

The Transformation of Planning Agreements as Regulatory Instruments in Land-Use Planning in the Twentieth Century

A thesis presented

By

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To the London School of Economics and Political Science
Department of Law

In fulfilment of the requirements for the degree of

Doctor of Philosophy

In the subject of

Law

London School of Economics and Political Science, London UK



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Abstract

This thesis assesses critically the role and function of planning agreements as regulatory instruments in the context of land-use control from a historical perspective. By adopting Hancher and Moran's heuristic of regulatory space, the origins of the practice and its development over time are considered against the backdrop of the evolving planning system in England and Wales. The objectives are to identify the various actors present and mechanisms used to regulate agreements and from this to understand more generally the implications of a use of contractual practices for regulatory purposes. Emphasis will be placed on the techniques used by Government in regulating the practice. Whilst established by statutory provision, agreements will be shown to be defined by many actors within a broad policy space and regulated also by those actors in a number of ways. Regulation will be seen to encompass far more than state-sponsored activity and extend a use of many strategies only one of which is law.

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Acknowledgments

This thesis would not have been possible without the unceasing patience of my supervisors Colin Scott and Martin Loughlin, whose thoughtful and at times challenging comments enabled me to work through what appeared to be a morass of information. I wish to acknowledge also the financial support received from both the Law Department and the LSE's Centre for the Analysis of Risk and Regulation (CARR) without which it would not have been possible to pursue my research at the National Archives. I owe a great debt to and have benefited greatly from my time at CARR (as an affiliate student) and in particular the lively discussions led by various members of the staff especially Michael Huber and Henry Rothstein. I wish also to thank the participants (both staff and students) at the Law and Society Association's Summer Institute of 2005 for their insightful critique on my work in progress. Lastly I wish to thank both friends and family for their continuing moral support and most of all to my Mother whose positive outlook, belief and encouragement helped me to persevere when all seemed lost.

Chapter 1. Origins, context and problematic tensions

1. Introduction

Planning controls cannot be seen solely as a statutory form driven only by the Centre. They can be viewed instead as an exercise in regulation; managing the many actors, with diverse agendas, present within the policy arena. The objectives of successive governments' in controlling land-use development can be characterised by a use of experimentation to steer rather than control the activity of others in a policy domain where its capacity is limited. This thesis explores how the practice of using planning agreements, as part of the general system of land-use control was shaped not only by the Centre but by various actors who in turn influenced Government's regulatory capacities. Through a process of historical study, applying the analysis of regulatory space, I consider the origins of agreements and their transformation in the twentieth century as a regulatory mechanism. The history of agreements demonstrates the existence of variety both in terms of functionality and the regulatory techniques deployed. This challenges assertions that the practice was only of significance after 1970¹ and that agreements have no relevance beyond that associated with the recovery of betterment², a prevailing contemporary assumption in the literature.³ The thesis will be used also to test how informative spatial analyses are in the given context.

¹ Jowell, J., "Bargaining in Development Control" (1977) *J.P.L.* 414–433 suggests that until the late 1960's the powers were little used.

² 'Betterment' is defined to include both benefits resulting from enhanced land values generally and deriving from the state undertaking public works benefiting development.

³ Grant, M., "Betterment again", (1991) JPEL Occasional Paper No 18 *The Planning Balance in the 1990's* London: Sweet and Maxwell. Healey, P., Purdue, M., and Ennis, F., in *Negotiating Development: Rationales and Practice for development obligations and planning gain*. London: E & FN Spon, 1995, p. 34 view obligations as a means to redistribute or reallocate the external costs of development, and the practice as a, "pragmatic and *ad hoc*" mechanism for recovery.

A use of agreement illustrates the inherent difficulties Government faces in constructing regulation in a policy domain influenced by a complex of economic and social systems. The practice of using agreements is indicative of the regulatory potential of techniques characterised by individuated negotiation and bargaining in controlling land-use. It posits also a positive role for Government in steering the behaviour of the parties to agreements. Many actors from different domains participate in the shaping of an ostensibly bilateral practice and have done so since its inception in the early 1900's. Here regulatory policy is enacted through the participation of both central and local tiers of government, landowners, developers and professionals, each with varying capacities, interests and viewpoints.

In land-use control negotiated solutions are not a recent phenomenon emerging in tandem with a shift from central planning to marketisation. Agreements predate the creation of the modern planning system, and can be seen as an ancient form of regulatory contracting⁴, far more than the spontaneous response (where the parties deliver optimal solutions, most often in the absence of external intervention). Whilst embedded within the statutory regime since the early twentieth century, limited research has been undertaken to assess the regulatory effects of a practice, which has been viewed as marginal to the system overall and, "an arbitrary mechanism stained with the risk of corruption".⁵ Mapped against the terrain of the emerging and developing planning system, agreements remain an important source of land-use regulation and a practice that challenges the capacities of Government. Their use provides a basis from which to question the core understandings of a use of quasi-

⁴ A shorthand for contracting for regulatory ends developed by Freeman, Jody "The Contracting State" (2000) 28 *Florida State University Law Review* 155–214. It signifies a distinctive form of contractual practice that suggests the introduction of negotiation and bargaining, "and an informal system of obligation and exchange"(p. 191) into the regulatory arena.

contractual practices for regulatory ends as a novel market form and one where hierarchical oversight is antithetical to the regulation of co-operative or collaborative relations.

Through the concept of regulatory space, an idea that emphasises the interdependence of various actors rather than Government alone in regulating activity, I will demonstrate the role of actor behaviour in shaping as much as being shaped by regulatory activity. This story evidences the limitations of statutory processes in regulating activity, and the inherent complexity of regulatory practices. I will show that historically often-divergent and contested regulatory perspectives and ambitions (especially those of business, landowners, and professional actors) have shaped both the use of agreements and their control. The treatment is schematic, pitched at the level of Government and does not address the role of community groupings or financial institutions in moulding regulatory approaches. The result is to characterise regulation by Government as assuming many forms ranging from hierarchical oversight to multiple forms of steering. This chapter situates agreements within the system of land-use control and explains some of the tensions associated with the practice.

2. The objectives of land-use control

As both a discipline and a practice, planning relates to the art of governing communities, through the translation of abstract concerns into built form.⁶ Land-use regulation is a practical illustration of how potentially competing or conflicting uses are controlled. It depicts also how the externalities (whether burdensome or

⁵ David Curry MP (Skipton and Ripon) 1855 *LGC* 15 (2 February 2006).

otherwise) arising from land-use development are dealt with. Planning has been described as situated, “at the interlocking of the study of the dynamics of urban and regional change and the study and normative practice of governance”.⁷ Not only does it incorporate a *territorial and spatial* dimension, it illustrates how contested and contestable interactions fall to be reconciled. Government’s objective in directing and influencing land-use activity as some note, is concerned with the, “... goals of economic efficiency and maximising land values as much, if not more than, those of social justice and equality”.⁸ The difficulties for Government are in achieving effective regulatory solutions to inter-disciplinary problems, having many centres of interpretation at the interface between law and policy, the regulatory space.⁹

2.1 Planning control in England and Wales: its origins

Planning controls are a technical response aimed at protecting society from the challenges imposed by environmental, technological and demographic change. Harmonious and compatible land uses are secured by ordering the topography of the nation. Alterations to the physical landscape, technological advance, or territorial threat resulted in the redrawing of the urban/rural distinction and sharpened Government’s focus for securing a healthy, productive workforce. Initially, these

⁶ Foley, D., L., “British Town Planning: One Ideology or Three” (1960) 11 *British Journal of Sociology* 211–321.

⁷ Healey, P, *Collaborative Planning: shaping places in fragmented societies*. Basingstoke: Macmillan, 1997, p. 4.

⁸ Brindley, T., Rydin, Y., and Stoker, G., *Remaking Planning: the Politics of Urban Change*. London: Routledge, 1996 (2nd ed.), p. 2.

⁹ Regulatory space is a metaphor for a policy space where power is dispersed but as I will show Government’s presence is not necessarily diminished. The phrase was first coined by Crouch, C., ‘Sharing Public Space: States and Organized Interests in Western Europe’, in Hall, J., A., (ed), *States in History*. Oxford: Blackwell, 1986 pp. 177–210, and has been used to assert the existence of diffuse or indirect governance strategies by Scott, C., “Analysing Regulatory Space: Fragmented Resources and Institutional Design” (2001) *Public Law* 329–353 and by Shearing, C., ‘A Constitutive Conception of Regulation’ in Grabosky, P., Braithwaite, J. (eds.), *Business Regulation and Australia’s Future* Canberra: Australian Institute of Criminology, 1993, pp. 67–80.

concerns were addressed through the manipulation of private interests, whether the principles of property law or contract, or public law forms as with the use of byelaws at a primarily local level, or exceptionally more general legislation. Over time a more comprehensive and co-ordinated regulatory strategy was needed to manage the increasing complexity of societal change. It was one that emphasised public decision-making and harnessed the exercise of public power. Yet Government remained dependent upon other actors to secure its objectives.

Land-use controls did not derive from industrialisation, but this influenced regulatory approaches and marked the emergence of a coherent body of public control. The process of industrialisation, “wrought profound changes in the fabric of English life – in its economy, demography, social attitudes and behaviour, and, of course, in its politics, law and government”¹⁰, many of which were anchored by land, as an indicator of economic change. Through land’s regulation, change could be managed more effectively. Not all effects were national in scale. Some of the most intense pressures existed locally. Industrial processes were often incompatible with other land uses because of the adverse effects they created, and the potentially risky consequences to person and property. Industry’s incessant demand for labour, coupled with the restructuring of agriculture had led to a gravitational pull of sections of the rural community towards the often-overcrowded urban areas. The results were ever expanding towns intoxicated by every form of “noxious influence”.¹¹ Creeping urban sprawl, threatened both the rural areas and more importantly the health and wellbeing of the nation’s subjects. Land-use activity became an imperative for regulation. By the nineteenth century major demographic shifts, local problems and

in particular their spillover effects, became national issues and the locus of regulation passed from the locality to the Centre. The emergence of reconfigured economic and social strata highlighted the pressing concern of how to govern the nation's inhabitants, without detriment to economic progress. The force of this idea generated movements concerned to reshape the living and ultimately working conditions of the new working class.¹² It was also a catalyst to revive government.

By controlling land use, Government sought to civilise communities and regulate living. The fundamental dilemma was how to control incompatible land uses without fracturing completely the rights associated with property ownership, whilst absorbing future potential into extant arrangements. The initial regulatory response replicated the earlier *ad hoc* local solutions, by emphasising the role of the common law. Municipal authorities relied on property law principles to minimise future potential adverse effects. Local Act provisions relating to nuisance and overcrowding were used also. By the late nineteenth century, adverse effects were becoming regulated through more general public and often statutory controls. By the twentieth century land-use management and control was structured through planning regulation that enmeshed both local and central institutions. The early 1900's marked a shift from reactive to proactive regulation. In essence this meant planning for the future, rather than dealing with the consequences (as early public health legislation had sought to do) by attempting to address problems before they arose through the power to plan,

¹⁰ Arthurs, H. W., "*Without the Law*" *Administrative Justice and Legal pluralism in Nineteenth-Century England*. Toronto: University of Toronto Press, 1985, p. 8.

¹¹ Noted by Joseph Chamberlain at a meeting of Birmingham Town Council in 1877.

¹² Cherry, Gordon E., in, *The Evolution of British Town Planning : A History of town planning in the United Kingdom during the twentieth century and of the Royal Town Planning Institute 1914-74*. Leighton Buzzard Beds.: Leonard Hill Books, 1974 provides a history of the town and country planning profession, which he describes as the product of E. Howard's Garden Cities Movement, a forerunner of the Town and Country Planning Association and itself derived from Fabianism and the Guild movement.

rather than addressing retrospectively their effects. General legislation became a pervasive part of regulatory control. Early legislation such as The Housing, Town Planning etc. Act 1909¹³ marks the origins of a system of coherent control that sought to regulate urban development, through the mechanism of the scheme, a method that would eventually apply throughout the jurisdiction. These aspects will be discussed more fully in Chapter 3.

As planning controls affected more and more inhabitants, they implicated the multiple *dramatis personae* present in a functionally differentiated society. Planning as a practice absorbed the interests of many actors with competing, if dissonant objectives, whether landowner or developer, lawyer or planner. Planning became an exercise in the allocation and distribution of scarce resources (predominantly land), and a means to provide enhancements to the physical environment, as well as facilitating economic growth. Land-use regulation had the potential however to distort land values by manipulating the property market. This would occur where some land uses were prohibited in particular areas but similar uses permitted elsewhere (the problem of 'shifting value'¹⁴ as it became known). Betterment questions would highlight tensions between national and local concerns in later years particularly during times of public expenditure constraint. They would impact directly on a use of agreements and become a recurring motif throughout the history town and country planning control.

¹³ An Act to amend the Law relating to the Housing of the Working Classes, to provide for the making of Town Planning schemes, and to make further provision with respect to the appointment and duties of County Medical Officers of Health, and to provide for the establishment of Public Health and Housing Committees of County Councils.

¹⁴ Ministry of Works and Planning *Expert Committee on Compensation and Betterment* Cmd. 6386 (September 1942) para. 26 p. 15.

2.2 Modern land-use planning

The land-use control system in England and Wales is a vehicle for allocating the efficient use of land according to generalised and certainly never static, collective aspirations and objectives. These may be detrimental to or at least affect individual interests. Regulation occurs through a process of continuous appraisal often invoking multiple forms of ordering and control, with Government especially using different techniques to achieve its goals. The response to industrialisation and social change had revived government both centrally and locally and contributed to the shaping of modern control. Regulation assumes both *ex post* (remedying the detrimental effects of incompatible land-use activities) and *ex ante* (minimising the risk of conflictual uses) forms, with an emphasis on latter. Through structuring and ordering communities and the inhabited space, modern controls represent an attempt to balance individual and collective land-use interests through efficient and effective allocation. Regulation is achieved through the manipulation of both common law (particularly land law principles) and statutory constructs. The canon of planning control is the right to use and develop land so far as it accords with central, regional and local objectives, economic demands and a “constantly shifting set of norms and values”.¹⁵

The planning system is not a closed system governed by internal consistency, but is linked to and must account for differing fields of knowledge (including the environmental and economic) where numerous interests are contested within public space. Through land-use regulation collective concerns, designated in policy terms as worthy of protection, can be weighted against (and if necessary trump)

¹⁵ McLoughlin, J., Brian, *Control and Urban Planning*. London: Faber and Faber, 1973 p. 27.

individuated interests. These are not rigidly fixed and are framed according to the currency of political and social demand. Planning controls place restrictions on an individual's rights to use her land over and above those imposed at common law.¹⁶

The underlying and enduring ideology is that an individual's property rights are not to be interfered with unless justifications exist for so doing. The justifications are matters of public policy. Planning control does not enshrine social rights but instead prefers a system characterised by the exercise of technical and formalised deliberation and decision-making. The resulting system restricts individual rights by incorporating community interests into the decision-making process.¹⁷

Modern land-use planning has its roots in the post-war central intervention that coincided with the creation of the Welfare State. The Town and Country Planning Act 1947 constructed the architecture for a universally applicable system of control that would meet national objectives. The system, much of which remains today, inscribed a strategy for development planning that would set the broad goals (whether national, regional or local) for development activity. This is achieved through both legal rules and policy methods with legislation dividing responsibility for control between central and local government through a centrally managed system that gives a broad discretion to local agencies.¹⁸ Although extensive in terms

¹⁶ In this context 'use' includes the right to develop the land by changing its character or placing buildings or structures on it.

¹⁷ In contrast to land law, planning is *a manifestation of the state's power to intervene in citizens' lives for the protection of the public health, safety and welfare*, notes Eagle, Steven, J., 'Devolutionary Proposals and Contractarian Principles', in Buckley, F. H., (ed.) *The Fall and Rise of Freedom of Contract*. Durham NC: Duke University Press, 1999 p. 186, when commenting upon the US system of zoning. This observation is equally applicable to the planning system in England and Wales.

¹⁸ Most usually the local authority, but also development corporations and other bodies responsible for specific regeneration projects. Through planning permission, the planning authority controls development activity according to the policies and principles defined by it and Government and all other 'material considerations' subject to the supervisory jurisdiction of the courts. This general phraseology disguises specific criteria that have been articulated by Government and the courts to confine the decision-making.

of statutory provision, the planning system highlights the limits of legal processes in addressing both polycentric issues and controlling the exercise of administrative activity. The statutory frame provides for Government to control by exception through an exercise of residual powers (as in the case of call-in procedures and departure applications). Development control is the mechanism through which the generalised statements of planning principle are implemented.¹⁹ Thus the Centre decides matters of strategic importance, and sets the framework for local planning authorities to determine local and regional matters.

Agency, provided for by statute is a key feature within planning regulation. Local authorities assume a significant role in resolving particular development questions. The statutory provisions do not and cannot define unambiguously absolute standards and significant discretion is donated to local decision-makers. The existence of discretion is tempered by central and legal controls. Through local delegation, planning authorities decide planning matters within the broad parameters set by Government. The Centre is involved extensively in planning determinations, whether through providing direction by promulgating general policy guidance, approving the strategic planning policies for detailed implementation by local agencies, as in the case of approving development plans or in deciding planning appeals.²⁰ Within public law an existence of wide agency discretion has resulted in

¹⁹ Control extends to the use, construction and redevelopment of the built environment. Those uses or operations classified as 'development' require planning permission before being deemed to be lawful. 'Development' is defined as the carrying out of, *building, engineering, mining or other operations in, on, over or under land or the making of any material change in the use of buildings or other land* under section 55 Town and Country Planning Act 1990 (as amended). Failure to obtain the required permission renders the development unlawful and carries the risk of enforcement action, and criminal sanction.

²⁰ A right of appeal exists where an application for planning consent is refused or not determined.

calls for it to be structured or confined by rule making²¹ or checked.²² In land-use control, the creation of discretion was a response to the pressing demands of post-war reconstruction and the inflexibility of the scheme provisions.²³ Its existence functions to compensate for the inefficacy of legal rules in securing policy objectives. However the exercise of discretion is structured through policy and law by statutory provisions relating to the determination of applications, appeals and challenges to decisions in addition to the application of the general principles of judicial review.

Government's approach to land-use regulation functions to modify the behaviour of many actors (including landowners, developers, the property industry, planning authorities, departments of central government, and other public and private providers) in predominantly local environments. The system of planning control illustrates the dilemma many governments' face in regulating an activity over which they have limited control. These concerns replicate those found in the regulation of the economy or of large or powerful actors, where insufficient capacity exists on the part of Government to control directly the behaviour of others. Land-use controls are tied to a commodity that has assumed historically an iconic status. The deference towards land ownership has coloured and complicated forms of central control.

Government's dependency upon others in regulating land-use development resulted in the adoption of a complex of control processes. Directive strategies allocating and designating land uses according to a comprehensive national plan have a limited role

²¹ Davis, K., C., *Discretionary Justice: A Preliminary Inquiry*. Urbana, Ill: University of Illinois Press, 1969.

²² Reich, C., A., "The New Property" (1964) 73 *Yale LJ* 733–787.

for reasons of Government's inability to control fully the organisation of modern life. Planning regulation over time is characterised by both sequential transitions in decision styles (ranging from broad command to more discrete methods including a use of policy guidance) and combinations of these strategies. The inability of successive governments to control land-use activity through hierarchical oversight alone, led to the emergence of a system of more diffuse practices, which interwove central and local players, and public and private norms and values. Negotiated solutions were particularly useful when Government was either unable or unwilling to tightly define and execute its regulatory objectives. Consequently, the strategies adopted have sought to marry control with co-operation. As more reflexive regulatory forms, negotiation and bargaining are integral to the system. This is evident from the general configuration of the system, which draws upon the foundations of both public and private law and in one particular instrument, the planning agreement. Planning by agreement exemplifies the coexistence of public and private forms that structure space on both horizontal and vertical axes, (that is the mutual or lateral and the hierarchical) against which are mapped the competing time frames of past, present and future.

3. Agreements as regulatory tools in land-use planning

Agreements are valuable instruments to Government, harnessing the capacity of other actors to restrict their conduct and generating beneficial effects. The practice illustrates successive governments' attempts to regulate land-use activity by superimposing public policy ideals onto a bilateral relation using a number of strategies, which include encouragement and persuasion in addition to direction.

²³ Booth, Philip, 'Discretion in planning versus Zoning,' in Cullingworth (ed.) *British Planning : 50 years of Urban and Regional Policy*. London: the Athlone Press, 1999 pp. 31– 44.

Planning agreements, as largely statutory constructs derive from the application of land law and contractual principles in a public law setting. The history of the tool and its continuing relevance show how the form has been applied to achieve a variety of objectives, sometimes those of Government, sometimes not. A use of agreements compensates for the Centre's incapacity to exert direct command in an unstable policy domain, where it is clearly dependent upon developers and landowners to execute many forms of control.

Agreements were used as a basis for control in the absence of a comprehensive planning system. The practice emerged informally and became embedded within the institutional fabric of the planning space, often evolving simultaneously according to the fluid demands of Government. The instrument has a long heritage dating from at least the early twentieth century, when it was used as a solution to the pressing need to regulate development activity. Whilst legislation existed to control urban development, its exercise was both slow and inefficient. Planning during this period was essentially reactive. For planning authorities a use of many of the statutory powers carried the risk of confrontation with individual landowners and ultimately financial expense (often in the form of compensation). Compliance entailed following cumbersome procedures set by the Centre, which were sometimes incompatible with local objectives. In the alternative, authorities resorted to more flexible solutions, one of which was a use of agreements. For those areas initially not subject to statutory control, agreements were very important. Agreements supplemented a highly fragmented decision-making framework. They were used by Government to compensate for deficiencies in the emerging system. By the end of

the twentieth century they would highlight flaws in the planning system and Government would harness the instrument, to deliver efficient solutions.

Planning agreements have been conceptualised as a device to enable the enforcement of covenants affecting land, notwithstanding the planning authority having no interest in adjoining land.²⁴ Statute overrides the common law restrictions relating to privity of contract and the principles of equity (regarding the enforceability of restrictive covenants) so as to facilitate the planning authority's enforcement of land-use restrictions against both the party to the instrument and successive owners. Originally a bilateral agreement, the planning obligation as it is now termed, takes also the form of a unilateral obligation.²⁵ Since its inception the practice has been used to regulate land-use activity including restricting the collateral rights of individuals to claim compensation under statutory planning regimes, and to deliver community benefits, including enhanced infrastructure provision. They have been an effective mechanism for securing the zoning of land, and to strengthen the regulation of development activity. Essentially the mechanism is used to define those aspects of individual development proposals that cannot be easily resolved in other ways under the statutory regime, especially through the imposition of planning conditions.

Negotiation and bargaining are pervasive elements within the planning framework, although not explicitly recognised in the statutory provisions, and agreements confer additional powers on planning authorities to regulate land use by consensus. Agreements have been construed as statutory contracts negotiated in the context of

²⁴ Clarke J., J., *Outlines of the Law of Housing and Planning* London: Pitman, 1934 p. 251.

²⁵ By amendments to the Town and Country Planning Act 1990 by section 12 Planning and Compensation Act 1991. Throughout this thesis a reference will be made to agreements and the term will be used to include planning obligations, unless it is apparent to the contrary.

consensual dealings.²⁶ Their use introduces further margins of informality into the system and the prospect of an exercise of more subtle forms of control being deployed within the policy space. Through agreements ordering is achieved through consensual dealings, the product of dependency relations where none have sufficient resources to bring its goals to fruition independently. These relations are not limited however to the parties to agreements, and extend to include the Centre and other key players, whether rival developers, landowners or professional groupings. Through agreements, Government has contrived to regulate the conduct both of planning authority and developer. Responsibility for regulation is placed not just on the planning authority but on all parties interested in the quest for effective regulatory solutions, including Government and others.

4. The regulatory puzzles arising from a use of planning agreements

This thesis explores the role of planning agreements as regulatory tools in the land-use planning system, both in terms of their functionality and the manner in which they are regulated. A use of agreements mirrors a broader dilemma concerning land use described above; that is how far a process that provides ostensibly limited scope for third party intervention can in fact be controlled and manipulated, especially by Government. By considering the history of the practice, I will demonstrate that Government's regulatory capacities extend to adopting a variety of techniques that include central oversight, the dissemination of information and the sponsoring of other actors. Using the heuristic of regulatory space, I will show that regulatory policy is effected through the interaction of many, both state and non-state actors. The evidence suggests that downplaying Government's capacity to secure its policy

²⁶ Grant, Malcolm *Urban Planning Law*. London: Sweet and Maxwell, 1982 p. 360, and confirmed in the 2nd Supplement (1990) at p.113. A view confirmed by the Department of Transport Local

objectives, where individuated forms exist may be misleading. Government is not wholly dependent upon other powerful non-state actors to secure its policy goals but as I have suggested, its capacity to exercise control over land-use activity is limited. This limitation is a constant and is not a new phenomenon. It provides however for Government the means to experiment creatively in regulating by steering and using the capacity of others, to maximise its powers albeit not always successfully. Further, the longstanding use of agreements is suggestive of a regulatory form that is neither a post-modern phenomenon, nor one seen as necessarily a form of spontaneous market ordering. Regulation is effected through both lateral and hierarchical processes, where the parties negotiating obligations regulate their conduct, but in doing so are regulated also by others. The practice has been deployed in a changing planning system and altering policy and economic contexts such as to demonstrate an inherent flexibility.

The limited reference to agreements within the statutory provisions²⁷ belies the practice's significance to both Government and the development community. Its continuity highlights both public and private agendas. Government's attempts to regulate the practice remotely extended from central oversight and legislation to a use of more subtle forms including advice, and policy guidance. The deficits arising, led to the production of alternative regulatory forms that drew in many actors. A use of agreements depicts a number of regulatory puzzles, not least the use of an individuated form to secure collective ends. The practice functions at the margins of the planning system and whilst a part of that regime, it can be also an irritant to Government's regulatory ambitions, to the extent that local bilateral negotiation can

Government and the Regions in *Planning Delivering a Fundamental Change* (December 2001) p. 38.

have the effect of ousting central control. Their use poses also a challenge to some of the literature regarding the deficits in using contracting practices for regulatory ends.²⁸

Market relations are seen to secure efficient outcomes through a form of spontaneous lateral ordering where responsibility for regulation is placed predominantly on the parties to the bargain concerned in the quest for effective regulatory solutions. This paradigm tends to avoid giving a strong role to regulators (especially Government) in overseeing the practice.²⁹ A use of agreements does not function wholly outside the hierarchical frame, which defines relations between central and local government in land-use planning. Further the idea that the parties, acting autonomously negotiate regulatory solutions is critically damaged by the fact that, over time, a multiplicity of agents enters the regulatory space including various arms of government, and the courts. Government has had success in regulating the practice to secure broad policy objectives by adopting a number of different techniques.

Contracting has been viewed as a harnessing of efficient and effective market strategies. Being closely allied to competition, contracting practices can generate allocative efficiency gains.³⁰ The relation between competition and contracting is

²⁷ The statutory provisions relating to agreements from 1932 to the present are contained in Appendix II

²⁸ This line is taken by law and economics scholars of which the Chicago School is one example. It points to the potential inefficiencies of public contracting given the high transaction costs including the difficulties relating to obtaining information, monitoring costs and the possibilities of agent hold-out and defection, as indicated by Pritchard, J. Robert, S., (ed.) *Crown Corporations in Canada: The Calculus of Instrument Choice*. Toronto: Butterworths, 1983.

²⁹ Graham, C., 'Self-Regulation', in Richardson, G., and Genn, H., (eds.) *Administrative Law and Government Action: the courts and alternative mechanisms of review*, Oxford: Clarendon Press, 1994; Ogus, A., "Rethinking Self-Regulation" (1995) 15 *OJLS* 97-107.

³⁰ Ogus, A., I., *Regulation: Legal Form and Economic Theory*. Oxford: Clarendon Press, 1994. This does not necessarily occur as Armstrong, M., Cowan, S., and Vickers, J., in, *Regulatory Reform: Economic Analysis and British Experience* London: MIT Press, 1994 demonstrate.

not a simple one, and competitive strategies can make contracting more difficult by reducing the scope for co-operation.³¹ Contract law has been viewed as a regulatory technique, at its most effective when regulating business relations.³² 'Regulation by contract' may take the form of Government fixing the terms upon which it contracts for goods or services, or it may extend to more subtle configurations, where the contractual practices of other actors are used by Government to steer activities in which it has some broad interest.³³ A use of contracting for regulatory ends within the public sector has been seen as an almost anarchic form and thus fundamentally problematic³⁴ or as a privatising strategy³⁵ most commonly associated with a reconfiguration of service delivery³⁶ or as a facet of post-modern society.³⁷ In town planning the practice emerged before the creation of the modern planning system. This is well in advance of the arrival of the New Public Management reforms, characterised by decentralisation, a programme of creating Agencies and the use of private resources rather than direct service provision.³⁸ This suggests a reading at odds with those identifying the use of quasi-contractual tools as essentially part of a 'new wave' incorporating market instruments in the regulatory armour, or as a form of privatisation.³⁹ In town planning a use of agreements undermines conventional understandings of the distinctions between centralisation and decentralisation.

³¹ As Helm, D., and Jenkinson, T., show when discussing the British Gas experience in, *Competition in Regulated Industries* Oxford: OUP, 1998.

³² Collins, H., *Regulating Contracts*. Oxford : OUP, 1999, Ch 4.

³³ Daintith, T., "Regulating by Contract: The New Prerogative" (1979) *Curr. Leg. Prob.* 41–64

³⁴ Collins, (1999).

³⁵ Even the rhetoric of privatisation can conceal greater intervention. Majone, G. (1994), "Paradoxes of Privatisation and Deregulation" 1994 1(1) *Journal of European Public Policy* 53–69.

³⁶ Vincent-Jones, P., "The Regulation of Contractualisation in Quasi-Markets for Public Services" (1999) *Public Law* 303–326.

³⁷ Edgeworth, B., *Law, Modernity, Postmodernity: Legal Change in the Contracting State*. Aldershot: Ashgate, 2003.

Thus binary distinctions between market and state, or coercion and consensus do not fully account for the practice. In town planning a use of agreements demonstrates that regulatory contracting can exhibit a level of variety which institutionalises a range of diverse regulatory techniques including but not limited to the self-regulatory practices of the parties to the agreement. The existence of such a level of flexibility confounds the Centre's attempts to control it fully and also the rational egoism of the various actors who seek to use it for their own purposes. This is suggestive of an inherent resilience to change, as Government has found in its recent attempts to overhaul the tool. It suggests also a mechanism for achieving regulatory moderation.

A climate of competition can lead potentially to innovative, creative and efficient solutions, but it can also lead to unexpected consequences and possible counterproductive effects. Government's regulatory strategies do not necessarily result in predictable outcomes. The history of agreements illustrates the endless regulatory possibilities that can exist when public and private actors compete and co-operate. The strategies adopted assume many forms, depending upon the level of co-operation or competition between actors. This may involve the co-option of existing strategies by different players or formation of new alliances. It does not necessarily imply that Government has divested itself of authority, or that the monolith of the state has simply withered. In fact the converse may be true, with governmental activity assuming discrete forms that are sufficiently far-reaching to include private as well as public actors. It is from this context that agreements need to be viewed. Government regulates planning agreements as much as the parties themselves,

³⁸ Rhodes, R., Oliver, D., and Drewry, D., *Public Service Reforms: Issues of Accountability and Public Law*. London: Pinter, 1996, Hood, C., "A Public Management for All Seasons" (1991) 69(1) *Public Administration* 3–19.

³⁹ Edgeworth op. cit. pp 134–137.

through using many forms of oversight. These ranged from the direct (e.g. a framework of express consent introduced in 1943) through to more diffuse forms (such as a use of steering through the provision of guidance or the gathering or dissemination of information) that, in turn, draw in other agents. The contestable nature of land-use activity provides one plausible explanation for the existence of, and continued use of planning agreements as regulatory instruments, because of their functional flexibility. In this section I explore in further detail the puzzles associated with the practice, sketched above.

4.1 Using individuated solutions to achieve collective goals

Planning agreements are used to provide gains that cannot be attained through other mechanisms in the system, especially through an imposition of planning conditions. The obligations secured often take the form of collective or community gains rather than the individuated benefits more commonly associated with contractual dealings. This suggests a presumptively effective use of contractual practices at the margins of public and private domains that secures both individual and collective goals. Using private instruments within the public domain is not necessarily contradictory, and Government may contract for a number of ends.⁴⁰ The difference here is that Government is not a party to the agreement. In land-use planning, agreements are used to secure community benefits including off-site infrastructure works⁴¹, and public provision is obtained through harnessing the individuals' capacity to negotiate their rights and interests. The collective gains generated are not a contingent effect as might be suggested by the rational actor paradigms found within neo-classical

⁴⁰ As tracked by Daintith op. cit., p. 41–42, and in “Legal Analysis of Economic Policy” (1982) 9(2) *JLS* 191–224 pp. 210, 214 and 218.

⁴¹ During the 1980's and 1990's in particular these works could not have been publicly funded through a lack of resources and ongoing public expenditure constraints.

economics.⁴² Nor is it easy to view these outcomes as an aggregation of individual interests' equivalent to collective goals. Agreements could be seen however, as a device functioning to stimulate co-operation that has wider consequences, where both planning authority and developer work together to find appropriate and effective collective regulatory solutions.

4.2 A paradigm of market ordering?

Agreements cannot be credibly understood solely according to the market rationales of demand and supply, capable of, "making compatible initially independent and possibly conflicting strategies of a large number of individual agents, pursuing their own selfish interests".⁴³ This is partly because planning as a discipline embraces many concerns including environmental, social and political factors. Developers (who might be expected, according to models of rational egoism to negotiate agreements providing sub-optimal benefits from a community perspective) have routinely offered enhanced gains in securing development rights, as happened during the 1990's. They and landowners might be expected to reject any form of practice that had the effect of enhancing community benefits to their own detriment. Contracting occurs in a context of the variable dependency relations that exist within the statutory regime. Variable levels of interdependence exist between planning authority and developer that have often the effect of providing community gains. This militates against viewing agreements in a classical sense as a free and equal exchange based upon mutual trust, reciprocity and equality of bargaining power. Using agreements can function to generate relations of trust and dependency that

⁴² As exemplified by the Chicago School of economics, which emphasises wealth maximisation through rational instrumentalism.

⁴³ Hollingsworth, J. Rogers and Boyer, R., (eds.) *Contemporary Capitalism: The Embeddness of Institutions*. Cambridge: Cambridge University Press, 1997 p. 57.

have regulatory significance.⁴⁴ This is one way of explaining the later stages of the evolution of the practice, post 1980, as I will show. The practice is a dynamic if unstable one, constituted by the parties where institutionalised bargaining processes and participant interaction stimulate co-operation, and what appears to be a highly efficient ordering solution for both Government, and the parties negotiating them.⁴⁵ The practice overcomes information deficits and both temporal and environmental uncertainties resulting from the statutory regime, especially those of delay for landowners and developers in the appeals process and by generating enforceable commitments from developers benefits local communities.

The market-ordering paradigm is damaged if the consequences of the parties' pursuing instrumental goals, and the involvement of Government in establishing and regulating the instrument's use, are considered. Any hypothetical reconstruction of actor preferences may point to a stalemate between planning authority and developer with, the latter resisting any demands for collective gains and pursuing instead appeals against any refusal of planning permission. Counter-intuitively perhaps, the British Property Federation⁴⁶, and the CBI⁴⁷ have restated the advantages of agreements and have been instrumental in cautioning Government on its recent proposals to revise or abolish the practice by substituting a fixed tariff. Whilst this

⁴⁴ Luhmann, N., *Trust and Power*. Chichester: Wiley, 1979 perceives trust as a basis for reducing complexity, and as ... *a solution for specific problems of risk*, 'Familiarity, Confidence and Trust: Problems and Alternatives' in, Gambetta, D., (ed.) *Trust Making and Breaking Cooperative Relations*. Oxford: Basil Blackwell, 1988, pp. 94-107 at p. 95. Braithwaite, J., 'Institutionalizing Distrust, Enculturing Trust' in Braithwaite V., I., and Levi, M., (eds.) *Trust and Governance*. New York: Russell Sage Foundation, 1998 by contrast cite distrust as the relevant concept as a basis for the creation of trusting relations.

⁴⁵ Coase, R., H., *The Firm, the Market and the Law*. Chicago: University of Chicago Press, 1988 has identified bargaining and contractual practices, can be highly efficient ordering solutions overcoming the problems of information asymmetries and bounds on rationality.

⁴⁶ Walker, Stephen and Smith, Peter *Planning Obligations: Current Practices and Strategies of Local Planning Authorities* (Oxford Brookes University) July 2002, a study commissioned by the British Property Federation.

might mean that developer communities have more to fear in profitability terms from the introduction of a flat rate charge, this does not necessarily demonstrate the bald efficiency of existing practice. In combination the existence of developer detriment, community gains, and third party (namely Government) intervention point to more than the workings of a spontaneous form of ordering, generating contingent external benefits.⁴⁸ They are suggestive to some degree of an institutional embeddedness that might explain the longevity of the practice.

4.3 Regulating planning agreements: the role of Government oversight

Some query the viability of contracting solutions for regulatory ends because they are presumed to function without resort to external, notably hierarchical oversight, leading to potential deficits in external regulatory control.⁴⁹ The mutuality of relations is conceived as obviating a need for oversight and an efficient equilibrium is maintained through the parties self-ordering. Contracts tend to be seen as a form of ordering without hierarchy.⁵⁰ Whilst hierarchical relations are not necessarily antithetical to contracting, as Joerges in particular has shown using the example of franchising agreements that incorporate both market and hierarchical elements⁵¹, this tends not to be the norm. The capacity to regulate contractual practices is seen therefore as difficult for Government, particularly given its difficulty in obtaining information, costs of monitoring and the real possibility of hold-out and defection by

⁴⁷ CBI, *Planning for Productivity – A Ten Point Action Plan* July 2001.

⁴⁸ Sugden, R., "Spontaneous Order" 1998 3(4) *Journal of Economic Perspectives* 85–97, reprinted in Witt, U., (ed.) *Evolutionary Economics* Cheltenham: Edward Elgar, 1993 and in Casson, Mark (ed.) *Culture, Social Norms and Economics. Volume I Economic Behaviour* Cheltenham: Edward Elgar, 1997.

⁴⁹ Collins (1999); Freeman (2000).

⁵⁰ In the context of the New Public Management reforms however, Hood, C., Scott, C., James, O., Jones, G., and Travers, T., *Regulation inside Government: Waste watchers, quality police and sleaze-busters*. Oxford: OUP, 1999, p. 79 have identified that a creation of arms length agencies (often through contracts) has resulted in a use of more formalised mechanisms of control.

⁵¹ Joerges, C., (ed.) *Franchising and the Law: Theoretical and Comparative Approaches in Europe and the United States*: Nomos Verlagsgesellschaft, Baden-Baden, 1991.

the contracting parties themselves. A use of planning agreements appears not to present this problem and since its inception, the practice been regulated by external actors including the Centre.

Oversight is as much a facet of the practice as relations of co-operation and collaboration. So strong is the presence of hierarchy that it militates against an understanding of purely horizontal dealings and detracts substantially from a vision of predominantly consensual dealing. A use of agreements occurs within the development control system, which contains strong hierarchical elements. Here the landowner or developer is dependent upon the planning authority to obtain planning consent. These relations of dependency extend to the planning authority (often conscious of the need to generate local economic prosperity) and likewise Government. The relations do not remain constant over time and are heavily influenced by contextual factors and by Government steering. In the earliest stages, landowners were dependent upon the planning authority to facilitate their development objectives through a use of agreements. Towards the end of the twentieth century the position was reversed, with planning authorities and Government being dependent upon developers to generate community gains and economic development. At other times the practice highlights more balanced reciprocal relations.

Government's use of oversight has not always been express. Discrete forms of encouragement and assistance, used to maintain dependency relations and engender greater reliance on central control (as in the case of checking drafts or by issuing precedents) are present especially in the early stages of the practice. The history of

agreements points to a broad trend in Government using less formal mechanisms of oversight (such as steering through the gathering of information and the dissemination of guidance, and the provision of advice and assistance) to capitalise on its authority or status. This appears to obviate the use of the 'heavy hand' of command. Some correlation exists between the type of oversight mechanism used and its intensity of effects; with control being more extensive in the absence of formalised commanding strategies, such as the mechanism of express consent. Diffuse forms of steering have been and continue to be used by Government to regulate the practice. In 1932, the Centre was using discrete oversight mechanisms, such as the provision of advice to regulate agreements' use. Subsequent strategies adopted for the same purpose included issuing precedents and the dissemination of formal planning policy. The latter strategy became an integral part of successive government's attempts to regulate agreements during the economic boom period after the 1970's. During this period, the use of policy guidance seems to have been equally effective as the express consent mechanism of earlier times. The adoption of different oversight mechanisms affects the use of agreements as much as the latter influences the mechanics of oversight. This challenges the understanding that the harnessing of *inter partes* practices like agreements is indeed beyond command.

4.4 A flexible regulatory instrument

Agreements provide for further margins of informality to exist. This extends not simply to negotiation and bargaining between the parties but the forms of regulatory control. A use of discrete oversight forms (whether steering through guidance, persuasion or the collection and dissemination of information) facilitates the maintenance of trusting or dependency relations. This can engender a greater reliance on central control (as in the case of checking drafts or by issuing precedents,

prevalent in the early eras). As the institutional arrangements developed by Government to control land use have become more sophisticated, planning agreements remain an important facet of land-use regulation. The instrument has maintained a functional utility in a centralised system as well as one characterised by largely individuated *ad hoc* solutions. This suggests a level of flexibility sufficient for the tool to remain an effective regulatory instrument despite contextual change. Although relatively few in number, accounting for less than 20% of all major development schemes⁵², agreements are said to, “play a significant role in delivering the outcome of development”.⁵³ The evolution and transformation of the practice will be charted in the next section.

5. Understanding the historical transformation of agreements

The practice has absorbed many transitions in the development control system, and is coloured by the evolution of the system itself. Functionally agreements have been used to regulate development proposals and secure the provision of on- and off-site benefits, often compensating for deficiencies in the system overall. The practice has secured also ends that are seen by some (particularly Government) as not necessarily consistent with the prevailing system of control. The planning system evolved (and with it agreements) as one aspect of the modernisation of the nation, to manage post-industrialisation effects and its associated social, economic and political consequences. In historical terms the transformation of agreements can be perceived from the key dates marking the evolution of the instrument and the planning system.

⁵² Figures projected by the Department of Transport, Local Government and the Regions, in *Planning Obligations: Delivering a Fundamental Change* (16 December 2001) from Campbell H., J., Ellis, H., Henneberry, J., Poxon, J., Rowley, S., and Gladwell, C., *Planning Obligations and the mediation of development* Monograph, Department of Town and Regional Planning, University of Sheffield RICS Foundation Research Paper 5(13) (2001) p. 4.

The developments can also be viewed against the system's prevailing and predominant regulatory characteristics. These range from local fragmentation in the early period (when no comprehensive system of land-use control existed), to centralisation to 1968 and in later times more strategic forms of central intervention. I divide these developments into eras by reference to the functionality of the practice and its control, hence its transformation. Pre-1932 planning authorities used agreements to avoid compensation claims, and achieve more flexible solutions to land-use control than could have been achieved through the scheme mechanism. Subsequently they were used to secure wider development aspects such as the provision of highways improvements, and the provision of public access culminating in substantial and significant gains not necessarily related to the development proposal by developers from the late 1970's. When the practice is mapped against the prevailing planning system, it becomes possible to see where a use of agreements conforms to and departs from the overall development control framework. This approach highlights also the strategies used to regulate the practice. The regulatory strategies adopted are considered according to their defining characteristics, whether collective or individuated, co-operative or competitive, lateral or hierarchical, locally fragmented or national in scale. Competitive characteristics can be mapped against collective ideals, to test how far each is accommodated in any given era. In each case the policy context within which agreements were used, colours the strategies adopted (especially by Government) to regulate them. The objective is twofold: to critically assess how far the practice complements a system of control that has assumed many forms and the strategies adopted to regulate agreements, especially in circumstances seen to challenge the integrity of the planning system.

