The Reform of Planning Law; Land Use and the United States

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BOOK REVIEW


Professor Neal Roberts takes as his text Professor Charles Haar’s ipse dixit that the English 1947 Town and Country Planning Act was a “daring experiment in social control of the environment.” He then rehearses the many changes that have been made in that Act since, the object being to discern whether there are lessons to be learned from the English experience. Needless to say, he discerns one or two. Before we can assay these results, however, it is necessary in dealing with an American audience to outline roughly the English land use planning system.

The 1947 Act put a halt to all development of land unless and until planning permission was obtained. Development was defined in sweeping terms so as to encompass even a material change in the use to which an existing building was put. Perforce, there had to be a plan, as indeed there was. Local governments were directed to come up with development plans, which had then to be approved by a ministry of the central government in London. The ministry, however, had to hold a public inquiry before stamping its approval. Because everyone had the right to appear, issues were left to develop as the hearings went along, cross-examination was allowed, and the plans included maps referring to specific parcels, the hearings turned out to be “lengthy” and often involved “very particularised discussion of specific parcels.” Little wonder. Once a plan was approved, a landowner denied planning permission, whilst he could pursue administrative review, could not as a practical matter expect meaningful judicial review. Meanwhile, another ministry might be financing a new town almost anywhere, and the highway authorities went on building.

What went wrong? It might take fifteen years to get a plan

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1 P. 1 (quoting C. Haar, Land-Use Planning in a Free Society 1 (1951)).
2 P. 71.
finally drawn up and approved. Although the plan was the work of the county council, decisions whether or not to grant planning permission were made at a second, lower tier of local government by the district councils. Because the plan was obsolete by the time it came into effect, these district councils had in ad hoc style to make the best decision they could: "This made the reality of policy-making focus on the permission system of development control, and the exceptions to the development plan came to determine future land-use policies. . . . This [was] exacerbated by the fact that third parties [were] not allowed to appeal against permission approvals."3 Here then were local units of government making decisions on which turned immense sums, all without much chance of effective review. It should come as no shock, except to the diminishing breed of Anglophiles, that we hear next of "corruption in local-government planning, permission approval, and public-works contracting."4

When concern about the environment became commonplace in its contemporary sense—pollution, diminishing unspoilt natural land, and lack of recreational space were widely perceived problems—the authorities in London responded by restructuring the agencies of the central government. Thus, there came into being the Department of the Environment (D.O.E.), a mega-ministry which subsumed under its table of organization the Ministry of Housing and Local Government, the Ministry of Transport, and the Ministry of Public Buildings and Works. Concomitantly, it had been perceived that land use planning would work better if county lines were redrawn on a larger scale to reflect actual urban conurbations, and this was done. All that was left was to mesh into this new structure the 1947 Act, after removing its imperfections.

This second time around an effort was made to separate the general from the particular by bifurcating the planning process into structure plans and local plans:

The counties or upper tier will do the structure plans, and the policy formulation will thus be established for areas of some size. However, the local plans, which are meant actually to relate the 'policy' to a map and thus to people's property, will be done by . . . the local districts, who will carry the plans out through the imposition of the day-to-day permission or control work.5

[References]
3 P. 9.
4 P. 22.
5 P. 94.
The structure plan, therefore, is designed to let a county "decide how much growth is envisaged in each urbanised area," and to select among "a variety of possible strategies (less growth in the north of the county, more in the south, more high-rise flats, fewer parking facilities, and so on)." As Professor Roberts notes: "[T]he concept is very close to that of the American master plan."

