of enforcement provisions; and the beginning of a new process for the handling of decisions on major infrastructure projects.

Some of the provisions of the 2004 Act are 'free-standing', in the sense that they contain provisions additional to those found in the Town and Country Planning Act 1990. Other provisions of the 2004 Act however, have operated by repealing or amending, or by the substitution of existing provisions in the 1990 Act. **1.24**

The Planning Act 2008

The Government published, on 21 May 2007, a White Paper (Cm 7120) *Planning for a Sustainable Future*, proposing further major reforms to legislation. The proposed reforms included the following: **1.25**

- the publication of a new national policy framework setting out how the country's key infrastructure needs will be met in the next 10–25 years;
- the provision of a clearer inquiry system with more expertise, led by an independent commission able to take decisions on individual projects;
- the imposition of a legal requirement on developers to consult the public and other key parties;
- an expansion of free access to planning advice;
- an extension of permitted development rights to cover minor household development such as conservatories, small-scale extensions, and micro-generation devices like solar panels;
- the provision of simpler information requirements for applications for planning permission, and the introduction of a fast track appeals system.

The Planning Act 2008 gave effect to most of the above reforms that required primary legislation. One of the most important provisions of the Act was the establishment of a new corporate body called the Infrastructure Planning Commission and the creation of one single consent regime for all nationally significant infrastructure proposals. The second important provision of the Act enabled the creation of a new Community Infrastructure Levy, to sit alongside planning obligations and planning contributions, whereby owners and developers can contribute wholly or partly towards the cost of infrastructure required to support the development which they are proposing. These topics are dealt with in Chapters 28 and 17 respectively. **1.26**

C. THE LOCALISM ACT 2011

The 2011 Act abolished the 'regional strategies' which used to form part of the development plan. Instead a new duty is imposed on local authorities and other public bodies to work together on planning issues. A new form of 'neighbourhood planning' has been set up by which local communities can draw up a neighbourhood development plan and grant full or outline planning permission for new homes and businesses. Linked to this is a community right to build as the Act provides that a community organization, formed by members of the local community, will be able to bring forward development proposals, providing they meet minimum criteria and can demonstrate local support through a referendum. The Act then introduces a new requirement for developers to consult local communities before submitting planning applications for very large developments, strengthens enforcement rules and reforms the community infrastructure levy and other local finance considerations. The law regarding the **1.27**

way local plans are made has also been changed with limitations on the powers of Inspectors to rewrite policies. In the case of nationally significant infrastructure projects the Infrastructure Planning Commission has been abolished and the final decisions are now to be made by the Secretary of State.

The Growth and Infrastructure Act 2013

1.28 The Growth and Infrastructure Act 2013 makes the following changes to the planning system:

- creation of an option to make planning applications directly to the Secretary of State when a local planning authority has been designated as not performing adequately;
- broadening of the powers of the Secretary of State to award costs between the parties at planning appeals;
- imposition of limits on the powers that local planning authorities have to require information with planning applications;
- allowing for the reconsideration of economically unviable affordable housing requirements contained in s 106 agreements;
- restrictions on the rights to apply for land proposed for development to be registered as a town or village green.

1.29 The main objective of the Act is to promote growth and facilitate the provision of infrastructure and it clarifies the position of variations and replacements of pre-Planning Act consents under the Planning Act 2008. The Act also enables the Secretary of State to direct that business and commercial projects of national significance can be considered under the nationally significant infrastructure regime contained in the Planning Act 2008. The Mayor of London is given the power to delegate decisions concerning planning applications of potential strategic importance.

The Enterprise and Regulation Reform Act 2013

1.30 The Enterprise and Regulation Reform Act 2013 makes important changes to the law concerning Listed Buildings and Conservation Areas. The need to obtain Conservation Area Consent for the demolition of an unlisted building in a conservation area in England has been removed and instead such works require planning permission. With regard to the listing of buildings, the Act allows for certain structures or objects to be specifically excluded from the listing and for specific features of a building to be identified as lacking architectural merit. There is also provision for the entering of 'heritage partnerships' under which agreements can be entered by owners and planning authorities as to the works that can be carried out to the listed building. Similarly, the Act allows the Secretary of State to make Listed Building Consent Orders and for local planning authorities to make Local Listed Building Consent Orders authorizing particular works for the alteration or extension of listed buildings in England. There is also provision for certificates of lawfulness (setting out works to a listed building which can be carried out without Listed Building Consent) and certificates of immunity (that buildings will not be listed for at least five years).