⁵³*Planning Obligations: Delivering a Fundamental Change*, op. cit., p. 2.

The study divides the evolution of agreements and their regulation into four episodes or eras: the pre-modern (1900-1942), the modern era (1943-1966), the high-modern era (1967-1990) and the late-modern era (post-1990).⁵⁴ The eras are drawn in schematic fashion, according to the relevant statutory provisions recognising the practice, and which at times provide the cues for oversight, as in the case of the imposition of express ministerial consent by the 1943 legislation. Each episode is tied to Government's broad systemic response to social or economic shifts. The reference to modernism (especially high-modernism) draws heavily upon the work of Moran⁵⁵ and Scott.⁵⁶ Both link modernism to tightening state controls, and centralisation whether express or tacit, often as a response to the existence of economic and institutional crises or policy failures. The traits of high-modernism identified by Scott as the, "standardization, central control, and synoptic legibility of the centre"⁵⁷, can be covert. As Moran notes the projects of large-scale intervention associated with modernism, by the high-modern era become manifest through greater integration and a subtle use of hierarchy.⁵⁸ Government's "commitment to massive, purposive social change [marking] both democratic and authoritarian regimes"⁵⁹, in the era of high-modernism is equally as ambitious as the centralising project of creating the Welfare State. The turn from a use of direct centralising tactics towards the selective regulation of economic and social activities, according to Moran expanded the mechanics of control available to Government, consistent with the

<http://www.odpm.gov.uk/pub/221PlanningobligationsdeliveringafundamentalchangePDF98Kb_id1143221.pdf> 17 March 2006.

⁵⁴ These periods are approximations.

⁵⁵ Moran, M., *The British Regulatory State: High Modernism and Hyper-Innovation*, Oxford : OUP, 2003.

⁵⁶ Scott, James, C., *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. New Haven: Yale University Press, 1998.

⁵⁷ *Ibid.* p. 219.

⁵⁸ *Ibid.*, Chs. 1 and 6.

high-modernist project. Often this is achieved by a use of discrete techniques, which include a greater reliance on “hierarchy, ...formality and...state control”.⁶⁰ Thus high-modernism is characterised by new forms of regulatory intervention and a level of experimentation to achieve the Centre’s strategic objectives, consistent with a modernist project that seeks to objectify and quantify by transforming the tacit knowledge of insiders into public knowledge. This can be illustrated by contrasting the regulation of agreements within the modern and the high- and late-modern eras. In the former, Government regulated the practice by a use of direct oversight – the consent mechanism. In the later eras, Government’s objective remained that of integrating the practice further within the planning regime overall by harnessing the power of the developer community to do so, but also making negotiations more transparent in the pursuit of, ‘synoptic legibility’. The methods used were characterised by a use of steering through a use of guidance.

Gradual changes occur where past and present merge almost imperceptibly, rather than through a defined process of metamorphosis or mutation. Whilst it might be possible to identify some moments when the characteristics of the practice are radically different functionally than the previous, (as in the case of agreements being used to regulate the development itself as opposed to providing unrelated off-site works) these are rare. Instead the subtle shifts in the function and characteristics of the practice tend to have no clear beginning or end. This is because, where change is discernible, strong elements of continuity remain.

⁵⁹ Moran op. cit., p. 5.

⁶⁰ Ibid., p. 6 using this statement in the context of the transformation of self-regulation. The same can be said of agreements, which do not necessarily manifest the character of a self-regulatory instrument.

5.1 The pre-modern era

In the pre-modern era, the regulatory response was characterised by local solutions to local problems, with Government assisting but rarely acting in directive fashion. This was a phase of ‘regulatory planning’ (an incremental, if modest approach) where Government relied on other actors to restrict their conduct whilst profiting from the outcomes, in the absence of an extensive system of control.⁶¹ The Centre’s main concern was to contain and minimise the adverse consequences of technological advances by harnessing the activities of others. The objective was to secure effective land allocation within the local area, minimising inconsistent or incompatible uses at the least cost to the local inhabitants, and preferably by consent with the landowner concerned. A use of agreements suited this objective well. During the era, Government gradually assumed an increasingly interventionist style to regulate agreements. Officials were enlisted to investigate the uses (or abuses) of the practice and to provide assistance to planning authorities, by disseminating pro forma precedents and approving drafts. The paternalistic strategy was not one of altruism, and marked the beginnings of a sea change towards centralising tactics in contrast to the earlier predominantly local forms of control. This can be likened to a ‘technology of rule’. The result was in 1943 a formalisation of central oversight in the modern era requiring Ministerial consent before agreements took effect.

5.2 The modern era

Express consent remained a form of oversight until 1968. In the modern era, planning overall was driven by centralised intervention, in contrast to the earlier period. By now the Centre’s objective was to revitalise the economic prospects of the

⁶¹ ‘Regulatory planning’ is a term used to imply Government’s modest ambitions in land-use control in the absence of a comprehensive system.

nation through central planning and direction, thus providing for the social stability of its inhabitants. The use of formal consent provided the means to regulate agreements directly to ensure that their content accorded with central objectives. It functioned however in tandem with the trust-enhancing mechanisms that central officials had constructed during the pre-modern era.

5.3 The high-modern era

In 1968 the planning system was radically overhauled and the earlier consent mechanism abolished. Attempts were made to streamline procedures in the pursuit of greater efficiency and effectiveness through a use of strategic direction. Greater autonomy was given to local decision-makers to accelerate decision-making. It coincided with significant economic uncertainty, in the form of boom and bust cycles and a restructuring of the property market, with developers rather than landowners assuming a higher profile. Government used policy to regulate agreements. To do this it needed to engender further trust and dependency to steer activity. Government's role in theory became more limited and its regulatory style changed from one of ostensible command towards indirect governance, steering the capacities of others through a series of techniques that included collaboration with those it sought to regulate (both local authorities and developers).

5.4 The late-modern era

The final period, the late-modern era, marks Government's 'reining-in' of agency powers through a consolidation of the earlier strategies and a greater use of policy guidance to confine the practice. It marks also Government's attempt to confine agreements to a marginal form of control and perhaps their abolition. In this era more actors exercise regulatory control, with the 'regulatory mix' including third

party oversight in the form of developer competition engaging also the courts as an additional controlling mechanism.

The historical periods selected indicate regulatory styles ranging from localism to central oversight, with the later eras combining the two facets. A broad survey of the statutory provisions points to transitional shifts occurring at the various key dates. Transformations occur also in the conceptualisation and articulation of problems. The framing of land-use dilemmas in the round, the general context and the articulation of collective needs and responses inform the dynamic. Each has an impact upon the construction and production of regulatory processes. An example of this can be found in the shift from the pre-modern to the modern era when Government co-opted existing, local strategies for its own centralising purposes to address the consequences of war and begin a programme of massive regeneration. The formalisation of central oversight marked the provision of stronger direction by Government to regulate land use. This is not to suggest, however, that local initiatives simply faded; they did not. At times central and local initiatives ran in tandem, if not in competition. During the pre-modern era, planning was characterised by local and largely *ad hoc* solutions. The modern era is characterised by centralising trends of Government, whereas the high-modern era (1967-1990) marks a period of both economic activity (whether boom or bust), coupled with a more innovative approach to land-use regulation by the Centre generally. The late-modern post-1990 era however overlays these developments with the recurring themes of local authority agency, developer activism, and competition at times of public expenditure restraint, and Government's movement towards harnessing private funding for public purposes.

Government's regulatory strategies throughout have derived from a complex of interactions between state and non-state actors. In this unstable environment, Government has had to work with rather than command others, building alliances and where necessary harnessing their capacities. It would be inaccurate, however to suggest that Government consciously created a climate of capacity building *ab initio*. Even in the late-modern era, where developer competition functioned as a regulatory form, this resulted partially from Government's incapacity to regulate through policy guidance. This is perhaps far removed from the idea of government actively leveraging the regulatory resources of others.⁶²

6. The literature

Research studies undertaken into a use of agreements have tended to survey the practice, focusing on practical effects, rather than situating the practice within a regulatory context. Some rely on the statistical sampling of small-scale studies and focus on the uses of agreements, extrapolating from this a national snapshot.⁶³ Critique of planning agreements and obligations was minimal prior to the 1970's. Standard planning works before that date tended to treat the tool as an anachronistic form in modern development control. From the Seventies to 2000 an increasing body of literature has been generated that is empirical in orientation. Few texts have

⁶² Shearing, C., "A Constitutive Conception of Regulation" in Grabosky, P., Braithwaite, J. (eds.), *Business Regulation and Australia's Future*. Canberra: Australian Institute of Criminology, 1993, pp. 67–80.

⁶³ Including for example, Durman, R., and Rowan-Robinson, J., *Section 50 Agreements: Final Report, Scottish Office* (1991), (relating to Scotland); MacDonald, R., *The Use of Planning Agreements by District Councils: Report of Research Findings*. Working Paper 138, Oxford Polytechnic, 1991; the Grimley J. R. Eve, *The Use of Planning Agreements* (in association with Thames Polytechnic School of Land and Construction Management and Alsop Wilkinson, Solicitors) study made for the

been devoted solely to the topic. One exception is Rowan-Robinson and Young.⁶⁴ This work provides an overview of the law and practice of agreements in Scotland. The book identifies an increasing local authority interest in the practice and situates it in the context of the shift by Government towards market solutions to regulate development. This orientation defines a body of work that has sought to locate agreements within the context of rising developer influence and as a vehicle for local authorities to secure planning gains, thus overcoming the deficiencies of the contemporary planning system. In common with Rowan-Robinson and Young's work, much of the literature provides advice on the practice and its limits (frequently introducing some empirical research), its overlap with other forms of development control, often giving a guide to 'best practice' in the field. The literature tends to assimilate agreements into the concept of planning gain, or view the practice as a technical mechanism to achieve it. Sometimes it assumes a normative stance questioning the appropriateness of authorities' negotiating and bargaining to secure controls or benefits beyond those achievable elsewhere in the development control regime.⁶⁵ This immanent critique concentrates upon the extent to which the integrity of the planning system might be damaged by the adoption of practices seen as peripheral to the overall system of development control.⁶⁶

Department of the Environment, 1992; the Healey, P., Purdue, M., and Ennis, F., research of 1993 in Healey, et. al. (1995) and the more recent study by Campbell, et. al (2001).

⁶⁴ Rowan-Robinson, J., and Young, E., *Planning by Agreement in Scotland* Edinburgh: W. Green and Son Ltd. 1989.

⁶⁵ Illustrations include Jowell, J., "The Limits of Law in Urban Planning" (1977) *C.L.P.* 63–83; Grant, M., "Developer' Contributions and Planning Gains: Ethics and Legalities" (1978) *J.P.L.* 8–15; Byrne, S., "Conditions and Agreements: the Local Authority's Viewpoint" in *Development Control – Thirty Years On* (JPEL Occasional Paper, London: Sweet and Maxwell, 1979); Boydell, P., and Byrne, S., "Planning Gain: How is this Form of 'Plea Bargaining' Justified?" (Blundell Memorial Lecture, 1981); Jowell, J., "Giving Planning Gain a Bad Name." 1982 *L.G.C.* 155; Reade, E., J., "Section 52 and Corporatism in Planning" (1982) *J.P.L.* 8–16; Ward, A., J., "Planning Bargaining: Where do we Stand?" (1982) *J.P.L.* 74–84; Loughlin, M., "Planning Gain: Another Viewpoint" (1982) *J.P.L.* 352–358; Spinney, R., W., "Planning Gain – A Developer's Viewpoint" in *Contemporary Planning Policies* (JPEL Occasional Paper, London: Sweet and Maxwell, 1984).

⁶⁶ As with Heap Sir D., and Ward, A., J., "Planning Bargaining and Planning Gain: the Pros and Cons: or how Much Can the System Stand?" (1980) *J.P.L.* 631–637.

This latter concern has been a feature of analyses in England and Wales. Shorter monographs and journal articles have been devoted to considering the practice in specific circumstances, often tied to the developing body of case law on the subject. Another pervasive trend has been to identify the practical uses of agreements. Empirical study has remained largely descriptive and can be traced from Jowell's seminal study of the seventies. Jowell surveyed a sample of 28% of English planning authorities during July to September 1975 on the number of agreements entered into since April 1974 relating to commercial development that had achieved planning gain and the uses of those agreements entered into, according to the benefits obtained. The research was not limited to the use of planning agreements under section 52 Town and Country Planning Act 1971 and included agreements entered into under other statutory provisions. It did not study the developer community. The research sought to distinguish when agreements were sought and whether the objective could have been achieved through imposing valid planning conditions or through a use of negotiation.⁶⁷ This was to become a model for Government sponsored research. The Property Advisory Group considered agreements as part of its research into Planning Gain.⁶⁸ The practice was not, however the main focus of the research, although agreements were viewed as a vehicle through which gains were secured.⁶⁹ The study was highly instructive of Government's interest in the negotiation of development gains, and was to indicate a step change in the regulation of agreements through the use of policy guidance. The research addressed the

⁶⁷ Jowell (1977a), op. cit. pp. 418–9.

⁶⁸ Property Advisory Group, *Planning Gain* (1981).

⁶⁹ Ibid., para. 3.02. This can be said also of I. Simpson's, "Planning Gain" in Ch 6 of Harrison, M., L., and Mordey, R., (eds.) *Planning Control: Philosophies Prospects and Practice*. London: Croom Helm, 1987, which considers planning gain (and by implication appears to equate gains with agreements) but does not conceive the instrument as an independent regulatory form.

capacity of planning authorities to secure the provision of public benefits or advantages from developers where these were not a part of the application itself, whether by negotiation or other means.⁷⁰ Agreements were seen as located outside the statutory system and a technical device to be used in circumstances to overcome a legitimate planning objection, which could not be addressed by the imposition of a valid planning condition.⁷¹ This showed a continuing perception of the marginality of the instrument to the system as a whole.

In contrast, the 1992 Department of the Environment study had as its central focus the extent and use of agreements by authorities and developers in England.⁷² This study consolidated the Jowell methods but had the object of gathering information for Government. It sought to understand the practice from the viewpoints of both developers and authorities. Its objective included establishing the circumstances in which authorities used their powers to enter into agreements, and whether this accorded with national policy. The study considered also the use of various other miscellaneous powers.⁷³ This was another small-scale survey of April 1987 to March 1990 relating to a sample of 28 planning authorities', of which 23 were districts and five were counties. Although the study acknowledged the practice's use for 'regulatory purposes', the term was defined narrowly and equated to the development control process of restricting activity.⁷⁴ It did not invoke any understanding of regulation as a discrete mode of governmental activity facilitating

⁷⁰ The definition of planning gain adopted in the Property Advisory Group's Report at paras. 2.02 and 3.01.

⁷¹ Ibid. para. 3.02.

⁷² Research Report: *The Use of Planning Agreements* – Grimley J.R. Eve incorporating Vigers in association with Thames Polytechnic and Allsop Wilkinson HMSO (February 1992).

⁷³ Section 33 Local Government (Miscellaneous Provisions) Act 1982, and section 111 Local Government Act 1972, and relevant local legislation but not agreements entered into resulting from an exercise of highways powers.

⁷⁴ para 2.44.

as much as promoting the achievement of broad policy objectives, or consider in detail the concept. The Departmental report set the tenor for further research, which would emphasise the prominence of the practice and the increasing numbers of agreements entered into, whilst also interrogating its appropriateness within the modern planning system.

The work of Healey, et. al., is a detailed contemporary study of the practice, locating both agreements and obligations within the context of an increasingly fragmented planning system.⁷⁵ It consolidates their earlier studies of 1993.⁷⁶ With the advent of greater private sector involvement in development provision during the 1980's and 1990's, agreements were seen as the formalisation of a 'negotiative' development style found within the planning system.⁷⁷ They were viewed also as the mechanism for mediating the changing power relation between developer and authority. The authors define the practice as contractual, and in doing so distinguish it from having regulatory significance.⁷⁸ Although the work situates the practice within the context of the post-war planning system, the emphasis remains empirical and the method to study five local authority areas, during the period 1990-1991, so as to establish whether a systematic and coherent use of agreements existed.⁷⁹ The context is that of a changing developer climate, which emphasises a growing interdependence between local authority and developer.

⁷⁵ Healey, et. al., (1995).

⁷⁶ Healey, P., Purdue, M., Ennis, F., *Gains from Planning?: Dealing with the impacts of development*. York: Joseph Rowntree Foundation, 1993.

⁷⁷ Healey et. al., (1995) p. 5.

⁷⁸ Ibid., p. 16, although they do not define what is meant by 'regulation' preferring instead to concentrate on the decision styles within the planning system.

⁷⁹ One metropolitan authority, one London Borough, one City Council metropolitan district, one Borough Council and one District Council; Solihull, Wandsworth, Newcastle City CC, Tewkesbury BC and Harlow DC respectively. Ibid., pp. 120-125.

Another contemporary study by Campbell, et. al., considers the growing role of planning obligations.⁸⁰ The research tracks how the use of obligations as a development control mechanism has progressed since 1991. The authors identify a shift in emphasis in land-use control from regulation to negotiation, which they consider to be a key characteristic of contemporary planning. They do not address however, whether this constitutes a changing regulatory decision-style or if indeed negotiation can be thought of as a strategy wholly different from that of regulation. The research comprised a survey of all local planning authorities in England and Wales, semi-structured interviews with representatives of the developer community, local authority associations and professional bodies, and a series of case studies including detailed studies of the negotiation of two obligations.⁸¹ It found that the practice had increased significantly since the Department of the Environment survey of 1992 (which had projected that 0.5% of all planning decisions were accompanied by an agreement), the number having grown by approximately 40% during the period 1993 to 1998.⁸² The study viewed obligations as market instruments through which the economic and social impacts of development could be determined and addressed. According to the authors, whilst the processes surrounding the negotiation of obligations had become more structured, conversely development control processes had become less coherent because of the weight being given to economic concerns. The researchers found also that the stronger role of negotiation between the parties complicated issues of transparency particularly when obligations were used to obtain community benefit. The authors perceived the practice as one, which could alter the development control process, by making financial considerations themselves material

⁸⁰ Campbell et. al., (2001).

⁸¹ Ibid., pp 21–28, an office development in Newbury, Berkshire and a residential development in Shepton Mallet, Somerset.

⁸² Ibid., p. 4.

to planning applications, if indeed they were not already. The researchers queried also the appropriateness of asserting the normative utility of obligations as an instrument for recovering betterment or to recoup development value. Although emphasising the mechanics of negotiating obligations, the study did not address the mechanisms used to regulate the practice even though it alerted to a changing status of the tool.

Each of the above studies adopts a strong empirical approach, surveying in detail activities of the main protagonists, whether planning authority or to a lesser extent the developer. Limited attention is paid to the historical development of agreements or attempts made to map successive governments' changing regulatory strategies towards the practice. Few of the studies consider whether over time the function of the practice has indeed altered. These are the issues, which will be addressed in this thesis. The study will consider the various modes of control used by Government and other actors to regulate the practice. By assuming that an increase in the practice equates to a paradigmatic shift, the literature to date has considered insufficiently the origins and development of the instrument as a means for comparison. Limited attention has been given to the various regulatory strategies deployed or to understand the different modes used by the Centre to steer these ostensibly bilateral relations. In situating agreements in the post-1968 world and in assuming that the development control system has remained largely unchanged, no critique has been made of the forms and functions that the practice has assumed nor to the contextual dynamics of policy change and progression. To understand the practice as an economic instrument without more perhaps misses the point, as do those who confine the agreements to the late-modern era.

None take as their focus historical study to inform the development of current practice, and most map current practices according to a limited timeline so as to establish the number of agreements entered into at any given time. The research remains largely descriptive and does not situate the practice within either the regulatory literature or the broader policy context of the Centre's attempts to steer the activity. Studies do identify the utility that agreements can have in both overcoming the limitations of planning conditions (Campbell, and Healey are cases in point), and their use in specific sectors to achieve improvements to urban and rural environments.⁸³

The deployment of archival study challenges some of the hypotheses derived from the literature particularly the historical insignificance of the instrument to the evolving land-use planning system and the limited role of Government in regulating the practice. The history of agreements indicates the existence of an unstable regulatory domain where numerous actors participate and Government experiments using various strategies to steer (rather than control) the behaviour of others. Multiple actors, concerned to ensure that their particular vested interest is noted, participate in developing regulatory policy. Those players with greater capacities or potential resources, whether public or private, are best placed to exert the most influence. The evolution of agreements provides a gloss to those contemporary studies identifying Government's use of contractual forms as a facet of post-modernization by the application of private law techniques to the processes of public

⁸³ As in the Elson, M., Mendham, N., and Walker, S., *Countryside Benefits from Developers' Contributions, A Report to the Countryside Agency*, Planning Policies Research Group, Oxford: Oxford Brookes University, 1999; MacFarlane, R., *Local Jobs from Local Development: The use of*

administration.⁸⁴ Neither is their use linked necessarily to a strategy of marketisation, moving further from strict planning considerations.⁸⁵

7. Conclusion

This chapter has set the scene by considering the place of agreements as an instrument within the land-use planning system overall. The practice has been significant from the earliest origins of Government's attempts to create a comprehensive system of development control. In situating planning agreements within the planning framework, I have outlined some of the tensions associated with the practice. Agreements combine the market characteristics of contractual relations with command-based strategies. They illustrate Government's use of an array of diffuse and reflexive regulatory techniques as potentially trust stabilising strategies to provide space for the regulated to assume responsibility for their actions. Within this regulatory space, there remains room for many to participate e.g. Government and its officials, courts, professions and, to a more limited extent, the citizen (although the role of the latter is beyond the scope of this thesis). This points to the juxtaposition of tiers of Government and the involvement of many actors. Here the practice of agreement is imbued with a level of dissonance that challenges the assumption of contractual practices as an unchanging coherent form. In town planning, a use of agreements confounds many of the conventional understandings regarding the distinctions between centralisation and decentralisation, the idea of a self-calibrating competitive markets to regulate behaviour as against state intervention, and the

Planning Agreements to Target Training and Employment Outcomes, York: Joseph Rowntree Foundation, 2000.

⁸⁴ Edgeworth, (2003).

⁸⁵ Property Advisory Group op. cit. para. 6.02 and Campbell et. al. op. cit., p. 35.

capacity to regulate agency discretion. This is an environment where each of the above merge or become blurred within a single legal instrument.

Modern regulation of land-use activity encompasses both private and public law forms together with the broader administrative institutional mix more commonly associated with policy-making activity. Its origins can be traced from the manipulation of private interests, (especially through the principles of property law or contract) at a primarily local level. By the twentieth century the emergence of planning as one response to the problems of modernity, extended the regulatory *modus operandi* to strategies that included the provision of information, advice and guidance. Thus legal solutions became plural and fragmented. The result was a mix of command-based practices and more diffuse instruments. Within the planning system those commanding practices that remain are tempered by the existence of a looser framework. As with all standard setting, the existence of information asymmetries places heavy burdens on regulators when they attempt to secure policy goals.⁸⁶ For this reason the procedures that emerged had to be supplemented by practices of negotiation and compromise⁸⁷, and this gave the impetus to a greater reliance on agreements.

Agreements replicate these characteristics and function to accommodate both local and national objectives. Those facets of co-operation and consensus appear strongest when Government lacked the capacity to address the consequences of industrialisation. Over time, with the systemic development of centralised land-use

⁸⁶ Breyer, S., *Regulation and its Reform* Cambridge, Mass.: Harvard University Press, 1982 pp. 109–19, Ogus (1994), Ch.8, Baldwin and Cave *Understanding Regulation* Oxford: OUP, 1999 Ch.9.



controls, the practice was regulated through a use of various strategies to ensure conformity with the Centre's objectives. Through the process of regulation, Government has attempted to secure that agreements remain congruent with the statutory regime. Regulation by Government implicates multiple actors with differing capacities and interests. An analysis of agreements suggests that Government has had to adopt a series of regulatory strategies ranging from hierarchical control, steering through the engendering of trust and dependency and the use of policy guidance, together with steering through its use of information. The evolution of the planning system demonstrated the impossibility of there being an effective single regulatory solution, and explains in part the continuing relevance of agreements.

In this thesis I intend to study the practice from a longer historical perspective than much of the contemporary literature. By studying the practice from its origins, the co-evolution of the planning system and the use of agreements becomes more apparent. This enables me to challenge understandings that the practice is incompatible with the rest of the statutory regime, has served a function only in relation to a recovery of betterment and that it is potentially difficult to regulate. Using a novel application of the regulatory space heuristic, I will show how the practice has been moulded to accord with the preferences of Government and others. By situating a use of agreements within the regulatory literature, I will provide an analysis of how Government has sought to regulate these ostensibly bilateral relations to secure policy outcomes using a variety of techniques and steering the capacities of others. The practice will be shown as an illustration of a use of

⁸⁷ Baldwin, R., *Rules and Government* Oxford: OUP, 1995 pp. 167–174 notes that efficient standard

contractual relations for regulatory ends that can deliver effective policy solutions. Agreements will be shown to be an ancient form of regulatory contracting that is neither necessarily a neo-liberal nor post-modern phenomenon. The story is one of the struggle for control between various actors with competing if dissonant objectives. It is also a narrative of how Government seeks to regulate a particular practice that absorbs and reflects the diverse mentalities of many players and the result. The regulatory field of land-use control is relatively well defined with Government (and its officials), local authorities, developers and landowners playing key parts. In Chapter 2, the substantive methods chapter, I introduce in some detail the main protagonists who have contributed to the shaping regulatory policy. These players, each of which have different capacities, potential and interests, play a crucial role in organising agreements. In that chapter I describe also the analytical approach taken to understand the puzzles described here. Given the character of the regulatory domain and the variety of actors involved, who themselves have deployed a variety of techniques to control the practice, an adapted regulatory space analysis will be adopted.

Chapters 3 to 6, the substantive chapters, describe in detail the development and transformation of agreements as regulatory tools. Chapters 3 and 4 carry the historical thrust of the argument, by outlining the origins of the tool. Without an understanding of the history of the practice, the range of regulatory techniques adopted and stochastic nature of the evolution of agreements cannot be appreciated. In Chapter 3, I describe the origins of agreements and how the practice emerged principally from the deficiencies of the common law principles of contract and land

setting practices of necessity incorporate these flexible procedures which in turn raise significant

law to control land-use activity. These principles were reformulated by Government and given statutory form as a mechanism to address the consequences of urbanisation and industrialisation. In the pre-modern era, the emergence of the antecedents to modern development control can be discerned in the shape of town planning schemes. The scheme or rather its deficiency led to greater use of agreements. The latter were adopted by local government initiative to provide local solutions to local problems. During the course of Chapter 3, I outline how agreements became an important mechanism in Government's project of 'regulatory planning'.

The Centre's ambitions in controlling the shape and direction of control are described and in the Chapter I explain the Government-created techniques to regulate agreements. That final element is developed in Chapter 4, which situates agreements within the modern period and the creation of a centralised system of land-use regulation. This era marked the period when Government formalised its existing practices by introducing the statutory requirement for Ministerial consent. The narrative shifts to the effects of Government's centralising techniques for land-use control overall on the practice, and how agreements were assimilated within the changing system. However, agreements were shaped also by private actors and I show how their use was constructed in reality by multiple public and private agendas.

Chapter 5 is set against the context of rising developer influence in a time of property boom. Not only had Government now turned from central planning; it was becoming apparent that developer ambitions in conjunction with local authority

maturity were a challenge to the Centre's regulatory power. In the high-modern era, Government's role changes from direction to steering strategically through a use of the more diffuse technique of policy guidance. Despite the abolition of formal consent as a mechanism of control, the substitution of guidance operates as an effective regulatory strategy and often as a far from less stringent regulatory form. The consequences of using alternative regulatory strategies become more apparent in the late-modern era, in Chapter 6. From 1990 onwards the increased developer power identifiable during the period of high modernity generates other efficient mechanisms of control. This in combination with Government's reliance upon steering through guidance results in a reconfiguration of the regulatory space and an orientation towards market mechanisms, such as developer and end-user competition resulting in the participation of the court in providing regulatory solutions.

The history of agreements is a long one. It highlights also a number of further puzzles including the role of Government oversight in the context of seemingly bilateral relations and the use of individuated solutions to achieve collective goals. Here multiple actors determine regulatory policy, often with Government using its capacities economically to steer rather than direct activity. This results in a diversity of regulatory styles becoming prominent in each era or episode. The changing presence of actors and decision styles partly explains the level of regulatory variety present. In the next chapter I detail the methods used to analyse the practice and introduce the main protagonists who, over time, have played a significant role in its transformation. Focussing on historical time frames and the functions of agreements shows that a generalised conception of regulatory contracting might be insufficiently developed to accommodate the multiple variations in this particular regulatory form.

Through a process of archival study, I will show that the practice is not an anachronistic precursor of the modern planning system, but continues to have an important function within land-use control. Further in developing the model of regulatory space, I will show how many actors implicated in the regulation of agreements have sought to wrest control away from the province of various organs of government. By adapting the regulatory space metaphor to emphasise temporal considerations, I will demonstrate Government's changing regulatory role. Having considered the evolution of land-use control and how a use of agreements fits into that system, I turn my attention to considering how best to approach the puzzle. The next chapter will be used to for this purpose.

Chapter 2. Using the model of regulatory space to understand agreements.

1. Introduction

Having placed a use of agreements in a broad context, I now turn attention to exploring the empirical and theoretical approaches that can assist in understanding the practice. Chapter 1 was used to outline a number of core hypotheses derived from the history of the practice. These included positing a use of agreements for regulatory purposes, as a long-standing contractual form that is neither a post-modern nor a neo-liberal phenomenon that could be conceptualised as a spontaneous form of bilateral ordering such as to exclude the capacity of third parties (especially Government) to exercise oversight. History shows that the array of techniques used to regulate the practice extends beyond the actions of the parties themselves, drawing in Government officials' and competing developers. Analysis of these methods points to a level of experimentation on Government's part, which has assumed historically many forms ranging from command to more diffuse techniques. The Centre's regulatory strategies display sometimes elements that are highly suggestive of being the product of something other than intentional design. The relation between Government, other actors and the regulatory strategies adopted may be contingent. Where a particular regulatory strategy providing a strong role for Government is in place, it does not mean necessarily that the state of affairs has been constructed by Government itself. An example can be found in the pre-modern era when there was no express designation for the Centre in checking and perusing drafts and yet this was precisely what occurred. In this chapter I use the

literature on regulation as a focus for conceptualising the practice and the mechanisms of its control.

Regulation can be conceived as the adoption of a variety of mechanisms to order or control the activities of others.¹ This definition captures both the instrument's inherent flexibility and the many players participating in the regulatory process. This level of regulatory variety that transcends distinctions between market and hierarchy, coercion and consensus is not easily captured according to a simple analytical frame. In exploring the empirical and theoretical approaches that can assist in understanding a practice combining both lateral and hierarchical forms, I use a regulatory space model to illuminate some of the puzzles identified in Chapter 1. The approach is to understand the practice through an analysis of public documents and other texts using an adapted regulatory space analysis that emphasises the importance of time. This chapter will explore the advantages of an approach that combines spatial and temporal facets. Here the location of regulation and particularly those involved closely with it can be understood against a historical backdrop.

2. Using empirical and theoretical analyses to interpret agreements

Whilst temporal studies have the potential to disguise more particular trends, and impose a causal teleology where none exists especially when a broad-brush approach is adopted, they can highlight also subtle changes when used carefully. For agreements, temporal

¹ This definition is similar to Julia Black's conceptualisation of regulation as *the intentional activity of attempting to control, order or influence the behaviour of others* in Black, J., "Critical Reflections on Regulation" (2002) 27 *Australian Journal of Legal Philosophy* 1–37, p. 25.

study indicates both the evolution and the changing functions of the practice. Reference to the development of the practice over time shows particularly Government's use of agreements to shape land-use planning control. The instrument was of central importance in the early stages before the creation of a comprehensive regulatory framework, perhaps less so in later eras. Historical study has limited utility however, without reference to the changing constellation of actors shaping the practice. The role of Government, others and the parties to agreements in regulating the practice is appreciated more easily through notions of space. Spatial analyses have been used to explain the behaviour of both the regulator and those regulated, as well as the institutional design of regulatory activity. The heuristic of space is used to delineate a specific area important to the shaping of public policy activity. Defining the regulatory arena permits reference to be made to the role and identities of those key players present within that policy space. Spatial approaches have been adopted to explain the importance of understanding organisational interaction in shaping regulatory effects. In this context, regulation encompasses far more than constructing and applying a set of rules or norms. It posits often a more expansive view of control than a rule-centred one. Space becomes important to appreciating actual actor behaviour, and their distance or proximity, as I will explain in later chapters. These spatial dynamics appear to shape the nature of regulatory control, both within and through the eras considered. Space is used as a shorthand for providing a more credible conceptualisation of regulation and regulatory failure; one shaped by actor participation and a measure of consensus. In combination, the space-time approach facilitates understanding agreements both in terms of their use as a form of land-use control and the techniques used to regulate them. As

one commentator observed, “space without time is as improbable as time without space”.²

2.1 The role of archives

My study highlights the changing functional utility of the practice (moving from local solution to accommodating centrally imposed goals) and importantly the variable participation of numerous players in the regulatory arena. A temporal study risks adopting a ‘totalising perspective’ carrying with it the possibility that a level of order or coherence might be inferred where none exists.³ Instead a more particularised account of history, the ‘general history’ approach of Michel Foucault that does not assume the existence of uniformity, but is directed instead to teasing out potential sites of tension, illuminates far more than an assumed general continuity. This is an approach that advocates the interrogation of the, “interplay of correlation and dominance” between various sites of power.⁴ It requires the researcher to be alive to sites of activity that extend beyond the sphere of public power. This is particularly true in the case of agreements. Whilst the location of the exercise of local and central public power is significant, any restriction of the enquiry to these sites risks overlooking the influence of other actors especially developers and landowners in shaping regulatory effects. An example of this can be found in the high-modern era where Government’s use of guidance to regulate the practice can only be assessed in combination with the rise of

² Crang, M., and Thrift, N., *Thinking Space* New York: Routledge, 2000 p. 1.

³ Foucault, M., *Archaeology of Knowledge*. Translated from the French by Sheridan Smith, A., M., London: Routledge, 1989. Foucault in his criticism of ‘total history’ (in essence a methodology crediting historical facts with an often unrealistic coherent continuity) endeavours to move towards an approach that unearths a measure of particularity or difference that seeks to avoid this trap. The project of general history, in contrast is to tease out the significance of the relations between different sites of activity and different rationalities.

⁴ Ibid., p. 10.

developer and service provider competition that also functioned as control mechanisms.

In Chapter 1, I tracked some of the broad developments in the transformation of agreements against the evolving planning system itself. The result was to construct a schematic periodisation that pointed to an array of regulatory strategies being used by Government especially but also by others. Government's endeavours to steer agreements ranged from the provision of informal advice and guidance to formal oversight, but were complemented by the actions of others. In the pre-modern era, for example, regulation was only possible because of the dependency of local actors (especially planning authorities) on the Centre for advice, and the pivotal role of local landowners in securing solutions.

The idea of general history illuminates also how successive events may relate to one another. The course of regulatory transformation particularly the, at times, perplexing heritage of new statutory provisions can only be understood from reference to previous events. The formalisation of central oversight through the 1943 legislation was in fact a consolidation of earlier administrative strategies. The regulation of agreements through various actors from the Centre, extending to the courts and drawing in third party developers, in later eras points likewise to the assimilation of previous regulatory strategies.

One way of appreciating these regulatory vicissitudes is by reference to archives, whether practitioner texts or contemporaneous Government records. Theoretically the latter can be accessed through the statutory access rights provided for under the Public

Records Act 1958 and the Freedom of Information Act 2000. Historical and governmental records clarify and supplement the legislative provisions. They provide detail that is often absent from reference to statute alone. Both however require the researcher to navigate and negotiate disclosure. To exercise information rights under the Freedom of Information Act, the process is very similar to discovery during litigation with the researcher being required to negotiate access to information from Government, which may not be provided.⁵ The texts themselves then have to be interpreted, as does the methodology adopted by Government, which can range from bureaucratic fact finding, the co-option of academic research, to discussions with selected stakeholder representatives. The results can be illuminating, by adding depth and colour to the statutory provisions. In the case of agreements, their use can neither be properly understood nor the conundrums associated with the regulatory form be appreciated without reference to the broader context. The archives illustrate not simply how problems were articulated, but evidence the expressed dilemmas of the Centre and other actors.⁶ From these texts it becomes possible to discern how Government represented the issues at stake and its methods adopted in controlling them. This form of documentary reportage links to the legislative provisions and in doing so adds further texture to it. Archival records portray how Government in particular problematised the practice and sought to steer it according its objectives for controlling land use overall, whether that involved centralisation or greater delegation. The texts record also how

⁵ A fuller account of my request to the Office of the Deputy Prime Minister is given at Appendix I.

⁶ My approach is closely allied to the hermeneutic philosophy of Gadamer that locates the process of interpretation in objective rather than subjective terms. The purpose is to provide an explanation in credible terms of the logic of the order investigated, see Madison, G., B., "Hermeneutics' Claim to Universality" pp. 349–65 in Hahn, L., E., (ed.). *The Philosophy of Hans-Georg Gadamer*. Chicago. Ill: Open Court, 1997.

regulatory strategies emerge by illuminating how social phenomena external to the legislative provisions influenced and shaped legal norms by privileging certain constructions (and by implication ways of interpretation and action) over others.⁷

2.2 Public records

Much of my analysis focuses on Government archives, as and when they became public under the Public Records Act 1958.⁸ Under the provisions of that Act, Government's departmental and administrative records selected for preservation are required to be made available for public inspection after 30 years from the date of their creation.⁹ Exceptions apply to public access for those records containing information, obtained from the public if access would or might constitute a breach of good faith on either Government's or the other party's behalf.¹⁰ Currently approximately 5% of all governmental records are selected for permanent preservation.¹¹ Selection methods are said to be rigorous and the National Archives published its current acquisitions policy in 1998 after consultation with archivists, academic historians and the public.¹² As both a Government department and an Executive Agency, the National Archives plays a key role in both the selection of records and the public records system. The National

⁷ This approach draws heavily upon M. Foucault's genealogical method as interpreted by O'Malley, P., Weir, L., and Shearing, C., in, "Governmentality, Criticism and Politics" (1997) 26(4) *Economy and Society* 501–517. They focus on the question of ...*how government is thought into being* (p.502). The archival material is seen here as a representation of the thought processes of Government.

⁸ Public Records Act 1958, Section 10 and Sched. 1.

⁹ Public Records Act 1967, section 1. Originally the period was 50 years under section 5(1) Public Records Act 1958.

¹⁰ Under section 5(1) Public Records Act 1958, the Lord Chancellor retains discretion to extend or shorten the access period on the request of any Minister or other person concerned with the disclosure of a particular class of records.

¹¹ National Archives website, "What we do: Selection"

<<http://www.nationalarchives.gov.uk/about/selection.htm>> 11 October 2005.

¹² Ibid.

Archives continues to work according to its acquisitions policy, whilst also developing new policies. Its stated strategic objective is to

“...to record the principal policies and actions of the UK central government and to document the state's interactions with its citizens and with the physical environment. In doing so, we will seek to provide a research resource for our generation and for future generations.”¹³

Extensive records remain of the origins of both the land-use planning system and planning agreements.¹⁴ By the late 1960's, the emphasis shifts from a level of policy generality to specific issues. An illustration of this more selective policy can be found in the Operational Selection Policies being developed across Government. For the Department of the Environment, OSP1 has been developed for the core functions of that Department for the period 1970-79.¹⁵

The collection themes themselves demonstrate both Government's policy and administrative processes. A contextualised approach is adopted that documents changes in Government's own organisational structure.¹⁶ Those documents retained show how agreements were viewed (by Government especially) at the time and often the mix of arrangements used to regulate them. Those techniques include strategies other than command, such as persuasion, encouragement and all of the techniques deployed in the,

¹³ <<http://www.nationalarchives.gov.uk/recordsmanagement/selection/acquisition.htm#8>>

Acquisition Policy para. 1 Strategic objectives. 11 October 2005.

¹⁴ Further detail of these records is contained in the Methodology Appendix I.

¹⁵ Acquisition and Disposition Policy Project Manager, Records Management Department, National Archives. *Operational Selection Policy OSP1* March 2000

<<http://www.nationalarchives.gov.uk/about/selection.htm>> 11 October 2005.

¹⁶ Para.. 2 Collection themes.

<<http://www.nationalarchives.gov.uk/recordsmanagement/selection/acquisition.htm#8>> 11 October 2005

“development of the science of government”.¹⁷ Whilst at times the records point clearly to an exercise of oversight on the part of Government officials, this commonly occurs in a context when the capacity to command is absent. This happened in the pre-modern era when no statutory powers existed to enable Ministers to control the use of agreements by planning authorities. Yet it was precisely at this time that officials sought to check the content of agreements by emphasising their legitimacy in overseeing the workings of the local authority. More often the records point to a use of persuasion and conciliation (which often matched ministerial oversight). The records indicate the role that report and classification played in making manifest the workings of Government. Whilst the statutory provisions have a clear meaning this can be subverted through policy processes that reinterpret the legal texts in such a way as to satisfy central officials’ will.

Whilst public records indicate how various practices were shaped by Government, they function also at a dramaturgical level by illustrating how relations between the Centre and others – between author and reader are played out. Text links regulator and regulated as much as the contemporary reader to historical evidence. This permits the critical consideration of how formal and informal practices shaped the use of agreements. The archives highlight both the interdependence of formal and informal organisation, together with important role of institutional cultures and values in shaping the possibility of thought. These identify some of the main actors present during the various eras in regulating agreements. They permit also an enquiry into how those agents using agreements, especially Government perceived and recorded their role in

¹⁷ Foucault, M. ‘Governmentality’, p. 99 in Burchell, G., Gordon, C., Miller, P., (eds.) *The Foucault Effect: Studies in Governmentality*. London: Harvester Wheatsheaf, 1991.

regulating the practice. There are times when the role of civil servants is significant and at others when developers or professional groups take centre stage. One example is the use of precedents by Government during the pre-modern era. This practice is not referred to in the statutory provisions but a reference to public records indicates that the use was an extensive and effective mechanism of control. The records synthesise the formal and informal giving a fuller view of Government's exercise of control. These historical texts express the framing of policy dilemmas and function to record especially Government's strategies in regulating agreements and how the Centre perceived the actions of others. The archives illustrate the dynamics operating between the various actors involved, and serve as a means to explain why at times the Centre was unable to penetrate the practices adopted by the parties to the agreement. Often as I will show the answer is found in the way in which Government saw the problem.

2.3 The Freedom of Information Act 2000

The Freedom of Information Act provides for access to contemporary records. In practice, access to current information can be more limited than historical records. The Act gives a right of access to information held by public authorities, on the making of a request. The definition of information extends to information in any form, and is said to engender, "a culture of openness and accountability across the public sector".¹⁸ The Office of the Deputy Prime Minister (ODPM) has provided information relating to background research (whether its own or that commissioned externally) into the use of agreements under these provisions and the Environmental Information Regulations

¹⁸ Information Commissioners Office, *Promoting Access to official information and protecting your personal information* <<http://www.informationcommissioner.gov.uk/eventual.aspx?id=33>> 11 October 2005.