Structure plans require central government approval, now by the D.O.E., but as a condition precedent to this imprimatur, the public inquiry has been replaced by a public examination. That is to say, because the structure plans concern policies instead of particular parcels, the format of the hearings has been revised. Their adjudicative overtone has been replaced by a consensus-building flavor even to the extent that, not only has cross-examination been abolished, but the D.O.E. fixes the agenda and selects the interest groups who can appear. In this "correct atmosphere," the D.O.E. is able "to clarify, explain, expand and explore the relationships of various parts of the structure plan." If structure plans are master plans of a sort, then the local

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6 P. 100.
7 P. 98. Cf. D. Heap, THE LAND AND THE DEVELOPMENT 29 (1975) ("The Structure Plan was not really a plan at all. It was a document showing strategic outlines, trends and tendencies, but never in any instance getting down to brass tacks or detail.")
8 P. 169. The entire paragraph is not without interest:
   In order to start this process in the correct atmosphere there is first a preliminary session, the purpose of which is to stress the different nature of an examination vis-à-vis an inquiry, the lack of counsel, and the "probing" nature of the panel's role. It is here that the participants are introduced, the programme dates and times established, and the mechanics of the appearances clarified. The hope as expressed by one D.O.E. spectator is that when the first session actually begins, "the whole atmosphere of the examination is established in the first ten minutes. . . . [It will be] a totally different pattern . . . a human atmosphere."
9 Pp. 160-61. Of interest, too, are these gems: "The selection of issues to a large extent predetermines the success of the public-review exercise, where the public at large does not have the right to appear and thus select the issues by their participation in the review." P. 163. And:
   What was clearly being rejected was the idea that the best way to discuss policy might be mechanisms to allow for more advocacy, more representation of the particularised view and the clear articulation of the specific, often very private, interests of particular groups. . . .
   In Britain, with a unified party-political structure and a great deal of confidence in government officials, this notion was rejected and the public inquiry was replaced by a scheme which depends on consensus building, government orchestration and to no little degree on the elimination of particularised, specific detail in favour of the consideration of more general policy.

plans are going to be rather crucial, for the latter "will contain the actual land-use maps."10 While nothing will become "operative" until the appropriate county issues a certificate of acceptability,11 the central government does not figure in the local decision. The problem is that "some observers . . . feel that the first set of local plans might take some fifteen years to prepare."12 The overhaul of local government, moreover, means that new districts are "just starting up an administrative structure."13 And Professor Roberts concludes: "What will most probably happen is that . . . the local districts will draft partial ad hoc plans for the immediate and urgent problems that are facing them."14

What has the author accomplished? He takes the reader from the 1947 Act to the present insofar as the structure of English land use planning is concerned. The book is packed with insights into the debates about how best to plan, the roles of lawyers and planners, and introduces the reader to documents like the 1967 White Paper and the Skeffington Report. This is no mean task if you take into account that the legislative package in England consists of 35 Acts of Parliament and 171 statutory instruments, the whole annotated lot of which runs to something like 2,111 pages. Throw in the circulars, white papers, law reports, and regulations, and you approach a coda of 5,334 pages.15

What are the author's conclusions having distilled this nearly unintelligible morass into a coherent overview? He concludes that it is not enough to create a system whereby planning permission is a condition precedent to development. Rather:

If the aim is for officials to provide housing, recreational or industrial land, with ready access to the governmentally provided infrastructure of transport and support services, then it seems that the local authority should be able to say what land is going to be developed, and where. And it should be able to do this without having to justify its effect on the personal wealth of each parcel-owner.16

10 Pp. 149-50.
11 P. 150.
12 Id.
13 P. 152.
14 Id.
15 See D. Heap, supra note 7, at 24-25.
16 P. 248.
All of which causes him to come out four-square for land banking and to advocate that Sweden be used as a model.\textsuperscript{17}

Granted that the English planning permission system is a cousin at least of American zoning, this book is going to have considerable appeal in university planning departments, particularly at Cornell; for “[i]n recent years Professor John Reps has been one of the most persuasive advocates of land banking as a means of controlling urban sprawl.”\textsuperscript{18} Cornellians have not overlooked Canadian use of this tool,\textsuperscript{19} and the idea has become accepted currency in planning’s intellectual market.\textsuperscript{20} Nay sayers obtain as well.\textsuperscript{21} But what’s new about this idea? That is the troubling question, since the land banking idea was common currency in the administration of F.D. Roosevelt.\textsuperscript{22}