2004; which also apply. The Regulations (the main access provisions used by the Department) impose a duty to make available environmental information subject to a number of exemptions. The exemptions narrow significantly the prospect of disclosure. The values of promoting transparency in decision-making can be subverted in practice by the existence of subtle and complex exemptions together with an application of rigorous procedure such as to override access rights.

2.4 The value of archives

The illustrations below emphasise the importance of archival material to understanding the statutory provisions. Agreements were in use well before section 34 of the Town and Country Planning Act 1932. That section 34 gave independent statutory recognition to their use to restrict the planning, development or use of land is clear. The practice itself, as I will describe in Chapter 3 can be traced from a time when local negotiating strategies were used to address how best development proposals could be regulated. Thus the 1932 Act did not create the practice, which is referred to in earlier legislation.¹⁹ The provisions gave no clue as to how agreements were regulated. This can be discerned from public records. The legislative provisions have not always served as signposts that assist in gauging the full extent of the practice. This is clear from the 1968 Act provisions, which provided for a radical shift from Government's oversight in the form of express consent to more diffuse mechanisms that included organisation (and ultimately the reorganisation of local government) and a use of policy. Here Government manipulated earlier practices of steering through the provision of policy and guidance (strategies which themselves had their origins in the pre-modern era) to

¹⁹ As in the 1909 and 1925 legislation, which acknowledge the practice.

suit its own instrumental goals. Tracing the origins of agreements through the statutory provisions alone (as is often an accepted approach) skews and ultimately undermines any appreciation of the instrument and its regulatory impact.

The records highlight tensions apparent within as well as outside Government and the way in which ostensibly simple statements can be given complex and constructive interpretations. This is particularly so in the case of statutes. Statutory provisions whilst an official record of the law, may be a poor reflection of the actual workings of Government. The archives show sometimes the existence of alternative normative systems being promoted and operated by officials. In essence, the archives can portray an interpretation of the provisions that strains the construction of the statute. At times, the construction given to the legislative provisions is so restrictive as to be barely credible. Yet these interpretations seem to have been accepted by those receiving them. This happened in the modern and pre-modern eras when Government sought to confine the uses of agreements. The statements of Government appear to have served regulatory purposes in their own right. Thus it is not necessarily simply the authorship that makes the edicts of the Centre credible but an acceptance by those to whom the statements may be addressed. The records illustrate the dilemmas Government experienced in regulating agreements. At times they indicate how the legal provisions were used and manipulated by the key players concerned. In this sense the legislative provisions themselves became a contested resource. Essentially the archives record the mediation of legal and political processes. A use of texts is always partial (and this is particularly so in the context of Government regulation where narratives are spun to accommodate

the instrumental political or governmental demands of the day). Bearing this in mind some care has to be exercised and this is particularly so when historical material is used. The task becomes that of achieving the best 'fit' consistent with the developments of the period in question. It requires movement between generality and detail so as to arrive at credible explanations. Bearing these caveats in mind the hermeneutic project can be a fruitful basis from which to explore the bald text. Historical study is essential to my approach of excavating the evolution of agreements, and drawing out the mix of regulatory strategies used to control the practice. To understand its transformation, particularly from Government's perspective, a more holistic approach is needed. Whilst records highlight the regulatory process they do not necessarily explain it. That is usually the province of theory. The next section addresses the deficiencies in some common conceptualisations of regulation.

3. Understanding the regulatory field

Agreements are used within the land-use planning context to regulate development control activity and are ordered by many actors (both public and private) through the use of a number of strategies, as I will show in Chapters 3 to 6. Land-use planning activity is negotiated by those in positions of power or authority, especially but not solely, Government. As the history of land-use control shows, this is a highly unstable environment that encompasses environmental, technological and economic dynamics. Here Government has been hampered in regulating by command, not least because of the existence of other powerful actors, including landowners and developers who have capacities to control land availability. This has resulted in a number of different strategies being adopted within the changing policy space. In this section I describe by

reference to the regulation literature, the regulatory field and the various ways in which regulation has been defined so as to construct a working definition appropriate to the context.

Many conceptualisations of regulation begin from the premise of command and control.²⁰ The exercise of commanding practices directing the activity of others, captures insufficiently the essence of regulatory activity within the planning space. A use of command (including the more refined models of responsive regulation²¹ calibrating the regulatory response according to the level of compliance) presupposes a level of direct influence or controlling capacity, if necessary through the imposition of sanctions. This view is problematic when considering agreements. As noted above both public and private actors exercise regulatory capacities. Even in the pre-modern era, Government's capacity to command land-use activity was markedly absent, not least because of the existence of limited and fragmented controlling forms that often required landowners to exercise self-restraint, in the absence of a comprehensive planning system. Similarly at local levels, planning authorities could only plan with the assistance and co-operation of the private landowner. In later eras the Centre's level of reliance upon other actors (especially the landowner and developer communities) militated against an understanding of the existence of directive control targeted towards outcomes. Conceptualising regulation as purely hierarchical command with the

²⁰ Selznick, P., 'Focusing Organizational Research on Regulation', in Noll, R. (ed.), *Regulatory Policy and the Social Sciences*, (Berkeley, CA.: University of California Press, 1985 p. 363 equates regulation with the exercise of, "...sustained and focused control".

²¹ Ayres, I., and Braithwaite, J., *Responsive Regulation: Transcending the deregulation debate*. New York: Oxford University Press, 1992 have provided an analytic synthesis of command and compliance based approaches. Co-operation is to be preferred initially to command based deterrence.

regulator setting goals and having the capacity to enforce its objective is inherently problematic.

Much of the enforcement or compliance literature rests on similar assumptions, often in a context where the regulatory breach constitutes a crime. The enforcement problems encountered by regulators, 'in the field' elucidated in this literature explains also why commanding strategies themselves may be ineffective.²² In land-use control, criminal sanctioning is a lesser facet of regulation. This is partly because of the system's configuration, which centres upon the mechanism of planning consent. What the compliance literature does point to, however is a use of multiple approaches to control (ranging from negotiation through to prosecution) that may be necessary within an effective regulatory regime. One analytic synthesis of command and compliance based approaches, is that of Ayres and Braithwaite. Through the concept of responsive regulation, regulatory enforcement strategies are tailored to the compliance levels of those regulated, with more interventionist responses being adopted where the regulated persist in infringement.²³ The "trick" of responsive regulation is to ratchet the regulatory response when less intrusive compliance strategies prove ineffective. In planning however, the model does not accurately reflect the strategies adopted by Government or any other actor with regulatory capacities. Here regulatory capacity is not confined to Government or those in positions of power or authority, but is most usually so. It can be the product of co-operative and competitive practices between

²² Hawkins, K., (ed.) *Uses of Discretion*, Oxford: Clarendon Press, 1992; *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* Oxford: OUP, 2002; *Environment and Enforcement: Regulation and the Social Definition of Pollution* Oxford: Clarendon Press, 1984.

²³ Ayres and Braithwaite (1992).

(near) equals, as evidenced in later eras where developer competition and planning authority and developer co-operation shaped the practice. It can be also the product of Government's dependency on others. The exercise of novel regulatory techniques in the context of town planning did not develop as a consequence of the perceived deficiencies of more direct intervention, nor can they be attributed to the rise of the "new regulatory state".²⁴ The idea of regulation here perhaps has more to do with fostering a sense of responsibility, so as to deliver solutions where the resources more commonly associated with command and control strategies (e.g. information or power) are scarce. To this extent co-operation is preferred to command-based deterrence.

An instructive way of analysing contracting practices is offered by Esty and Geradin's view of regulatory competition and in particular the model of "regulatory co-opetition".²⁵ This is defined as a, "a mix of competition and co-operation across various levels of government, within the branches or departments of government, and between regulators and non-governmental actors".²⁶ Regulatory co-opetition comprises inter- and intra-governmental competition and cooperation arising between governments (whether laterally or vertically), and other actors. It is the, "give-and-take between departments and officials within government".²⁷ This idea signals the possibility of variety in outcomes depending on the mix of co-operation or competition between public and private actors, which may be a more realistic position from which to view agreements.

²⁴ Majone, G., "The Rise of the Regulatory State in Europe" (1994) 17 *Western European Politics* 77–101.

²⁵ Esty, D., and Geradin, D., (eds.) *Regulatory Competition and economic integration: comparative perspectives*. Oxford: OUP, 2000.

²⁶ *Ibid.*, pp. 31–32.

The presence of many actors exercising regulatory capacities (including landowners, planning authorities, and developers in addition to Government) points to a view of regulation at variance to that which confines the activity in status terms. Intellectual positions that conceptualise regulation in these terms are those of public or private interest theories. Public interest theories view regulation as a “central state activity”, where regulatory activity is agency driven and oriented towards the implementation of previously formulated conceptions of the public good.²⁸ The approach emphasises the existence of hierarchical structures and rule-based systems where independent officials implement pre-determined state articulated goals.²⁹ In land-use planning, public interest perspectives underpin expressions of concern about the presence of negotiation and bargaining within the planning system, especially in the context of planning gains.³⁰ However a strong role is given to discretion and negotiation within the planning system, and the regulation of land use may not be achievable without it.

Other interest group theories see regulatory practices as the product of inter- and intra-group relations and the state. Here competing groups struggle for power and the ‘ear’ of Government. Private interest theories assert that regulatory outcomes result from private interests rather than group interests, where parties seek to maximise their own welfare.³¹ Wealth maximising rationales are not restricted to the regulated party and extend to the regulatory agency and the state. Legislators and regulators may become captured (or

²⁷ Ibid., p. 32.

²⁸ Francis, J., G., *The Politics of Regulation: A Comparative Perspective*. Oxford and Cambridge, Mass.: Blackwell, 1993 p. 35.

²⁹ Mitnick, Barry M. *The Political Economy of Regulation. Creating, Designing and Removing Regulatory Forms*. New York: Columbia University Press. 1980, pp. xxiii–xxiv.

³⁰ Reade (1982) suggests that bargaining is an anathema to public interest outcomes. A similar view is expressed by Ward (1982).

proceed to regulatory decline) especially when lacking determinate preferences. Public choice theories use micro-economic theory to inform and instrumentalise public policy.³² The ideology of the market provides one foundation for evaluating regulatory behaviour. Self identifies the practical limits to applying idealised conceptualisations of the market within social-scientific arenas, pointing to the potentially conflicting normative premises that exist when the language of neo-classical economics (rational egoism and wealth maximisation) is transposed to other contexts.³³ The application of idealised conceptions of markets, (with an emphasis upon the existence of a self-calibrating order having the function of generating efficient outcomes) fails to address the significance of the cognitive frames constructed by the participants themselves.³⁴ A use of agreements tempers the pursuit of rational self-interest with other institutionalised belief systems, to the extent that cohabitation and co-operation become the norm.

In land-use planning, neo-classical economic paradigms, simplifying motivations to a decontextualised rational self-interest, do not explain how the pursuit of individual preferences can generate co-operative behaviour and have regulatory effects. The rational actor paradigms underlying interest group approaches tend to overlook the role of institutional frameworks in fostering co-operation. In an effort to overcome the limitations of private interest theories, institutionalist theories emphasise the role of

³¹ These are known by many names including 'capture', 'public choice' and 'economic' theories.

³² As Self, P., J., O., in *Government by the Market? The politics of rational choice*. Basingstoke: Macmillan 1993 notes public choice theories emphasise the dominance of rational egoism in decision-making, whether economic or political.

³³ Ibid., pp. 16–18 and Chs 7 and 8.

³⁴ This is a factor Callon, M., *The Laws of the Markets* Oxford: Blackwell Publishers, 1998 in his conceptualisation of markets and the economy emphasises. Ideas shape economic behaviour, and point to the fact that the concept cannot remain constant over time.

organisations and institutional structures in shaping regulatory arrangements.³⁵ Actors are seen as complex beings influenced by organisational and cultural factors. The institutional approach signifies a role for the participants' values and the effect these may have on structural configurations. An orientation towards values focuses on the differences between organisational actors. Here boundaries exist, albeit unstable ones, which are subject to processes of definition and redefinition when activities overlap or need to be co-ordinated within a semi-formalised arena.³⁶ It is at the margins of interaction where a broader picture of regulatory activity can be found, and the effectiveness of regulatory strategies better understood. Structural set-ups themselves are also important to understanding how the relations between actors come to be established and maintained and thus ultimately affect decisions. The structures (which are both organisational and cognitive) do not only delimit spheres of decision-making but are shaped by activity. This is the location where sense can be made of not only how social relations are structured but also what happens during that process.

Neo-institutional approaches draw attention to the impact of cultural and contextual considerations. Powell and DiMaggio for example emphasise the importance of culture when viewing organisational structures.³⁷ This approach indicates how, "forms of economic activity are shaped by their embeddedness in specific social contexts".³⁸ Law is but one facet of the regulatory landscape. In the context of planning agreements, the

³⁵ Meyer, J., and Rowan, B., "Institutionalized Organizations: Formal Structure as Myth and Ceremony" (1977) 83(2) *Am. J. Sociology* 340–363.

³⁶ Blau, Judith, R., *Social Contracts and Economic Markets* New York: Plenum Press, 1993.

³⁷ Powell, W., W., and DiMaggio, P., J., (eds.) *The New Institutionalism in Organizational Analysis*. Chicago: University of Chicago Press, 1991.

³⁸ Engwall, L., and Morgan, G., 'Regulatory Regimes' at pp. 82–105 p. 82 in Morgan, G., and Engwall, L., (eds.) *Regulation and Organizations: International perspectives*. London: Routledge, 1999.

framework is established by statute but legal principles do not necessarily govern the practice itself. Whilst remaining an important and highly visible part of the regulatory “armoury” that can serve as an indicator of appropriate future action, a use of legal instruments or concepts can structure or order the capacities of actors and provide direction for the development or evolution of other norms.

Rather than focussing purely on the formalised areas of government, a neo-institutionalist perspective considers the relevance of informal practices. This approach highlights the interdependence of formal and informal organisation, and provides a strong role for institutional cultures or values, which can often substitute for structural controls.³⁹ It predicates a synthesis of the formal and informal and gives a more comprehensive view of organisation. Although often associated with the political science literature, the neo-institutionalist frame travels well, and has been applied to understand the nuances of regulation. It is a perspective that permits reference to the relation between norms, practices and actors and ultimately organisational decision-making. It emphasises an expansive view, which when translated into a regulatory context exposes the narrowness of perspectives focusing on rule making and the activities of the regulator alone. Thus regulatory solutions are moulded by a number of streams of influence, which include but are not limited to the broad culture or environment within which decision-making proceeds. This is a theory that identifies the complexity of real life situations and the existence of a plurality of issues colouring decision-making. Here regulatory decisions are not just made by the Centre, but in

³⁹ Scott W., Richard, “Unpacking Institutional Arguments” in Powell, W., W., and DiMaggio, P., J., op. cit. pp. 164–182.

various locations and are influenced by multiple factors. On this reading regulation can be defined as a social practice incorporating mechanisms of control that have the effect of manipulating, ordering or constraining behaviour.⁴⁰

The deference to a neo-institutional approach has been used within regulatory arenas to assert that “regulation as rule-making” is significant, but, “inexplicable outside the context of the wider processes of intervention and control”.⁴¹ Emphasis here is placed upon institutionalised interdependence, with regulation being driven by numerous actors including government. This perspective points to a view of regulation, which recognises both the capacity and the limits of the reaches of regulatory powers and associated activity. This conceptualisation of regulation most fits the land-use planning domain generally, and the practice of using agreements in particular. A variety of techniques have been adopted by Government especially to regulate a use of agreements that range from hierarchical control, steering through the collection and dissemination of information and the engendering or maintenance of trust-enhancing relations with landowners, developers and planning authorities. Government’s capacity is however limited and matched at times by the existence of other powerful participants, especially during the high- and late-modern eras, when the role of the developer community in delivering economic prosperity should not be overlooked. Hancher and Moran drawing upon the neo-institutionalist approach adopt the heuristic of regulatory space to give a more nuanced interpretation of regulatory decision-making.⁴² Here regulation is viewed

⁴⁰ Meidinger, E., “Regulatory Culture: A Theoretical Outline” (1987) 9(4) *Law and Policy* 355–386.

⁴¹ Hancher, L., and Moran, M., (eds.) *Capitalism, Culture and Economic Regulation*. Oxford: Clarendon Press 1989, p. 3.

⁴² *Ibid.*

as the product of an interdependence between public and private organisation that is not necessarily constant and involves the adoption of an array of techniques. In the land-use arena there are some clearly definable actors who influence the form that regulation takes. Landowners, developers, professional groupings (whether lawyers or planners), local planning authorities and of course Government and its officials, participate in the shaping of regulatory policy, remaining present despite systemic changes in land-use control. The regulatory space heuristic is important to explaining the mechanisms used to control agreements. This will be discussed next.

3.1 Spatial dimensions and the importance of context

Many organisational and institutional factors shape planning practices at the various levels or tiers of government and in the private sphere. Here, cultural foundations for decision-making matter as much as the decisions themselves. Given the emphasis on how permeable systems are to environmental influence, it is hardly surprising that rational or instrumental explanations need to be tempered by the role of belief systems and norms in shaping activity. Through a use of agreement, government (both central and local) seeks to harness and steer, according to its agenda the power of other actors to use their land. Through the same instrument landowners and developers seek to maximise their development rights. These rational aims are held in tension and shaped by social and organisational factors.

Within the distinctive policy space, regulatory behaviour generally and the practice of using agreements in particular are influenced by the iterative interactions between regulator and regulated. These give rise to relatively stable informal structures that

challenge an assumption of pre-existing, formally articulated (and often goal-oriented) norms and patterns of behaviour. Here cultural or contextual factors are important to understanding regulatory practices. This emphasises the configuration of the policy arena (and for agreements the political or administrative frames set by Government and its officials in guiding and directing practices) as well as the economic demands motivating the parties to agreements, especially landowners and developers. This perspective points to a view of regulation that recognises both the capacity and the limits of the reaches of regulatory powers and associated activity. Hancher and Moran's study directs attention to the interaction between operating market economies and state/Government control.⁴³ This is precisely the locus of planning agreements, where the practice links the two arenas, by using the advantages of the former to compensate for deficiencies in governmental control. The authors' question how regulatory actors and instruments are shaped by the regulatory space within which they operate, and indeed how governance mechanisms and government activity is shaped by the uncertainties posed by late capitalism. Hancher and Moran use 'culture' as a shorthand for the

"...rules of the regulatory game. ... Expectations about the purpose of regulation, about who are the legitimate participants and about their relations with each other, ... 'Culture' in our title signals an interest in the recurrent tension between the common structural forces shaping regulation in the economies of developed market nations, and the idiosyncrasies introduced by unique historical, national and industrial settings."⁴⁴

On this reading, regulation becomes a political process, in which the existence of power imbalances, are significant. The exercise of power is not limited to the formalised

⁴³ Ibid.

processes of government or the sole capacities of public or private actors but is the product of an interaction between the two. The regulatory, 'rules of the game' are shaped by the configuration of politics and the economy. This analysis considers the function of Government in situations characterised by the existence of, "large, sophisticated, and administratively complex organizations performing wide-ranging economic and social tasks", something pertinent to the planning regime where the Centre has a limited capacity to control land use directly.⁴⁵ Thus other powerful entities (in the planning context, landowners and developers) challenge the role of Government. Here organisations function as countervailing powers to Government. It suggests a disaggregation of the clear distinction between the exercise of public and private power to the extent that modern definitions of government are classified according to the existence of an exercise of substantial and significant (if not unique) powers. In this context Government alone does not set the agenda or strategy to be pursued. This is the site where

"Non-governmental actors, principally but by no means exclusively firms, can seek to induce regulation from often reluctant governments. Conversely, governments' regulatory objectives can meet resistance and non-collaboration from actors whose compliance is required for the objectives to be realized. What this points to is a conception of the process of regulation as a power struggle, where the resources of the various actors are constantly shifting with changes in market conditions and competitive pressures."⁴⁶

⁴⁴ Ibid., pp. 3–4.

⁴⁵ Ibid., p. 272.

⁴⁶ Cawson, A., Shepherd G., and Webber, D., 'Governments, Markets and Regulation in the Western European Consumer Electronics Industry', in Hancher and Moran (eds.) (1989) pp.109–133 at p. 129. One manifestation of this could be the existence of competing rationalities that potentially draw no distinction between public and private actors.

This is a context of dependency and interdependence. The history of planning agreements illustrates just this point. The practice supplements the deficiencies of the planning regime by generating solutions that cannot be secured through the imposition of planning conditions. It compensates for the incapacity of Government to control land use, by placing the initiative for creative solutions as much with developer community (including the landowner) as the planning authority. At times the practice has been co-opted by the Centre (as in the pre-modern and modern eras), at others it has been resistant to Government's proposals to modify the instrument, with the parties to agreements pursuing their own agenda outside the structure defined by the Centre, as has happened in recent times. Here the regulatory processes include forms of bargaining and negotiation that blur the distinction between public and private activity but are, "embedded in the practices of the interventionist state".⁴⁷ Put succinctly this is a space where, "interdependence and bargaining between powerful and sophisticated actors [takes place] against a background of extensive state involvement".⁴⁸ It is relatively easy to see the relevance of such an analysis in the context of land-use planning where bargaining has been and remains a pervasive strategy at both local and central levels, and Government action is largely coloured by a measure of dependency on the landowner or developer.

According to Hancher and Moran regulatory bodies function within a bounded (but arguably permeable) arena (the regulatory space) occupied by other actors who in concert resolve the nature, relevance and importance of the regulatory issues at stake.

⁴⁷ Hancher, L., and Moran, M., (eds.), *op. cit.*, p. 272.

⁴⁸ *Ibid.*

Those issues of relevance and the composition of the space are influenced by both temporal and broadly environmental considerations. The use of a spatial metaphor draws attention to the fact that certain actors and indeed issues remain outside the frame or bounded space, and further that the space may be divided, become fragmented or contested by the participants. In addition it is conceivable that other (originally excluded) players have the capacity to invade that space. It is a metaphor that has been used to explain various policy activities both specifically in the regulation of utilities⁴⁹, accounting⁵⁰, telecoms⁵¹ and inter-governmental activity⁵² and more generally.⁵³ Spatial analyses have been criticised because of the symbolism, projection and scale they signify.⁵⁴ They are valuable however in describing different forms of law and the linkages between them in space and time where regulation (and in particular legal regulation) invoke “images of space and interactions”⁵⁵, more so in land-use planning. Land-use planning has the focus of governing physical space, but also combines the complex of both the, “...universality of statute law [and] ...the patchwork of local law, ...and regulatory laws [together with] a combination of different types of authority”⁵⁶,

⁴⁹ Prosser, T., “Theorising Utility Regulation” (1999) 62(2) *Modern Law Review* 196–217.

⁵⁰ Young, J.J., “Outlining Regulatory Space: agenda issues and the FASB”, *Accounting, Organizations and Society*, January 1994, pp. 83–109; Kent, J., “The Public Sector Accounting Standards Board: Constructing Regulatory Space for Accounting Change” (2003) 13(2) *Australian Accounting Review* 10–15.

⁵¹ Lodge, M., and Stirton, L., “Embedding Regulatory Autonomy in Caribbean Telecommunications” (2002) 73(4) *Annals of Public and Cooperative Economics* 667–693.

⁵² Eberlein, B. and Grande, E., “Regulation and infrastructure Management: German Regulatory Regimes and the EU Framework” (2000) 1(1) *German Policy Studies: Politikfeldanalyse* 1–18.

⁵³ Daintith, T., “A Regulatory Space Agency?” (1989) 9 *O.J.L.S.* 534–46, Scott (2001).

⁵⁴ De Sousa Santos, B., “Law: A Map of Misreading: Towards a Postmodern Conception of Law” (1987) *JLS* 14(3) 279–302 at p. 297, and Twining, W., *Globalisation and Legal Theory* London: Butterworths 2000, p. 234.

⁵⁵ Lange, B., “Introduction: Regulatory Spaces and Interactions”, p 411, in: ‘Regulatory Spaces and Interactions’, (2003) 12(4), Special Issue of *Social and Legal Studies*, (eds. Lange, B., Campbell, D., and Haines, F.) 411–414.

⁵⁶ This is termed spatialization by Rose, N., and Valverde, M., in “Governed by Law?” (1998) 7(4) *Social and Legal Studies* 541–51, p. 551, who consider how far legal norms can determine what can be regulated.

not all of which emanate from the Centre. This approximates to the idea of governance, which locates sites of power and control in many arenas. The practice of using agreements is no exception. It illustrates at a practical level the dynamic between those involved in the planning space and how the relations shift. These historically contingent forms of engagement between actors are clearly illustrated by the repeating agenda of Government to control the practice and the altering regulatory styles adopted by it. During the pre-modern era Government sought to influence local activity through the provision of advice and guidance. Later (such as during the 1990's) agreements were redefined through a use of guidance but via the influence of third parties, including courts and disappointed developers. When the various players dip in and out of the regulatory space, the character of agreements and their regulation can alter.

The spatial analytic provides a basis for exploring the potential limits of regulatory practices at both an analytical and more concrete level. Regulation is framed in terms of far more contestable forms of control. This approach is useful when considering the planning agreement, a practice coloured by bargaining, negotiation and the exercise of discretion. The spatial allusion provides a focus to consider the boundaries or limits of regulatory capacity. Here the barriers are however as much cognitive as physical, with the limits of regulatory capacity being defined by what is conceivable. Structural set-ups are important to understanding how the relations between actors come to be established and maintained and thus ultimately affect decisions. These deep structures (which are both organisational and cognitive) not only delimit spheres of decision-making but also are shaped by them. This might explain why at certain times the Centre

made clear, but not perhaps consistent choices in regulating the practice. One illustration is the shift from ministerial oversight to more diffuse forms of control. During the late 1960's (when Government sought to overhaul the planning system) it was inconceivable that the framework for ministerial consent could continue, although the archives show no evident failure in the system from the perspective of Government officials or those regulated.

The regulatory space heuristic is very useful at addressing who is implicated in the regulatory process. There is a risk that an agent centred approach, without more, could overlook how actors become a part of that process and the consequences of their doing so. It requires a slightly different interpretation of space; one that sees space in terms of both structure and function. When combined with more 'thickly described' accounts of activity that search for credible explanations without resorting to subjective interpretation, the more puzzling practices associated with a use of agreements can perhaps be made sense of.⁵⁷ In land-use planning this idea could be used to adopt a form of sequencing where existing practices are interpreted by reference to how they emerged from past actions and were refined over time. One example of this is the emerging practice of oversight through the issuing of pro forma precedents and the checking of agreements during the pre-modern era, which was consolidated subsequently by officials through their acquisition of greater expertise leading to its statutory recognition in 1943.

⁵⁷ I draw heavily on C. Geertz interpretation of G. Ryles account of "thick description" in, "Thick Description: Toward an Interpretive Theory of Culture", in Geertz, C., *The Interpretation of Cultures: selected essays*. New York: Basic Books, 1973 of how ethnography can inform interpretive understanding. The idea of thick description is overlaid by more than a statement of the obvious, it is a systematic attempt to understand the nuances of action or gesture in a meaningful way, such that similar actions can be distinguished by their context, perception and interpretation. It attributes significant importance to the role of context.

Spatial analogies allow room for broadly environmental considerations, but risk regulatory arenas being viewed in a linear or one-dimensional fashion – one where it is difficult to understand the roles of the various actors, their codes, and organisational differences, and how the arenas of dispute are shaped and resolved. It is one thing to point to a contestability in regulatory resources but quite another to explain from this regulatory change. The analytic of space alone leaves limited room for temporal considerations, such as to grasp the changing nature of regulatory activity, and from the particular perspective, the historical transformation in the regulation of agreements.

4. Planning agreements in regulatory space

Taking a broad view of regulation exposes the limits of perspectives that focus on rule making and the activities of the regulator alone. More expansive views of control do not necessarily situate regulatory power solely in the hands of Government, and instead integrate the individualised power relations of public and private actors. Accounts of quasi-contractual practices having regulatory effects tend to be situated within the locus of a market broadly defined.⁵⁸ As I explained in Chapter 1, the opposition of market operations against state intervention poses particular problems for understanding agreements. Individualised concerns shape (but do not necessarily dictate) both action in commune and regulatory effectiveness. As a regulatory alternative to direct (state) intervention markets are said to, “...promote individual choice, entrepreneurial initiative

⁵⁸ A market has been defined as *arm's-length bargaining, [where] the parties are generally informally organized and remain autonomous, each actor presses his/her own interests vigorously, and contracting is relatively comprehensive* (Hollingsworth and Boyer (eds.) op. cit. p. 7, but such an interpretation tends to overlook the extent to which markets are created and structured. Morgan, G., and Engwall, L., (1999)

and business efficiency”.⁵⁹ They are dependent upon government however to provide institutional support for the mechanics of exchange. Integral to a functioning market is the beneficial outcome achieved that may coincide with collective goals, but will not necessarily do so. Market solutions serve as co-ordinating mechanisms and function as a stimulus to innovation, that can in perfect conditions enable and transform existing institutional arrangements. Contractual practices can be viewed as a market harnessing strategy⁶⁰ or a form of private ordering⁶¹ that represent an efficient alternative to command and control. The seemingly paradoxical practice of using individuated agreements for collective regulatory ends cannot be explained however by reference to market principles alone. In this section I consider how far the juxtaposition of markets against hierarchies offers a credible account of agreements when using a spatial analysis.

4.1 Neither market nor hierarchy

A use of agreements comprises more than a dyadic individuated relation, and incorporates elements of oversight. The practice cannot be seen realistically as an exercise of sustained control, where the Centre has sufficient capacity, resources at hand and will to order the activities of others, neither can it be viewed as an individuated market practice that absents any clear role for Government. Any analysis of the practice as a market mechanism of exchange and an efficient and effective form of spontaneous ordering similarly fails. In the land-use planning context, a use of agreements combines both elements of command and co-operation. It incorporates also hierarchical elements

draw a more general conclusion vis à vis the shaping of the regulatory discourse at national level and how institutional forces shape national regulation at Ch. 1, pp. 1-2.

⁵⁹ Eisner (2000), p. xiii.

⁶⁰ Baldwin and Cave (1999) Ch4 pp. 46–7.

in the form of central oversight in addition to those of co-operation and collaboration. Markets and hierarchies have been viewed as, "...alternative instruments for completing the same transaction".⁶² The two are combined in planning agreements.

A use of agreements, is ostensibly a highly efficient regulatory solution for both central and local government, and developers alike. The institutional economics perspective such as that provided by Coase and subsequently elaborated by Williamson explains how governance structures emerge so as to minimise transaction costs in a world characterised by actors with bounds upon their rationality, acting opportunistically.⁶³ In this context contracting practices function as governance structures. Agreements might be viewed as 'transaction-cost minimising' governance forms suited to overcoming the problems of cognitive deficits and opportunism, overcoming the costs of designing institutional mechanisms to secure specific benefits and then enforcing them.⁶⁴ Agreements can function to overcome problems of informational asymmetries and uncertainty for local authorities when negotiating with developers, through the bargaining strategies adopted. Whilst the practice appears to address the issue of information deficits and both temporal and environmental uncertainties, it cannot be understood solely in terms of exchange or markets sufficient to explain the overall beneficial effects generated. These are significantly more than the contingent externalities deriving from the functioning of a self-calibrating order and represent the

⁶¹ Ellickson, R., C., *Order Without Law: how neighbors settle disputes*. London: Harvard University Press, 1991.

⁶² Williamson, O. E., *Markets and hierarchies: analysis and antitrust implications: a study in the economics of internal integration*. New York: Free Press, 1975 p. 8.

⁶³ Williamson (1975).

⁶⁴ Coase, R., H., "The Nature of the Firm" (1937) (4) *Economica* 386–405.

systematic and well planned delivery of community gains. It does not appear possible, given the history of the practice, to model the circumstances in which optimal solutions are achieved because it is often a combination of factors that under very specific conditions facilitate effective regulation.

Some interpretations embed markets within a given socio-political setting, with the latter placing constraints upon individual action and decision-making.⁶⁵ Economic activity becomes restricted or moulded by institutional set ups, sometimes functioning as a language or system through which goals and values come to be (re)interpreted and actioned.⁶⁶ A spatial analysis of agreements points to the difficulty in explaining the practice as a form of ordering without hierarchy and highlights the ability of Government to construct institutional configurations that regulate activity and restrict in some way the rational pursuit of instrumental goals. The regulatory space model is a useful tool for understanding the practice because it indicates the role of many actors in shaping regulatory practices. The model as adopted by Hancher and Moran has however a tendency to downplay the role of Government. Yet the history of agreements shows it is not wholly accurate to absent Government from this picture. In the next section I describe some of the key actors aside from Government shaping agreements and their regulation.

⁶⁵ Hollingsworth, J. R., and Boyer, R., (eds.) 1997.

⁶⁶ Ibid.

4.2 Actors shaping planning agreements

Regulatory communities may bring together adversaries but also cement trust, mutuality and the promotion of shared values.⁶⁷ These epistemic communities as they have been termed often assume a shared discourse, expertise and values regarding knowledge management and its use.⁶⁸ Land-use control draws in multiple *dramatis personae* in addition to central and local government, including professional actors (lawyers and planners) landowners and developers. Each grouping brings with it a different rationality or perspective to its own competitive advantage on the normative question of the function of planning and its regulation. As Braithwaite and Drahos have shown, whilst the communities may disagree they, “have a basis in shared values for dealing with one another”.⁶⁹ Landowner and developer interests were pivotal in the post-war regeneration of the nation, and held the key to economic prosperity during the high- and late-modern eras, given the imbalance between state and private land ownership. Government’s relative disadvantage favoured landowner and developer interests, shaping the regulatory response to land-use concerns, and especially agreements. The use of agreements accommodated a greater reliance on negotiation and co-operation. Their regulation in the latter eras demonstrates a transition largely a response to economic recession and a reliance on the private sector to compensate for public expenditure restraints. The heavier the reliance on the private sector, the greater the variety in regulatory approaches used by the Centre.

⁶⁷ Braithwaite, J., and Drahos, P. *Global Business Regulation*. Cambridge: CUP, 2000, p. 501.

⁶⁸ Haas, Peter, M., “Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control” (1989) 43 *International Organization* 377– 403.

The professions both legal and planning, have influenced also the instrument especially in later eras. With the maturity of the planning profession, its aims and objectives became more clearly defined and influenced the regulatory resources available. Lawyers, particularly during the high-modern era, would (re)interpret the provisions relating to agreements and attempt to define the legal limits of the practice. Public and private sector organisations' heavily dependent upon town planning, property and legal professionals contribute to the existence of a level of interdependence.⁷⁰ The presence of ostensibly self-contained professional groupings overlaps, with professional capacities transcending organisational boundaries. Lawyers advise both property developers and local authorities, professional planners (those members of the governing professional body the Royal Town Planning Institute) similarly are found in both public and private sectors, as are surveyors. Conflict and confrontation arise both within and between professions transforming in the process regulatory frames, leading to new inter and intra-professional alliances and groupings. In tandem, these professionals were to prove a match for and usurp the role of central officials who in the pre-modern and modern eras had defined the use of agreements. Central officials were not necessarily legal or planning professionals, rather more professionals of government. The latter play a key role in the regulatory chain that links Government with others. This was particularly so in the early stages, when the provision of formal and informal guidance

⁶⁹ Op. cit., p. 501.

⁷⁰ Reichmann, N., 'Moving Backstage: Uncovering the Role of Compliance practices in Shaping Regulatory Policy' in Shlegel and Weisburd (eds.) *White-collar Crime Reconsidered* Boston: Northeastern University Press, 1992; Dezalay, Y., and Sugarman, D., (eds.) *Professional Competition and Professional Power* London: Routledge 1995 have observed the role of professional actors in shaping regulatory processes in different contexts.

was used by the Centre as a way to regulate activity. The officials' role in checking draft agreements shaped both practice and the perception of the utility of the instrument. It was a diffuse, if powerful, regulatory force that was to continue with the instigation of the formal consent system. The civil servants' position functioned as a locus for generating informal norms that would challenge strict legal interpretations.

Land-use regulation requires the Centre's heavy reliance upon local government to resolve development questions. In functional terms local authorities are both agents of Government and of their local electorate, by providing both local services and managing at a local level the allocation of central resources. It is a relation of dependency that can make or break Government's capacity to regulate others. From being largely dependent upon Government during the inter-war period, the local authority became pivotal in securing the post-war rebuilding of the nation, and implementing the Centre's agenda. Over time municipal authorities, holding significant budgets and acquiring substantial local Act powers became a match for Government. By the 1980's and 1990's the institutional changes arising from the restructuring of welfare provision and local government funding weakened the local position.

The modern structure of local government has reinforced the central local dichotomy found in land-use planning, but laid also the foundation for tension between localities. Locally, power is allocated through a mix of unitary and two-tier systems of

government, categorised broadly along urban rural lines.⁷¹ In the metropolitan areas unitary authorities exercise all planning functions for the area. Local authority delegation in planning is divided in non-unitary areas between district and county councils with the latter being responsible for strategic planning and districts for local matters. This of itself can be a source of conflict.⁷² The broad delegation arrangements posit a level of trust between the various arms of government, such that the local authority is expected to be an instrument of the Centre's will. At the same time local government, being the representation of *local* demands, as an entity of locally elected representatives, partly funded by the local inhabitants, has the capacity to place this agency relation under stress, leading to competition between local authorities in the pursuit of acceptable local solutions.

4.3 The techniques used by Government to regulate agreements

Throughout the evolution of agreements, Government has used a variety of techniques to regulate the practice. These have ranged from direct oversight to more discrete methods that include steering through guidance, and the use of precedents, and the collection and dissemination of information. Control through hierarchy (in essence, an exercise in command in the form of Ministerial consent) was used exceptionally by the Centre in the modern era. Whilst central oversight through the consent mechanism was a key strategy, it was not used in isolation. Directive control appears to have carried symbolic weight by demonstrating expressly the capacity of Government to ensure that local and

⁷¹ Modern local government structures are loosely modelled upon the post-war overhaul under the Local Government (Boundary Commission) Act, 1945 and the Redcliffe-Maud Royal Commission *Reform of Local Government in England* Cmnd. 4276 (February 1970).

⁷² Marriott O., *The Property Boom* London: Pan Books, 1969 p. 261 gives an account of the consequences of local authority rivalry in connection with retail development.

predominantly lateral dealings accorded with national objectives. In practice it was used in tandem with those earlier generally trust-enhancing strategies existing in the pre-modern era, including providing information to planning authorities, issuing advice and keeping precedents. The consent mechanism was used to consolidate Government's authority, by exercising control in restrictive or negative terms. It functioned to render more transparent to the Centre the dealings between planning authority and landowner or developer, by making the Minister the ultimate arbiter of the practice.⁷³ More importantly it gave Government the facility to determine the extent of the use of the practice on the ground, as happened during the late 1960's. The consent mechanism engendered also further reliance by planning authorities on Government, making them more malleable to the Centre's will. Ultimately the process placed burdens on central officials that outweighed the benefits to Government.

Government's experimentation with hierarchy proved excessively burdensome, resulting in the abolition of consent in 1968. By this time the configuration of the regulatory arena was peopled by powerful developers rather than individual landowners who had been considered less able to protect themselves. It is possible that Government may have thought the regulatory balance of power was shifting away from its hands for this reason. By the high- and late-modern eras, steering through a use of policy became Government's favoured strategy. This technique replicated the earlier trends of the pre-modern era, which were also characterised by steering through the manipulation of

⁷³ This was not simply in name. It seems that the culture of the Ministry was to recognise the Minister's power of intervention in even the most minor matters well into the late 1960's as is evidenced in Sharp, E., *The Ministry of Housing and Local Government*. London: George Allen and Unwin Ltd., 1969 during the period 1955–1966, pp. 17–18.

information, rather than direction, except that by this time planning authorities were far less dependent upon the Centre for advice. In terms of efficacy, the use of policy appears to have effected few changes in Government's capacity to regulate the practice, partly because of the existence of the countervailing force of developers, with the potential to influence central policy formulation and its application.

5. The analytical frame

Regulatory space is an analytical tool, "defined by the range of regulatory issues subject to public decision".⁷⁴ The use of a spatial analogy invites both consideration of wider social and political settings in which regulation and regulatory decision-making occurs. There is no reason why such a broad interpretation of the regulatory setting should not include temporal considerations. The inclusion of an historical account within a largely cultural or contextual setting gives a wider perspective over more market-oriented analyses. The appeal of the spatial analytic is that it signifies both the importance of structural considerations in defining and indeed confining regulatory ideals (in the cognitive sense of defining what is and is not possible) and points to the importance of the interaction between participants operating within it. The idea of space thus helps to illuminate regulatory processes. The modified spatial analytic can be used to suggest the dynamic of change, where players dip in and out of the regulatory scene. The progress of agreements is marked by both shifts in the construction of what is at stake at any given time and perhaps more interestingly the competing goals of the players concerned whether they are Government, developer or planning authority. Thus space defines not only how negotiations are pursued but also who at any given moment has the capacity to

control where these occur – whether hierarchically or between local players to the almost total exclusion of the Centre. This is where institutional configurations can make or break co-operation between competing actors. In cases of congruence, trust and co-operation are more likely to be enhanced but where this is absent persistent regulatory problems occur.

The transformation of agreements is difficult to understand without reference to the context in which the practice occurs and the institutional environment shaping the instrumental goals of the actors concerned. In the pre-modern era, for example, it is difficult to understand why Government encouraged a use of agreements without reference to the dilemmas for the Centre in creating a land-use planning system. Later, the centralising tendencies formalised by the 1943 legislation make little sense without reference to the problems of agency and lack of trust between central and local government that underpinned the expanding role of central officials in checking and supervising agreements' use. There are also times, as I will explain later, when the outcome of regulatory strategies (whether a success or failure) only make sense when institutional decision styles are matched against one another.

6. Conclusion

In this Chapter I have suggested why a more rounded vision of regulation is valuable in looking at agreements. It provides a basis for viewing the adaptability of the practice to accommodate the numerous shifts in a planning system that have ranged from local incrementalism to more extensive forms of centralised control. Given that agreements

⁷⁴ Hancher, L., and Moran, M., (eds.), *op. cit.*, p. 277.

bear the hallmarks of the individuated contractual form, the critique of markets and contracting has obvious appeal. The purposes for which agreements are used, and especially the securing of collective or community benefits illustrate however the limitations of such an approach. Classical interpretations of rational instrumentalism do not appear capable of explaining either the practice of using agreements in circumstances where developers especially may be better placed to adopt alternative strategies nor the role of central government in regulating the practice. Yet economic perspectives do highlight the regulatory significance of contracting as an efficient form of ordering, and in some circumstances give credence to the social settings underpinning and moulding strategic activity of this type. Spatial analyses go some way to clarifying why this should be by referring to changing identities of the actors involved in both the negotiation and oversight of the tool. However it is also clear that whilst the regulatory space heuristic provides a more sophisticated view of regulatory governance, it allows limited insight into the dynamic of change. It is problematic to take legal instruments or processes at face value, particularly without reference to spatial and temporal considerations. Contextual factors are very important, but, of course, may vary across time. To understand more fully the use of agreements in land-use planning, account must be taken of temporal change. Part of the process of unravelling the seeming paradoxes associated with the practice will be through mapping how the practice has evolved and continues to apply. This I believe can only be done by reference to an analysis that draws in both spatial and historical factors.

The next four chapters provide the historical detail. In Chapter 3, I explain the origins of the practice, and consider how a use of agreements was harnessed by Government and gradually moulded into a regime of centralised supervision. Public records of the time demonstrate the way in which these private, “...practices, materials, agents and techniques”⁷⁵ were gradually shaped by the Centre to be of broader regulatory significance. Government papers demonstrate the gist of official thinking at the time, and rather than focussing purely on parliamentary record, provide a more rounded insight into some of the thoughts of central officials during the various phases. It is here that the structured narrative of the Whitehall machine is located. The use of these documents, whilst portraying primarily Government’s perspective draws attention to the views of others by highlighting their voiced concerns. The content (as predominantly a narrative of the Centre’s instrumental goals), anchored as it is within the Government machine, gives a rich insight into the regulatory function of agreements, both as a mechanism to control local agencies and developer communities alike and as a means to secure Government’s objectives. In this way I highlight how processes emerged and were gradually co-opted by Government, as mechanisms of control. This leads me to pose questions surrounding how agreements were viewed (as a matter of record) by those actors in the given regulatory space and the practices, disciplines or technologies used to make them regulatory tools. In simple terms, I will ask how the vision of contractual relations (in the form of agreements) in planning was put into effect, shaped and constructed. What will be seen is the interrelation of the different instrumental goals between the major players, Government (both central and local) landowners and

⁷⁵ O’Malley P., Weir, L., and Shearing, C., “Governmentality, Criticism and Politics” (1997) 26(4) *Economy and Society* 501–517, p. 502.

developers. In the next chapter I explain how agreements became a significant piece of the planning jigsaw.

Chapter 3. The pre-modern era (1900-1942): the emergence of planning agreements as regulatory solutions

“...Parliament’s desire to cover as much ground as it thought the nation would allow, coupled with its anxiety to fair play with owners of property whose freedom to do what they like with their own ..., has produced ninety pages in the 1932 Act compared with twenty-two in that of 1925, and nine pages dealing with Town Planning in the original of 1909.”¹

1. Introduction

The pre-modern era marks the beginning of Government’s attempt to construct a coherent framework for regulating land-use development. The project resulted ultimately in the massive growth of legislation referred to above. Consensus was however, a key facet of land-use control. In this chapter I explain the role of agreements, as a significant regulatory tool integral to the evolving planning system, in delivering Government’s objective. Initially, land-use control was often characterised by the application of the private law. Agreements emerge as a hybrid form, deriving from statutory provisions that draw heavily upon private law constructs. This chapter explores the origins of the practice adopted by local authorities and Government to deal with post-industrialisation effects. It is a history that challenges the assumption that modern land-use planning is the product of post-war legislation.² In this era, the shape of future mechanisms of control is drawn. These are not confined to statute. Local, *ad hoc* solutions become an important source of planning regulation and a use of agreements compensates for other deficits in control, which is confined initially to the

¹ Foreword p. iii by P. Abercrombie, in Poole, Reginald *The Town and Country Planning Act 1932 Explained: A Guide to the Law and Practice of Town and Regional Planning*. Liverpool: The University Press of Liverpool, Hodder and Stoughton, 1933.

urban areas. The role of private law solutions to control land use should not be underestimated in this embryonic phase. It is from these principles that many aspects of agreements derive. Their use delineates also the pathway of the Centre's future regulatory intent; one that is symbolic of the balancing of private interests with collective goals and that treads a fine line between co-operation and command, formal integration (hierarchy) and more lateral dealings. In this era, agreements and planning system evolve in tandem, with each influencing the other. Agreements highlight at times the deficiencies of the new regulatory schema and at others the conceptual difficulties underlying it.

The need to regulate land-use activities over and above the protection afforded by existing principles, coincides with demographic shifts, in particular the competition for space commonly associated with urbanisation. Modernisation marks the gradual overlaying of central control onto local activity, where ideas of place and locality become imbued with a more expansive construction. It is in the pre-modern era that this project can be discerned. Urban and industrial effects are no longer viewed as purely local concerns but regional and ultimately national issues; this shifts the locus of regulation accordingly towards the Centre. Slowly government-centred control forms transform localised and fragmented regulatory practices. The course of this process will alter a use of agreements. A use of agreement becomes prominent at a time when public concerns regarding controlling competing and conflicting land-uses emerge as a major problem for Government to resolve. Local individuated solutions remain a significant decision-style, even with the creation of more systematic and integrated central controls,

² Grant (1982) views, "modern planning law as entirely the product of statutory legislation", p. 2.

and this process will modify the practice of using agreement. Agreements represent a refinement of pre-existing legal constructs, capable of being used and regulated in diverse ways. Even at this stage it is possible to see emerging trends that will influence both the direction of regulatory control and shape the instrument for the future. My task in this chapter is to establish how agreements were constructed, defined and given regulatory effects. A use of agreements shifts from a local individuated and autonomous form to one drawing in wider concerns, especially in the context of zoning land. This replicates the functional objectives of the town-planning scheme in controlling development, but with one difference. For agreements few centralised oversight mechanisms exist initially. Over time, however, the Centre assumes greater responsibility for their regulation, with official control moving from informal guidance to the establishment of formal mechanisms to check and supervise the practice. The era heralds a period of transformation initiating more widespread Government intervention. Land-use regulation becomes gradually more directive in substance and intent and, simultaneously, more visible but in this pre-modern era the Centre's attempts to control agreements are achieved by indirect methods. The next section explains how and why this happened.

2. Urbanisation and industrialisation: foreshortening the neighbourhood

Although different land uses had always existed, the attenuation or foreshortening of the distance between them and the population (particularly in the urban areas) is often a trigger for further land-use control, particularly central intervention. The dramatic effects of industrialisation, which had refashioned the nation from a predominantly

agrarian one accelerated the pressure to find solutions. Whilst land-use control emerged predominantly from private and local forms to address particular site specific issues (often as an extension of land law principles), it was moulded gradually into a more extensive regulatory stream. Town and country planning regulation became a specific mechanism to address these concerns.

Urbanisation and industrialisation, as the products of social transition and economic upheaval were key catalysts for the origin of land-use planning as a practice and the systemisation of control. Land anchored many of the structural and economic changes in British society, and its management was fundamental to both the health and wealth of the nation. With the Industrial Revolution came different understandings of the role of the built environment. From a different trajectory the post-enlightenment philanthropic movements concerned to reshape the living conditions of the new working class³ and Guild socialism embodied by William Morris and his followers contributed to the delineation of town planning as a separate discipline. The emergence of a reconfigured political economy and civil society engendered a new ethos regarding the governing of the nation's inhabitants. This coincided with the maturing of municipal government. Common law principles (especially those of property and nuisance law) could no longer be relied upon however to achieve effective solutions to the pressing problems arising

³ Philanthropic experiments like those undertaken at Port Sunlight (begun in 1888) and New Earswick, and the Garden Cities movement (with the first development at Letchworth) shaped land-use planning but were primarily concerned with protecting a specific workforce. Further explanation can be found in E. Howard's tract *Tomorrow: A Peaceful Path to Real Reform* London: Swan Sonnenschein, 1898, F. J. Osborn's preface to Howard, E., *Garden Cities of Tomorrow* London: Faber, 1974 and Hardy, D., *From Garden Cities to New Towns: campaigning for town and country planning 1899-1946*. London: Chapman and Hall, 1991.

from industrialisation. Instead new governance structures and tools were needed and public decision-making displaced the private.

Earlier demographic shifts had contributed to the rise of urban centres.⁴ Since the nineteenth century, concerns had been voiced openly about the consequences of urbanisation. From the 1820's control was effected through a use of regulatory processes by municipal agencies: firstly in relation to public health concerns and then more broadly. Municipal regulation through the direction of urban and community affairs was by then well established.⁵ There remained serious concerns regarding the consequences of the rapid expansion of the urban areas, both in terms of the impact upon the rural areas and the effects for the health and capacity of the labour force.⁶ Great progress had been made in regulating specific areas but few general powers existed.⁷ The pressure was on to find an effective solution to the dilemmas of urbanisation and to protect the 'green and pleasant land' from 'urban sprawl'.

The emergence of planning agreements in the enlarging public space, represents an attempt to accommodate through legal principle private property interests within a context of the growing municipalisation of land-use activity. It indicates also the,

⁴ Cherry (1974) notes at p. 8 that between 1801 and 1901 the population had "almost quadrupled" from 8.9m to 32.5m. The 1851 Census recorded more than 50% of the populace living in the urban areas, (as confirmed by HC Debs. vol. 188, col. 950, [(Authorised Edition) (Fourth Series)] (12 May 1908) The President of the Local Govt. Board Mr John Burns, Battersea). By the end of the nineteenth century 75 towns had more than 50,000 inhabitants and 74 of these had an aggregate population of 10m.

⁵ Cherry (1974), p. 7.

⁶ The demand for local authority planning powers can be traced (according to Government) to Horsfall, T., C., *The Improvement of dwellings and surroundings of the people – the example of Germany*. Manchester: Manchester University Press, 1904 (referred to in TNA: HLG 52/747, *History of planning legislation* (1935). Memo for Sir F. Floud (undated)).

“[framing of] private doctrines within a public law context”⁸ through a project that seeks ultimately to transcend that distinction to achieve more effective regulatory outcomes.

3. Resolving planning dilemmas before 1932

The twentieth century system is both the product of the legislation adopted to address the housing and public health crises of eighteenth and nineteenth century industrialisation and an extension of the public and private law forms dating from much earlier.⁹ Before the enactment of modern planning legislation, the allocation of property rights was a key mechanism for regulating of land-use activity. Early planning law can be viewed as the manipulation of private rights for regulatory purposes.¹⁰ The principles of property and tort law especially could not be relied upon to secure effective solutions to the effects of industrialisation however. The common law favours private rights rather than collective interests. Protection attached to specifically identifiable (and generally individuated interests) rather than generalised concerns. Land law in particular afforded the private landowner or developer the capacity to restrict land uses even after ownership was relinquished. What it did not do was provide overarching protection for the amenities of an area or control the relation between individual development proposals. Yet from these early forms the heritage of agreements can be discerned, and it is one partially a product of the convergence of property and contract law principles. Modern planning law is also, however, the product of the nineteenth

⁷ HC Debs vol. 188 col. 959-60 (12 May 1908). The London Building Acts 1894 and the London Building Acts (amendment) Act 1905 would be a model for the 1909 Act.

⁸ Getzler, J., Review of Taggart, M., “Private Property and Abuse of Rights in Victorian England: The Story of Edward Pickles and the Bradford Water Supply.” (2003) 66 *M.L.R.* 819-822, at p. 821.

⁹ McAuslan, P., *Land, Law and Planning: cases, materials and text*. London: Weidenfeld and Nicholson, 1975 at p. 34 traces the origins of public land-use control from the 14th century.

¹⁰ *Ibid.*, pp. 48-76 and 245-349.

century statutory regime where public decision-making displaces the private.¹¹ Government's assumption of responsibility for land-use planning resulted in a new 'take' on land-use control. Control was no longer to be secured through predominantly private law mechanisms, which whilst potentially efficient locally were incapable of securing programmatic results nationwide. Instead the regulation of development would be co-ordinated on a statutory basis consonant with Government's project of facilitating the orderly planning of the nation.

A use of agreements incorporates into the system an ostensibly private law solution where planning authority and landowner or developer, negotiate to regulate land-use activity. The controls have two distinctive strands, one traceable from the public health legislation (including local Act powers) of the nineteenth century directed towards addressing public nuisances, particularly the unsanitary housing conditions attributable to overcrowding. The other derives from common law solutions, which with an orientation towards private property, some have perceived as almost counterproductive to satisfying the collective needs of the country's urban population.¹² In the next section I explain these in more detail.

3.1 Private law as a land-use control technique

Land-use control in the nineteenth century was effected predominantly through the common law, whilst situating the capacity to exercise powers in both public and private hands. Common law principles afforded protection through both tort law and land law

¹¹ Ibid., p. 34.

¹² McAuslan, P., "Planning Law's Contribution to the Problems of an Urban Society" (1974) 37 *M.L.R.* 134–153.

but was insufficiently responsive to the demands of rapid change and the challenges posed by industrialisation.¹³ Much of embryonic planning law emerges as the product of the land law principles and the powers given to local authorities regarding the prohibition of public nuisances. It is from nuisance law that some development control concepts derive¹⁴, and there still exists an uneasy relation between planning law and the common law principles of nuisance (particularly where a grant of permission does not necessarily provide a defence to the perpetration of an actionable nuisance).¹⁵ In this section I explain how the deficiencies in private law led to more comprehensive development controls and the property law principles that functioned as a template for the creation of agreements.

Enforcing covenants

Before the existence of statutory protection, landowners and local authorities relied on the doctrines of contract and property law to protect the amenities of adjoining land. Restrictions the product of tenure, imposed by superior landlords have been used as a mechanism to achieve planning control¹⁶ and long leases used as an instrument to secure

¹³ McLaren, John, P., S., in, "Nuisance law and the Industrial Revolution – Some lessons from Social History" (1983) 3 *O.J.L.S.* 155-221, at p. 220 explains that the tort of nuisance failed to provide sufficient protection not because it was doctrinally weak but, "because it was no match for the social problems spawned by industrialization."

¹⁴ Tort law is significant in the development of the idea of "amenity", a key concept in planning law, see, McAuslan (1975), pp. 49-51.

¹⁵ Compliance with planning controls is not necessarily a defence to a nuisance action. In *Wheeler v. JJ Saunders* (1996) Ch. 19, it was suggested that the court should be *slow to acquiesce the extinguishment of private rights* as a result of administrative decisions including the grant of planning permission (per Peter Gibson LJ p. 35). *Gillingham BC v. Medway (Chatham) Dock Co Ltd* (1993) QB 343 suggests that whilst a grant of planning permission cannot authorise a nuisance it may have the effect of changing the character of the locality and be relevant to deciding whether the interference in question is unreasonable.

¹⁶ Leasehold control it was said, *[permits] an adequate safeguard against undesirable changes of user...* over and above the general and negative protection afforded by planning control Cmnd. 7982 Report of the Government's Leasehold Reform Committee (June 1950), para. 314.

acceptable uses.¹⁷ One example is the Bournville Estate owned by the Bournville Village Trust.¹⁸ Houses were leased on 99 year leases with the object of maintaining continuing and adequate control over the character and integrity of a development, something that could not be achieved by the imposition of covenants on freehold sales. Through this technique both positive and negative covenants continued to be enforceable. Their effectiveness rested on the existence of a superior landlord (and thus a contractual nexus) to enforce them.

The Joseph Rowntree development of New Earswick near York, and the development at Letchworth by the First Garden City Company, illustrate the role of covenants in securing planned residential development and point to another facet of the emergence of agreements. The Garden Cities Movement, promoted by E. Howard, provided a basis for the origins of spatial planning and the way in which the holistic ideal of the, “...proper and orderly correlation of industrial, residential and other development” could be achieved.¹⁹ The reformist ideology of the Movement had been premised upon the implementation of the principle of building self-contained towns surrounded by a protective ‘belt’ of agriculture or rural land, as a remedy for the continuing growth of large cities in Victorian England.²⁰ The zoning of land for residential, community or industrial purposes could only be achieved where land remained within a single ownership. In the case of Letchworth, the planning of the area could be secured only

¹⁷ In effect this can be viewed as a form of zoning land according to the uses deemed acceptable by the superior landlord.

¹⁸ A philanthropic enterprise of the Cadbury family in 1895 in Birmingham.

¹⁹ *Garden Cities and Satellite Towns* – Report of the Departmental Committee (Ministry of Health) 1935 Chairman Lord Marley, at para. 4.

²⁰ Garden Cities Association, Tract No 1, September 1899.

through the company retaining the freehold of the land and granting leases of 99 and in some cases 999 years.²¹ The development of other sites such as Welwyn Garden City in 1920 was secured in a similar manner. These private experiments relied upon the granting of long leases so as to maintain some degree of control over land use, to promote, "...harmonious and orderly development".²²

An alternative was the use of equitable rules between freeholders. One was the scheme of development. *Elliston v. Reacher*²³ held that parties deriving title from a common vendor who had laid out an estate for sale in lots, according to a clearly defined scheme for development intended to benefit all, would be bound by the restrictions. Thus the owners or their successors in title could enforce those restrictions. Although having to satisfy the quite rigorous conditions outlined above, the building scheme gave protection to freehold owners who did not necessarily have any contractual relation. It was an extension to the device of the restrictive covenants, which in equity provided, as between freehold owners, a mechanism to control future and existing land uses. In the absence of planning controls restrictive covenants provided a minimal form of planning protection. Common law rules preclude the enforceability of a covenant against the successor in title of the original covenantor. Equity provided however a major exception to the general rule as regards negative covenants by virtue of the principles outlined in *Tulk v. Moxhay*.²⁴ Here, the plaintiff (the owner of undeveloped land in Leicester

²¹ The first Garden City founded by the First Garden City Limited in 1903, comprising 4,500 acres (approximately 7 square miles).

²² Bournville Village Trust, *The Bournville Village Trust 1900-1955*. Birmingham: Bournville, 1956 p. 31.

²³ (1908) Ch. 665, C.A.

²⁴ (1848) 2 Ph. 774, E.R. 1143.

Square, and houses forming part of the Square) was granted an injunction against the defendant who had threatened to build upon land in breach of a covenant of which he had knowledge. The plaintiff had sold land to E who covenanted for himself, his heirs and assigns for the benefit of the plaintiff and his successors in title to keep the land as open gardens. The land subsequently passed through several hands including those of the defendant who admitted knowledge of the covenant, although the conveyance to him did not contain this. It was held to be inequitable for a purchaser to act in a way inconsistent with an obligation of which he had notice. Thus the enforceability of restrictive covenants became dependent upon equitable principles, which would prevent unconscionable acts. The decision allowed for the effective enforcement of covenants between freehold owners on a basis similar to those applicable between landlord and tenant. Landowners could regulate land-use development in cases of its subdivision, where a covenant against building existed. The use of restrictive covenants became one way of protecting land from development pressures including the carrying out of anti-social activities, especially in the urban areas. Covenants could, of course, be waived by agreement between the parties. Neighbouring owners could agree to restrict the use of land or limit the number of dwellings to be built on a site, with the specific intent that the covenant would remain in force long after both parties had disposed of their interests in the land affected. By the decision of *Haywood v. Bromwich Permanent Building Society*²⁵ only negative covenants could be enforced.

Whilst the enforcement of restrictive covenants was a useful device in allocating land uses, it did not protect collective or community interests, which in private law were

²⁵ (1881) 8 QB 403.

deemed too diffuse to warrant protection. Although equitable rules displayed some degree of malleability, those seeking to enforce restrictive covenants had to retain an interest in the land, and enforceability was dependent upon the existence of appurtenant land capable of benefiting. As the decision of *LCC v. Allen*²⁶ showed, this was often a block on the local authority's ability to protect the amenities of its inhabitants. Here the defendant obtained permission to develop land over which he had an option to purchase. In accordance with the permission he entered into a covenant with the plaintiff binding himself and his successors in title not to build on land which lay across the end of a proposed street on the site. Subsequently the whole of the plaintiff's land was conveyed to the defendant, who later conveyed part of the land to his wife who, with full knowledge of the covenant, built three houses on it. On the plaintiff bringing an action against the defendant, his wife and the mortgagees, it was held that no cause of action could be sustained against the mortgagee and the defendant's wife. Here the knowledge of the wife was held to be irrelevant, and the benefit of a covenant could only be asserted upon the existence of appurtenant land capable of benefiting against an assignee of the burdened land. As the County Council held no land, they were not in a position to assert an action against anyone other than the original covenantor. Consequently the local authority could not protect in either equity or common law the collective rights or interests of the local inhabitants, which was effectively what they had sought to do.

Subsequent decisions (such as those of *Bailey v. Stephens*²⁷ and *Kelly v. Barrett*²⁸) required the enforcer of the covenant to not only retain an interest in the dominant land

²⁶ (1914) 3 K.B. 642, C.A.

²⁷ (1862) 12 C.B. (N.S.) 91.

but also have land sufficiently proximate to that land subject to the covenant. This reinforced the limitations of the device as an adequate means of protection of the general amenities of the community by local government. Here planning control amounted to a little more than a reformulation of property law. It did however mark one strand in the origins of planning agreements as a regulatory form.

The law of nuisance

Tort law principles reveal another source of land-use control. Nuisance law is directed towards identifying acceptable land uses by applying the principle of the right to enjoy land without interference. The law of nuisance functions to control land-use activity through the allocation of costs for specific activities between the parties at common law. Its origins recognise the right of a landowner to enjoy or exploit land, subject to the existence of reciprocal rights of others. By the late 18th century, the rules as to nuisance were being applied to situations of urban development to control anti-social or incompatible activity. Doctrinally it has been said to protect the amenities of sanitation, peaceful enjoyment, clean air, and sanitation by preventing interference with the use or enjoyment of land.²⁹ *Rylands v. Fletcher*³⁰ established the principle of strict liability in tort for escapes from land resulting from lawful (if dangerous) land uses. Many of these goals were subsequently replicated and refined in planning law.

Attempts had been made by the court to distinguish nuisances that produced, 'material injury to property' from those causing personal inconvenience. In *St. Helen's Smelting*

²⁸ (1924) 2 Ch. 379.

²⁹ Brenner, J., F., "Nuisance Law and the Industrial Revolution" (1974) 3 *Journal of Legal Studies* 403–433.

³⁰ (1868) L.R. 3 H.L.330.

*Co v. Tipping*³¹ the plaintiff bought a large estate situated within one and a half miles of a copper smelting plant. Whilst the evidence submitted to trial substantiated damage to the property and the trees and shrubs on it, the question remained whether the character of the neighbourhood was such that industrial activities of the type could be carried on with impunity. The plaintiff was held entitled to damages for the injury to his estate, notwithstanding its location within a highly industrialised locality. The private rights of the individual could not as a matter of law be subordinated to the public interest and industrial entities were in principle required to bear the costs of the consequences of their activities. Consideration had to be given to the location and character of the activity. Whilst the common law could not accommodate the consequences of industrialisation, in principle it could arrest its progress.

Where a public nuisance is found to exist, protection extends to the community as a whole. Whilst public nuisances at common law (as an embryonic form of collective protection) constituted offences against the public authority and were actionable by it, they afforded limited protection against industrialisation effects.³² The statutory powers described below were to reverse the common law position.

3.2 Statutory mechanisms of control

The law of nuisance like its statutory equivalent under the Public Health Acts was a reactive form of protection. The public health legislation had been driven by the appalling housing conditions in the industrial areas that spread epidemics including

³¹ (1865) 11 H.L.C. 642.

cholera and caused rising infant mortality. The report of Edwin Chadwick at the request of the Poor Law Commissioners, into the causes of death and poverty in 1842, was a catalyst to the appointment of a Royal Commission on the Health of Towns.³³ The Commission's reports of 1844 and 1845³⁴, resulted in the Public Health Act 1848 and the Nuisance Removal and Prevention of Disease Act of the same year. The former established a General Board of Health with powers to establish local boards on the petition of 10% of the inhabitants of a district and to enforce boards where the mortality rate exceeded 23 per 1000. Powers were given to the boards to secure that water and drainage were provided for both new and existing houses. New houses were not to be built without formal notification being given to the boards of the location of drainage. The Nuisances Removal Act 1855³⁵, permitted local authorities to complain to the Justices where premises were found to be a nuisance or injurious to health so that remedial works could be ordered or where the house was declared unfit for human habitation its use for that purpose prohibited. Subsequently the Sanitary Act 1866 empowered the local authority or board of health to compel houses to be connected to drainage systems where this was lacking. Each of the statutory provisions permitted the local board or authority to attack the problem on an individual rather than comprehensive basis. The underlying cause, that of an absence of overall planning for the location of housing could not be addressed. Effectively action became contingent

³² Taggart, M., *Private Property and Abuse of Rights in Victorian England – the Story of Edward Pickles and the Bradford Water Supply*. Oxford: OUP, 2002 asserts that the common law, by emphasising private property interests, afforded limited protection to public welfare concerns.

³³ Chadwick, E., *Report to Her Majesty's principal Secretary of State for the Home Department from the Poor Law Commissioners, on an inquiry into the sanitary condition of the labouring population of Great Britain*. London: W. Clowes and Sons, 1842.

³⁴ *First and Second Reports of the Royal Commission on the State of Large Towns and Populous Districts*. B.P.P. 1844 XVII and 1845 XVIII.

³⁵ Replacing the Nuisance Removal and Prevention of Disease Act, 1848.

upon the existence of an offensive activity.³⁶ The Public Health Act 1875 extended the powers of municipal government, by allowing the making of byelaws to control the size of habitable spaces and the ordering of houses and streets. This signalled the prospective and pre-emptive (to protect amenities before harm arose) characteristics more generally associated with modern planning controls. It also marked a shift in responsibility away from the individual in favour of public bodies, and from the exercise of individuated rights towards an interest-based approach that relied upon a mix of policy instruments of which law was but one.³⁷

4. 1909-1932 – From land law to “regulatory planning”

Under the Public Health Act 1848, Local Boards of Health assumed powers to secure the sanitation of properties and could if necessary tear down those with defective foundations. The Public Health Act 1875 imposed a duty upon local authorities to secure sanitary accommodation.³⁸ This permitted modest spatial planning of an area, particularly in relation to the density of dwellings³⁹, their drainage and sewerage.⁴⁰ It gave also authorities the important power of closing down those dwellings unfit for human habitation on application to the court.⁴¹ Byelaws allowed the systematic

³⁶ As identified by Jennings, W., Ivor., *The Law Relating to Town and Country Planning* London: Charles Knight and Co. Ltd., 1946 (2nd ed.), p. 3.

³⁷ Wilson, Geoffrey, P., in, ‘The Development of Environmental Law in Nineteenth Century Britain’, pp. 13-36 in Weick, G. (ed.) *National and European Law on the threshold to the Single Market*. Frankfurt am Main: European University Studies: Ser. 2, Law: Vol. 1347, 1993 argues that the nineteenth century developments in the law to deal with the environmental consequences of industrialisation, involved wider questions of the role and form of government and its administration that were dealt with in an incremental fashion.

³⁸ Part III.

³⁹ Part IV Public Health Act 1875, sections 150 (streets), 155 (the regulation of the line of buildings), and 157 contained the important power to make byelaws in respect of the construction of new streets and the space around buildings.

⁴⁰ Part III.

⁴¹ Section 97 related to the prohibition of houses unfit for human habitation.

planning of the layout of streets and became the prevailing regulatory standard. They did little to improve aesthetically the layout of areas and landowners often used the statutory standards as the maximal level of protection. Municipal authorities, as successors to the Local Boards of Health, assumed extensive powers relating to slum clearance. After the passing of the Housing for the Working Classes Act 1890, they were empowered to build homes on both undeveloped land and land cleared by improvement order. The Public Health legislation, which set minimum standards of control, together with the activities of private developers, and the legislation relating to municipal housing provision for the working classes established a model for the planning framework. These provisions did not permit authorities to control comprehensively development in their district nor to incorporate spatial planning considerations for the area as a whole; something considered a major flaw in the national legislation when compared to other areas in Europe.⁴² The costs of a lack of planning control were significant. One commentary estimated that in the 50 years to 1932, £50,000,000 was spent by local authorities on street widening.⁴³ The same study calculated that the costs of demolishing and clearing congested areas in the City of London (a similar sum) would have been saved if a plan for its development, and reconstruction had been adopted within the same period.⁴⁴ Haphazard development was uneconomic for landowners and authorities. Planned development served both individual interests and those of the community. It could not be secured through the

⁴² Much of impetus for the early planning legislation can be traced to Horsfall (1904) and the National Housing Reform Council's deputation to Sir Henry Campbell-Bannerman in 1906 suggesting a housing programme. Both had the objective of enhancing existing powers so as to introduce an element of spatial planning and thus relieve the monotonous layout of the urban areas.

⁴³ Pascoe Hayward, S., and Kent Wright, C., *The Law of Town and Country Planning: An Exhaustive Commentary on the Town and Country Planning Act 1932* London: Sweet and Maxwell Ltd., 1933, p. 9.

⁴⁴ Ibid.

limited statutory framework. One model development that of Hampstead Garden Suburb was promoted by Private Bill to overcome these limitations.⁴⁵

In the rural areas a patchwork of controls had to be used, few of which were directed to the particular problem. This form of improvisation often resulted in the manipulation of existing and limited legislation that had been passed to deal with specific issues rather than the generality of conflicting land uses. Some areas such as Buxton, Leamington, Bath and Folkestone and Eastbourne had been planned by major landowners of the area, who had influenced the manner of control.⁴⁶

4.1 Town Planning Schemes

The Housing, Town Planning, etc. Act 1909 gave local authorities further powers to influence town development, and to prepare town planning schemes for land in the course of, or likely to be developed for building purposes.⁴⁷ It produced some of the first general regulatory planning powers, whereby the local authority, with the consent of the Local Government Board, could designate land-use allocation and infrastructure provision in their area. The Act was limited in scope and as one commentator notes it was, “aimed at the prevention rather than the cure” of bad planning⁴⁸ and the monotony of back-to back, ‘byelaw streets’.⁴⁹ The legislation provided the machinery for authorities to provide solutions through co-operation with landowners, a factor

⁴⁵ The Hampstead Garden Suburb Act 1906.

⁴⁶ Eastbourne was a ‘new’ town created in 1863 by the Duke of Devonshire. Ashworth, W., *The Genesis of Modern British Town Planning: A Studying Economic and Social History in the nineteenth and twentieth centuries*. London: Routledge and Kegan Paul 1954, p. 39.

⁴⁷ Section 54 Housing, Town Planning, etc. Act 1909. Under the 1919 Act the council of every borough or urban district with a population of more than 20,000 was required to produce by 1st January 1926 a planning scheme.

⁴⁸ Pascoe Hayward, S., and Kent Wright, C., op. cit., p. 2.

trumpeted by the Local Government Board.⁵⁰ Authorities could include in schemes provisions relating to streets, limit the number of buildings per acre and reserve areas for specific types of development. The Act provided the foundation for the creation of the modern planning system, but the schemes themselves, based on the framework provisions of the Act enabled authorities also to adopt novel solutions to control land-use activity.

Schemes could be prepared for urban areas by either landowners⁵¹ or authorities. The scheme was *the* mechanism for securing the comprehensive planning of a development area. For the first time authorities could plan for general amenity and convenience, “in connection with the laying out of the land itself and any neighbouring land” in addition to securing proper sanitary conditions.⁵² Schemes had to be approved by the Local Government Board and laid before Parliament before taking effect. Aside from the 1909 legislation there were few general statutory provisions controlling the development of towns, and none relevant to the regulation of land use in the rural areas, except for the general provisions previously mentioned or specific private legislation.⁵³ An absence of general planning controls in the rural areas made it possible for the enlightened garden city proposals to take place there.

⁴⁹ HC Debs. vol. 188 col. 949, 12 May 1908, Mr John Burns (President of the Local Government Board).

⁵⁰ Pascoe Hayward, S., and Kent Wright, C., op. cit., p. 2. The Local Government Board Circular of 31st December 1909 on the Act states *the Town Planning part of the new Act involves, ...a material advance in the relations between the owners of land and the local authorities... and enables each party to co-operate with the other in promoting the general interest.*

⁵¹ Jennings (1946), p. 5 suggests that in practice authorities prepared schemes after consultation with landowners.

⁵² Section 54 and Schedule 4 Housing, Town Planning etc. Act 1909.

Parliament drew heavily upon innovative proactive schemes, such as those of the Garden Cities movement and specific local legislation as a template for the 1909 Act.⁵⁴ The Garden Cities ethos had facilitated the comprehensive spatial planning of an area, by securing control over all development and not just the setting of minimum standards of control regarding housing. The Housing, Town Planning, etc., Act 1919 streamlined procedures by extending the power of the Local Government Board to make regulations and removing the requirement for the publication and laying of schemes before Parliament. It introduced also the principle of interim development. Here the Local Government Board was authorised to permit the development of estates or building operations pending the preparation of a scheme. National Archives record that under the 1909 Act, between 1912 and 1919, 95 resolutions to prepare a scheme were passed or approved.⁵⁵ The Town and Country Planning Act 1925, was the first legislation devoted solely to town planning. By now local authorities were starting to plan more effectively their areas. The provisions did not apply universally, and there remained a distinction in the treatment of development in rural and urban areas.

4.2 The deficiencies of town planning schemes

Schemes were procedurally cumbersome. Draft schemes were subject to a lengthy consultation process and where objections were made, the holding of a public inquiry. They were however substantively comprehensive. Schemes included every facet of spatial planning from the zoning of land and the provision of streets, to the density of

⁵³ The *Tenth Annual Report of the Ministry of Health, 1928-29* Cmd. 3362 (June 1929) emphasises at p. 80 that *land cannot be made the subject of a statutory scheme merely because it is rural*.

⁵⁴ As with the London Building Acts 1894. Government's priority was to *secure, the home healthy, the house beautiful, the town pleasant, the city dignified and the suburb salubrious*. HC Debs. vol. 188 col. 949, (12 May 1908) Mr John Burns.

building estates and the provision of amenity areas and open spaces.⁵⁶ They also included pro forma agreements.⁵⁷ The model clauses (issued by the Ministry of Health) were largely prescriptive and regularly updated. Illustrations of these can be found in the Model Clauses and explanatory notes of June 1926, July and September 1928, January 1935 and 1938, although the earliest precedents identified date from 1913.⁵⁸ Whilst the precedents were adapted by local authorities to suit their local circumstances, the procedure functioned as a discrete form of regulatory control by setting the bounds of local authority activity.

Early town planning schemes were restricted however to the urban areas, and had limited purchase on already developed land. In order to promote a scheme, "...it was necessary to go into great detail as though the whole area was to be subject to development and change".⁵⁹ The land the subject of the scheme had to be surveyed, plans drawn up and a draft resolution passed by the planning authority. Between 31st March 1923 and 31st March 1928, 409 authorities' resolutions to prepare schemes had been passed to Government.⁶⁰ Although the figure had steadily increased from 1912,

⁵⁵ For the year ending 31st March, TNA: HLG 52/686 *Town and Country Planning Bill, 1932: Bill File*. (1932).

⁵⁶ The stated object of a scheme was one which [*secured*] *proper sanitary conditions, amenity and convenience in connection with the laying out and the use of land, and of any neighbouring lands*. HL Debs vol. II col. 1142, (14 September 1909) Second Reading introduced by Earl Beauchamp.

⁵⁷ As in Model Clause 42, p. 40 of the Model Clauses 1928 (July) TNA: HLG 52/685 *Preparation and consideration of clauses* (1931).

⁵⁸ TNA: HLG 54/29 *Town planning schemes; railway companies lands; model clauses* providing precedents for model clauses. Provision was made for the Local Government Board to issue model clauses at section 55 of the 1909 Act but does not appear to have been used until much later.

⁵⁹ Abercrombie *Some Notes upon the application of the Town and Country Planning Act in regional (?) schemes* National Housing and Town Planning Council, referred to in TNA: HLG 52/592 *Model forms* (1933-8).

⁶⁰ TNA HLG 52/686.

schemes covered only a small proportion of land.⁶¹ Schemes often took years to be approved. A case in point is that of Barnes UDC where the schemes of 10 February 1926 and 10 September 1929 were still awaiting approval in 1934.⁶² A third scheme the subject of Council resolutions in 1925 had still to be approved in the early 1940's. As Ashworth (1954) notes statutory town planning was, "marked by the most drastic limitations".⁶³ Even when the procedure was streamlined, Boroughs and Urban District Councils were still required to submit their schemes for parliamentary approval.⁶⁴ By 31st March 1925, 15 schemes (submitted by 12 authorities) had been approved covering 27,992 acres. Ten years later there were 59 approved schemes (submitted by 46 authorities and two Joint Committees) covering 152,182 acres.⁶⁵ By 1927, 263 local authorities had obligatory town planning functions, of which 188 had begun to prepare schemes. 75 authorities had taken no action at all. Of those who had begun preparing schemes, 96 had not passed beyond the resolution stage.⁶⁶ Schemes did not necessarily cover the whole authority area, and planning authorities tended to make multiple schemes. Schemes were used particularly for the orderly planning of suburban developments.⁶⁷ An example of this is the Scheme for the development of residential

⁶¹ *The Control of land Use* Cmd.6537 June 1944, reports that by 1933 only 5% of England and 1% of Wales were subject to schemes.

⁶² TNA: HLG 23/342 *Barnes District Council. Town Planning Scheme* and TNA: HLG 4/162, *Barnes UD 812*. At the time of the Second Reading of the Town and Country Planning (Interim Development) Bill, in 1943, Silkin (Peckham) noted that schemes were taking from five months to years for approval: HC Debs vol. 389 col. 545 (11 May 1943).

⁶³ Ashworth op. cit., p. 190.

⁶⁴ TNA: HLG 52/909, *Town planning schemes: obligation to submit schemes of Boroughs and Urban District Councils with a population of more than 20,000*, (1927-31).

⁶⁵ Figures to 28 February 1935. This compares to 1,700,000 acres and 14,800,000 acres (of a total 37,339,215 acres) for schemes in preparation at 31 March 1925 and 28 February 1935 respectively. TNA: HLG 52/747, "The Progress of Planning" Note to Sir F. Floud, 8 April 1935 pp. 4-5.

⁶⁶ TNA: HLG 52/909. "Compulsory Town Planning" 28 June 1927.

⁶⁷ Ministry of Town Planning Circular No. 60 dated 11 October 1948, entitled, "Schemes in force under previous planning Acts" at the appendix (p. 4) gives some indication as to schemes undertaken by county and county borough councils, examples can be found in the case of Chesterfield, Birmingham, Croydon –

areas in Barnes, made under the Town and Country Planning Act 1925. Clauses covered the construction or widening of streets and sewers, the adjustment of street boundaries, zoning for the density of buildings (including “character zones” that restricted the uses to be carried out). At the time of the making of this scheme some 20 agreements existed dating from 1923.⁶⁸

For those areas already developed, Local Act powers like those of Newcastle in its Newcastle-upon-Tyne Act 1926 were used.⁶⁹ This was the first Act to be passed regulating comprehensively the development of built-up areas. The Act provided for the authority to make a scheme relating to any area in the City notwithstanding its state of development. Power was given also to purchase land for the purposes of improvement (whether to improve or widen streets or for comprehensive redevelopment), where the shape or the size of plots rendered it difficult to secure development. These powers were however frequently opposed.⁷⁰ Other authorities acquired similar powers.⁷¹ Where schemes related to developed land they took much longer to implement, mainly because of landowner objections.

the last two being county boroughs, numerous small schemes in Essex, Brightlingsea, Burnham on Crouch, Chelmsford (Runwell) Chingford, Frinton Harwich Ilford, Loughton, Rayleigh and Southend-on-sea. In Middlesex alone there were 26.

⁶⁸ TNA: HLG 4/162.

⁶⁹ Poole Reginald, *The Town and Country Planning Act 1932 Explained: A Guide to the Law and Practice of Town and Regional Planning*. Liverpool: The University Press of Liverpool, Hodder and Stoughton, 1933 p. 6.

⁷⁰ *Ibid.*, p. 5.

⁷¹ By 1931, 11 authorities including Birkenhead, Birmingham, Blackpool, Chester, Derby, Newcastle-on-Tyne, Southport, Epsom RDC and Guildford RDC had acquired Local Act powers to cover already developed areas, 8 other authorities including Surrey CC, Dagenham, Doncaster and Portsmouth were seeking similar powers. TNA: HLG 52/679, *Preparation and consideration of clauses* (1930-31).

Another reason for the poor uptake of schemes related to compensation. Although the preparation of a scheme did not prevent the carrying out of development, and development remained lawful even if it conflicted with its draft provisions, the approval of the scheme had implications for compensation claims. Where development was carried out after the date of the local authority's resolution, it ran the risk of removal or alteration without compensation if found to be in conflict with the approved scheme provisions.⁷² A scheme triggered a right to compensation, where development was refused. This was a costly route, and may explain the preference for negotiation and agreement. Agreements were initially an almost obscure regulatory tool from Government's perspective but one upon which local authorities tended to rely. It was through this mechanism however, that local authorities attempted to control development. The defects of the scheme led to the use of agreements.

At the time of the introduction of the Housing, Town Planning etc. Bill 1909, co-operation was viewed as a key strategy in securing the objectives of the Bill, as is clear from Parliamentary debates. In the debate on the power of the Local Government Board to make regulations⁷³, it was noted that, "...the Local Government Board are anxious to secure as far as possible the co-operation of the local authority and the landowners and other persons interested in preparing these schemes".⁷⁴ In the House of Commons it was said by the President of the Local Government Board that

⁷² The Local Government Board (predecessor to the Ministry of Health) was empowered by Interim Development Order to allow the development of estates and building operations pending the adoption of a scheme.

⁷³ Clause 56 of the 1909 Bill.

⁷⁴ HL Debs. Vol. II col. 1143, (14 September 1909).

“...the main object of this Bill as regards town planning is, as I have already described, to secure agreement, by conference, by coordinating the varying and conflicting interests, and in the case of the objectionable owner, to buy him out or exchange his land for some other piece or to make arrangements which will be suitable to everybody”.⁷⁵

Schemes required the co-operation of the landowner. The powers were often viewed as a mechanism reinforcing a predominantly voluntary regime, where, “self-organisation of owners themselves, acting in close consultation with town planning Authorities (or a combination of them)” prevailed.⁷⁶ In each instance a use of agreements complemented these objectives, but was not expressly alluded to.

Co-operation seems to have been viewed as a necessary facet of local authority action, not least because of a dependency on private landowners to implement zoning and secure its broad development objectives. The absence of similar powers in the rural areas enhanced the significance of agreements in the preservation of tracts of open land. The fragmented regulatory framework added further pressure for development on the rural areas where limited control existed and furthered reliance on co-operative strategies. The Ministry of Health Annual Report of 1929-30⁷⁷ develops these themes further. This presents local authority planning functions in terms of developing plans for the purpose of, “...guiding and ordering development and so promoting and protecting private as well as public interests.”⁷⁸

⁷⁵ Mr John Burns, HC Debs vol. 188 col. 965, (12 May 1908).

⁷⁶ Cmd. 3362 op. cit., p. 79.

⁷⁷ *Eleventh Annual Report of the Ministry of Health, 1929-30*. Cmd. 3667 (June 1930).

⁷⁸ *Ibid.*, p. 96.

Comprehensive redevelopment could not take place without the consent of the landowner and/or the payment of compensation in the absence of a town planning scheme. The promotion of schemes required also co-operation between landowner and developer if they were to be approved without the holding of a local inquiry. To achieve positive outcomes, “agreement and persuasion”⁷⁹ underpinned development controls. Land use control at this stage was said to be regulatory in character. The term regulatory planning derives from official publications of the time.⁸⁰ It denotes the capacity of Government or the planning authority to constrain or proscribe activity, on an *ad hoc* or incremental basis. This does not posit a strong role for Government in securing control according to a pre-existing national strategy, “... [to] secure that development actually takes place as an orderly process of growth”.⁸¹ That was to come much later (*post* 1945). While regulation remained very much reactive in form, with developer and landowner activity controlled through consensus, a use of agreements was a logical approach. In the next section I describe how agreements became an integral part of the emerging planning system.

5. The formative stages of agreements

Agreements replicated the role of the scheme in regulating land use. Many of the provisions contained in the agreements of the pre-modern era covered the same aspects found in schemes, but often on an individual basis. Unlike agreements, the scheme covered a wider area than the land of one owner.⁸² Officials saw agreements as key

⁷⁹ Cmd. 3362, op. cit., p. 81.

⁸⁰ TNA: LCO2/2658, *Town and Country Planning (Interim Development) Bill, 1943* (1943), “Brief for Second Reading (Lords) of the Town and Country Planning (Interim Development) Bill”.

⁸¹ *Ibid.*, para 3.