Why should socialist England be the scene for a land banking mechanism? Thereby hangs a tale. Recall now that the 1947 Act put a halt to all development except that licensed by planning permission. Land was not nationalized: the right to develop it was. An owner of a farm lot, worth £50 as such, but really worth £500 as the site of a housing park, was in theory given the right to claim compensation for his lost development rights. Suppose now the owner of the same lot was given permission to develop; he was hit with a development charge which consumed the land’s increase in value from £50 to £500. This value, or so the theory went, was created by society’s demand, and society was therefore entitled to the gain it had created. So awestruck by this demise of Adam Smith

\textsuperscript{17} Pp. 242-79. Note this, however, at 251:

The other major point which must be kept in mind is that Sweden has had a political party in power for the entire post-war period. This continued political support has given the policy-makers within the party and the civil service a strong mandate to meet the problems of housing and rational urban development. But see Social Democrats: 44 and Out, \textit{TIME}, Oct. 4, 1976, at 46, col. 2.


\textsuperscript{22} See, e.g., National Resources Planning Board, Public Land Acquisition, Part I: Rural Lands (June 1940); \textit{id.}, Part II: Urban Lands (Feb. 1941).
and the free market in land was Professor Harold Potter that he penned a eulogy for the fee simple itself.\textsuperscript{23}

This Labor scheme failed to take into account original sin. Now a developer might pay a farmer £500 for land worth £50 as farmland, obtain permission to build a housing estate, and pay a charge of £450. So what? Out of pocket £950 for the lot, the developer would simply pass on this cost to his homebuyers, thereby exacerbating inflationary pressures. Thus the Tories put an end to this notion in 1953. In his inaugural lecture at the University of Nottingham in 1966, Professor J. F. Garner was able to describe English planning in terms familiar even to Americans. "[P]lanning law," he said, "does not operate to destroy the traditional theory of estates, but imposes general restrictions on the enjoyment of estates in land, being essentially of the same kind as other statutory controls, such as those imposed in the interests of public health or safe building."\textsuperscript{24}

But back in power again, in 1967 Labor came up with the Land Commission Act which imposed a betterment levy to tax the gains created by the grants of planning permission. So inartfully drawn was this legislation that the Lord Chancellor had to confess: "I would be the last person to say I understand the Bill."\textsuperscript{25} This strategy lasted until the Tories regained the top of the greasy pole in 1970.

With Labor again in power we are now witness to the 1975 Community Land Act and the 1976 Development Land Tax Act. The idea here is simple enough: no one should reap gain out of increased land values created by the societal need to develop. Local governments are to calculate the land needed for future development and condemn it, paying only its current use value. Development should then occur only on these lands and be accomplished by local government itself or by private developers to whom the land may be leased. While this system is being geared up, anyone who sells developable land or begins actually to develop it is to be assessed eighty percent of the value over use value, the tax to increase in time to one hundred percent.

This may be land banking, but it is land banking with a vengeance. It is being done, at least in part, to "get" perceived malefac-

\textsuperscript{23} The Twilight of Landowning, 12 Conveyancer & Prop. Law. (n.s.) 3 (1947); Caveat Emptor or Conveyancing under the Planning Acts, 13 id. 36 (1948).

\textsuperscript{24} J. Garner, An Englishman's Home is his Castle? 13, Jan. 27, 1966.

\textsuperscript{25} Quoted in E. Roberts, Land-Use Planning 3-49 (2d ed. 1975).
tors who have profited from the public's need for land. But at what cost? Desmond Heap suggests a practical problem: "In effect all initiative in the development field is to be handed over to the new county councils and the new district councils. Now, at the moment, all local government . . . is suffering badly from post-operative shock following the reorganisation . . . ." But he also confirms that it is an ideological dispute: "The entrepreneurial skills and expertise of the developer who is prepared to back his fancy and take a chance—these are not the sort of thing to be found at town or county hall." All of which gets us around to my own appraisal of this book.

As a study of the English planning system—ignoring the ideological wars over who is entitled to the gain to be had from developing land—the book is excellent. This overall effect is spoilt, however, by the addition of the reference to land banking, a chapter actually derived from a law review article. Land banking is a tool that deserves serious attention. Here, however, it emerges out of any overall context and appears to be a ploy in parochial English ideological disputes. No one is enticed to look objectively at the design of a lifeboat after being told that it was used aboard the Titanic, and I fear that the English nation is now so regarded. My concern is that this book may do a disservice to the land banking concept. I say "may" deliberately, because except for teachers of jurisprudence, no one in America pays all that much attention to the English. It's just as well.