⁸² Although in the case of large estates e.g. Cliveden the area subject to an agreement could be extensive.

regulatory tools and potentially the sole means to regulate some land uses; especially to make available large tracts of land for recreation in the form of private open space or to secure the redevelopment of already developed areas.⁸³ Agreements were used to minimise the risk of local authorities paying compensation. The practice allowed the local authority and landowner to agree to zone land for development, whilst preserving other areas of land from the pressure of development. At this early stage agreements had the advantage of formalising arrangements with the consent of the landowner, as opposed to the directive tool of the scheme that could be viewed as a form of zoning verging on the state expropriation of rights. Consensus and co-operation were at the time key factors in land-use regulation, and were to remain so. In the absence of a comprehensive system, regulators whether Government or local authorities placed greater reliance upon co-operative strategies to constrain or direct behaviour. Planning by agreement was a necessary part of the emerging system, and the tool had a significant role in securing land-use control. Yet Government did not, at this stage appear to have appreciated the impact that agreements would have and the consequent effect on its own attempts to order development.

In some cases agreements were used where schemes had not been approved to secure payments by developers for infrastructure costs or in connection with anti-social developments in residential areas.⁸⁴ Schemes hampered the trusting relations between local authority and landowner. The procedure superimposed central oversight

⁸³ Instructions to Counsel for the Town and Country Planning Bill 1968, Section G.1. TNA: HLG 29/779 *Instructions to Parliamentary Counsel: application for Queen's consent; vol. 10.*

⁸⁴ Memo 70/D of the Ministry of Health, *Town Planning – Development during the preparation of Preliminary Statement. Orders under section 45 of the Housing etc. Act 1919*, para 11 – August 1922.

(especially through the convoluted inquiry and approval mechanism), and in turn diminished the ever-closer relations between the parties at a local level.

Where agreements formed part of the scheme, their validity (and enforceability) derived from the scheme itself. Section 55 Housing, Town Planning, etc., Act 1909 empowered the Local Government Board to prescribe matters relating to the contents of schemes and further details, including the power to make agreements, were specified in the Fourth Schedule to that Act.⁸⁵ Agreements were used to provide for the continuation of uses incompatible with schemes (and as such were often scheduled in them) and made provision also for the zoning of land and the mutual waiver of compensation and betterment rights.

5.1 Agreements under the pre-1932 legislation

A use of agreements was initially important to local government but less so to Government. Over time the Centre recognised the growing significance of both the instrument and official oversight by consolidating existing practice and creating a formal consent mechanism in 1943. Before 1932 agreements had no independent legal base for their use. Clarke in his commentary on the 1932 Act notes that only after 1932 could agreements be made independently of schemes.⁸⁶ This does not appear to reflect practice. Often pre-existing agreements were scheduled in the scheme. The *Fifteenth*

⁸⁵ Para. 13, Fourth Schedule to the Housing, Town Planning, etc., Act 1909. This provision was repeated at section 11 Town and Country Planning Act 1932.

⁸⁶ Clarke (1934), pp. 251-2 notes, *...In the past, arrangements had been made between local authorities and landowners to save certain land being built on, but, as the law stood, agreements of that kind did not become effective legally until they had been incorporated in town or regional planning schemes. These arrangements were desirable, [for tax purposes if the owner having made an arrangement died]...Sect 34 should prove a great incentive to large landowners to reserve their estates as private open spaces under agreements made with the responsible authority.*

Annual Report of the Ministry of Health, 1933-4, shows that agreements were used even before the making of schemes and that the Ministry advocated this approach.⁸⁷ A scheme for the Barnes urban district⁸⁸ was made under the Town and Country Planning Act 1925. Part VI⁸⁹ related to agreements which had been executed before the making of the scheme. Twenty agreements (dating from 1923) were scheduled in the scheme. These covered the laying out of housing estates⁹⁰, the provision of commercial or industrial developments⁹¹, the conversion of buildings to flats⁹² and the design of shop elevations.⁹³

The fragmented form of land-use controls engendered a level of dependency by both central and local actors on the landowner. This was especially true in the rural areas where limited powers of control existed before 1932. Regulators at both central and local level had to gain the co-operation of landowners, if they were to effect any form of control in these areas. In order to protect areas of natural beauty and preserve open spaces, the agreement of the landowner had to be secured. Agreements were a primary instrument in the reservation of open space and agricultural belts. At the time of the *Eleventh Annual Report, 1929-30*⁹⁴, land subject to agreements included the Thames reaches at Cliveden, and the Grand National racecourse at Aintree. In the case of the

⁸⁷ Cmd. 4664 (July 1934), p. 165.

⁸⁸ TNA: HLG 4/162 dated September 1932.

⁸⁹ *Ibid.*, Clauses 42 *et. seq.*

⁹⁰ Barnes UDC (1) and Messrs. Cox, Taylor and Harton Builders (2) for the laying out of the Palewell Lodge estate, dated 17 January 1924, and the provision of the Mortlake Brewery Estate, Lower Richmond Road Mortlake by an agreement between Barnes UDC (1) and Watney Combe Reid & Co. Ltd. Brewers (2) dated 20 February 1925. TNA: HLG 4/162.

⁹¹ For the erection of a sawmill Barnes UDC (1) and H. Quilter (2) dated 18 March 1930 TNA: HLG 4/162.

⁹² Barnes UDC (1) and Messrs. Annesley, Brownrigg, and Hancock (2) dated 6 October 1928 for Temple Court, Temple Sheen, Mortlake TNA: HLG 4/162.

latter, an agreement was entered into to permit the land to continue to be used for racing and for agriculture during the continuance of the extant life tenancy and an extension to the permitted uses on its determination.⁹⁵ Attempts were made to secure land at the South Downs for recreation purposes in 1928, although it was many years before the land could be assembled and agreement reached.⁹⁶

5.2 Defining the regulatory space pre-1932

Whilst the local authority and the landowner as the parties to an agreement, were the key actors, Government actors (at both parliamentary and ministerial levels) shaped the way in which agreements were used. The *modus* of local co-operation and agreement was promoted broadly by the Centre. Behind the façade of consensus, a more nuanced approach was already being constructed; one that distinguished urban and rural areas and the tool of agreement from the scheme in terms of the preferred regulatory path. The inclusion of agreements in schemes paved the way for more rigorous oversight – both democratic and administrative. There were a number of reasons for this. Firstly the relevant statutory provisions were drawn by the parliamentary process, and established a framework heavily dependent upon it. Schemes were subject to parliamentary scrutiny before approval and in the event of objections being raised, an inquiry had to be held. The Ministry itself played a key role in providing guidance and issuing model clauses to be adopted by local authorities when making schemes. Secondly, given the embryonic stage of land-use planning control and in particular the convoluted form that regulation took, local authorities were reluctant to exercise the

⁹³ Barnes UDC and Messrs. Marrable Brothers (builders) (2) dated 27 July 1931. TNA: HLG 4/162.

⁹⁴ Cmd. 3667 (June 1930).

⁹⁵ Ibid., p. 99.

statutory powers and those that did were reliant upon the Ministry in particular for detailed guidance.

Pre-1932 agreements appear to have been regulated in a number of ways. This was largely dependent upon whether agreements were annexed to schemes. Model clauses provided for under the town planning legislation precluded agreements requiring the Council to incur expenditure, to be supported by a loan sanction from taking effect until approved by the Minister.⁹⁷ For agreements referred to in a scheme, any inquiry held resulted in their being subject to external scrutiny. Paradoxically, agreements were used also as a means to avoid the local inquiry through the cementing of negotiations. The democratic processes attendant on scheme approval were also a source of regulatory control. At this stage parliamentary control represented a significant form of restraint upon the powers of the administration.⁹⁸ Supervision was exercised by civil servants, who were for the most part not legally qualified. Their framing of what was considered to be an appropriate or inappropriate agreement defined the activity of other (especially local) actors. This was to become more pronounced after 1932. Civil servants were significant actors in regulating agreements in practice. The tool was used to overcome scheme objections and provided an alternative negotiated and flexible solution to the

⁹⁶ *Eighteenth Annual Report of the Ministry of Health, 1936-37* Cmd. 5516 (July 1937), p. 131.

⁹⁷ Section 55 and Schedule IV to the Housing, Town Planning etc. Act (1909) provided for the Local Government Board to prescribe model clauses. The Ministry of Health *Town Planning Model clauses for use in the preparation of Schemes* (June 1926) Pt VI cl. 42 refers. It is from here that the origins of the consent mechanism can be discerned.

⁹⁸ The emerging role of the House of Commons in relation to the exercise of controls over the central administration (and Ministries in particular) during the nineteenth and early twentieth centuries is well documented by Willson, F., M., G., "Ministries and Boards: Some Aspects of Administrative Development Since 1832." (1955) *Public Administration* 43-58. It represented a real concern for the Ministry as TNA: HLG 52/747 shows. It records a long discussion on why the voluntary procedure regulations could no longer be used by the Minister when scheme making became obligatory.

procedurally cumbersome scheme provisions. The instrument remained however, a part of the scheme. Ministry officials in particular played a significant role in regulating agreements and thus local authority practices. Officials indirectly supervised agreements because of their incorporation into the scheme. There is evidence that agreements dating from the early 1920's were scheduled in schemes and considered as part of the approval process.⁹⁹

Officials were not the only ones shaping agreements. In cases affecting high profile agents or sites of strategic importance, civil servants held meetings with landowners and local authorities in person. An example of this is the agreement relating to Lord Astor's Cliveden estate.¹⁰⁰ The first agreement was referred to in the *Eleventh Annual Report of the Ministry of Health, 1929-30*¹⁰¹ and related to the reservation of a stretch of land along the Thames as private open space and the erection of dwellings for tenants of the estate including agricultural workers. It also provided for the local authority to purchase the reserved land at open market value. The agreement dates from 1929, with a later agreement being made in 1933. Ministry files show that meetings were held with both the landowner's advisors (Professor Abercrombie¹⁰², and his solicitors Messrs. Lewis and Lewis), and a representative of the local authority Slough Urban and Eton Rural Districts Joint Planning Committee, at the Ministry.¹⁰³ Close monitoring was given also

⁹⁹ TNA: HLG 4/162, where agreements dating from 19 December 1923 (between The Barnes UDC (1) and Messrs. Couch and Coupland Architects (2), relating to the Enmore Estate, Stonehill Road, Mortlake) were scheduled.

¹⁰⁰ During 1919 to 1921 the 2nd Viscount Astor was Permanent Under Secretary to the Ministry.

¹⁰¹ Cmd. 3667 op. cit., p. 99.

¹⁰² A past president of the Town Planning Institute.

¹⁰³ TNA: HLG 52/592, "Town and Country Planning Act, 1932: Agreements (1933)" Memorandum, 5 December 1933.

to the agreements councils entered into with Lord Cranborne and Lord Sefton.¹⁰⁴ In part this may have been attributable to the status of the landowners concerned, but it indicates also a growing practice of supervision which became firmly embedded after agreements were given an independent legal base under the Town and Country Planning Act 1932.¹⁰⁵

5.3 The Town and Country Planning Act 1932: independent statutory recognition of agreements

The above Act extended the ambit of schemes to include both urban and rural land, (whether developed or not).¹⁰⁶ It was important also for the independent statutory recognition given to agreements. From this date, it was no longer necessary to incorporate agreements into schemes to give them legal force. Section 34 formalised existing local authority practice and provided a clear statutory basis for the making of agreements independently of schemes.¹⁰⁷ The section allowed the landowner to enter into agreement with the local authority to restrict the use or development of land. The agreement was binding as a covenant on the land and enforceable at the suit of the authority against successors in title; in terms of content agreements were an equivalent to those made under the scheme provisions.

¹⁰⁴ Releasing land for building purposes on the termination of a lease. TNA: HLG 52/592.

¹⁰⁵ TNA: HLG 52/592 also refers to meetings being held in 1933 with the Norfolk (East Central) Joint Town Planning Committee 4 March 1933. By 1933 civil servants were clear in their strategy of establishing the form and content of agreements, as will be shown later.

¹⁰⁶ The Act received the Royal Assent on 12th July 1932, and the provisions relating to agreements (unlike the rest of the Act) came into force on that date. The remaining provisions came into force on 1 April 1933.

¹⁰⁷ Section 34 is recited at Appendix II.

Section 34(1) provided a consensual framework for *restricting the planning development or use* of land.¹⁰⁸ Agreements could be made which restricted the use of land in perpetuity or for a limited period. It would seem that a planning authority outside the area concerned could even conclude the agreement.¹⁰⁹ The statutory provision emphasises the voluntary nature of agreements; the landowner must be “willing to agree” with the authority, and the authority, “if they think fit” may enter into an agreement. This is consistent with a conventional conceptualisation of contracting with the parties entering freely into a bargain. It emphasised also the regulatory aspect of land-use controls.

The Act derived from the recommendations of a 1921 Committee that proposed a more comprehensive form of planning legislation.¹¹⁰ The Maude Committee had estimated that before 1932, planning control applied to less than one-quarter of England and Wales.¹¹¹ The debates during the course of the Bill to enactment, themselves resonate with concerns which are still problematic; how to, “obtain the greatest possible measure of liberty and facilitation for private enterprise developing by [means] of adjusting the various individual enterprises each in proper relation to its surroundings and

¹⁰⁸ An earlier Bill of the same title had fallen during the session of 1930-1931 but had not contained provision for the use of agreements. The clause was not referred to at the Second Reading and approved without discussion when considered by Standing Committee A of the House of Commons on 3 May 1932.

¹⁰⁹ This is confirmed in the precedent file TNA: HLG 95/52 *Precedent books; precedent cases arising under the TCPA 1932 and various Act in relation to planning questions: A to L Vol. 1*. In the *Eighteenth Annual Report of the Ministry of Health 1936-7*, Cmd. 5516 it is stated that the section was perceived as *an alternative machinery for imposing ...restrictions* (p. 144).

¹¹⁰ Ministry of Health, *Committee Principles to be followed in dealing with unhealthy areas. Second and Final Report*. April 1921, chaired by N. Chamberlain.

¹¹¹ Ministry of Health Advisory Committee on Town and Country Planning (Chairman, Sir John Maude, K.B.K., C.B.). *Preservation of the Countryside*. (1938).

neighbours”.¹¹² At the same time the regulation of land-use planning was still characterised by what could be termed ‘fragmented incrementalism’.¹¹³ A use of agreements accommodated these objectives. Schemes made under the 1932 Act did not necessarily secure orderly and comprehensive development. Land could be allocated for certain purposes by the planning authority and even if the plans were effected, this did not necessarily result in a co-ordination of land use according to regional or national requirements. In essence schemes remained of local significance and furthermore there was no means by which the authority could, without the co-operation of the landowner, ensure that development according to its plans took place. Agreements supplanted the scheme provisions by cementing co-operation between landowner and planning authority.

There was little if any discussion of agreements themselves during the course of the Bill’s progress. Like agreements incorporated into schemes, the section can be read as a technical enforcement mechanism, and as such a provision which deemed enforcement to be effective *as if* the local authority had an interest in adjoining land which benefited from the terms of the restriction. The section’s procedural force was contained within the deeming provisions relating to enforcement. A structure was created which eliminated the impediment regarding the enforcement of covenants at common law, where the local authority held no interest in land that could benefit (the *LCC v. Allen*

¹¹² HC Debs. vol. 261 col. 44, (2 February 1932).

¹¹³ This is confirmed in the Lord Chancellor’s Brief for the Second Reading of the Town and Country Planning (Interim Development) Bill, which notes at para. 2

2....*The present Act – the Town and Country Planning Act, 1932, – is the culminating stage in the development of a system of regulatory planning which began with provisions in the Housing and Town Planning Act, 1909, which were aimed mainly at the control of suburban development. The objects of the*

effect). Section 34 can be read however, as a provision enabling the conclusion of agreements independent of the formality of governmental influence and administrative complexity. This view emphasises a clear route to the formalisation of the parties' negotiations, whilst overcoming the limitations relating to the enforcement of covenants at common law. Neither interpretation is however particularly accurate.

Throughout this time the Ministry were keeping a watchful eye on the use of agreements. At this stage agreements were seen as both an alternative to the complex scheme procedure and as complementary to it. This much is made clear from the Ministry of Health Annual Reports.¹¹⁴ A use of agreements seems to have been encouraged particularly in circumstances related to securing good development, rural planning and preservation (a primary objective of the 1932 Act).¹¹⁵

One of the earliest agreements made under section 34 and recorded by Government, is that relating to the protection of amenities.¹¹⁶ It appears to have been used as a model for others. A series of agreements were used to protect the amenities of the Cambridge area. Steps had been taken by the Preservation Society to preserve others areas in the vicinity.¹¹⁷ The agreements dated 31 December 1932 entered into by the Borough Council with amongst others the landowners and the Cambridge Preservation Society, sought to protect scheduled land and limit the encroachment of the proposed Cambridge

Act of 1932 extend to the control of development and protection of amenities both in town and country.
TNA: LCO2/2658.

¹¹⁴ As in *The Seventeenth Annual Report, 1935-36*. Cmd. 5287 (Oct 1936) p. 108.

¹¹⁵ *The Fifteenth Annual Report of the Ministry of Health, 1933-34*. Cmd. 4664 (July 1934) pp. 191-2.

¹¹⁶ TNA: HLG 4/482 and TNA: 95/52.

¹¹⁷ Ministry of Health *Tenth Annual Report* op. cit. p. 80. No indication of how or if this was achieved is mentioned.

ring road to no nearer than Grantchester. The use of the land was limited to agricultural or recreational uses (playing fields) with any building development being ancillary to those uses. For its part the Council covenanted – the agreement took the form of a deed of covenant, although stated to be made under section 34 – not to plan the ring road within the exclusion boundary, and to secure the objectives of the deed in its negotiations with the Ministry regarding a planning scheme it was proposing. Compensation rights were excluded. The main objective of the Preservation Society was the preservation of the rural character of the land in the area. This is indicated by another deed of covenant entered into between (1) the Cambridge Preservation Society, (2) The Provost and Scholars of the Kings College of our Lady and St. Nicholas and (3) the Mayor, Aldermen and Burgesses of the Borough of Cambridge.¹¹⁸ These agreements sought to regulate both land-use activity and the negotiations of the Borough Council with central government.

Agreements were viewed as particularly suited to secure, “adequate control over the outlying parts of rural areas” and the preservation of public and private open space.¹¹⁹ In the *Seventeenth Annual Report, 1935-36* of the Ministry of Health, it was noted that

“...of the nineteen million odd acres at present under planning, by far the greater number are rural – agricultural, pastoral, down, park, forest and moor – and the question how such land is to be treated within the limits of a statutory scheme, is not altogether an easy one. Where the authority is anxious to preserve a stretch of country in its entirety, and prevent any but agricultural development, the only practicable method is to secure a simple agreement to that effect with the owner, preferably under Section 34 of the Act”.¹²⁰

¹¹⁸ TNA: HLG 4/482 and TNA: 95/52.

¹¹⁹ Cmd. 5287 (Oct 1936) p. 108.

¹²⁰ Ibid., p. 107.

Precedent files show that agreements were used for multiple purposes.¹²¹ These included the preservation of buildings of architectural or historic interest¹²², to preserve protected land¹²³, to control the use of land in circumstances, which could have been dealt with under a scheme but where no resolution to make a scheme had been passed.¹²⁴ They were used to reserve land from development without the payment of compensation¹²⁵, and to allow for the phasing of development.¹²⁶ Agreements complemented Government's preference for negotiated solutions. There were however potential pitfalls and so their use required monitoring. The *Twentieth Annual Report of the Ministry of Health, 1938-39* highlights the attendant risks

“The desire to secure agreement at all costs sometimes lead Authorities astray. In consequence the final document does not always embody a good bargain or may have degenerated into a mere expression of goodwill. Before negotiation ...is begun the Authority should formulate their objectives clearly and should take care that their perspective does not become obscured as the negotiations progress”.¹²⁷

The measures taken to regulate agreements are more clearly seen when considering how the practice developed.

5.4 Agreements inside and outside town planning schemes

After the passing of the 1932 Act, agreements were being entered into both under that legislation and also by virtue of the scheme. Agreements made under section 34 became valid on execution and did not require scheme confirmation to become effective. This

¹²¹ TNA: HLG 95/52.

¹²² Ibid., Richmond 1548/3 1 June 1933.

¹²³ Ibid., as in the case of an agreement between Epsom and the National Trust to override the provisions of the National Trust Act ref. 2078/505R.

¹²⁴ Ibid., Shanklin to preserve the amenities of Shanklin Chine 1599/S742.

¹²⁵ Ibid., Bromley BC 908/501E/6 April 1934, Morecambe and Heysham 1416/501B, January 1936.

¹²⁶ Ibid., Chipping Wycombe 963/3/2.

was a major advantage. Those incorporated into schemes were ostensibly subject to more rigorous oversight. Central officials seem to have preferred the use of agreements annexed to schemes.¹²⁸ It made oversight easier. The Ministry files show that for agreements made under the 1932 Act, “the main object ... is really to provide for special circumstances of a particular case which make some variation of the scheme provisions desirable, which it would be inconvenient to incorporate in the body of the scheme”.¹²⁹ When incorporated into schemes, the agreements derived their enforceability from that instrument. It is possible that the provisions were used as a form of ‘double insurance’ for authorities whereby the confirmation of the agreement via the route of the scheme removed any possible doubt as to its validity.¹³⁰ For landowners, agreements provided insulation against taxation on the land’s building value and thus avoided some death duties.¹³¹

One factor determining whether section 34 could be used related to the land tenure of those entering into the agreement. It was thought by civil servants that section 34 could not be used by tenants for life or those having other forms of limited title to the land. Such a limited construction is not apparent from the Act. It was in the case of larger (and possibly higher profile) estates that limited title in the form of strict settlements were most likely to exist. The scheme procedure ensured that a greater measure of

¹²⁷ Cmd.6089, (August 1939) p.112.

¹²⁸ TNA: HLG 52/592. In the note, “Town and Country Planning Act 1932: Agreements of 1933”, section 34 was said to be, *difficult to apply except where the object of the agreement is an unconditional reservation of land*, and there was concern that *...if agreements under Section 34 prevail over the scheme they might seriously clash with it or at least with the provisions applied by the scheme to comparable land of other owners*.

¹²⁹ Ibid., Pepler to Hill, 27 January 1933.

¹³⁰ Similar to the use of agreements and conditions in later eras.

¹³¹ TNA: HLG 52/592, undated note of G. Pepler, “Town and Country Planning Act, 1932: Agreements”.

control could be achieved. In an agreement covering the North Riding of Yorkshire area, the district council of Masham had relinquished its planning powers to North Riding of Yorkshire to make a scheme, and although the agreement contained a recital of the section 34 powers, it was scheduled in a scheme.¹³² The land was included in the zoning provisions of the scheme, and was to be restricted to use as private open space. The land in question was subject to a strict settlement.

In the event of uncertainty or difficulty, the planning authority turned to the Ministry for definitive advice. The views of the Ministry were not always consistent. An example of this can be found in the general correspondence between the Ministry and Hertfordshire County Council concerning the powers of limited owners (especially tenants for life, under strict settlements) to enter into validly binding agreements under section 34 Town and Country Planning Act 1932.¹³³ The correspondence again usefully compares the *locus* of agreements as part of a scheme or independent to it. The planning authority had obtained Conveyancing Counsel's Opinion (Mr Fores) regarding the capacity of tenants for life to enter into agreements under section 34 of the Act and the validity of the agreements where this had been done. Counsel was of the view that any agreement could only bind the restricted interest and in view of this the authority consulted the Ministry. The precedent files confirm this view in July 1937 regarding an instance in Calne.¹³⁴ Yet central officials assumed a pragmatic viewpoint where it was expedient to do so, to protect existing agreements. Commenting on the meetings central officials note

¹³² Made between the County Council of the Administrative of the North Riding of Yorkshire (1) the Right Hon Viscountess of Swinton (Mary Constance Cunliffe-Lister) (2), Geoffrey Moseley and Thomas Frazer (3), and Robert Imeson (4), dated 30 December 1938, and TNA: HLG 4/71B.

¹³³ TNA: HLG 52/593 *Powers of life tenants* (1936-7).

“...As a result of the discussion Mr Fores was induced to change his view to the extent that he thought he would be able to advise that in view of the facts (1) that the Minister had, ... put some provision in his Model Clauses and (2) that even if the provision was irregular, it would be validated within six weeks of coming into operation in the Scheme”

Earlier in the same note it is said

“...it seemed to us that we must defend out [our] action in this respect, especially since the provision was considered to be of such importance by the local authority”¹³⁵

The concerns of the Clerk to the County Council were such that he was able to impress upon civil servants that

“... it was essential from his [Mr Longmore’s] point of view that the owners of property in Herts. should not gain the impression that the agreements which they had entered into were ultra vires, and that he hoped to persuade Mr Fores that there was no clear illegality in the model clause provision.”¹³⁶

It is difficult to establish any consistent trend in the use of agreements inside and outside schemes. In both instances agreements were used to secure open space provision, to preserve buildings of architectural or historical interest and to exclude land from an operative scheme. An agreement was used to plan a whole estate including the location of agricultural land, village green and public open spaces.¹³⁷ Some local authorities, like Banstead UDC used both the powers under section 34 and the existing scheme provisions.¹³⁸ The Council seems to have used agreements widely. Between 1934 and

¹³⁴ TNA: HLG 95/52.

¹³⁵ Ibid., 6 May 1937.

¹³⁶ Ibid., 15 March 1937.

¹³⁷ TNA: HLG 52/592 includes a note from Prof. Abercrombie on, “planning by agreement”, the location of the estate is not specified.

¹³⁸ These agreements were recorded by the Ministry and are now contained in TNA: HLG 4/146 *Banstead UD 807A* (1934-38).

1938 sixteen agreements were entered into and subsequently sent to the Ministry for record. Not all were entered into pursuant to the section 34 provisions – some appear to have formed part of the relevant schemes. Seven of the sixteen noted made reference to section 34. Taking Banstead Urban District Council as a model, it is possible to consider both procedures. An agreement dated 4 March 1938 and made between the Urban District Council and the National Provincial Bank, provided for the rezoning of land aside from those uses specifically zoned in a previous scheme. The Bank was to develop land for the erection of a hospital with ancillary residential and other buildings as part of the Banstead Wood Estate. The Bank was required also as part of the agreement at clause 2 to comply with all byelaws, Local Acts, orders and regulations in force in the District as well as general statutory provisions. At clause 1, consent was given for the proposed development. The provisions included the dedication of additional land for use as a public highway. The Bank was not responsible however for its making up, improvement or maintenance (clause 4). The provisions of the agreement were said to be *...subject to the approval of the Minister of Health so far as the same is or may be necessary* (clause 6). Here the agreement formed part of a scheme and as such the latter was subject to separate approval provisions and thus a further form of oversight. The Second Schedule to the agreement contained restrictions as to the density and use of buildings on the site (with the occupation of those dwellings to be restricted employees of the hospital). Covenants were imposed relating to the location and of the dwellings, access to the highway and the preservation of trees. The agreement repeated the scheme provisions, covering substantial details of the development, as opposed to being a skeletal form of covenant. Woodland on the site was to be preserved, and

private open space provided. No dwellings were to be visible from the existing open space of Park Downs. All of these requirements were framed in terms of the protection of neighbourhood amenities and the preservation of woodlands in the area. Another agreement¹³⁹ made no reference to section 34. It was scheduled as part of a scheme. It did provide for the laying out of an estate, including the provision of dwellings, shops and business premises.

In contrast the Council entered into an agreement with the developer Costain Homes Ltd, under section 34.¹⁴⁰ This provided for the development of what became known as the Kingswood Warren Estate. The original agreement specified the frontage depths to the dwellings, their density (including their height and the space between them), layout, zoning and building lines. The original agreement provided that the specifications for frontage depths could be relaxed if development sales were not proceeding well (with the Council's consent).¹⁴¹ A subsequent and supplemental agreement altered these specifications and the density restrictions for dwellings. The agreement replicated those provisions that could be contained in a scheme.

Where agreements were an integral part of the scheme they often provided for the continuation of uses incompatible with schemes (and as such were often scheduled in them). An example of this can be found in the case of Samford Joint Planning Committee. The East Suffolk (Samford) Planning Scheme 1937, made by the Samford

¹³⁹ Dated 20 December 1937 *re* Drift Bridge Estate between UDC of Banstead (1) and the Downs Estate Ltd (2).

¹⁴⁰ Dated 6 January 1934.

¹⁴¹ *Ibid.*, at Schedule 2 (d).

Joint Planning Committee (East Suffolk), referred at clause 63 to a number of agreements in its Fifth Schedule.¹⁴² In one, the agreement provided for the continued use of premises as a public house within the district, permitting its alteration provided that the premises remained licensed under the Licensing laws.¹⁴³ This agreement was executed to overcome the scheme objections of Ind Coope and Allsop Ltd. (the brewers). Again the restriction was to be enforceable without the payment of compensation to the landowner. Another agreement facilitated the zoning of land as private open space and restricted development until the scheme came into operation on being approved by the Minister.¹⁴⁴ By another agreement dated 16 October 1937¹⁴⁵, the use of land was restricted to that of private open space notwithstanding that it had been zoned in the Scheme as residential. Effectively the agreement was being used to 'buy time' to facilitate future land assembly. Agreements were used also to phase the release of land for development purposes.¹⁴⁶ Often the underlying basis was to secure co-operation and avoid the risk of payment of compensation by the planning authority where land was restricted by agreement to a specified use.

Authorities' dependency on Government in the exercise of their planning powers continued. They looked to Government for advice and it appears that the latter were not

¹⁴² TNA: HLG 4/3548 *Samford Joint Planning Committee (JPC)* (1937-40), which became operative on 6 October 1940.

¹⁴³ Made between Samford RDC (1) and The Colchester Brewery Co Ltd (2) 26 November 1937.

¹⁴⁴ Samford RDC (1) and I.F.L. Elliott and G.C. Fison (2) and L.M. Fison (3), 18 August 1937.

¹⁴⁵ Relating to land and the development of two cottages at the Flatford Mill Estate, between Samford Rural District Council (1) and Thomas R. Parkington (2).

¹⁴⁶ As in the Samford RDC (1) and The Chancellors Masters and Scholars of the University of Oxford (2) agreement dated 19 February 1939. This related to land at Woolverstone, Chelmondiston and Shotley. The area in question covered 436.326 acres (in Schedule 1, Part I) and in Part II areas in Chelmondiston, Woolverstone, Freston and Holbrook (366.707 acres) and in Part III 12.182 acres. The land was either

reluctant to provide it. Central officials had been in the process of compiling precedent books on planning questions from the early 1930's until 1943.¹⁴⁷ Although the precedents list many different issues raised by local authorities, they highlight the systematic attempts to compile a picture of what were considered to be significant agreements by civil servants at the time. The agreements selected were listed according to subject matter, date and authority (where relevant), with a brief explanation of the decision, and where appropriate cross-referenced according to the scheme files. Many of the precedents relate to the status of agreements made under section 34 in relation to schemes. It is clear that, for the Ministry, agreements when made under section 34 had to be consistent with the scheme's provisions (this is not explicit from the Act) but could relate to land subject to it.¹⁴⁸ The scheduling of an agreement within a scheme was said to allow, "the agreement to operate notwithstanding provisions of the scheme which may be inconsistent and to validate it".¹⁴⁹

The precedents illustrate the extent of Ministry input even when no formalised oversight mechanism existed. They also illustrate how active civil servants in the Ministry were. One example concerns a use of an agreement in connection with an appeal. In that case the Council was willing to enter into a section 34 agreement, but the would-be developer appealed to the Minister of Health against the authority's refusal of permission under an Interim Development Order.¹⁵⁰ The Ministry deferred consideration of the appeal to

zoned as excluded from the carrying out of building operations or as a residential zone for a time limited period.

¹⁴⁷ TNA: HLG 95/52 refers. The precedent book contains some 58 cases.

¹⁴⁸ TNA: HLG 95/52, Couldson and Purley, March 1933.

¹⁴⁹ TNA: HLG 95/52, Hendon R.D., March 1934.

¹⁵⁰ TNA: HLG 95/52, Chailey R.D.C., September 1942.

allow negotiations to proceed. The appellants, “re-opened the appeal because of the delay by the Council in completing the agreement”.¹⁵¹ As a result the Ministry held a local inquiry dismissing the appeal.

Rather than devise formal model clauses, as occurred with schemes¹⁵², officials seemed to prefer building a store of knowledge on an *ad hoc* basis, a strategy mirroring the individuated form of the practice itself. Civil servants were not averse however to disseminating drafts that they received. Commenting on a draft prepared by Counsel¹⁵³, officials commented

“I know several landowners who would be glad to enter into agreements and it would be a great thing to get a common form and to save individual owners’ expense”¹⁵⁴

Central officials appeared to take seriously their role in protecting landowners from, ‘bad bargains’ with authorities, hence the reason for their interest in establishing the extent of the practice. The same file records, “the real safeguard for owners for an equitable deal is, I think the control of the Minister of Health or Parliament”.¹⁵⁵ To this end by November 1933, civil servants wanted to know more about agreements made under section 34. The fact finding was undertaken covertly as a note in the same file indicates

¹⁵¹ Ibid.

¹⁵² The Ministry of Health issued a series of *Model Clauses for use in the preparation of schemes* which, it would seem, were largely prescriptive and regularly updated. Illustrations of these can be found in the Model Clauses and explanatory notes of June 1926, July and September 1928, January 1935 and 1938.

¹⁵³ Randolph Glen Honorary legal adviser to the CPRE.

¹⁵⁴ TNA: HLG 52/592, 1934–8 (Pepler to Hill, 14 January 1933).

¹⁵⁵ Ibid.

“I do not want any special enquiries made, but particulars can be obtained, incidentally, when officials are seen at the Ministry or when inspectors visit places.”¹⁵⁶

The files give a general indication of how the statutory provisions were constructed and framed by official thinking. By late 1933, agreements were viewed as the preferred way to secure land-use restrictions and in particular the prevention of building. Over time the Ministry began to exercise clear oversight by giving ‘authoritative’ advice as to the lawfulness or otherwise of local authority proposals, even in the absence of any statutory requirement to obtain ministerial consent. Civil servants made systematic efforts to co-ordinate and control the use of agreements through the use of precedents. Officials checked agreements during the course of considering draft schemes, and sometimes as a consequence they were revised or rejected. Although the agreement detailed below, being a part of a scheme, had to satisfy the procedural standards set for the approval of schemes, the extent of central intervention becomes clear. There the Ministry identified certain drafting errors including an inappropriate and convoluted clause about compensation. The Clerk to the council wrote to the Ministry on 8 March 1938, “...I have amended the draft to remove the inconsistency and I am much obliged to you for drawing my attention to it”.¹⁵⁷ Meetings continued to be held between civil servants’, local authority representatives and landowners. Landowners appeared willing to enter into agreements as a ‘trade-off’ for future development certainty, especially with the assistance of professional assistance. Professor Abercrombie, town planning expert and

¹⁵⁶ Ibid.

¹⁵⁷ 18 August 1937, made between Samford RDC (1) Ian Frederick Lettersom Elliot and Guy Claverling Fison (2) and Mrs Lucy Maud Fison (3), in respect of 138.462 acres in the parish of Stutton TNA: HLG 4/3548.

leading exponent of the discipline, figures in some of the negotiations with Ministry civil servants, and especially large-scale high profile negotiations on agreements.¹⁵⁸

By monitoring agreements central officials seem to have effectively controlled not only landowner development but relations *inter se* between branches of Government, and local government actors and even specialists including Counsel. The centripetal pull of Government's non-legal actors appears to prevail, overriding the knowledge of others. This is something to which the planning authority becomes complicit through its own dependency on the Centre.¹⁵⁹ Whilst reliance is placed on the democratic process to protect the landowner, (especially where agreements are used in tandem with schemes), the Ministry evolves supportive stratagems to protect local authorities provided that they fulfil Government's own objectives. By defining the limits of the practice, the Ministry lays the foundation for further intervention, which is formalised by the 1943 legislation. For the pre-modern era, local authorities with the assistance of the Ministry, achieve their goals and targets, partly because these converge with central ideals and in this embryonic phase no other regulatory solution to land-use planning problems exists.

¹⁵⁸ Including the subsequent Cliveden agreements of 4 December 1933, and the land at Dunham Park and Dunham New Park in Cheshire, (owned by Lord Stamford). TNA: HLG 52/592 – 1934-8.

¹⁵⁹ Another example of this is contained in TNA: HLG 52/592 – 1934-8. Here, commenting on another agreement in a memorandum, civil servants note, *The first is an amateur production which gives rise to all kinds of difficulties. Most of it appeared in a draft agreement between Eastbourne RDC and the Eastbourne Waterworks Company sent to us by the Treasury Solicitor. We persuaded the latter to abandon the draft and accept an alternative form.* (Hill to Gibbon, 23 November 1933).

6. Conclusion

Over time, the Ministry monitored more closely a use of agreements, constructing the boundaries of possibility for action by others. Essentially, officials defined the parameters and legal effects of the instrument, thus establishing the trend for further centralising tactics. After 1940, agreements excluding land from an area covered by a resolution were stated to be unlawful and it would seem that a *de facto* consent system was being operated.¹⁶⁰ By 1942 officers at the Ministry were systematically viewing draft agreements, and the use of the tool was in turn being tied ever more closely to the planning scheme.¹⁶¹ The practice of using agreements where the objective could be achieved through the use of a scheme was discouraged.¹⁶²

Industrialisation and its consequences functioned as a catalyst for the development of a planning system that was state sponsored and provided a pivotal role for the administration. Organisationally, the result was to diminish a reliance on common law principles, and enable government intervention (whether central or local) through the use of an array of policy and legal mechanisms. In this chapter I have shown how a use of agreements illustrates the transition from a reliance on private law to public principle in regulating land use. This did not occur overnight but incrementally with central officials being key actors in expanding the role of Government. The practices emerging in this pre-modern era laid the foundations for legislative changes that encompassed

¹⁶⁰ TNA: HLG 95/52. In contrast to views concerning an agreement made by Bromley (1934), by 1940 the opinion of the Ministry on an agreement in Oxford (91621/1/1, February 1940) indicates that approval would not be given to such a proposal even though formal consent was not required.

¹⁶¹ TNA: HLG 95/52.

¹⁶² Ibid., By 1942 advice was given that agreements were to be considered ...*in cases only where their object cannot be readily served by the planning scheme* (Berkhamsted and Tring 91601/223/501B).

greater centralisation and the formalisation of existing regulatory controls. The war years were to mark a more general trend towards centralisation and the planning regime was no exception. A comprehensive review of the town and country planning system would be undertaken, which would further impact on the use of agreements. This is the theme of Chapter 4.

Chapter 4. The modern era (1943-1966): forms of control by the Centre

“The Minister wishes to make it clear that these increased powers will be used, not to hamper the freedom and initiative of Local Planning Authorities, but to ensure first, that suitable provision for matters of national importance is made in local schemes.”¹

1. Introduction

In the previous chapter, I outlined the origins of agreements as regulatory instruments. By the modern era agreements were situated firmly within the public (and statutory) domain. The Town and Country Planning Act 1932 had given statutory recognition of the tool, independent of the scheme and the practice had begun already to attract the attention of central officials. In the pre-modern era agreements had been an important component of land-use regulation, in the absence of comprehensive controls. With the move towards creating a complete regulatory system, the earlier informal oversight strategies adopted by civil servants were codified by statute, to ensure that the practice met with national objectives. In this chapter, I explain how far the process of formalisation reshaped agreements, making them part of the emerging comprehensive statutory system by aligning them to the instrumental designs of Government. The results challenge assumptions that, after the creation of a comprehensive system, a use of agreements would perish and cease to have any significance.² Instead what occurred would place the practice under further scrutiny.

¹ TNA: HLG 71/267, *Comments on the Town and Country Planning Act 1932 and the Town and Country Planning (Interim Development) Act 1943* (1942-7). Draft circular on the 1932 and 1943 Acts, 27 June 1943, para. 6.

Regulatory planning, a term used by Government in its earlier policy documents suggested limited, if incremental regulation that was modest in its ambitions.³ It showed the Centre's limited capacity to constrain or proscribe land-use activity. This was to change with the extension of centralised control and the consequent integration of local practices into regional and national aims as part of Government's project of planning society. Local activity could not be allowed to impede Government's objective of extending planning control throughout the whole of England and Wales, as is evident from the comments of civil servants at the Ministry of Town and Country Planning quoted in the chapter's epigraph. The statement is taken from a draft circular on the Town and Country Planning (Interim Development) Act, 1943.⁴ Although these comments were removed from the final version⁵ they emphasised the Ministry's view that local planning authorities had to ensure, "that a proper balance is maintained between local and national needs".⁶ Land-use controls had 'gone national' and with the "process of co-ordination and direction"⁷ came increased Ministerial powers to ensure that issues of national importance were not prejudiced. This influenced how agreements were regulated. In this chapter, I track Government's co-option and consolidation of the earlier informal and largely fragmented mechanisms devised by its officials to regulate agreements, through the operation of a statutory consent mechanism.

² Wood, W., *Planning and the Law: A Guide to the Town and Country Planning Act 1947*. Percival Marshall & Co.: London, 1949.

³ TNA: LCO 2/2658, "Brief for Second Reading (Lords) of the Town and Country Planning (Interim Development) Bill".

⁴ TNA: HLG 71/267 op. cit., forming part of the draft Circular at Memorandum A.

⁵ The final version became Circular 2. The comments were removed because they, "[said] too much about regional and national interests when we are not in a position to... to give any real guidance on these matters". TNA: HLG 71/267 Note to Parliamentary Secretary 16 July 1943.

⁶ TNA: HLG 71/267 op. cit., paragraph 5 of the draft Circular.

⁷ TNA: LCO 2/2658 *supra*.

2. The centripetal pull of planning

The incapacity (and possibly absence of will) of Government to manage actively land use, and its reliance upon the market as a means of efficient allocation, gave landowners a key role in facilitating and securing (often in consort with the local authority) efficient and effective land-use solutions. The pre-modern era showed this well. Planning as a discipline was still in an embryonic phase, and there remained continuing uncertainty about how best to balance the interests of both the individual and community in respect of land. The war had been the catalyst for an emergent trend of central planning. During the 1920's and 1930's central planning was beginning to be seen as a solution to the nation's economic problems. The demands for the Centre to assume responsibility became stronger with the advent of World War II, and with its devastating effects, these grew.⁸ Government, of necessity had assumed a strong role in organising the nation's defence. Reconstruction was itself a 'formidable task' and fears of a brief post-war boom, leading to economic depression and deflation prompted further central control.⁹ The election of Clement Attlee's Labour Government after 10 years of coalition, with its commitment to plan, "from the ground up" through the mechanism of a National Plan, resulted in the first sustained attempt at economic planning in 1947.¹⁰ Central planning was seen as the means to achieve economic prosperity, the physical reconstruction of a realm devastated by war and to satisfy of the newly incumbent socialist Government. Whilst central economic planning was not achievable, other more modest forms of

⁸ Alford, B., W., E., Lowe, R., and Rollings, N., *Economic Planning, 1943-1951: A Guide to Documents at the Public Record Office*. London: HMSO 1992, pp. 1-2.

⁹ *Ibid.*, p. 2.

¹⁰ The Labour Party Manifesto, *Let us Face the Future* (1945).

centralised control including the creation of the Welfare State were.¹¹ Centralisation became *the* means to promote and co-ordinate the delivery of public goods, economic growth and stability. It was to apply to healthcare, education, transport to social security, and of course the control of land use, which was required to be, “...in close accord with the general economic and social programme”.¹² In the case of the latter, the preparations for further centralisation had begun with the coalition Government before the end of the war.¹³

During the early 1940's Government used town and country planning as one route to address and eradicate the unacceptable and aesthetically displeasing consequences of war and urbanisation. A greater interdependence existed between the nation and its subjects. Government, in order to carry out its radical reforming programmes, was reliant upon business to secure adequate economic growth. Industry as the motor for progress, was a necessary evil that had to be managed. With the advent of improved communication systems, the urban and rural areas became more closely linked. Planning was no longer conceived in the limited terms of the earlier urban/rural dichotomy. Its ambit was extended to the provision of housing, open spaces and green belts, the overhaul of transport and utility services. What was being constructed is in fact a picture of recurring themes linking co-ordination, planning, and environmental concerns that underpin the management of uncertainty in the modern age. This

¹¹ The idea of central planning is inextricably linked to the emergence of the welfare state, which as identified by Cox, R., H., in, “The Consequences of Welfare Reform: How Conceptions of Social Rights are Changing” (1998) 27 *Journal of Social Politics* 1-16 at pp. 3-5 is premised upon an assumption of central planning and co-ordination, and the general progress of humanity.

¹² HL Debs vol. 125 col. 328, (1 December 1942), Lord Portal (Minister of Works and Planning).

¹³ The coalition Government of 1935 had its mandate extended throughout the period of World War II.

integrated approach is shown by the reports commissioned by Government pre- and post-war. During that period, Government commissioned four major reports to investigate how land-use planning could be transformed from a fragmented local system to a comprehensive one.¹⁴ Between 1941 and 1943, Government had made no fewer than 13 official statements in parliament on planning legislation, and the race was on to strengthen land-use planning controls.¹⁵ The solution identified was that of Government's direct intervention, framed in terms of central planning and co-ordination.¹⁶ In advocating a centralised system post World War II, Government conceptualised planning as requiring internal consistency, to be determined at its direction and sought as a consequence to devise a comprehensive system for framing, guiding and harmonising land-use activity.¹⁷ This centripetal pull would be achieved through legislation and the manipulation of existing informal practices. The latter would be integrated into national objectives, often via statute but also through honing current techniques. For agreements, the strategies of monitoring (through checking) and the

¹⁴ The Barlow Commission appointed in 1937 and which reported in 1941, the Scott Report (1942) and the Uthwatt Committee Reports (Interim and Final) of 1941 and 1942, the Reith Report on New Towns and a number of departmental reports e.g. *The Control of Land Use* Cmd. 6537 1944. During the eight year period from 1943 five major statutes were enacted; the Town and Country Planning (Interim Development) Act 1943, the Town and Country Planning Act 1944 (covering war damage), the New Towns Act 1946 for the creation of New Towns, the Town and Country Planning Act 1947 and the National Parks and Access to Countryside Act 1949.

¹⁵ Schedule to a Cabinet briefing note of 1943, TNA: LCO 2/2658.

¹⁶ As the *Uthwatt Report* Cmd. 6386 (1942) notes at para. 11, *[these] ...problems lie purely in the economic sphere, but the economic and physical aspects are closely related and, in so far as the various requirements of economic reconstruction will involve the use of land, it is part of our duty to ensure that our recommendations provide a suitable basis for whatever policy may be adopted so that it may be freed from any elements which might "hamper, prejudice or delay" its effective execution.* Similar concerns were expressed in *Progress Report of the Minister of Local Government and Planning on the Work of the Ministry of Town and Country Planning – Town and Country Planning 1943-51*, Ministry of Town and Country Planning Cmd. 8204 (April 1951).

¹⁷ The foreword to Cmd. 6537 (*The Control of Land Use*) notes the importance of harmonising land-uses. The 1947 Act was seen to have provided, *a complete system of control over new development in England and Wales.* (The Minister for Housing and Local Government, Mr Anthony Greenwood, when introducing the Second Reading of the Town and Country Planning Bill 1968, on 31 January 1968, HC Debs vol. 757 col.1361, (31 January 1968)).

dissemination of precedents were given statutory force through the mechanism of Ministerial consent that permitted the Centre to draw the use of negotiated solutions away from the local domain. Agreements no longer represented a local solution to local problems achievable through the *animus* of the parties. Instead the practice was becoming more a tool of Government policy.

Whilst land-use had been subjected to public controls since the turn of the twentieth century, there were a number of problems associated with the emerging system. By 1943 there were still only 27 million acres of land in England and Wales (out of a possible 37 million) subject to either an approved scheme or a resolution to make one.¹⁸ Progress had been slow not least because of the War.¹⁹ The local (and incremental) nature of planning schemes led to a fragmented response by local authorities. Often authorities did not heed the problems extending beyond their boundaries. Schemes had territorial and spatial limitations (unless authorities planned jointly, and many did not) that led to greater fragmentation and inefficacy.²⁰ These defects were to be remedied through the adoption of cohesive national planning policies, in effect a process of harmonisation.

In future planning agreements were to be controlled more tightly so that the practice accorded to national objectives. This was done by imposing a requirement of Ministerial consent before the agreement could take effect. The Town and Country

¹⁸ TNA: LCO 2/2658.

¹⁹ By 1942 73% of England and 36% Wales were covered by interim development control but only 5% and 1% respectively subject to operative schemes as noted at p. 4 Cmd. 8204.

²⁰ The *Control of Land Use* op. cit., highlights at para. 4 the problems inherent with local authorities thinking locally and not beyond the extent of their own boundaries.

Planning (Interim Development) Act 1943 institutionalised and formalised the existing practice of monitoring dating from before 1932. The gravitational pull of the Centre made agreements more susceptible to public and particularly Government scrutiny and reconfigured the relevant regulatory space. Agreements became an integral but ancillary part of the planning system, rather than a significant but independent mechanism for delivering planning solutions in substitution for the cumbersome and tortuous route of the planning scheme. The idea of regulatory planning was receding rapidly. Agreements (previously a key concept in that approach) were subsumed within a more comprehensive and centrally controlled planning schema, which would be centred on the development plan. The centripetal pull of Government shaped broadly the regulation of land-use activities and had a profound impact upon the use and regulation of agreements. The changes had also an effect on other actors who participated within the regulatory space, especially local authorities.

2.1 The drive toward centralisation

By the 1940's planning was no longer viewed as a local initiative. The fragmented application of the planning provisions was thought to perpetuate an inefficient use of land. One of the main objectives of centralisation was therefore to ensure "consistency and continuity in the framing and execution of a national policy with respect to the use and development of land throughout England and Wales".²¹ This was very different from the views of particular actors, especially Parliament. Parliamentary debates illustrate however a number of divergent conceptions of the planning system. These fell into three categories. Some saw planning as, "a redistribution as the result of State

action, of the values of land in different parts of the country”.²² For the majority, it was viewed as a protection of the countryside from ‘spoilation’ and a requirement that land, “be put to the best use in the public interest”²³, as the means to secure the efficient use of resources in towns and cities, the protection of the nation’s workforce and a way to secure effective post-war reconstruction. It was also perceived as, “the actual coercion of the use of private property in land...[where] private property is the essence of a free people”.²⁴ These differences perhaps foretell the difficulties that were to arise in the future.

Government saw planning as a means to raise living standards. Its main objectives were to secure an efficient and effective post-war reconstruction, and a proper basis for modernisation by ensuring that all future land-use was planned in a positive way so as to achieve this aim.²⁵ Because of the scant information available to it, Government set about gathering and collating information, establishing a section responsible for planning maps, developing planning techniques and in conjunction with independent agencies (such as universities) cataloguing information on planning subjects through the compilation of a national bibliography.²⁶ From this period (from Government’s perspective at least) planning was no longer, “a local affair negotiated to a great extent

²¹ One of the statutory duties imposed upon the Minister of Town and Country Planning when the Ministry was established in 1943, section 1 The Minister of Town Planning Act 1943.

²² HC Debs vol. 389 col. 534, (11 May 1943), Mr Mander (Wolverhampton, East), during the discussion of the Interim Development Bill.

²³ W.S. Morrison, Minister of Town and Country Planning, when introducing the Second Reading of the Interim Bill in the House of Commons, HC Debs vol. 389 col. 501, (11 May 1943).

²⁴ Sir F. Freemantle (St. Albans) HC Debs vol.389 col. 528, (11 May 1943).

²⁵ As the Uthwatt Report noted reconstruction was viewed as part of the larger modernisation project whereby badly planned areas could be rebuilt, thus providing for improvements in the facilities available for the health and recreation of the inhabitants whilst also counterbalancing the predominant motive of *unrestrained profit* (para. 11, Final Report).

between the local authority and the property owners concerned”.²⁷ Instead the balance moved further to the Centre, a trend initiated informally during the pre-modern era, through the provision of guidance by civil servants to authorities. Local authorities’ were to operate as an agent of Government’s will. The problems of agency would resurface, however, on many occasions during both the modern era and subsequent ones.

Central control and oversight became the defining indicators of the new planning system established by Government. The separate reports of the Barlow Commission²⁸ and Scott Committee²⁹, relating to the impact of industrialisation and the use of rural land respectively, were premised upon the existence of a central planning authority and accordingly recommended a shift towards a more centralised planning system. These reports in addition to that of the Reith Committee on New Towns³⁰, reinforced the earlier ideal of social progress through housing and town planning, where regulation would reduce urban overcrowding and improve living conditions.³¹ The objective of managing life through the orderly planning of the surroundings resonated with the planning agenda set by the Garden Cities movement. Both improved housing conditions and the protection of agricultural land would be achieved, it was thought, through proper

²⁶ TNA: LCO 2/2658, para. 8.

²⁷ Uthwatt (1942) para. 34.

²⁸ *The Royal Commission on the Distribution of the Industrial Population*, Cmd. 6153, (January 1940).

²⁹ *The Committee on Land Utilisation in Rural Areas*, Cmd. 6378, (August 1942).

³⁰ Cmd. 6876 (July 1946).

³¹ As the President of the Local Government Board of Trade (Mr John Burns) had stated much earlier in 1908 *slowly but surely town planning schemes have evolved and regulation has taken the place of squalor, chaos and hideousness* HC Debs vol. 188 col. 959 (12 May 1908), [(Authorised Edition), Fourth Series]. By 1909 town planning was seen as a *new departure in the legislation of this country* [where] *communities [are given] the opportunity of consciously shaping their own development in a better way*. HC Debs vol. III col. 736, (5 April 1909).

land-use planning.³² Yet unlike the vision of E. Howard and his followers, that envisaged improved living standards through self-help, these objectives, from Government's perspective could only be secured through systematic central direction and co-ordination. Only Government could cohere the fragmented activity of individual local authorities, some of which were less inclined to plan than others, as was shown by the sporadic adoption of schemes throughout the country.

By using centralising tactics to direct and secure efficient post-war reconstruction, Government had additionally the goal of ensuring that speculative land dealings were minimised with land being made available for those uses considered to be in the public interest. This form of intervention affected land values. By controlling land uses, land values would reflect the pattern of development allocated through planning policies. The traditional role of markets in the efficient allocation of land uses would diminish. Through its intervention in the land market, Government would assume also some responsibility for compensating landowners where uses were curtailed. The control of land values would be one way for the Centre to influence land use and development. Centralisation in this context implied not simply controlling land-use development activity, but the capacity to regulate property values and land-use availability. To do this Government had to become either a major landowner or acquire the means to regulate the property market. Whilst complete nationalisation was never an option, Government adopted a less direct strategy linking development and land values. Debates surrounding compensation and betterment show some of the difficulties in

³² The Scott Report concluded that proper policies needed to be established to prevent urban sprawl and protect the rural areas, one of which would be the existence of a presumption against the development of

constructing a managed planning system sufficiently responsive to economic and broadly social trends. Planning was not viewed simply as a means to secure the efficient allocation of land use resources, in an aesthetically pleasing way. It was through planning that the predicament of the redistribution of enhanced land values also the product of the system would be resolved. The linking of land-use controls with compensation issues would be another theme shaping the role of agreements within the planning system.

2.2 The compensation debate

As commentators note, land values tend to reflect the broad development plan policies denoting acceptable uses.³³ Intervention refines questions of social costs, with the regulation of land use working against expectations that the market will efficiently allocate land to its most productive use. This raises policy questions of how (or indeed if) landowners should be compensated for changes in their expectations arising from land-use regulation. There is also the issue of how far the state should be able to recoup the costs of undertaking public works or for its general role in generating economic growth (both of which are known as betterment).³⁴ The nexus between planning and land values is not straightforward, as the Barlow Commission had observed as early as 1939.³⁵ Before 1947 planning authorities were responsible for paying compensation (to the extent of the development value) in the event of a refusal of permission to develop,

agricultural land unless the national interest required this (paras. 232-3).

³³ Hall (1965) p.x.

³⁴ The concept is premised upon the idea that development value created by the community should be returned to it. Lloyd George's Budget debate of 1909 referred to the dilemma that, *instead of reaping the benefit of common endeavour of its citizens, the community has always to pay a heavy penalty to its ground landlords for putting up the value of their land*. HC Debs vol. IV col. 532, (29 April 1909).

³⁵ Neuburger H., L., I., and Nichol, B., M., note this much later in *The Recent Course of Land and Property Prices and the Factors underlying it*. DoE Research Report 4 (1976), p. 42 para. 82.

or where property was injuriously affected by a scheme. The cases in which compensation was recoverable became less well defined. Betterment was in principle recoverable by the authority for increases in value attributable to the making of a scheme, and under the 1932 Act the amount an authority could claim was increased from 50% to 75%. In practice the collection of betterment was difficult and local authorities could be liable for extensive compensation if they attempted to plan by restricting development. The cost of putting development land into the Green Belt or reserving land as open space was very high and had to be balanced with the perceived insatiable demand for housing.³⁶ As the planning authority made higher compensation payments, the more valuable development land became. Development value shifted with demand; where land was refused planning permission, the value of development land rose elsewhere. This became known as the problem of 'shifting value'. Theoretically local authorities could recoup betterment by arguing that the reason for increases in land values derived from its promotion of a scheme, with the owner of the land being developed benefiting at the public's expense. This was difficult for authorities and in practice could rarely be done.³⁷ Valuation was also complex. This was the basis upon which the Uthwatt Committee considered the problem of compensation.³⁸

The existence of a comprehensive planning system has the potential to diminish the value of some land and displace this to other areas. This is particularly so where a

³⁶ Parker, H., R., 'The History of Compensation and Betterment since 1900', in Hall (ed.), (1965), at p. 60 notes that *local authorities scheduled enough land for development to accommodate something like 290 million people against an actual population of forty million.*

³⁷ Parker op. cit., pp. 53-72, provides a detailed history of the period from the compensation and betterment perspective. Wood (1949) confirms this.

³⁸ *Expert Committee on Compensation and Betterment* – Interim Report Cmd. 6291, (July 1941) and Final Report Cmd. 6386 (September 1942).

development plan system operates to designate certain areas as ripe for development to the detriment of others. The proposed comprehensive system (which was adopted *post-1947*), imposing a requirement for planning permission for most development proposals, had a potentially detrimental effect for landowners whose land could have been developed previously without permission, but now required consent. It had also the effect of enhancing land values in areas designated as ripe for development. The Uthwatt Report noted that the progress of development planning had been hindered by existing compensation schemes, and as part of its remit investigated this aspect. The second aspect centred upon the recovery of betterment relating to the public control of land use. The difficulty that remained was that the planning system envisaged attempted to adopt an approach of minimal intervention as far as compensation was concerned.³⁹

The advent of war exacerbated speculative land dealings, which in turn could detrimentally effect post-war reconstruction. The Uthwatt Committee had among its terms of reference the question of how to (a) stabilise the value of land required for development or redevelopment, and (b) any extension or modification of powers to enable such land to be acquired by the public on an equitable basis.⁴⁰ To do so the Committee was required to examine the merits and demerits of various options, including the unification by pooling schemes of existing use rights (effectively nationalisation) so as to enable any shift in values to operate within the same

³⁹ McAuslan (1975) indicates, *...a system of land-use planning that tries to live with and leave as untouched as possible a free market for land is almost inevitably forced into accepting only a residual role for positive planning conducted on terms largely dictated by private enterprise; compulsory purchase for planning purposes is the exception rather the rule ...* (p. 603). This approach may explain in part why agreement has remained relevant as a regulatory tool.

⁴⁰ Cmd. 6386 op. cit., para. 1.

ownership.⁴¹ The principle upon which the earlier legislation operated had been one of balancing gains and losses in development value, so that charges of betterment levy equalled compensation payments. According to Uthwatt, this was not feasible, with compensation claims exceeding the development values.⁴² The Committee was required in its terms of reference to advise on the necessary alterations to the existing law to implement its recommendations. One of the Committee's interim recommendations was to ensure that for compensation purposes land values should not exceed those set at 31 March 1939.⁴³ Both the Interim and Final reports were premised upon the principle of national planning policies being executed by a national planning authority.⁴⁴ A fragmented planning system could inhibit certainty by hindering post-war reconstruction and potentially increasing the cost to the public purse should land prices become inflated. Under the local scheme, landowners could rebuild with impunity buildings that had been destroyed and could carry out inconsistent development even where the local authority had passed a resolution to make a scheme. In each case, steps taken by the authority to prevent the carrying out of development carried with them a right to compensation. Furthermore a lack of procedural uniformity meant that land-use control powers could be exercised under bye-laws, the Town Planning legislation or the Minister of Works and Buildings and some government departments under the emergency powers of Defence Regulations. It was only in the latter case that the rights of the private landowner were subordinated expressly to the national interest.

⁴¹ Otherwise one authority might find itself responsible for paying compensation and another recouping betterment.

⁴² *Expert Committee on Compensation and Betterment: Final Report* Cmd. 6386, op. cit. para. 38, p. 23.

⁴³ *Interim Report* Cmd. 6291 op. cit., para. 7.

⁴⁴ In the Committee's view *neither ...patchwork amendments of the existing code of law [nor]...piecemeal adaptation of the existing procedure* could achieve the desired solution. Consequently *...a fundamentally*

The interim recommendations of Uthwatt assumed the existence of a hierarchical system whereby a Central Planning Authority would exercise powers of planning control subject to the power to, “delegate ...to local authorities any of its powers of granting licences for development”.⁴⁵ Although a central authority was never created for development control purposes, and national planning policy remained in the hands of the relevant Ministry, the definition of development was reformulated so as to amplify development control, by extending the concept to all activities save for minor development and agricultural uses.⁴⁶ Government needed a central mechanism to prevent continued competition for the same piece of land and thus speculative land acquisition that could frustrate its policy objectives. Increasing demands for food production, the extension and dispersal of industry, and the pressure for services associated with these had to be addressed in addition to post-war reconstruction.⁴⁷ For the future development powers extended to not only reconstruction but also new development, so that in principle speculative development that inflated land values could be regulated. Speculative dealings were to be regulated through both the land-use planning system and the compensation framework.⁴⁸ The recommendations pointed to a centralisation of control initially required by the war but to be extended post-war to enable coherent development throughout the nation. The war effort thus “kick-starts” a further move to the Centre.

new approach to the whole problem may be inevitable to solve the problems of reconstruction and post-war planning Final Report, para. 7.

⁴⁵ Cmd. 6291, para 25.

⁴⁶ Section 12 Town and Country Planning Act 1947.

⁴⁷ Cmd. 8204 op. cit., p. 5.

⁴⁸ At the time of the Interim Report, the Committee were not concerned with general property increases in value – only those concerned with...*the cost of public acquisition or public control of user for the purposes of reconstruction* [para 13, p. 6]. At this stage there was no concern to stabilise pre-war prices.

3. Reordering the planning space

The records of the Planning Board and of the Cabinet Office show how limited progress towards centralisation was in the early 1940's. Although by July 1941, Government had promised to introduce new planning legislation, most of the recommendations contained in the Scott and Uthwatt Reports could not be implemented immediately. Government, well aware of the controversy and effect of legislative strengthening, chose not to state how this was to be done until 1942.⁴⁹ Notes of the Planning Board of March/April 1942 show that the Minister was reluctant to explicitly state the effects of the changes.⁵⁰ Government had no wish to demonstrate the continuing failure of its efforts in land-use planning, nor did it wish to indicate the uncertainty in its objectives to protect national or regional interests. One of the reasons for the delay was the deficiency of agency. The extant planning authority structure in addition to the powers exercisable were a hindrance to Government's objectives.

To implement its plans the local government structure had to be rationalised. Government needed planning controls to extend to the whole of England and Wales, to secure uniformity. By 1943 248 local authorities were without any part of their area subject to planning control out of the 1531 and 178 joint committees.⁵¹ Of that total, 1300 authorities were at various stages in the process of adopting schemes. The Parliamentary Brief to the House of Lords on the Bill's Second Reading indicated that at

⁴⁹ TNA: HLG 71/266 *Circulars explaining the implications of the transfer of town and country planning functions from the Ministry of Health* (1941-43).

⁵⁰ Ibid., Notes of the Planning Board, 20 March 1942, 23 March 1942.

⁵¹ TNA: HLG 71/267. As at 22 April 1943. These figures contradict with those given in the House of Commons, HC Debs vol. 389 col.529, (11 May 1943) by Sir F. Freemantle MP, who indicates 1465 planning authorities and of those 1195 authorities in the process of scheme preparation.

the outbreak of World War II there were 1441 local authorities for planning purposes, of which 1195 had prepared or were preparing schemes. 873 of those were acting jointly through 162 joint authorities of various configurations.⁵² As officials in the Ministry observed, it was necessary to secure

“the revival of the present planning system (with certain amendments) to cover the concluding stages of the war and the early period of peace”.⁵³

The groundwork had been laid by engendering greater local authority dependence on Government, through in the case of agreements, checking and approving drafts. The Centre’s ambitions would be frustrated however, unless additional steps were taken to co-ordinate land-use development nationwide, and formalise procedures. By 1942 civil servants at the Ministry gave thought as to how best to implement a comprehensive planning system in England and Wales in the absence of a central planning authority. Ministerial files indicate official thinking on the question, highlighting how far the configuration of local government was thought to hold the key to the regulation of the planning system. It was through the reshaping of local government that centralisation could also be achieved.⁵⁴

Re-grouping authorities was envisaged to allow for easier co-ordination and control and to discourage the “separatist tendencies” of the County Boroughs.⁵⁵ Responsibility for making schemes would then rest with 200-250 joint committees, a much easier number

⁵² As either Executive Joint Planning Committees, County Councils or Advisory Committees. These figures are said to be approximations TNA: LCO 2/2658.

⁵³ TNA: HLG 71/267, internal memorandum Gillie to Pepler, 24 December 1942.

⁵⁴ Ibid.

⁵⁵ Ibid., internal memorandum Pheysey and Shepard to Gillie, 22 April 1943.

to manage. The reconfiguration of the local authority structure enabled better control over those responsible for implementing the planning system. Making the smallest unit for planning matters the county or county borough, as was to happen in the Town and Country Planning Act 1947, would facilitate positive planning as, "...a continuous process of collaboration between local and central authorities and the individual citizen".⁵⁶ It was also a means for Government to regulate local authorities more effectively.

The appointment of the first Minister of Town and Country Planning⁵⁷, in 1943 signified the ongoing development and maturity of planning as a practice together with its visibility and significance in the welfarist trajectory towards the resolution of the post-war dilemmas. As planning acquired a higher profile, so too did its regulatory significance. Only Government could cohere the fragmented activity of individual local authorities, some of which were less inclined to plan than others. The Prime Minister's personal minute of 6 April 1943, showed the urgency of the situation. It recorded

"...The Minister of Town and Country Planning must have the statutory power now to compel recalcitrant, obstructive or merely incompetent county authorities to do what is necessary in the larger interest."⁵⁸

With the restructuring of local authorities, came other subtle forms of regulation that functioned as discrete controlling mechanisms. Education was one device used on the new authorities. Concerns remained as to the competence of local authorities to

⁵⁶ Cmd. 6537 *The Control of Land Use* 1944 para. 40.

⁵⁷ William Morrison.

⁵⁸ TNA: CAB 21/1596 *Post war reconstruction and development schemes: Town and Country Planning (Interim Development) bill; powers of the Minister under the Act.*

implement national objectives⁵⁹, and a system was established ensuring that appropriate technical advice was available. Regional Planning Officers were to make, 'frequent visits' and each Joint Committee, "was to be provided with a planning officer or source of technical advice".⁶⁰ One memorandum of the time illustrates this rationale

"...we believe that the right way to deal with these absolutely new Authorities is to give them a great deal of personal attention by way of visits and discussion. This is already being seen to. This policy is possible with a comparatively few authorities, but is not practicable with all ...while staff is so short...we have therefore advocated (a) general memoranda all round; (b) special education for the most backward areas."⁶¹

A measure of dependency at the Centre remained. In the Ministry Circular of 1 March 1943 it was evident that

"...(2) in the discharge of this duty the Minister intends to collaborate with Local Authorities, and is confident that he can rely on their cordial cooperation and support".⁶²

The transfer of power from the Ministry of Works and Planning to the new Ministry appeared to result in some official concern regarding the maintenance of cordial relations between central and local government. At one stage, civil servants, at pains to disguise the *de facto* centralisation, agonised over the content of a draft circular pointing out,

"...I think that local authorities will contrast this with the much more cordial terms of Circular 1 of the Ministry of Works and Planning and may deduce that the new Ministry intends to ride the high horse. To cause any such impression would be most unfortunate."⁶³

⁵⁹ This is clear from opposition statements during the debate on the 1943 Bill e.g. HC Debs vol. 389(63) col.529, (11 May 1943).

⁶⁰ TNA: HLG 71/267.

⁶¹ Ibid., Memorandum, Gillie to Pepler, 17 July 1943.

⁶² TNA: HLG 71/266, Circular 1 March 1943.

⁶³ Ibid., memorandum Pepler to Neal, 9 February 1943.

The drive towards centralisation led to the development of a “new concept of planning”⁶⁴, and the enactment of the Town and Country Planning (Interim Development) Act.

4. Towards a “new concept of planning”: The Town and Country Planning (Interim Development) Act 1943

The war had resulted in a chronic shortage of local authority staff. By 1939 most authorities had suspended all activities for preparing schemes and by virtue of Defence Regulation most development activity had ceased. Government needed to streamline the planning procedures applicable for the making of schemes and make sure that by the end of the war reconstruction and redevelopment was possible. The Interim Development Bill was an opportunity to, “...control building and other development throughout the country by reference to national requirements”.⁶⁵

The post-war reconstruction demands led to planning acquiring such a high profile that its implications were discussed at meetings of the War Cabinet. The Cabinet proposed measures to bring planning controls into operation without having to satisfy the lengthy formalities regarding the making and preparing of schemes and the service of notices, both of which were time consuming. The objectives of the Bill were to (a) prepare for acts of reconstruction on sound i.e. strategic lines, as there was little or no planning in the ‘blitzed’ areas and (b) to avoid development rights which might impede or prejudice

⁶⁴ TNA: HLG 71/266.

⁶⁵ HL Debs vol. 125 col. 105, (18 November 1942), Lord Portal (The Minister of Works and Planning).

“sound reconstruction”. In particular the absence of ministerial control over local authority planning activity was seen to be

“ ... irreconcilable with the duty which under statute rests with the Minister...to secure consistency and continuity in the framing and execution of national policy with respect to the use and development of land”.⁶⁶

Interim development was a potential “brake” on speculation and a preparatory measure for post-war reconstruction, whilst preventing immediate claims for compensation. The objective was to extend the powers of planning control (still regulatory in the words of both politicians and civil servants).⁶⁷ The claim of national interest was an accepted if unwanted justification for Government to exert further regulatory control. Ministerial control over interim development permissions was perceived as, “fundamental to national planning”.⁶⁸ Notes of the War Cabinet indicate that

“ ...Informal discussions with associations of local authorities go to show that while the power is disliked, the need for it is recognised”.⁶⁹

Interim development was heralded as a new concept in planning by the Centre. The Planning Board of the time wanted to demonstrate, “...the new conception of planning now generally held”.⁷⁰ The creation of a Ministry of Town and Country Planning and in the same year the passing of the Town and Country Planning (Interim Development) Act 1943 had shifted powers of oversight to the new Ministry and formalised the existing

⁶⁶ TNA: HLG 71/1550, *War Cabinet Legislation Committee: Town and Country Planning (Interim Development) Bill, 1942: Memorandum by the Minister of Town and Country Planning*, para 3 B(6), p.4.

⁶⁷ Many files of government during this period highlight the regulatory function of planning. Examples of this can be found in Instructions to Parliamentary Counsel, relating to both the 1943 and 1947 legislation, and LCO 2/2658, the Lord Chancellor’s Department file on the Town and Country Planning (Interim Development) Act 1943.

⁶⁸ TNA: HLG 71/1550, 1 March 1943, para. 4(d).

⁶⁹ Ibid.

⁷⁰ TNA: HLG 71/266, Board meeting 20 March 1942, notes, 24 March 1942.

administrative practices of Government. The creation of a new Ministry signified the transition of planning to, “an instrument of national policy”.⁷¹ Although the reconstruction of town and country was now of national importance, for a time it could only be achieved by less than direct means, and in particular only with the support of the planning authorities themselves.

Government’s stated aim of the Town and Country Planning (Interim Development) Act 1943 was to

“... bring under planning control land which is not subject to a scheme or resolution under the Town and Country Planning Act 1932 to secure more effective control of development pending the coming into operation of planning schemes”.⁷²

The idea of interim development had existed in limited form, since 1932.⁷³ The period of interim development defined by that Act was the period between the date when the authority had resolved to prepare a scheme and the date the scheme came into operation. The Ministry of Health fixed by order the rules applicable to previously authorised forms of development and set out the circumstances in which the Interim Development Authority was prevented from refusing permission for development and when conditions could be imposed. Under the 1932 Act, an authority could not easily take action against development carried out otherwise than according to the Ministry’s Order. The 1943 Act streamlined these provisions, making the concept of interim development

⁷¹ TNA: HLG 71/266 Circular advising of the new Ministry, 21 July 1942.

⁷² Foreword to the Act. The Minister of Town and Country Planning, Mr W. S. Morrison, HC Debs vol. 389 col. 501, (11 May 1943), indicated that the Act would, ... *secure that the land of this country shall be put to the best use in the public interest, that it shall be used to the best interests of all the people in the towns and the countryside.*

⁷³ Section 10 Town and Country Planning Act 1932, defines Interim Development.

universally applicable irrespective of whether a resolution to make a scheme existed. The provisions enabled planning authorities to postpone (subject to safeguards) the determination of premature applications.⁷⁴ The Minister could revoke or modify permission for interim development subject to the payment of compensation. The provisions came into force three months after the Bill became law, with a notional resolution (making land subject to interim development control) applying to all land not already subject to a scheme.⁷⁵ Between the stages of the local authority passing a resolution and the confirmation of the scheme by the Minister, land use controls would be strengthened. In short, “the powerful machine for controlling land use”⁷⁶ namely Government began to assume further responsibility. Planning was no longer, “essentially conceived of as a local function, a local planning, and ... from a local point of view put forward by a local authority.”⁷⁷

The major push for a comprehensive, integrated and orderly planning system would secure optimal land usage. At the Second Reading of the Bill, it was said that enactment would secure 95% coverage of planning control.⁷⁸ The shift in regulatory emphasis had moved from the permissive in 1932 to the directive by 1943. In the House of Lords Second Reading⁷⁹, interim development was described as a way of, “controlling effect[s]”.⁸⁰ The risk of carrying out unauthorised development would pass to the

⁷⁴ Section 2 Town and Country Planning (Interim Development) Act 1943.

⁷⁵ *Ibid.*, section 1.

⁷⁶ Hall (ed.) (1965) p. x.

⁷⁷ Lord Chancellor, HL Debs vol. 127 col. 991, (10 June 1943).

⁷⁸ This equated to approximately 10,000,000 acres (noted by W.S. Morrison, Minister of Town and Country Planning, when introducing the Second Reading of the Bill in the House of Commons), HC Debs vol. 389 col.505, (11 May 1943).

⁷⁹ The Lord Chancellor, HL Debs vol. 127 col. 993, (10 June 1943).

⁸⁰ *Ibid.*

landowner, who could be required to remove development without the right to compensation. Through the scheme, “the haphazard intermixture in the past of various types of development...and the consequential detriment to health and convenience” would be combated.⁸¹ Schemes remained inflexible tools to meet the challenges resulting from war. Objections to schemes were difficult for authorities to resolve and ensuring that interim development complied with the adopted scheme was hard to monitor. For this reason authorities and landowners appear to have preferred agreements. This approach was not necessarily unproblematic, as is clear from the way in which agreements were regulated by the 1943 Act. In assuming further control, through the consent mechanism, Government had to ensure that it had the capacity to regulate effectively all of those affected, directly or indirectly.

5. Marginalising agreements through the consent mechanism and central official interpretation

Section 10 of the 1943 Act incorporated a substantive change to the 1932 legislation regarding agreements. Henceforth to be effective all agreements required the Minister’s consent. In exchange for extended planning powers that overcame many of the scheme’s procedural defects, local authorities had to accept further limits on their local negotiating powers to ensure a degree of national consistency. Agreements were now viewed as, “supplementary to development control rather than an alternative to it”.⁸²

⁸¹ TNA: LCO 2/2658, Brief for the Second Reading (Lords) of the Town and Country Planning (Interim Development) Bill, para 2.

⁸² TNA: AT 29/76 *Town and Country Planning Act 1962: development agreements under section 37* (1967-70), confidential note headed, “Agreements under Section 37” referring to the 1943 Act.

Local initiatives had to accord with national objectives. The bilateral nature of agreements became more of a fiction.

One of the consequences of the Interim Development Act was that Government assumed responsibility for land-use control at a much earlier stage, with formal involvement or supervision shifting to the 'front end' rather than at any inquiry into the scheme provisions – *ex ante* rather than *ex post*. The gravitational 'pull' toward the Centre made ministerial activity more prominent and raised expectations. It attenuated the distance between local authorities and Government, by bringing the formers' activities closer to central control. The Minister could now pre-empt local authority action that might hinder Government's objectives. In the case of agreements advice was issued that

“...The Minister should be consulted when a proposed agreement is first mooted, not when the draft terms have already been settled.”⁸³

The advice note also stressed that

“...agreements ...have been used with a view to preserving certain areas, frequently of great natural beauty, from ill-considered development...it has been decided that, having regard to the important planning issues involved, where such agreements are still thought to be advisable, they should require the consent of the Minister”⁸⁴

For the future, Government sought to marginalise the use of agreements through the operation of the consent mechanism.

⁸³ TNA: HLG 71/268 *General notes on planning schemes and detailed comments on the Town and Country Planning Act 1932 and the Town and Country Planning (Interim Development) Act 1943* (1943). Draft Memorandum A to General Notes on Planning Schemes and Detailed comments on the Town and Country Planning Act 1932 and the Town and Country Planning (Interim Development) Act 1943, para 68

⁸⁴ Ibid., an earlier draft of the Annex A to the circular General Notes on the Town and Country Planning (Interim Development) Act 1943 and the Town and Country Planning Act 1932, indicated at para. 20, *Consultation should not be delayed until the draft terms have already been settled.*

Limited debate occurred in Parliament on agreements, but what did occur is illuminating. During the Second Reading of the Bill, the Minister indicated that, “the remaining Clauses and the Schedules to this Bill are in the main formal and consequential”.⁸⁵ At the Committee stage an amendment was proposed making provision for the modification or revocation of existing agreements by consent of the parties or on an application of either party to the Minister.⁸⁶ This would have aligned existing agreements to the Ministerial consent provisions proposed. The amendment was lost because agreements entered into under section 34 were seen to be consensual tools that could only be revised in a similar fashion.⁸⁷ Agreements under the 1943 Act were viewed differently from those entered into previously, at least by Parliament. The inclusion of an express form of oversight altered the ostensibly consensual nature of the instrument.

Governmental records point to a different story. Agreements had assumed an important regulatory function before planning control extended across the country, and were in practice being monitored through the informal checking of drafts and the dissemination of information. The Minister was now clearly associated with the instrument, through the consent mechanism, and its use had to be appropriate in Government’s eyes. This was particularly so when, through the scheme process, the Ministry had to arbitrate

⁸⁵ HC Debs vol. 389 col. 512, (11 May 1943) referring to those clauses *post* Clause 8; the clause relevant to planning agreement was found initially at Clause 9.

⁸⁶ Sir A. Maitland HC Debs vol. 389 col. 1535, (25 May 1943).

⁸⁷ HC Debs vol. 389 col. 1535, (25 May 1943) (Mr H. Strauss).

between the individual landowner and the wider interests of the local authority. In the

Notes on the Bill's clauses, it was observed

“...in some cases these agreements do not secure sound planning control and are an embarrassment when the scheme comes up for approval...On occasions, and in return for the restrictions, the agreements have been found to confer undesirable rights of development on the owner making the agreement which have, moreover, been objected to by other owners. Such agreements cannot be reproduced by the scheme, and it is much better that they should not be made in the first instance.”⁸⁸

Here agreements are being constructed as a parallel provision to the scheme, in essence replicating what is achievable through the scheme provisions. Where this occurs, the scheme is to be preferred. Central officials sought to play down or minimise the role of agreements in the modern era.

Commentaries on the legislative changes appear to confirm some success in these objectives by highlighting the marginal significance of agreements in the future. The general consensus appeared to be that agreements would have less utility. Wood notes that

“ ... the scope of the agreements which local authorities will be able to make in future is bound to be more restricted than before.....it has something, in most cases, to offer both the landowner and the local authority; the local authority kept green fields free from buildings without having to pay compensation, the landowner had his *quid pro quo* when he was allowed to develop other land without having to meet any claim for betterment.”⁸⁹

⁸⁸ TNA: LCO 2/2658, Draft notes on the Bill (draft 16), “Notes on Clauses”, 16 March 1943 cccviii—E (I), version 3.

⁸⁹ Wood op. cit., p. 84.

The involvement of a third party, namely the Minister and the closer identification of agreements with schemes posited that fewer agreements would be entered into. The process seems to have maintained some importance. Notes of the Ministry in 1943 indicate that agreements continued to be used in connection with, “important planning issues” and in particular, “...preserving certain areas, frequently of great natural beauty from ill-considered development”.⁹⁰ There are however few records of the supervisory activities of the Centre during the period 1943-7.

6. The Town and Country Planning Act 1947: “a new and comprehensive planning system”

The post-war solutions to the closer spatial links between the nation's subjects were framed in terms of central planning, co-ordination and direct intervention. Regulating land encompassed not only development control but the allocation land for various uses according to national designs. Planning's ambit was extended to all uses, activities and locations with the exception of agriculture and relatively minor activities, heralding the creation of a “new and comprehensive planning System”.⁹¹ It was extremely difficult for Government to find a balance for the control of land-use activity that was acceptable to all. Indeed the Command paper, *The Control of land Use* in its preface notes

“...Proposals for the control of land use are bound to raise again issues which for many years have been the subject of keen political controversy”.⁹²

⁹⁰ Although statistics do not appear to have been recorded at this time, TNA: HLG 71/267, para. 20 draft Memorandum A, “General Note on the Interim Development Act and the Town and Country Planning Act 1932”.

⁹¹ Cmd. 8204 op. cit., preface by the Minister of Local Government and Planning Hugh Dalton.

⁹² Cmd.6537 June 1944.

The collaboration of all in the National Government ensured that reconstruction plans involving health, industry, transport, roads, housing and leisure could be brought to fruition. It achieved through a process of harmonisation

“to ensure for the people of this country the greatest possible measure of individual well-being and national prosperity.”⁹³

1947 marked a further shift towards centralisation, and the earlier plans of Government were brought into effect. Under the Town and Country Planning Act 1947, the 1441 local planning authorities in existence in 1932 in England and Wales were reduced to 145, by making the smallest unit for planning matters the county or county borough.⁹⁴ This facilitated positive planning which was viewed as, “...a continuous process of collaboration between local and central authorities and the individual citizen”.⁹⁵ However it was also a means through which local government could be more easily regulated. Planning was to become both preventative and facilitative; for the future it was concerned, “...almost as much in what is not done as in what is done”.⁹⁶ Planning became one of the most important local authority functions⁹⁷ hence the reason for Government to supervise its exercise.

The Act was described much later as follows

“...Lewis Silkin’s Act of 1947 ... was the centrepiece of the most advanced system of land-use planning and development control that had then been devised.”⁹⁸

⁹³ Ibid., p.3.

⁹⁴ Town and Country Planning Act 1947 section 4.

⁹⁵ Cmd. 6537 *supra* para. 40.

⁹⁶ Cmd. 8204 op. cit., preface by the Minister of Local Government and Planning Hugh Dalton.

⁹⁷ Ibid.

⁹⁸ TNA: AT 29/223, *Divisional Interest in the Town and Country Planning Bill 1967: discussion papers; draft instructions to Parliamentary Counsel* (Jan – Dec 1967), “Memorandum provided by the MHLG and the Secretary of State for Wales on the Town and Country Planning Bill 1968” para. 1.

The 1947 Act⁹⁹ required planning permission for all activities classified as development, and the introduction of a centralised compensation system. It embraced the change in direction signalled by the 1943 Act. Development planning was a key facet of land-use control. The plans were based upon the results of a survey of the physical, social and economic characteristics of the area and authorities were required to review plans at five yearly intervals. Planning permission had to be obtained irrespective of the approval or otherwise of the plan. The machinery for control closely followed that of the Interim Development Act. The 1947 Act dealt specifically with planning, compulsory acquisition, compensation and betterment and provided for the effective nationalisation of development value without providing for the automatic right to compensation where planning permission was refused, except in limited circumstances where existing use rights subsisted.¹⁰⁰ Where planning permission was granted for development, a development charge was payable on the increased land value above existing use value. Whilst local authorities could, in theory, acquire land at a more reasonable price for their own development purposes, in practice owners proved reluctant to bring land forward for development because of the obligation to pay a development charge to a Central Land Board. The charging system was premised on land transfers at existing use values. In practice it was exchanged at more than this but at less than the market rate. This should have impacted upon the use of agreements, whereby the more easily local authorities could acquire and develop land, the less reliant they became upon the

⁹⁹ The Town and Country Planning Act 1947, received Royal Assent on the 6 August 1947 and came into force on 1 July the following year.

mechanism of agreement to secure community benefits, including amenity provision. The new local authority acquisition powers failed to function in this way and agreements remained a practical means for facilitating land-use control.¹⁰¹

Limited debate occurred in Parliament on agreements, and initially the Bill before both Houses omitted all reference to them. This suggests that the instrument had marginal significance to the overall planning control schema. The debate on the amendment to the Bill proposed by the Lord Chancellor, at the Committee stage does however show how agreements were viewed within a comprehensive planning system.¹⁰² The amendment proposed enabled a continuation of the practice. Although the number of agreements entered into under the 1932 Act is not stated – perhaps for reasons of lack of knowledge, the Lord Chancellor indicated that, “a very large number of such agreements” had been made, and that in regulatory terms whilst in essence voluntary, they had, “proved useful”.¹⁰³ Agreements were said to be used to waive compensation claims, often in exchange for the local authority refraining from claiming betterment in respect of the development of other land, to gift land in consideration for a grant of

¹⁰⁰ Section 20 Town and Country Planning Act 1947. Under Part VI of the Act £300m was allocated for the payment of compensation to landowners for loss of development value (payable in Treasury stock) by 1 July 1953. Additionally compensation was payable for certain war damaged land.

¹⁰¹ The resulting withholding of land from the market forced eventually the abolition of the system. A detailed explanation of this can be found in Cmnd. 5730 *Land*.

¹⁰² HL Debs vol. 149 col. 635 et seq., (1 July 1947) where the Lord Chancellor in proposing the amendment to the Bill by the insertion of a clause covering agreements stated in reference to section 34 of the 1932 Act that, *they are all voluntary agreements and they have proved useful. Accordingly I am proposing to continue this principle of voluntary agreements*. The statement was not wholly accurate given the requirements of the 1943 Act as to consent.

¹⁰³ HL Debs vol. 149 col. 636, (1 July 1947).

permission and to permit public rights of access to private land.¹⁰⁴ The continuation of the power for local authorities to enter into agreements was generally welcomed.