Let us beat a hasty retreat back to our own shore. Inexorably, whether under the guise of environmental law or land use planning, state-level control over land use is increasingly displacing the haphazard local zoning and subdivision regulation that obtained before 1970. Florida, Hawaii, Idaho, Maine, Minnesota, Montana, Nebraska, Nevada, Vermont, Virginia, and Wyoming—the states

26 D. Heap, supra note 7, at 68.
27 Id. at 70.
28 See, e.g., Britain at the Brink, N.Y. Times, Oct. 15, 1976, at A1, col. 5:
The war they fight is called "we-they." It is a conflict that poisons reasoned discourse between management and workers, between white Britons and Asian immigrants, between Scots and the English, between the ruling Labor Government and the Conservatives, and even between the left wing of the Labor Party and the faction of the party that governs.

We-they, in political terms, means that each new government will try to undo the work of its predecessor. A Labor Government nationalized the steel industry. A Conservative Government denationalized it and a new Labor Government renationalized it. The principal loser in the merry-go-round was the steel industry.
one by one have responded to the perceived need. Hawaii is not Vermont, however, so that no unifying matrix like the old Standard Zoning Enabling Act exists to illustrate the structure of these various state responses. After years of boring state-by-state alike-ness, land use planning is exploding into a multisplendored thing in which different concerns prompt different answers.

These different answers, however, cannot be explained only in terms of different geographic and economic situations. The political context is crucial to understanding why this expedient worked here but not there. Why did the publication of a map cause such a reaction in Vermont? Why did even Nelson Rockefeller, at the zenith of his caudillo-like hold over New York, abolish a state agency that had the temerity to advocate a state-wide land use plan? How is it that the state authorities in New York are nonetheless escalating land use control to the state level under the guise of environmental protection? Law books, codes and statutes, and most law review articles are not of much help here. One has to appreciate what is going on "out there" to understand this field.

Mr. Robert G. Healy's book is a "must" precisely because he left the law library and visited some of the battle grounds. He adumbrates the felt needs, the conflicts, the progress, and the setbacks that have exemplified the scene in California, Florida, and Vermont. His is a book lawyers and law students should read instead of their land use treatises and hornbooks.

Let it not be thought that I am altogether happy with Mr. Healy. His was work done for Resources for the Future, a group I fear my friend Professor Howard Conklin would describe as spokesmen for "affluent suburbanites." A decent environment for whom?—that is the question. Environmental law may actually disguise a most interesting class war, wherein the upper-middle class are trying to preserve an environment suitable for themselves. True, the Adirondacks should be preserved, but to stop development now simply means that people rich enough to have already acquired a place are guaranteed their solace, whilst latecomers to affluence are shut out, and native landowners are denied their chance to turn a profit developing land. Are we really dealing here

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with neutral principles of law, or has “environmental protection” been transformed into a new counter in the eternal struggle to accumulate more chips than the next fellow?

While beset by this devil of negative thinking, I am struck by the thought that both books ignore the issue most critical to contemporary planning. Where do either Asians in Birmingham or blacks in Detroit fit into the planning equation? Whether planning amounts to a plan or a process, the merits of land banking, and the quality of the environment—these are issues important to refining the quality of life. What, however, if you do not have a civilization? Are these books symptomatic of a larger tendency to ignore the urban core? Can one ignore the urban core?

Frankly, these books encourage my despair. The young Stephen Spender once asked T. S. Eliot what form he thought the collapse of civilization would take.31 “Internecine warfare,” was the reply. When pressed to be more specific, Eliot explained: “People killing one another in the streets.” Well, we are just about there. One of these books should be read but not widely distributed, the other should be widely read and modestly recommended, whilst this reader will retreat to perusing again Evelyn Waugh.

E. F. Roberts*

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31 S. SPENDER, T.S. ELIOT 120 (1975).
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