The debate in the House of Commons illustrates how difficult it was to articulate a common rationale for a use of agreements. This derived from the different views taken of the instrument, and its role in the context of the land-use planning reforms. The Commons debate contrasted agreements as consensual tools negotiated between the parties *inter se* (the traditional approach) against being a part of the wider planning regime having the objective of meeting broadly collective demands.¹⁰⁵ Opposition members in particular were concerned that the local authority could renege upon any agreement, and that there should be a saving provision for agreements entered into under section 34 of the 1932 Act. This was couched in terms of, the agreement being a deal “...which the local planning authority had voluntarily agreed to”.¹⁰⁶ The discussion here was framed in terms of agreements being viewed as voluntary instruments, (reflecting the neo-classical ideal of contract). This did not necessarily equate to individual agreements being particularly effective. One Member in question noted

“there have been cases where agreements have been made which have served a useful purpose from a town and country planning point of view. We have some instances where those agreements have not been so beneficial but where a man has voluntarily entered into an agreement subjecting his land to restrictions and limiting his powers to use the land, and the agreement has been made by deed.”¹⁰⁷

¹⁰⁴ Ibid.

¹⁰⁵ HC Debs vol. 441 col. 823-836, (1 August 1947).

¹⁰⁶ HC Debs vol. 441 col. 825, (1 August 1947) Mr Manningham-Buller (Daventry). Agreements were also said to be *very much to the public advantage* at col. 828 by Mr Henry Strauss, especially for the preservation of open spaces. The *defect* [of section 34] *from the point of view of the central planning authority* (col. 828) was that they could be entered into without ministerial consent. The Attorney-General emphasised that the Central Land Board was not concerned with these provisions (col. 830).

¹⁰⁷ HC Debs vol. 441 col. 824, (1 August 1947) Mr Manningham-Buller.

From an initial concern surrounding the continuing effect of agreements previously entered into, was substituted a more pressing objection – that an agreement could be repudiated by the local authority in order to satisfy broader planning objectives. Scheduled within the Bill was a provision for the continuation of agreements made under the 1932 Act. Power was given, however to the Minister to discharge or modify agreements inconsistent with the development plan, subject to the payment of compensation.¹⁰⁸ The Attorney-General's response identified a need for agreements to adhere to overall planning objectives, in which case the planning authority would be required to exercise its statutory duty to vary or depart from the agreement in order to implement planning policy. The benefits of the individuated solution and particularly the flexibility deriving from consensual negotiation were subjugated to securing broad planning objectives. The need for comprehensive planning took precedence over the individual bargain and agreements were construed accordingly.

Section 25 of the 1947 Act (like its forerunner) permitted a local planning authority to enter into an agreement with Ministerial approval. The provisions mark a shift in terminology and emphasis. Gone is the reference to a person interested in land being *willing to agree*¹⁰⁹; instead the local authority with the approval of the Minister may enter into an agreement *with any person interested in land in their area* (section 25(1)). The balance between landowner and the local authority is shifted subtly to accommodate a regime of comprehensive planning. The 1932 Act had placed the initiative with the landowner to restrict the development of land, as a means for the local authority to plan.

¹⁰⁸ These provisions became paras. 10 and 11 of Schedule X to the 1947 Act.

¹⁰⁹ As was found in section 34(1) Town and Country Planning Act 1932.

Planning arose from landowner restraint in tandem with the local authority powers of development control in a context of consensus and co-operation. After 1947 however, development planning and control took precedence, and with it an emphasis on the collective rather than the individuated interest. The common theme of the voluntary nature of agreements remained ostensibly a consistent thread in both instances. The notion of what was voluntary masked shifts in the dependency relation between local authority and landowner, with the former being less reliant on the latter. As for the relations between local authority and Government, the Centre had to secure the compliance of planning authorities to attain its objectives. The 'fig-leaf' of consensus disguised centralising policy objectives, and signalled a use of broader regulatory techniques.

Agreements made under the 1947 Act were stated to have the purpose of *restricting or regulating the development or use of the land* (section 25(1)). Additionally they could contain any necessary *incidental or consequential provisions (including provisions of a financial nature) as appear to the local planning authority to be necessary or expedient for the purposes of the agreement*. Although the section has been construed in a restrictive light¹¹⁰, there is no ostensible reason why this should be so, except insofar as the restrictions (a) are development related and (b) are limited to the extent of the covenantor's estate or interest in the land. In terms of substance, prior to section 25 there was no express power to include financial provisions, although as identified previously, agreements were often used to address the issues of compensation and

¹¹⁰ See Jowell (1977a) *supra*, Tucker, L. R., "Planning agreements: the Twilight Zone of Ultra Vires." (1978) *J.P.L.* 806-809.

betterment. Again the agreement may be enforced against successors in title of the landowner. The section points to a more control-oriented instrument than appears to have been envisaged by the earlier legislation consistent with further centralisation. It is the local authority now initiating the transaction in situations considered to be necessary and expedient. Furthermore, subsection (3) limits the effect of an agreement to the extent that it conflicts with any discretionary powers of the authority or the Minister, which accord with development plan provision. Agreements appear an adjunct and complement to the planning authorities powers rather than a separate regulatory tool.

7. Agreements in the modern era

The Explanatory Memorandum to the Act made limited reference to the use of agreements except to indicate that the section 34 provisions remained in force but without prejudice to the exercise of any powers under the current legislation.¹¹¹ Consequential amendments were made for existing agreements to remain in force until revoked or modified. This power is referred to at Part II of the Explanatory Memorandum which recites the section, and makes reference to the transitional powers of the Minister to revoke or modify the agreement in circumstances thought inconsistent with proper planning of the area or an area subject to the agreement's terms. This is the provision, which was not accepted when amendments were proposed during the passing of the 1943 Act. The provisions marked a transformation of the tool from that of an independent regulatory instrument to one incorporated within the frame of the development plan and thus positive planning. Government's objective to assimilate agreements into the development planning was achieved by these provisions. By

Schedule 10 to the Act the landowner could refer the matter to an arbitrator if of the opinion that the agreement should be modified or rescinded. In that instance the Minister could declare the development value of the land *as if* the agreement had been modified or rescinded for compensation purposes. Commenting on these statutory provisions, one text notes, "This power to enter into agreements has little in common with the former provisions of section 34 of the 1932 Act, as to which see Schedule X, paragraphs 10 and 11, of the 1947 Act".¹¹² It continues referring to the powers of the Minister and or the authority to override the agreement where it conflicts with the Development Plan

"This is so wide that it appears to leave very little which can make it worthwhile to the owner to enter into an agreement"¹¹³

The tightening rein of oversight through a use of statutory consent defined the regulatory landscape and the parameters for a use of agreements by delineating what it was and was not possible to achieve with the instrument.

Before the 1947 Act, local authorities were responsible for paying compensation (to the extent of the development value) in the event that they refused permission to develop. One of the uses of agreements under the 1932 Act had been to eliminate compensation claims through negotiation. This is supported in the precedent files held by the Ministry. Wood asserts that the instrument of agreement was one of the main reasons why so few claims for betterment were made with claims for betterment being offset against

¹¹¹ Circular 34, issued by the Ministry of Town Planning in 1947, at Part I, para. 30 (8 September 1947).

¹¹² Williams, H., B., Mekie, E., C., and Roots, W., L.. *Town and Country Planning Act, 1947 Together with various orders, supplement to town and country planning law 1946*. London: E. & F. N. Spon Ltd. and Eyre and Spottiswoode Ltd., 1948, p. 16.

compensation claims.¹¹⁴ When the Central Land Board, became responsible for betterment and the limitation of compensation claims under the 1947 Act¹¹⁵, there appeared to be no real incentive for landowners to use agreements, especially where their terms could be overridden. Government files indicate that only four to five applications per annum were made to modify or discharge agreements made under the 1932 Act.¹¹⁶ If agreements were a less attractive mechanism as Wood suggests, arguably more applications would have been made to the Ministry to modify existing agreements, and their future use would have been limited. The evidence appears rather different.

The discretionary powers created under the 1947 Act to control development took precedence over any contractual agreement. Section 25 Town and Country Planning Act marks a recognition that an agreement may impose binding obligations upon the local authority *only to the extent that* these do not constitute a fetter on the exercise of its statutory duties. It marks the point of divergence between contracting and discretionary action. Whilst as yet the two ideas were not perceived as mutually exclusive, they were during the 1970's to be seen as incompatible.

I will use two examples to show how a use of agreements was gradually transformed and became more limited. Although only a snapshot, they provide an indication of how section 25 was used in practice.

¹¹³ Ibid.

¹¹⁴ Wood op. cit., pp. 84– 85.

¹¹⁵ Only compensation for the loss of existing rights would be payable, none for the refusal of permission.

¹¹⁶ TNA: AT 29/76, "Notes on the Planning Bill – Development Control Matters [1967-8]", memorandum 5 February 1968.

7.1 The Woolworths development: 1956-1957

By now agreements were used in connection with road widening schemes. Following fire damage to premises in Slough, Woolworths submitted an application for planning permission to reinstate the property (extending beyond the improvement line, and being contrary to a direction given by the Ministry of Transport in respect of the A4). The developer considered a condition imposed limiting the reinstatement to be unreasonable, as it denied a right to compensation in the event of any future road improvement.¹¹⁷ They could not reinstate the building without being at risk to a demand for its removal (by being set back) in the event of the improvement proceeding. The Divisional Road Engineer consulted the Ministry of Transport as to whether a section 25 agreement could be entered into, which had been suggested by Woolworths as a solution to the problem. The planning agreement would require the removal of the building in the event of road improvements taking place, subject to appropriate compensation at a diminishing annual rate of 4%, if both the adjoining buildings at Nos 136 and 144 were set back to the improvement line.

An agreement was proposed to compensate the developer in respect of the ground floor of the reinstated building, with the cost of its removal, if it remained for a period of twenty five years being borne by the developer. This took the form of a covenant to grant permission for the development, subject to a reciprocal covenant to remove the development on the service of a notice (should the adjoining properties be set back to the improvement line). The draft contained a formula for the payment of compensation in

¹¹⁷ An error on the part of the planning authority had the effect of entitling the developer to reinstate the building, and seek full compensation in the event of any road improvement.

respect of the ground floor only at a diminishing rate. The local planning authority (Slough Borough Council) entered into the agreement as both highway and planning authority. The draft agreement was sent to the Ministry of Housing and Local Government (MHLG) for approval. On 9 November 1956 the Ministry wrote to the Ministry of Transport, in the following terms

“...It is not the Minister’s policy to approve agreements under section 25 of the Act, the objects of which could be achieved by the use of the normal planning powers of Part III of the Act. In the present case it appears that an order under section 21 revoking or modifying the 1953 permission and if necessary a new conditional consent would achieve the purpose
...In any event the Minister could not countenance any arrangement whereby the condition offered was the grant of planning permission. He considers that the Council are under a statutory duty to deal with any application on its merits without requiring anything further from the applicant in return.”¹¹⁸

A lengthy exchange took place between the planning authority, the Ministry of Transport and the MHLG. The planning authority even resorted to quoting the standard text, *Hills, Complete Law of Town and Country Planning*¹¹⁹, which referred to the Lord Chancellor’s statement in the House during the progress of the 1947 Bill. By 1957, the agreement had still not been concluded and on 9 April 1957 was aborted. The planning permission was revoked and a temporary permission granted. The use of agreements had been frustrated, partly through central officials at the MHLG definition of the functional use of agreements and partly through delay.

¹¹⁸ TNA: HL 49/001 and MT 105/79; *Town and Country Planning Act 1947, section 25: proposed agreements for the purpose of restricting or regulating the development or use of land; policy* (1956-1966), Woolworths development – Slough High Street (A4), rebuilding of premises at Nos 139-142, High Street Slough, 1955-6.

¹¹⁹ (4th ed.) at p. 97.

Agreements could not be used to avoid the exercise of statutory planning functions even if this would minimise the local authority's liability to pay compensation; a shift in emphasis from the early days.¹²⁰ Whilst the Ministry of Transport viewed agreements as permitting

“...a compromise to be reached willingly between the developer and the planning authority thus avoiding the delay and uncertainty of going to appeal on development in a form unacceptable to the planning authority”.¹²¹

this was not how the MHLG saw it. The response was firm, that agreements

“...can accomplish nothing that cannot be done under normal planning powers. Nevertheless agreements may well save time by avoiding appeals and have mutually accepted conditions which [the Ministry] might hold to be ultra vires the Act in the normal way.”¹²²

7.2 The Bullcroft Colliery development

Here an agreement was entered into to provide for remedial works to a colliery site.¹²³

On 1 June 1960 West Riding County Council submitted an application to Ministry for observations on the proposal. By 28 July 1961, central officials had approved the agreement in principle. Being the first of its kind, officials were involved in the detailed drafting of the agreement, and took a restrictive interpretation of what was achievable. The Ministry construed section 25 as not permitting the carrying out of works in default. Officials were heavily involved in influencing both the principle of the scheme and its

¹²⁰ This Official view can be contrasted with that of the House of Lords in *National Westminster Bank Ltd. v. the Ministry of Housing and Local Government* (1969) AC 508, where it was held that it was not an abuse of power for an authority to exercise powers under the planning legislation which had the effect of avoiding a liability to pay compensation under other statutory powers.

¹²¹ TNA: HL 49/001 and MT 105/79, 18 August 1956, Ministry of Transport to MHLG, in respect of An Appeal by Lincolnshire Co-operative Society.

¹²² Ibid., Minute 42 MHLG (6 May 1957).

¹²³ TNA: HLG 89/856 *Yorkshire (West Riding) CC: agreement under Town and Country Planning Act 1947, s.25 for improvement of Bullcroft Colliery spoil heap* (1960-64).

detail, and were concerned that section 25 should not be used "...if the same effect can be achieved by planning condition".¹²⁴ The agreement was finally concluded on 26 August 1963.

In each case, good practice was promulgated through the consent provisions and served to control local authority and developer activity. The practice was being closely monitored. The Ministry continued to take a strong line regarding the uses to which agreements could be put, and challenged the views of other Government departments like the Ministry of Transport, which took a more pragmatic view. Whilst agreements, "served a useful purpose from a town and country planning point of view"¹²⁵, suspicions remained as to the overall utility of the instrument and this may account for the strong influence of the lead Ministry.

8. The Town and Country Planning Act 1962

By the 1960's Ministry officials were still closely examining agreements. This extended to both their technical drafting and their substantive planning content. One note from the Ministry of Housing and Local Government states

"...agreements are rarely submitted in an acceptable form [but] from an examination of cases it appears that it is very rare for a planning branch to make any observations on the planning content of the agreement."¹²⁶

¹²⁴ Ibid., 29 August 1962.

¹²⁵ HC Debs vol. 441 col. 824, (1 August 1947).

¹²⁶ TNA: AT 29/76, "Notes on the Planning Bill – Development Control Matters", (1967-8) minute 27 July 1967.

The planning merits appeared to be subsidiary to the form the agreement took, especially where this related to compensation issues. By the time of the consolidating legislation of the 1962 Act, which repeated the 1947 Act provisions and extended the power to enter into agreements to district councils in addition to the planning authority¹²⁷, agreements were being used to limit financial entitlements especially compensation awards. Civil servants expressed particular concern that section 37 agreements were being used to avoid the levy of the Land Commission. One Ministry file is devoted to this subject. There does seem to be some evidence of section 37 being a route to avoid the payment of the levy and the file contains lengthy correspondence with Trafalgar House on the subject. In another, that of a minerals application, the developer Blue Circle notes that planning agreements are

“...very popular with planning authorities and are an obvious device...to avoid paying compensation under the planning Acts [on revocation of planning permission]...Nevertheless we have to live with planning authorities and if this is a convenient way out against Public Inquiry procedure, with a mass of amenity objectors it is a course which is accepted...as affording the quickest solution to development problems which have arisen.”¹²⁸

The statement indicates a function of agreements that would assume greater prominence in later eras. Agreements were used (despite the reservations of central officials under the 1947 Act) to avoid the payment of compensation by the local authority, but with developers on receiving permission being liable to pay a levy to the Land Commission. The only exception to this was where the authority itself entered into the transaction to acquire the land at nil value and then reconvey it. This would work well potentially in the case of local large-scale redevelopment schemes (which were gaining some

¹²⁷ By section 37(4) Town and Country Planning Act 1967.

prominence) but not in other instances particularly minerals' development. Whilst the Land Commission itself appeared concerned at the potential revenue losses, the response of the Ministry shows a reluctance to intervene. One reply to the Commission (dated 10 August 1967) identified three issues; (a) section 37 agreements as valuable and flexible devices whose use the Ministry did not want to hamper in any way; (b) the administrative difficulty of further intervention or supervision – all section 37 agreements would have to be notified to the Commission, which, “would have meant a great deal of work for you and the valuation office for very little levy” and (c) that the Minister confirms section 37 agreements and could refuse to confirm those where the, “...agreement was being used as a device to avoid the levy”.¹²⁹ The letter concedes also that in one case where the agreement was a patent device, consent had still been granted. It is plausible to infer that by this time agreements were becoming very difficult to oversee. This may have been attributable to the imminent abolition of the consent mechanism. There appears also an unwillingness to avoid direct confrontation with the planning authority, given their role in carrying out national and regional planning policy. From the former keenness to regulate agreements via consent, especially when they related to compensation issues, the officials appear to feel the strain of their earlier zeal.

An illustration can be found in a file outlining the use of an agreement to prevent a dwelling being built on the land, and the payment of £400 in compensation to the landowner on the revocation of an extant planning permission.¹³⁰ The council sought to use a section 37 agreement to revoke the permission and determine compensation. The

¹²⁸ TNA: AT 29/76, letter to the Land Commission, 20 February 1970.

¹²⁹ TNA: HLG 75/88 *Town and Country Planning Act 1962: s37 agreements* (Dec 1969-71).

Ministry did express concern that the effect would be to avoid the landowner paying betterment levy. The issue for the Department was how the Minister might supervise cases like these after the requirement for consent was abolished. A minute notes

“9. ... the alternative is to deal with the matter administratively and issue a view to all local planning authorities that such agreements should not be made if other means are available for securing the desired effect. I am sure that councils are already aware of this being our view and would not really be a clog. I do not think we could go as far as saying such agreements are unlawful even if they were. This would question the validity of the many agreements that are in being.”¹³¹

Unlike earlier situations where the Ministry would have confronted the authority directly, they appear reluctant to do so, instead preferring to offer advice in the hope (and anticipation) that the planning authority will comply. This is suggestive of a greater emphasis on guidance as an alternative means to regulate agreements.

9. Conclusion

Whilst it may be a caricature to portray agreements as a simple relation between landowner and local authority at the time of the 1932 Act, the role of Government is by 1947 explicitly much stronger. Between the two periods the landscape against which the planning system was mapped had radically altered. The war years had made planning of the economy and the reconstruction of the nation key responsibilities of Government. Controlling development was one aspect through which the Centre sought to ensure economic regeneration. Planning, as a practice, was transformed from one dealing with purely negative or regulatory effects to having a positive or constructive role in

¹³⁰ TNA: HLG 29/76, Minute P4/2832/5/4.

¹³¹ TNA: HLG 29/76, minute Brewer to Schwab, 4 August 1967 UPD2.

resolving the social, economic and strategic concerns of the nation. The transition of planning agreements from *ad hoc* local regulatory mechanisms consistent with a system, “based on the initiative and financial resources of local bodies”¹³² to instruments subject to the systematic checking and appraisal of drafts and Ministerial consent was a hallmark of the modern era. The formalisation of these procedures (through legislation) shaped a use of agreements, to the extent that Government sought to define them as a supplementary regulatory instrument, although this was not necessarily how others viewed them. Through the consent mechanism imposed by the 1943 Act, the significance of agreements was recognised but their use was downplayed to further the integration of local practices with central objectives. Government’s approach was to mark the future of the instrument. From the modern era, the planning space comprised both the Centre and the local authority together with the landowner or developer but with also a great emphasis being given to the role of central officials.

The modern era introduces further centralisation of land-use control, and a new planning system centred on the development plan. With this comes a greater assimilation of agreements into that system. Agreements no longer function as an independent mechanism of control, but become more closely aligned to the system. For the informal measures of central oversight are substituted express forms, most importantly a use of the consent mechanism as a means of regulating activity. The use of agreements is now being drawn predominantly centrally rather than locally, and must accord with national objectives. Appropriate uses become more clearly defined and attempts are made (not wholly successfully) to prefer other statutory planning mechanism over agreements.

¹³² Cmd. 6383, Final Report, *Expert Committee on Compensation and Betterment* op. cit., (para. 13).

This is a trend that will continue in successive eras. Whilst being perceived as serving, “... a useful purpose from a town and country planning point of view”¹³³, Government seems not to have any real grasp of the extent of the practice, and no files remain dedicated to recording the numbers of agreements entered into during the period (if indeed they ever existed). Suspensions remained as to the overall utility of the instrument, another theme developed during the next era. The process of regulation is not without cost, especially in terms of the time and energy expended by central officials to ensure that national rather than local concerns predominate. By the 1960’s attempts to control the practice through the individuated consent mechanism become unsustainable. Regulating agreements by Government will assume a more discrete character. This will become a continuing trend that defines both practice and the regulatory space. The ongoing dialogue regarding the best way to regulate negotiated solutions reaches a critical point in the next era, when, as the full implications of centralisation became clear, a more pragmatic approach has to be taken.

By 1951 the use of agreements had been overtaken by development plan procedures that facilitated comprehensive development. In contrast to the regulatory strategies *post* 1932, the development control process and development plans are used to secure appropriate development including the siting and location of buildings and their appearance, and the protection of sensitive areas hitherto the province of agreements.¹³⁴ Government statements show how limited a use of agreements had become.

¹³³ HC Debs vol. 441 col. 824, (1 August 1947)

In the context of minerals' workings, a Ministerial statement issued on 4 July 1950 on the restoration of ironstone workings highlights this. Although it might have been anticipated that agreements would have been expressly referred as a means to reinstate land, the nearest the statement gets is

“Over and above the terrible appearance and its depressing effect on the morale of the people, the present state of this land represents a permanent loss to agriculture. Most of it should, even now, be levelled and brought back to agriculture though some of it can only be afforested...It is hoped to make voluntary arrangements with some of the owners to restore the land”.¹³⁵

Despite the limited reference to agreements after the 1947 Act, they continued to be used, as is evident from the illustrations given above. From the perspective of Government, agreements were acknowledged as one way of overcoming difficulties encountered on appeal, something that would acquire formal recognition post-1990. In addition the flexibility of the tool to cement the solutions negotiated between landowner and local authority are recognised, if not always accepted. What is clear however is the tight rein by which local authority activities in this area were regulated and how this is used by Government to limit the practice. In the next chapter I explore the consequences of the Centre using a different strategy and abolishing the consent mechanism in the context of a changing economic climate.

¹³⁴ *Report of the Ministry of Housing and Local Government 1950/51 – 1954* Cmd. 9559, and for 1955 Cmd. 9876.

¹³⁵ Cmd.8204, op. cit., p. 51

Chapter 5. High modernism (1967-1990): from 'static control to positive guidance'

"The decks of Whitehall must be cleared of matters of no policy significance so that proper care can be given to those which it is vital that central government shall give direction and which the clutter of subordinate planning business now impedes."¹

1. Introduction

Centralisation through direct intervention had been the defining character of the modern era. In the high-modern era, steering by Government is substituted for many forms of direct action as a refinement of central control.² During this period the centralising project reaches its apogee, with Government still focused on accomplishing, "massive, purposive social change"³, but this time through a use of selective strategic direction, which shifts from, "static control to positive guidance".⁴ The ideal of centralisation does not necessarily recede, in some respects regulatory control intensifies. It is characterised however, by a use of different strategies. The Town and Country Planning Act 1968 abolished Ministerial consent, ending the express and individuated oversight mechanism regulating agreements. It broke also the nexus of direct information flow. Government no longer knew how many agreements were being entered into nor the extent of the practice. Information gathering became fundamental to the adoption of alternative regulatory strategies. It resulted in important research into planning gains, which

¹ TNA: AT 29/223, *Divisional interest in the Town and Country Planning Bill 1967: discussion papers; draft instructions to Parliamentary Counsel* (Jan– Dec. 1967) Town and Country Planning Bill 1968, Brief to Parliamentary Counsel.

² The metaphor used by Osborne, D. and Gaebler, T., *Reinventing Government: How Entrepreneurial Spirit is Transforming the Public Sector*. Reading, MA: Addison Wesley, 1992 to describe the role of Government as the facilitator or provider of strategic direction and the associated intensity of its regulatory functions, as opposed to its involvement in the delivery of every aspect of state activity.

³ Moran, op. cit., p. 5.

⁴ TNA: AT 29/223, Brief to Parliamentary Counsel, Town and Country Planning Bill 1968, para. 3.

although concentrating on wider issues than the use of agreement, pointed to the significance of the practice.⁵ Different regulatory techniques replace direct oversight drawing other players into the planning space. In this chapter I explore how the Centre's preference for selective and strategic intervention in planning control and an emphasis on a use of policy guidance shaped the instrument during the era. It coincided with the extant planning system proving incapable of meeting the developer and community demands. Before doing so, I outline briefly the context in which Government shifted its priorities and sought to regulate more remotely the control of land-use activity.

The use and regulation of agreements must be viewed in the context of ongoing innovation in land-use planning control, and in particular the continued reconfiguration of the overall regulatory schema, which remained an integral part of the centralising project. Planning, as a discipline is difficult to conceptualise as a closed system, governed by internal consistency. It is linked to and must account for different fields of knowledge, and consequently is subject to a continual renewal process. The high-modern era, beginning at the late 1960's, is characterised by a series of economic shocks and rapid change. The regulation of economic and technological risks became less clearly definable by Government alone, and its task of controlling activity more difficult as a result. Whilst the 1960's and early 1970's were a continuation of the economic boom that had begun in the Fifties, there followed the first significant post-war recession of 1974–5. With property a variable of the economy, the changing situation was to have a profound effect on land-use development, and in turn, its control. These factors were to impact on the configuration of the planning system. The planning agreement was no

⁵ Property Advisory Group, *Planning Gain*, op. cit.

exception. During the period of high-modernism agreements became identified more clearly as instruments for the recovery of betterment, by both planning authorities and Government, but in different ways. One was to plug public expenditure deficits, the other to compensate for adverse development impacts. Each would create tensions in local central relations, indicating different understandings of the practice and its regulatory effects.

The shifting economic climate not only placed greater strain upon Government to manage economic uncertainty; it highlighted also the limitations of central economic planning. This allowed others aside from Government to demonstrate their capacity to shape significantly economic development. The developer community would operate as both a counterbalance and complement to Government in regulating land-use activity. One task of Government was to create a sufficiently flexible system that could accommodate opposing economic cycles. The priority of Government in the high-modern era was to devise a system that gave strategic rather the detailed direction, whilst absorbing possible future exogenous economic shocks. The shift resulted in the repackaging of the planning system and agreements so that, "action and strategy are possible, sensible and agreeable in the case at hand".⁶ This meant, freeing, "Whitehall from burdensome detail".⁷ The reworking of land-use planning regulation resulted in a mix of decision styles ranging from competition and calculation, through to co-operation, community and hierarchy that drew in private actors, especially the developer community. Solutions followed rather less a lineal cause and effect decision line than

⁶ Forester, J. *Planning in the Face of Power*. Berkeley: University of California Press, 1989, p. 16.

responses to the demands of an unstable environment, where problems and the instruments used to solve them assumed a more diffuse character.

2. Broadening the regulatory field: economic growth as a dilemma in land-use planning

Planning (especially development planning) was now an integral facet of economic stability. The Planning White paper recorded

“...the plans drawn up must be realistic in financial terms and the demands they make on the main capital expenditure programmes must be reasonable in amount and timing. However admirable they may be, plans which cannot be realised are positively harmful.”⁸

Social and economic change was a hallmark of high-modernity. After the period of steady economic growth (matched by moderate public sector borrowing) of the late 1960's there followed periods of recession, and radical swings in fiscal policy which were to impact upon the planning system and the instruments integral to it. The effects of land-use planning control on land values and its availability for development has already been outlined in Chapter 4. The Uthwatt Report had recorded earlier that the existence of a comprehensive planning system could disturb the functioning of a 'market for land'.⁹ Most importantly land's availability or scarcity could affect whether collective goals were achievable.¹⁰ The continuing mission remained to ensure that the right land became available when required to secure national, regional and local policy objectives whilst retaining for the state a substantial part of development value in order

⁷ TNA: HLG 136/153, *Planning Advisory Group: papers on new planning system* (1965–6), Notes on the Town and Country Planning Bill, 1967 UPD 2.

⁸ *Town and Country Planning*, Cmnd. 3333 (June 1967), para. 9.

⁹ Final Report, Cmd. 6386 op. cit., para. 38.

¹⁰ *Land*, Cmnd. 5730 (1974), para. 20.

to subsidise land acquisition for essential collective purposes. Projected population increases burdening existing resources and leading to heavier traffic were significant factors requiring strategic direction within development planning.¹¹ The White Paper on land-use planning illustrates these concerns.¹² It was projected that 17.5m more homes would be required in Great Britain by the end of the century, representing an increase of nearly one third.¹³ Three million homes would need to be replaced via urban renewal, and slum clearance sites reused or recycled. By 1975 there would be 18m cars, with more to follow having a significant impact upon both urban and rural areas. Previous legislation, promulgated on the basis of a stable population, was thus sorely deficient in its scope and worse still could frustrate potential economic growth by hampering development. As the report noted

“[the system] must be broadened, both to take advantage of new advances in technique and to set problems of land use in the wider context of traffic, transport and investment policies”.¹⁴

The need for urban regeneration, and its strategic redevelopment was constrained by burgeoning land values and the limited supply of public resources to fund the activity. By the late 1960's the value of both urban and rural land had increased dramatically. Fewer homes were being constructed, and there was a real risk that the demand for housing would exceed supply, especially in the South-east. More generally the population continued to move from the traditional industrialised areas towards the periphery of town centres and from London to the Home counties. By doing so the

¹¹ In 1970 John Silkin (in opposition) noted that the population was increasing by 250,000 p.a. HC Debs vol. 808 col. 1401, (16 December 1970).

¹² Cmnd. 3333 op. cit..

¹³ Ibid., para. 6.

transport profile also changed. The shortage of planning permissions and the scarcity of development land, resulted in some well-publicised and notorious property speculation.¹⁵ Planning applications were not being processed in line with developer demands, and the system was slowly grinding to a halt.

Political statements also linked the efficiency of the planning system to the latter's capacity to respond satisfactorily to economic demands.¹⁶ These objectives could not be secured easily through a continuation of existing centralising trends, and Government recognised this. There was a real danger of bureaucratic overload, unless the project of centralisation was transformed to one of strategic direction. A draft for the Home Affairs Committee on the Town and Country Planning Bill 1968 noted

“...There have been many changes since 1947, notably an unexpectedly large and continuing growth of population and road traffic...If the statutory framework is not altered to cope with this new situation, we will be encumbered with a machinery of control which will increasingly hamper and delay new building and redevelopment; and with a plan-making system which cannot...provide a sound framework for investment in both public and private sectors.”¹⁷

¹⁴ Ibid., para 49, the earlier report of the Planning Advisory Group *The Future of Development Plans* (1965), para. 1.33, p.8 had been premised upon a prediction of economic and social development and a population demanding higher living standards.

¹⁵ The Poulson Affair of the 1960's a scandal relating to local government corruption in the context of property development was one of the main reasons for the Royal Commission on *Standards in Public Life* Cmnd. 6524 (July 1976). Its implications are described at Ch 2 of the Commission's Report.

¹⁶ HC Debs vol. 757 col. 1362, 1363, (31 January 1968), and HL Debs vol. 292 col. 1231, (30 May 1968) similar observations were contained in Cmnd. 3333.

¹⁷ TNA: AT 29/223, “Memorandum provided by the MHLG and the Secretary of State for Wales on the Town and Country Planning Bill 1968”, para.1.

3. Freeing Whitehall of, “burdensome detail”

One objective of the Town and Country Planning Act 1968, was to prevent the planning system becoming “...a hindrance to progress and an economic burden”.¹⁸ Planning procedures (which had caused the, “central machinery to be overburdened and slow”¹⁹) needed to be streamlined, to enable developers make Government’s vision of regeneration a reality, and to free the latter from, “burdensome detail”.²⁰ The late 1960’s, characterised by chronic administrative overload at the centre, culminated in concerns being expressed politically and bureaucratically about the capacity of the existing system to accommodate further growth. The central machinery was overburdened because, “the system involves the Minister so deeply in local detail which has no national significance”.²¹ The issue remained one of how the ideal of planning as an instrument of urban renewal and regeneration could be realised, given the economic and administrative constraints of Government.

Successive reports, notably the Management Study of Development Control²² and the Government White Paper²³ illustrate how this was to be done. Local authorities were provided with further devolved powers and the technical expertise to implement Government’s strategic objectives for land-use control. Stronger local governance was

¹⁸ Ibid., para 2.

¹⁹ TNA: HLG 136/153, Ministerial memorandum on the ambit of the 1968 Bill, Corrie to Pugh, 8 May 1967.

²⁰ Ibid., Notes on Bill, 9 August 1966.

²¹ TNA: AT 29/223, memorandum, 8 May 1967.

²² *The Management study of development control*, (HMSO, June 1967), chaired by N.J.R.J. Mitchell. The study was commissioned by the MHLG in conjunction with local government associations and had been carried out by a team from the Treasury, Hants CC and PA Management Consultants Ltd.

²³ Cmd. 3333, op. cit., para. 49 on the streamlining and simplification of the planning system. Reference can also be made to Minutes on the contents of the planning bill (Minute 23.12.12/67/50, TNA: AT 29/223).

seen as a basic necessity if the, “best coordination and therefore best value is to be got from public investment”.²⁴ The Ministry had appointed the Study to consider, local government’s function relating to planning control under the 1962 legislation. It undertook a time-management exercise to determine the optimum configuration of local authorities to carry out development control functions and implement Government policy, using efficiency as its main criterion for assessment.²⁵ At the time Government had little, if any information on local authority activity.²⁶ The most satisfactory configuration for development control was found to be through joint committees via the route of decentralisation.²⁷ Area committees would carry out development control functions according to district groupings, with district council’s being represented on those committees, thus maintaining a vital link between national and local objectives. Questions remained about the competence of local authorities to exercise additional powers and whether they could be, “relied upon to deal fairly with other interests subject to their powers”.²⁸

Delegation to joint committees required the provision of sufficient qualified staff. The Study’s emphasis on the consequences of allocating responsibility for deciding planning

²⁴ TNA: AT 29/223, Town and Country Planning Bill, Brief, para A.5.

²⁵ According to its terms of reference, the Study was *to advise on what arrangements the authorities might best make to discharge these functions expeditiously but without loss of quality of decision*. MSDC 2/66 MHLG August 1966, Brief for Team TNA: HLG 141/52.

²⁶ TNA: HLG 141/40 *Planning Advisory Group: action on interim report; management study* (1966). In a draft paper entitled, “Delegation of planning functions” (undated) sent under a covering letter of P. Critchley dated 26 September 1966, it was noted, *this analysis is based on inadequate knowledge...the only real source of information and the one which has not so far been tapped is the local authorities themselves* (para. 171).

²⁷ Part II of the Study.

²⁸ TNA: AT 35/2 *Planning Advisory Group. Legislation for new Development Plan system* (1966–7) note entitled, “Physical Planning” UPD2 19 September 1966, (para. 8) under cover of a memorandum (W.R. Corrie to Cox) marked for the Minister’s attention of the same date (subsequently submitted to the Cabinet Committee on the Planning Bill, 21 November 1966).

applications, and the organisation of decision-making, pointed the way to, “ways and means of toning-up the development control machinery”.²⁹ Government’s need was more extensive; to construct a more efficient system responsive to both economic demand and central direction. The Planning Advisory Group’s general review of the planning system³⁰ had considered this issue, and its recommendations had spawned in part the Management Study.³¹ The Group’s objectives were to ensure that the system remained an effective vehicle for planning policy with adequate public participation in the planning process. Other key aims included the task of ensuring the correct level of responsibility for decision-making, by distinguishing the

“...strategic decisions on the one hand and the detailed or tactical decisions on the other ...so that only matters of general policy and major objectives are submitted for Ministerial approval, and matters of local land use are settled locally in the light of these considerations.”³²

The “trivial controls or the use of control for insignificant purposes” had to be relaxed.³³

The Group’s Report itself not only revisited the principles of development planning, but sought to consider the question of how far a centralised planning system could resolve the problems associated with delay, population growth and increasing traffic. The multi-representative body of local government officers, civil servants and professionals, had

²⁹ TNA: AT 29/223.

³⁰ The PAG was appointed in 1964 and reported in 1965.

³¹ TNA: HLG 136/153 “Note for the Minister: The New Planning System, Introduction of the PAG Proposals” May 1966.

³² PAG Report foreword by Richard Crossman.

³³ TNA: HLG 136/154 *Planning Advisory Group Interim Report: 1965* (1964–65) para. 4.

recommended enhanced devolution to local authorities.³⁴ The only solution was to devolve powers to local government and remove local issues from the Whitehall machine.³⁵ Control would be secured through the political and bureaucratic response of management by exception; with the Minister retaining powers of direction and positive guidance on matters of national importance.³⁶ The, ““devolution of responsibility for some planning decisions” and the simplification of procedures, in order to “improve and modernise the system” however required implementation by those with key professional skills.³⁷ It required a level of trust between the Centre and planning authorities that perhaps had not existed previously.

3.1 The Town and Country Planning Act 1968: a leap forward

As the Planning Advisory Group, (the PAG) Report had observed

“The integrated and cohesive nature of the system and the central position of the Minister have undoubtedly been a force for stability and consistency in the development of planning policies and techniques throughout the country.”³⁸

It was time to change. Until 1968, the direction of land-use control had been towards comprehensive integration. A key feature of the Town and Country Planning Act 1968 was the decentralisation of the planning system under strategic central guidance. For the

³⁴ The Ministry was initially sceptical, with one official noting, *...maybe the Liverpools and Manchesters of this world are capable of the leap forward required but what of the Stockports, the Oldhams, the Wigans and the Birkenheads* (P. Critchley, 28 September 1965 TNA: HLG 136/153).

³⁵ The strengthening of local initiative was one of the PAG’s objectives, para. 7 of the minutes of its first meeting 26 May 1964. TNA: HLG 136/156, *Planning Advisory Group: agenda and papers* (1964–65).

³⁶ TNA: AT 29/223, Objective 1:1 of the PAG Report, repeated in the Brief on the Town and Country Planning Bill, para. A4, or as the Home Affairs Committee were advised on the draft Bill, *[exercising] discriminating control over proposals that matter* (at para. 2).

³⁷ Cmnd. 3333, op. cit., para.12.

³⁸ *The Future of Development Plans*, op. cit., 1965, para. 1:7.

many local procedures, subject to a regime of explicit central oversight and accountability, a different form of regulation was substituted; that of control by more diffuse means (including the exercise of powers by exception and the issuing of guidance). In line with the PAG recommendations, further delegation and greater responsibility for detailed local development control and local plans was given to the planning authority, with the Minister retaining residual control for strategic matters.³⁹ A distinction was thus drawn between policy and strategic decisions and detailed matters. This would inevitably have an effect on both agreements and the relations between central and local government and its personnel. As Baroness Serota stated on the introduction of the Bill's Second Reading in the Lords

“...the Bill creates the means to develop a more positive and effective partnership between planners and planned, between Government and governed”.⁴⁰

This “new partnership” was to raise the expectations of the public and developers alike and become another source to regulate local authority activity. Demands placed on the public sector, (at both central and local levels) had a profound effect upon decision styles, and were to mark the transition from, “...static control [to] positive guidance”.⁴¹ This left room for other players to colonise the regulatory space including the developer.

³⁹ As the Report stated at pp 44–5, *it means conferring on local government a greater control responsibility and initiative in the planning field, and this is in line with the general policy of strengthening local responsibility and releasing central government control*. The Minister was, however to retain responsibility for *...general supervision and co-ordination of planning policies and planning standards* (para. 7:3).

⁴⁰ HL Debs vol. 292 col. 1231, (30 May 1968)

⁴¹ TNA: AT 29/223, Brief for the Town and Country Planning Bill 1968, para.3,.

4. Regulating agreements in the high-modern era

The continuing use of agreements emphasised the deficiencies of the centralised planning system, especially its inherent inflexibility in times of economic uncertainty. For a practice directed to local development control issues, its use was recognised centrally and supervised closely. A survey undertaken in 1967 by Ministry officials⁴² into the uses of agreements in the regional planning divisions identified that in the late 1960's agreements were used for restricting the use of land⁴³, phasing development⁴⁴, tying conditions⁴⁵ and modifying existing grants of planning permission.⁴⁶ Whilst the use of agreements did not appear to, "evoke comment on planning merits"⁴⁷ from the Divisions, Divisions P.2(b) and P.2(c) covering the south east region were most heavily concerned with their use. Whilst the technical advisers in the regions seem to have had limited input in scrutinising agreements, they did have some. A memorandum, referring to the survey, shows that the advisers would liaise with councils, on specific issues to clarify points and offer guidance. Staff would advise on matters of detail e.g. questions of the density of development where the agreement covered phasing, the inclusion of a compensation waiver clause, or the extent of the land within the agreement. Central officials were more concerned with the legal form.⁴⁸ The views of regional staff did however carry weight at the Centre. Civil servants in Whitehall would consult regional

⁴² TNA: AT 29/76, *Notes on the Planning Bill – Development Control Matters* (1967–8) memorandum, J. Prior to Brewer, 17 July 1967.

⁴³ Ibid., Bexley Greater London Borough, restricting land to use as a car park; Braintree RDC, restricting the use made of poultry sheds; Leicester County Borough Council, restricting land to public open space; Chesterton RDC restricting the use of amenity areas; Liverpool County Borough Council, restricting the use of land as pedestrian way as part of a development.

⁴⁴ Ibid., Slough Borough Council.

⁴⁵ Ibid., Hailsham RDC.

⁴⁶ Ibid., South Westmoreland RDC's agreement not to build a bungalow for which planning permission had already been granted.

⁴⁷ TNA: AT 29/76, memorandum.

technical staff before giving consent, as a matter of course. The same memorandum records anecdotally an instance when civil servants failed to consult the appropriate regional division and, "when the agreement came in for approval the division protested and said they would have been reluctant to support approval had it been referred to them at draft stage".⁴⁹ Despite what seems to have been a division of labour between central and regional staff, over time central officials were gradually becoming inundated with supervisory tasks. By that time civil servants had accepted that

"...the use of these supplementary provisions of planning control is increasing as their value in appropriate circumstances becomes more widely known".⁵⁰

In another case the Ministry refused to approve a draft agreement that included a covenant relating to the closure of a private car park provided by the developer. The Ministerial memorandum notes (commenting on the fact that agreements made under the 1962 Act provision could not contain positive covenants)

"It would sometimes be useful if positive covenants could be included. To take a recent example, permission was granted for a row of new shops subject to the condition that a space should be left to give access to a car park, which the developer was to provide at the rear. All parties wanted to agree that, when in due course the local authority provided a public car park, the private one should be closed and the access way used for the construction of a shop to complete the row. We had to turn the agreement away because of the positive covenant."⁵¹

Agreements covering compensation claims were also the subject of close scrutiny, especially where their effect was to avoid compensation payments under the Land

⁴⁸ TNA: AT 29/76, minute 27/7/67, Brewer to Schwab, 27 July 1967.

⁴⁹ TNA: AT 29/76, memorandum.

⁵⁰ Ibid., memorandum, 27 July 1967.

⁵¹ TNA: AT 29/76.

Compensation Act. The issue for the Department was how agreements having the effect of circumventing payments of betterment levy could be supervised after the requirement for Ministerial consent was abolished. Civil servants considered possible options, in great depth. One suggestion was for matters to be dealt with administratively by providing advice. Another was that the amended provisions should exclude the making of financial payments (but not necessarily those made by landowners to councils, "...where the owner makes a contribution for the preservation and maintenance of amenity open space on housing estates").⁵² Nothing was done. The official reluctance to dictate to councils coincided with a clear awareness that declarations of illegality could significantly prejudice current practice.⁵³ The approach indicated also the tendency of the Centre towards subtle controlling strategies, heavily dependent upon trust as opposed to command. This would become increasingly more important after 1968 with the abolition of Ministerial consent.

The number of agreements approved had increased steadily, despite one observation of the Ministry that, "such agreements have not been used widely since the 1947 Act".⁵⁴ Between 1965 and 1967 a total of 379 agreements were approved by the Ministry⁵⁵; 86

⁵² Ibid., minute Brewer to Schwab, 4/8/67 UPD2.

⁵³ A similar strategy had been adopted during the early 1960's relating to a use of agreements for the payment of commuted sums in lieu of parking deficiencies. Correspondence of the early 1960's in TNA: HLG 136/163 *Payment by developers to local authority for car parking provision near development: correspondence with local authorities and other bodies* (1964–76) shows that whilst officials considered that a use of agreements was unlawful to secure this objective they were reluctant to be explicit on the point.

⁵⁴ TNA: AT: 29/76, memorandum 27 June 1967.

⁵⁵ TNA: AT 29/76 as noted in a Departmental Memorandum (Brewer to Schwab) 17 May 1967 MHLG. The figures were calculated to 8 May 1967.

in 1965, 141 in 1966 and 159 in 1967 and 97 in the eleven months of 1968.⁵⁶ Such was the concern of the Ministry at the time that a systematic appraisal of the agreements made was undertaken. Ministry files show that prior to the passing of the Bill agreements were used for a number of purposes. A memorandum of 13 December 1967 notes,

“...152 agreements have been approved of which about 20% relate to the restrictions on the carrying out development pending the provision of sewage facilities or other public services.

15% of the agreements relate to the preservation of open areas on housing estates in order to prevent them being built upon at a later stage.

The remainder ... are somewhat of a miscellaneous bag. They involve such matters as:

- (a) Time conditions on occupation of dwellings
- (b) Control of tenting and caravans, usually in respect of numbers
- (c) Agreements not to use land otherwise than in a certain manner e.g. car parking, agriculture, residential or access
- (d) Phasing of development so as to regulate the number of houses that can be built at any one time in order that they can be assimilated into existing services.”⁵⁷

The practice was becoming significant for the provision of infrastructure works associated with proposals, rather than simply regulating specific developments. The use of agreements to provide open spaces and for infrastructure works facilitated controls that could not be achieved by the imposition of conditions, especially where the works related to land not part of the application. This use would become more important in times of public expenditure constraint.

⁵⁶ During the same period the Ministry calculated that there were approximately 400,000 planning applications per annum. TNA: HLG 135/2, *Research Studies* (1969–70). In contrast to the findings of the DoE research report, *The Use of Planning Agreements* 1992, which identified that the annual number agreements between 1987 and 1990 had increased by +20% per annum (para. 4.6), these show an increase

Ministry officials perceived agreements as legally complicated, “slow and cumbersome” with councils not being competent to draft them without assistance.⁵⁸ The Centre did not appear to openly express the strategic importance of agreements, unlike the local authorities using them, but nevertheless maintained a keen interest in their use. Local authorities made, “constant use of the power to make section 37 agreements”.⁵⁹ They were of broad regulatory significance centrally to the extent that the statutory provisions gave an explicit role to the Minister. As one civil servant noted, agreements were “...closely examined for legality and appropriateness” because the Minister was involved.⁶⁰ Government’s continuing perception was that local authorities were incapable of being trusted (or indeed of managing their own affairs) without close supervision.

Central oversight had served a functional purpose. Whilst Ministerial approval appears to have been given to the majority of agreements⁶¹, the Ministry used its powers to ensure that local authorities complied with its worldview, and did not exceed central government diktat. A use of hierarchy functioned as a protective regulatory mechanism. The consent mechanism provided overarching protection against local government abuse and incompetence. Since the advent of agreements under the 1932 Act, Government

of almost 90%. The figures themselves do not tally with the study undertaken by Jowell (1977a) op. cit., at p. 416 who indicates 83, 139, 157 and 95 approvals respectively for the same years.

⁵⁷ TNA: AT 29/76, MHLG memorandum Schwab to Cox, 13 December 1967.

⁵⁸ TNA: HLG 136/163, note UP D.3, 24 May 1967.

⁵⁹ TNA: AT 29/76 confidential note on the Town and Country Planning Bill, para. 7.

⁶⁰ TNA: AT 29/76 op. cit., memorandum 27 July 1967

⁶¹ Jowell (1977a), *supra* p. 416 notes that in the period 1964-8, 97.6% of planning agreements, submitted under section 37 Town and Country Planning Act 1962 were approved by the Ministry of Housing and Local Government. What is less clear is the role of regional officials in pre-empting applications for consent.

(and Parliament) had been concerned with their role as guardians of the interests of the individual. As Ministry staff noted as early as 1933

“The real safeguard for owners for an equitable deal is, I think, the control of the Minister of Health and Parliament.”⁶²

This is consistent with the debates on the Interim Development Bill, which back in 1943, extended local authority planning powers but provided compensating central oversight.⁶³

In the case of agreements, there was real concern to protect the individual landowner from the possibility of local government abuse through the use of its powers, and this remained in the high-modern era. A Ministerial memorandum notes

“...we have no responsibility for protecting outsiders from bad legal advice, but the “little man” (with whom large numbers of these agreements are concerned) needs someone to have regard to his interests.”⁶⁴

The idea appeared to be that Government should function as a countervailing weight or counterbalance against local authority power – possibly operating as a means to absorb or diffuse the ability of the latter to act opportunistically. A note on suggested amendments to the planning legislation in 1967, comments (on the proposal to abolish the requirement for consent)

“... this proposal makes the old-stagers uneasy, for not only do authorities tend to bully, but an agreement holds despite a planning permission granted by the Minister”.⁶⁵

⁶² TNA: HLG 52/592

⁶³ HC Debs vol. 389, col. 529, (11 May 1943) where the question was raised as to whether local authorities were the correct institution to deal with planning (Sir F. Freemantle) and col. 538 where MacLaren queried the general competence of joint planning committees.

⁶⁴ TNA: AT 29/76, Departmental memorandum Prior to Brewer 1 May 1967.

⁶⁵ TNA: HLG 136/153, “Suggestions for Planning Bill (extract)” para. 7. April 1966.

There remained a distinct lack of trust in the capacity of authorities to function appropriately without direct oversight.⁶⁶ Before 1968 this was done through the checking of draft agreements, the use of precedent files to aid the drafting of agreements as well as the formal consent mechanism, but the mechanics were to change. After 1968 Government placed greater emphasis on securing the trust of planning authorities to ensure their compliance by almost subliminal means.

Agreements fell within Government's strategy to "clear the decks ...of matters of no policy significance"⁶⁷ so that attention could be given to those issues of vital (i.e. national and strategic) planning importance. This meant removing the requirement for Ministerial consent to which agreements had, until 1968, been subject since the introduction of comprehensive interim development control under the Town and Country Planning (Interim Development) Act 1943. In the high-modern era, the Ministry saw agreements as having marginal significance to the planning system overall.⁶⁸ They were seen as matters of local significance only.⁶⁹ This was the stated basis justifying the removal of the consent requirements under the Bill. However, by the late 1960's the role of agreements had been recognised as important, especially in securing obligations from landowners and developers. The practice was said to be, "convenient despite its rigidity, and ... produce[d] desirable results which would be

⁶⁶ TNA: T 224/1485 *Papers leading up to Town and Country Planning bill 1966–1967*.

⁶⁷ TNA: AT 29/223, para. 4.

⁶⁸ TNA: AT 29/76, "Instructions to Parliamentary Counsel on the Town Planning Bill 1968", "Notes on the Planning Bill – Development Control Matters" indicated that ...*section 37 agreements are...of limited application and concern matters of purely local significance* (para. 4). The fact that matters are locally significant does not necessarily signify a lack of national importance.

⁶⁹ TNA: HLG 136/153, para. 8 Note on the Town and Country Planning Bill, 4 May 1967 UPD.2.

difficult to attain in other ways”, especially by imposing conditions.⁷⁰ The earlier

Management Study of Development Control had noted that

“Section 37 agreements are used for restricting and regulating development and are useful tools for the planning authority and appear readily understood by developers. At present, these arrangements require confirmation by the Minister and delays of up to six months have occurred.

Certain authorities, it is understood, have local act powers to make such agreements without confirmation and it is *recommended* that these powers should be extended to all authorities by general legislation.”⁷¹

The background to the revision was not straightforward however. The 1968 Bill as it related to agreements, covered two distinct aspects, the devolution of powers to local authorities by abolishing consent and the power to include positive covenants within agreements.⁷² Part of the strategy was to remove local issues from the Whitehall machine as successive reports, notably the Management Study of Development Control and the Government White Paper had recommended.⁷³ By the mid- to late-Sixties, officers at the Ministry had adopted a rigid interpretation of the statutory provisions as they related to agreements.⁷⁴ In part this stemmed from the inclusion of positive covenants in agreements. There were concerns also regarding the use of obligations to

⁷⁰ TNA: AT 29/76, Bill notes, “Agreements under section 37” para. 7.

⁷¹ TNA: HLG 136/153 Part IV, para 6, p.22, also referred to in TNA: HLG 141/53, *Management Study of Development Control: study proposed by Planning Advisory Group to investigate local authorities’ development control functions* (1966-68). Civil servants noted in a later file that the comment was in fact inaccurate, and that the Study had confused positive covenants with planning agreements, TNA: HLG 141/68 PAG: *Management Study on Development Control of local authorities functions* (1968).

⁷² The County Councils’ Association had identified a similar problem regarding developer obligations to lay out and maintain public open space. TNA: AT 29/76, memorandum, A. Hetherington to W. R. Corrie referring to representations by the Association on Clause 27 of the 1968 Bill (dealing with section 37 agreements), 18 April 1968.

⁷³ Confirmed in the MHLG minutes on the contents of the planning bill (Minute 23.12.12/67/50, TNA: AT 29/223).

⁷⁴ As confirmed at TNA: AT 29/223, memorandum by the Ministry of Housing and Local Government and the Welsh Office 17 June 1967 MHLG B/28/2/5, B/28/2/6, WO P.G. 3105 and the draft Instructions to Parliamentary Counsel.

cover matters outside the realm of land-use development.⁷⁵ Draft agreements containing positive obligations were either asked to be modified (if Ministerial approval was to be given) or refused.

Although originally anticipated that the inclusion of positive obligations would be subsumed within the recommendations of the Wilberforce Committee on positive covenants⁷⁶, this did not occur and the revisions (together with the proposal to abolish the consent provisions) were inserted into the planning Bill 1968. Differing views on the utility of agreements were apparent from consultation responses on the proposal, pointing to the possibility of tension between some of the key actors for the future. The Country Landowners Association, local government bodies (with the exception of the GLC)⁷⁷ and the National Parks Commission welcomed the proposal. The General Council of the Bar however, viewed (astutely), "...with distaste the possibility of a network of section 37 covenants operating as a secondary system of planning control".⁷⁸ With the increasing use of the practice and pressures on Departmental time, agreements were redrawn as local solutions to local matters. Section 108 and Schedules 9 and 11 of the Town and Country Planning Act 1968, removed the requirement for Ministerial

⁷⁵ TNA: AT 29/76, Minute UDP 2, 4 July 1967.

⁷⁶ *Positive Covenants Affecting Land* Cmnd. 2719 (1965).

⁷⁷ The London Boroughs Association, The Rural District Councils Association, and the County Councils Association supported the proposal, as did the Urban District Council's Association. The GLC however did not wish to dispense with the consent mechanism in its response, 28 July 1967. TNA: HLG 148/13 *Town and Country Planning Bill 1967: consultations with local authority associations, representative bodies and government departments; correspondence* (1967–8) "Correspondence with various bodies on planning law and Bill" (1968).

⁷⁸ TNA: HLG: 148/13. This was a special committee chaired by Frank QC (chairman), and included Boydell QC, Widdicombe QC, Layfield QC and Dobry drafted the report.

consent. The section, with the rest of the Act, came into force on 1 Jan 1969.⁷⁹ It made no substantive reference to agreements save in the Sched. 9 para. 19.

5. The enlarged regulatory space: ‘old hands’ and emerging actors

The reorientation of central priorities towards strategic planning emphasised the demise of any aspiration to plan every aspect of development control nationally. The economy itself was less amenable to central intervention with significant power concentrated in the hands of private actors. Economic uncertainty together with increasing central overload forced Government to rethink how far it was possible to be involved in every aspect of development control. These factors contributed to the creation of space for other players (both new and existing) to participate or consolidate their position within the planning arena. Often their presence was a direct result of the Centre’s strategy of ‘clearing Whitehall’s decks’, at other times it was more a matter of contingency. The place of developers, local authorities and planning professionals in the redrawn regulatory space is considered below. The role of the courts will be described in a later section.

5.1 The rise of the developer

By the 1960’s it was clear that alone the public sector could not meet the demands for urban renewal and regeneration. Continuing reliance had to be placed on the private developer to secure the nation’s goals. A report presented to Parliament in February 1961 had identified a seemingly insatiable demand for housing in England and Wales

⁷⁹ S.I. 1968/1909.

that could not be satisfied wholly by public authorities.⁸⁰ In the fifteen years since the end of the World War II, more than 3.25million new homes had been constructed, and whilst one family in every four lived in a post-war house and 400,000 older properties had been renovated, many families still lived in unfit or over-crowded properties. Government was becoming ever more dependent upon the private sector to satisfy the demand for future housing but had also much less influence over the private developer. Developers were viewed as a, “real force” in the shaping of towns and cities, who had sufficient technical and financial “clout” to exert pressure on planning authorities and as a consequence secure their own objectives.⁸¹ In 1945 the ratio of house completions by private builders and local authorities was approximately 2:1 in favour of the former. During the post-war period that trend had been reversed and by the early-1950’s public housing completions exceeded private construction by almost 6:1. After 1958 the trend swung in favour of the private developer.⁸² By 1966 the Ministry was holding strategy meetings with representatives of those interested in land-use planning, including the National Federation of Building, W.R.K. Laing, trades associations, the Building Societies Association, and representatives of each county district planning department to discuss the Housing Programme for the period 1965-70.⁸³ The developer as well as the local authority and landowner became a participant in the regulatory space.

⁸⁰ *Housing in England and Wales (Role of private enterprise, public authorities, etc.) proposals*. Cmnd.1290 (February 1961), paras. 1–6.

⁸¹ Mr E. Rowlands, (MP for Cardiff North), speech to the House of Commons HC Debs vol. 757 col. 1413, (31 January 1968).

⁸² By a ratio of 1.5:1 in 1960. Ministry of Housing and Local Government *Housing Return for England and Wales 31st December, 1960*. Cmnd. 1271, Table III (January 1961).

⁸³ TNA: HLG 141/39, *Review of delegation arrangements* (1965–6).

Changes also took place in the commercial property domain. Marriott outlines the history of commercial property between 1945 and 1967.⁸⁴ In this highly volatile market of speculation, risks intensified during periods of rapid economic change. The abolition of the Ministry of Works building licence consent system for carrying out development⁸⁵, and the rationalisation of compensation and betterment had resulted in a significant rise in land values in some areas. Individual landowners and developers benefited from inflated land values. Individuals held substantial amounts of property and in contrast to the limited number of major corporate players in the housing market, a ready supply of land with other development potential existed.

One of the main post-war problems was the congestion of cities, especially London. The emergence of the white-collar worker exacerbated this. By 1953 there was a massive demand for offices in London.⁸⁶ Between mid 1948 and 1954, 22.3m sq. ft. of office development in London had been permitted, and another 6m sq. ft. granted permission to change use to offices – almost three times the loss during the war.⁸⁷ The spiralling costs of rents in London resulted in a ripple effect in the provinces. Property developers with their business acumen and speculative intent remained one step ahead of the market and when difficulties loomed had the knack of diversifying by either floating their company on the stock market or seeking another opportunity.

⁸⁴ Marriott, *op. cit.*

⁸⁵ Under the Town and Country Planning Act 1954.

⁸⁶ Marriott, *op. cit.*, p. 5 notes that although 9.5m sq. ft. out of a total stock of 87m sq. ft. (in 1939) had been destroyed in the war, total floor space (built or under construction) amounted to 140m sq. ft. by 1966; a rise of 72% over the 1939 total.

⁸⁷ *Ibid.*, p. 169.

The property boom was not limited to office development. Although between 1955 and 1960 retail development in the provinces was quiet in comparison to office activity in London, developers switched their attention to the High Street by the end of the fifties owing to fierce inter-developer competition in the office sector and the rise in development land values. By the mid-sixties new players were entering the retail market e.g. Laing, Arndale, Hammersons, Murrayfield, Town and City and Ravenscroft (formerly Ravensfield) Properties. Retail growth prospered during the early '60's. From 1956–8 the number of supermarkets increased from 100 to 175 an increase of 75%. Between 1960 and 1962 this percentage increased by 111% and 171% respectively.⁸⁸ Yet in each case the property developer could not function without the assistance of the local authority as either facilitator of development (as the provider of planning permission) or land assembler through the exercise of its statutory powers of comprehensive redevelopment.

5.2 The epoch of the local authority – a challenge to the Centre?

Local government's role should be viewed in the context of a growing independence from Government and the continuing professionalisation of planning. It was indeed a time of coming of age. Burgeoning post-war economic growth coupled with the usual constraints on public expenditure converged with the ongoing requirement of urban renewal. Local authorities like the state faced the heavy burdens of reconstruction; war damaged centres needed rebuilding, as did unfit houses. These local demands resulted in land-use planning being given a higher profile at the lower tier of government. It was accompanied by a growing centralisation of local bureaucratic activities. The

⁸⁸ Ibid., p. 237.

centralising post-World War II planning legislation proved ineffective to address local requirements, especially comprehensive redevelopment. Compulsory acquisition was cumbersome, raising almost insurmountable difficulties in terms of finance, land assembly and administration.⁸⁹ To be effective, redevelopment required both public and private involvement sharing the costs and returns accordingly. This was not achievable easily under the planning Acts. It left space for local government to adopt creative solutions and grow in stature. Local authorities were major players in the post-war era. With their extensive powers they became "...the new ground landlords of the post-war era".⁹⁰ Major town centre redevelopment was often the product of close co-operation between local authority and private developer. Sometimes, as in the bomb-damaged regions of the south-west⁹¹, reconstruction was a necessity, in others as Marriott notes it was more a case of a return to civic pride. Fuelled by competing developers keen to assume redevelopment projects, local authorities sought to initiate town-centre redevelopment. By the end of 1963 some 70 schemes were being considered by the Ministry (compared with 15 in 1959), and there may have been some 500 schemes and 100 developers in train.⁹²

During the modern era, there had remained room for flexible and negotiated local solutions (particularly agreements) but these would not for the future be central to land-use control, given the priority of development planning. The changing property market

⁸⁹ *Traffic in Towns: A Report of the long term problems of traffic in urban areas*. Reports of the Steering group and Working Group appointed by the Minister of Transport, (1963) HMSO at paras. 41- 43 of the Report and 472-474 of the Report of the Working Group refer to the problems associated with comprehensive redevelopment.

⁹⁰ Marriott, op. cit., p. 80.

⁹¹ As with Bristol, Plymouth, Hull and Swansea.

⁹² Marriott, op. cit., p. 240.

and the demands for redevelopment demonstrated however deficiencies in the planning system, especially its unresponsiveness to market demands. Local authorities continued to work in partnership schemes with developers in order to implement development projects, sometimes using agreements. Authorities had the opportunity to colonise those areas where the planning legislation was flawed, gaining experience on the ground and maturing in the process. The use of local Act powers illustrates this point. Before the 1968 Act, local authorities were using local legislation to enforce positive obligations and thus facilitate redevelopment projects. The Leicester Corporation Act, 1956 was one such example. It stated at section 6 that

“...Every undertaking given by or to the Corporation to or by the owner of any legal estate in land and every agreement ...shall be binding not only upon the Corporation and any owner joining in the undertaking or agreement but also upon the successors in title...”

In doing so it allowed for the enforcement of both positive and negative covenants, something not possible with agreements.⁹³

The use of local Act provisions contributed to furthering the autonomy of local authorities, as is clear from the archives in the late 1960's. By then central officials felt some disquiet about the use of private legislation to achieve redevelopment. Private bills were viewed as, “...slow, inflexible and expensive”, they were also subject to, “...the disadvantage that the decision does not rest with the Minister but with Parliament”⁹⁴, thus largely avoiding Departmental oversight. One file is devoted to the

⁹³ Jowell, (1977a) op. cit., pp. 416–7, Loughlin, (1981), p. 67. Similar powers existed under section 13 Essex County Council Act 1952, and section 9(2)(a) Manchester Corporation Act 1965.

⁹⁴ TNA: AT 29/123 *The relationship between private bills and the planning system* (1968–71).

relation between planning control and private bills.⁹⁵ The accrual of permitted development rights for the carrying out of works authorised by private Act, resulted in a circumvention of planning process. The General Development Order of 1963, by permitting works under Class XII, shielded the activity from the scrutiny of the planning application process i.e. the full consultation process and where appropriate the holding of a local inquiry. The minutes of the Ministry indicate the level of bureaucratic concern regarding the inability of the Centre to influence and thus regulate local authority activity in this respect. Whilst the Department would have a much easier task, "...influenc[ing] bodies over which we have some measure of statutory authority than private developers" such as local authorities and other public undertakings, officials were well aware of the limited way in which this could happen. As one memorandum indicates

"...this could only be a matter of persuasion. ...There is then the question of the circumstances in which we should attempt to steer authorities in one direction or another".⁹⁶

There is a recognition on Government officials' part of their limited capacity, at the time, to regulate local authorities. This could effectively be done only by a use of the more subtle measures of steering and persuasion.

The use of private legislation gave local authorities the opportunity to experiment and in the process gain further confidence and expertise partly shielded from the reaches of the Ministry. Whilst Government could deny the Bill a Second Reading, issue a mandatory instruction or report to Committee, the Ministry preferred to use persuasion or even

⁹⁵ Ibid.

threats rather than formal measures.⁹⁷ Private legislation was used for major redevelopment projects such as Ipswich docks and Brighton Marina. In the latter case, the promoters were urged to apply for planning permission and the application was called-in by the Department after discussion with the Ministry of Transport.⁹⁸ In the case of major development that involved significant planning issues, negotiations would often take place before the Bill was presented to Parliament. Some local authorities used these powers frequently, as in the case of Birmingham Corporation.⁹⁹ The route was one way local authorities assumed further powers to effect regeneration. Whilst the Ministry managed to dissuade some authorities¹⁰⁰, the practice continued during the 1960's, converging with a more general recognition on Government's part of its own limited capacity to effect the project of regeneration and renewal through direct intervention. Despite Government's evident disquiet regarding the use of private Bill powers, the powers did secure rights and impose obligations that were not possible under existing legislation. During the session 1967-8 none of the objectives promoted by private Bill could have been achieved under existing statutory powers.¹⁰¹ By the 1968 Act, further devolution to local authorities was assured.

5.3 The planning professional

Modifications to the planning process emphasising further delegation to local authorities, inevitably resulted in greater attention falling upon those who were to

⁹⁶ TNA: AT 29/123, (K)PSO/7122/68, memorandum of W. R. Cox, 26 July 1968.

⁹⁷ The reasons for this appear to be partly cultural as well as pragmatic because the *private Bill procedure* was ...*embedded in the constitution long before the introduction of planning control* (TNA: AT 29/123, para. 8 (K)PSO/7122/68).

⁹⁸ TNA: AT 29/123, 8 November 1968 para. 10.

⁹⁹ Which traditionally proceeded by private Bill. TNA: 29/123, 26 July 1968.

¹⁰⁰ Such as Croydon in TNA: AT 29/13 *Review of compensation for compulsory purchase and planning restrictions* (1967-68).

implement the changes; the planning professional. Questions arose about the qualifications of those having the responsibility for the formulation and implementation of planning policies. Some recognition had been given to the “town planner” as a specialist at the turn of the twentieth century, but the qualifications and role of planning personnel was not revisited by Government until 1950.¹⁰² By this time the planning officer had assumed considerable powers of control.¹⁰³ The Ministry had noted that the new planning system had placed greater demands upon the local authority officers’ charged with its implementation. These involved both determining policies and then implementing the plan to secure the use and development of land in accordance with those policies.¹⁰⁴ Rather than planning techniques being carried out by the engineer, architect, lawyer or chartered surveyor separately or in tandem, the independently well-qualified professional took the lead.¹⁰⁵

Planning became a specialist profession overseen by, “an authoritative national institute” that would have as its members those educated to a degree level with two years post-graduate training.¹⁰⁶ A key role was given to the Town Planning Institute in this respect. The Institute followed the academic tradition, enhancing university representation and co-opting representatives from the social sciences. The raising of professional standards

¹⁰¹ TNA: AT 29/123, Minute E/PSO/ 7122/68 9522/68, 26 November 1968.

¹⁰² Pre-1909 planning was thought of as a technical skill rather than a profession. At that time there were four practitioners of town planning and no universities taught the subject. The Town and Country Planning Association was a successor to the Garden Cities Association of 1899. The Town Planning Institute was established in 1914 through the liaison of RIBA and what is now RICS and the Institution of Municipal and County Engineers. A brief history of the profession is provided in the Joint Report of the Ministry of Town and Country Planning and the Department of Health for Scotland on *Qualifications of Planners* Cmd. 8059 (September 1950). Cherry (1974) traces the history of the Town Planning Institute and the co-evolution of town planning and the planning profession.

¹⁰³ *Qualifications of Planners*, para. 53.

¹⁰⁴ Ibid.

and the status of the national body enhanced the credibility and authority of the planner. Another key player therefore emerges in the regulatory space – the planning professional¹⁰⁷, led by the Chief Planner Officer of each local authority who would be both professionally trained and skilled in management, someone able to think ‘creatively and imaginatively’. The planning professional had assumed a prominent role in the planning process. With the prospect of further delegation by Government this would increase. From this time the planner would shape planning practice; this included agreements.

6. Fragmented governance forms *post* 1968

With the abolition of the consent mechanism, the Ministry adopted other controlling strategies. These focused on a use of policy and guidance. The adoption of less direct means to regulate the practice had the effect of drawing other actors into the regulatory space. Sometimes this occurred as a direct consequence of Government’s approach, as in the case of the promulgation of guidance framing the bounds of local authority activity, at others the results were more contingent upon the Centre’s approach. In this section I consider the effects of Government’s changing regulatory style, in the context of the Town and Country Planning Act 1971, the consolidation of the 1968 provisions.

6.1 The Town and Country Planning Act 1971

The 1971 Bill was said to

¹⁰⁵ Ibid., para. 28.

¹⁰⁶ Ibid., recommendation 25.

¹⁰⁷ The recommendations of the Joint Report tie planners closely to local authorities. No real significance was attached at this stage to the planner in private practice, although the Report notes that planners in the private sector advised both local authorities and landowners (para. 104).

“...consolidate, with Amendments, the whole of the law relating to town and country planning in England and Wales ...It is a drawing together of all the legislation passed by Governments since the end of the war.”¹⁰⁸

Under its terms, agreements were classified as *additional powers of control* by virtue of section 52 (as they had been under the 1962 Act). Section 52 of the Town and Country Planning Act 1971 closely mirrors earlier provisions. The section provides a framework within which the development or use of land can be restricted or regulated, beyond the imposition of planning conditions on a grant of planning permission. Like earlier provisions, agreements could only impose negative covenants. Subsection (1) provides as follows

“A local planning authority may enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement.”

Subsection (2) allows for the agreement to contain incidental or consequential provisions (including those of a financial nature) as appear to the planning authority necessary or expedient to the agreement. By virtue of subsection (3) the agreement becomes enforceable by the local planning authority against those deriving title from the original covenantor, as if it possessed adjoining land and the agreement had been made for its benefit, thus overriding the defect of *LCC v. Allen*. The section supplements the development control framework (centred upon the discretion to grant planning permission pursuant to an application) by conferring powers on the planning authority to

¹⁰⁸ The Solicitor-General, Sir Geoffrey Howe HC Debs vol. 823 col. 505, (18 October 1971) on the Second Reading in the Commons. The Bill was considered by a joint committee of both Houses on 7 and 14 July 1971, receiving its Second Reading in the Lords on 22 June and the Third Reading on 29 July. As a consolidating Bill it was not debated fully on Second Reading.

regulate land use by agreement. It provides few clues as to its potential effects, which can only be grasped from the operational context. It is the local authority that, in deciding whether or not to enter into an agreement and its content, assumes the classical position of control. Yet, “agreement” implies negotiation between the parties, and possibly an equality of bargaining power largely absent in the land-use planning context where the regulator is dependent upon the landowner or developer to deliver solutions. Practice and law appear to diverge.

The 1971 Act provisions have to be viewed against a background of continuing growth in both the commercial and residential property sectors.¹⁰⁹ The symbiotic relation between local authorities and the private sector that had resulted in ever-closer co-operation between the two in the 1960’s continued apace. The removal of the betterment levy and the abolition of the Land Commission¹¹⁰ had resulted in an increase in land values and kick-started further developer ambitions. Agreements by this time were viewed as a tool through which, “bargaining in development control” could be secured.¹¹¹ Government encouraged the negotiation of developer contributions. The Sheaf Committee report acknowledged the high costs to local authorities of acquiring

¹⁰⁹ This is identified by both Healey et. al. (1995), and the earlier work, Davis, J., and Healey, P., *Wokingham: The Implementation of Strategic Planning Policy in a Growth Area*, Oxford Working Paper No 74 1983. Henry, David in *Planning by Agreement in a Berkshire District*, Oxford Working Paper 69, September 1982 and 1984 *JPL* 395–400, concurs with this view.

¹¹⁰ The Land Commission (Dissolution) Act 1971. The Land Commission was established in 1967 as a central mechanism to exercise compulsory purchase powers and collect betterment. Whilst the objective had been to make land cheaper and more readily available, the Commission had acquired 2800 acres and made 320 available for development to December 1970 HC Debs vol. 808 col. 1384, (16 December 1970). The Conservative government in accordance with its manifesto abolished the Commission preferring instead to rely upon direct taxation and delegate compulsory purchase powers to local authorities.

¹¹¹ Jowell (1977a) p. 414.

land and providing infrastructure, especially in times of rising house prices.¹¹² The Committee suggested the use of planning agreements by local authorities to secure private contributions to infrastructure costs. Government circulars such as Circular 102/72 indicated a similar approach.¹¹³ The Property Advisory Group's Report *Commercial Property Development* identified a key role for local authorities in facilitating commercial development, and the associated need to plan positively to achieve, "...good planning standards and socially desirable gains with the promotion of viable commercial developments".¹¹⁴ Authorities were becoming facilitators rather than providers – a role left to the private sector. The close relations between developer and local authority added to the displacement of Government's capacity to intervene directly in regulating agreements.

6.2 Judicial interpretations of Section 52 agreements

Against this background, a use of agreements is not wholly unproblematic. Whilst the decision of *Stringer v. Minister of Housing and Local Government*¹¹⁵ demonstrated that a local planning authority could not enter into a contract to fetter its discretion, agreements could in principle regulate the exercise of future statutory powers. In *Windsor and Maidenhead Royal Borough Council v. Brandrose Investments Ltd.*¹¹⁶ the court discussed the possibility that a planning authority could by agreement fetter the exercise of a future discretion. The defendant landowners entered into land exchange and section 52 agreements with the local planning authority in January 1976. The

¹¹² *Report of the Working Party on Local Authority/Private Enterprise Partnership Schemes* (HMSO) May 1972, paras 49-53 and Annex D.

¹¹³ *Land Availability for Housing* (17 October 1972) paras. 8-10.

¹¹⁴ Property Advisory Group, November 1975, para 2.22.

¹¹⁵ (1971) 1 All ER 65.

covenants contained within the agreement limited building on the site and imposed restrictions on the height of certain buildings to facilitate development of the site. It was known that the development could not be executed without the demolition of certain buildings. By October 1976 outline planning permission was granted for the development, but in 1978 the local planning authority designated a conservation area which included also the development site. This precluded the demolition of buildings on the site without specific additional consent. In June 1979 the defendants proceeded to demolish part of the buildings on the site and the planning authority sought an injunction to prevent further demolition. The question arose as to the validity of the section 52 agreement to override the exercise of other planning powers (in this case the designation of a conservation area and the requirement for conservation area consent).

Lawton LJ. (giving the sole opinion of the Court of Appeal), held that section 52 could not be construed to preclude the exercise of other statutory powers. These were powers, “merely incidental to the granting of planning permission”.¹¹⁷ In a reserved judgment at first instance, Fox J. alluded to a clear distinction between the 1971 Act powers and those of earlier legislation. He observed that

“It is clear that s52 is very different in its language from s34. I observe that while s34 is only dealing with the case where a landowner is willing to agree to conditions restricting the planning development or use of the land, s52...opens with a wide general authority to the planning authority to enter into any agreement with any person interested in the land for the purpose of restricting or regulating the development or use of the land”.¹¹⁸

¹¹⁶ (1983) 1 All ER 818.

¹¹⁷ Ibid., p. 822 j.

¹¹⁸ (1981) 3 All ER 38, p. 43 d-e.

Although the Court of Appeal declined to interpret the agreement as preventing the future designation of a conservation area, the subsequent case of *R v. of Hammersmith and Fulham London Borough Council, ex p. Beddowes* again alluded to the issue.¹¹⁹ There the court refused to quash a covenant on the part of the authority in an agreement limiting the exercise of its powers as a housing authority, indicating that the honest and reasonable exercise of a statutory power to achieve a statutory object could not be regarded as a fetter on the exercise of another power.¹²⁰

6.3 Planning agreements in practice

Agreements enabled both local authorities and developers to capitalise through achieving development gains. The practice served to distil the contentious issues and frame negotiations between the parties to more clearly identifiable components. It facilitated compromise and mitigated the risk of the uncertain consequences of a refusal of permission or lengthy appeal. Developers gained by making concessions in development projects, which might otherwise not proceed at a time when speed was a key concern. Local authorities, as 'key brokers' (either as decision-maker or landowner) could obtain community benefits as an integral part of the development proposal where private sector development was a pressing need. It appeared to be a 'win-win' situation. The instrument was used to secure those aspects of planning which were functionally important to development control, that could not be achieved by imposing conditions. The statutory power of local authorities to impose such conditions, 'as they think fit', on

¹¹⁹ (1987) 1 All ER 369.

¹²⁰ Under section 104 of the Housing Act 1957.

granting planning permission is not an unfettered discretion and like other discretionary powers is subject to judicial oversight. Earlier decisions in *Hall v. Shoreham-on-Sea UDC*¹²¹ and *R v. Hillingdon LBC ex p. Royco Homes Ltd*¹²² show how this power had been circumscribed in the context of development gains. Conditions could never be imposed for any purpose whatsoever and in particular they would be struck down as *ultra vires* by the court if found to be manifestly unreasonable in the *Wednesbury* sense. In the *Hall* decision, the authority had sought to impose a condition requiring the applicant to construct a road on its land and then dedicate it for public purposes without receiving compensation. In *ex p. Royco Homes*, a condition requiring that tenants from the housing waiting list should first occupy the properties built was attached to a grant of permission for residential development. In each case the conditions were struck down. *Hall* provided the basic tests for the validity of conditions that were to be adopted for the future.¹²³ Conditions had to fairly and reasonably relate to the development, not be imposed for an ulterior purpose and not be *Wednesbury* unreasonable. The same objectives could be achieved lawfully however through the mechanism of agreements.

Contrary to the understanding of some, agreements were used for similar purposes to those before the abolition of Ministerial consent.¹²⁴ These included the provision of infrastructure beyond that necessary for the development to benefit the neighbourhood generally or land outside the application site. Public amenities (including the provision of public open space) were provided also by agreements, especially where these were

¹²¹ (1964) 1 All ER 1.

¹²² (1974) 2 All ER 643.

¹²³ As in *Newbury DC v. International Synthetic Rubber Co* (1981) A.C. 578.

¹²⁴ Healey et. al. (1995), Jowell (1977a) op. cit., p. 414.

not essential to the developer's scheme. Agreements were used to discontinue non-conforming uses, for the rehabilitation of buildings unconnected with a material change in use, environmental treatment, the creation of public rights and the payment of money.¹²⁵ Many of these were related to residential development. Examples included the provision of community facilities, and a doctors' surgery¹²⁶ (residential), payments in connection with the provision of yellow lines on adjoining highway land¹²⁷ (commercial), highway improvements, lorry routing, off-site landscaping, footpath provision, dedication of land to public open space and continuing maintenance (commercial – landfilling with controlled waste)¹²⁸, the reservation of 10% of a residential site for “school purposes”, the provision of open space, and the payment of commuted sums for the provision of sewerage, sewage disposal facilities and a flood alleviation scheme.¹²⁹ Jowell's study of the 1970's concerning the negotiation of agreements sampled 28% (87) of English authorities and conducted in-depth interviews with 20.¹³⁰ The agreements covered the following

- (a) specification of use viz. restricting or requiring additional uses
- (b) public rights of way over developers land
- (c) dedication of land for public uses
- (d) extinguishing existing use rights
- (e) provision of community buildings
- (f) rehabilitation of property

¹²⁵ Property Advisory Group Report *Planning Gain*, Section 4.

¹²⁶ *British Railways Board v. SSE & Another* (1992) JPL 1030.

¹²⁷ *Ealing LBC v. SSE & Another* (1993) 2 PLR 12.

¹²⁸ *Wimpey Waste Management Ltd v. SSE & Rotherham MBC* (1993) unreported.

¹²⁹ *Abbey Homesteads (Developments) Ltd. v. Northamptonshire CC* (1991) 61 P & CR 295.

¹³⁰ Jowell (1977a) p. 418.

- (g) provision of infrastructure
- (h) gift of site or buildings for residential use
- (i) payments of commuted sums for car parking

The prevalence of agreements appeared to be linked to economic growth. Studies of the Wokingham area, observed an increasing use of agreements.¹³¹ Wokingham, a small district council with a population of 119,930 in 1981 had a threefold increase in the number of agreements executed during 1974–1981. Healey’s 1983 study of the same area considers how they were negotiated for three main land allocations. These were in Lower Earley (5k dwellings), Woosehill (2.3k dwellings) and Woodley Airfield (15k dwellings). Each provided for the construction of feeder routes, water mains and drainage facilities, public open space and the reinstatement or preservation of woodland, again all matters covered by earlier agreements. What did occur was a heightened awareness and visibility of their use (perhaps paradoxical to the extent that there was no central Government focus through the consent mechanism) at a time when constraints remained on public expenditure, and developer pressure increased. The concept of planning gain assumed great significance in this era and is in itself a contested idea. Jowell defines this as,

“ the achievement of a benefit to the community that was not part of the initial application (and was therefore negotiated) and that was not of itself normally commercially advantageous to the developer.”¹³²

Loughlin emphasises the strategic instrumentalism of the bargain by linking the conception of “gain” to those acts which are superficially commercially

¹³¹ Henry (1982). Davis and Healey (1983).

disadvantageous, but not necessarily oriented towards public benefit and, “which may be ultra vires if achieved by imposing a condition, but which is nevertheless provided by the developer, ...in the expectation that the planning application will, ...receive more favourable treatment”.¹³³ Planning gains can be also the product of the interdependency relations between planning authority and developer that generate a climate of ‘strategic altruism’, an emerging trend in the high-modern era. Here the developer “gauges” or packages the application so that those benefits are incorporated *ab initio* without the need necessarily for oppositional negotiation. This may happen in situations where the developer is already attuned to the local authority’s approach through previous dealings, or local knowledge, and was certainly the case in some of the major town centre redevelopments of the time. It was the carrying out of these large-scale projects which again put agreements in the spotlight, and it illuminated the subtle shifts in regulatory strategies and the emergence of new methods and players to carry these out.

A use of agreements complemented a decision style of development control that at the time was focussed on close co-operation between local authority and developer. In the absence of direct central oversight, it was unsurprising that alternative accountability mechanisms evolved from the late 1960’s that were to have regulatory effects. Regulatory control now involved both public and private actors. Overt state regulation in the form of express Ministerial oversight is displaced by more subtle or diffuse governance arrangements, which remain largely state-sponsored. The changing relations

¹³² Jowell (1977a), p. 418.

¹³³ Loughlin, *op. cit.*, p. 61.

between central and local government and simultaneously those of local government and developer affected the practice.¹³⁴

7. Different modes of regulation in the high-modern era

In the absence of a defined framework of control such as consent and the close inspection of individual agreements by the Ministry, Government adopted alternative strategies. One was to promulgate guidance rather than dictate through the mechanism of consent. The other only indirectly concerned Government, and saw the emergence of a new player – the court. Although the two may appear to be separate regulatory modes they are, in fact intertwined and it is possible to discern a shift at the Centre from the interpretation and articulation of legal rules to a reliance on third parties (especially courts) to perform this function. This regulatory strategy is reinforced by developer input, perhaps paradoxically because of their close relation with the planning authority. The regulatory space of agreements becomes populated with more actors. Regulatory authority becomes dispersed between Government, in the form of its capacity to execute legislative reform, and promulgate guidance, local government (in the negotiating of agreements), and developers given their enhanced interests as a result of economic vitality or indeed recession. Ultimate supervisory jurisdiction however, resides with the courts. Courts provide the regulatory back up for both Government and the developer. The early normative confinement of the planning agreement to the (private) contractual sphere is now truly broken, but state bodies do not retain a monopoly of control. A

¹³⁴ The latter phenomenon can be viewed as the development of a form of interdependence between the public and private sectors. Healey et. al op. cit., (1993) p. 10 note that by the 1980's one of the reasons for a greater use of agreements rested upon *the difficulty of funding public facilities and services ...without private contributions.*

strong lobby of interest groups representing developers, and professional groups¹³⁵, and academic critique weakens potentially any autonomy that the local authority possess by calling into question the notion of planning gain, and the level of accountability which exists to supervise local activity.¹³⁶ In part this is attributable to the power existing as between the developer and the authority which is shielded from the public gaze. Yet the form the instrument takes and very often its subject matter have the effect of making the local authority dependent upon developer information and initiative, which as a consequence passes key resources out of state hands. The overall structure of the legislative frame, and in particular the absence of express Ministerial oversight provides potentially for the exercise of significant *local* authority. The existence of complex relations between the participants in combination with a vibrant economic climate, served to influence but not determine the function of agreements. Their use shaped however, understandings of the bargaining processes adopted in the pursuit of planning gains.

7.1 Central government guidance

In 1975 McAuslan noted that

“...a great deal of the planning process is affected by the relationship between the Department of the Environment and the local authorities”¹³⁷

¹³⁵ Such as the legal profession and the RTPI, and the Property Advisory Group.

¹³⁶ A series of articles were published in the *Journal of Planning and Environmental Law* on the topic during 1975 and 1980. These included Grant, M., “Planning by agreement”, (1975) *JPL* 501–508; Grant, (1978); Loughlin, M., “Bargaining as a tool of development control: a case of all Gain and no Loss” (1978) *JPL* 290–295; Suddards, R., “Section 52 agreements: a case for new legislation?” (1978) *JPL* 806–809; Hawke, J., N., “Section 52 agreements and the fettering of planning powers” (1980) *JPL* 386–389; Heap and Ward (1980).

¹³⁷ Op. cit., p. 87.

Circulars hold a special place within the planning framework.¹³⁸ They have been called “...[the] formal means of departmental influence”¹³⁹ and link the formal and less formal activities of the planning regime by providing a generalised interpretation of legislation (legitimising certain local authority activities in the process), and the promotion by encouragement of certain forms of action. With the loss of a clear regulatory channel (in the form of Ministerial consent) to direct the use of agreements, Government resorted to a use of circulars instead. Through the medium Government instructed, informed and persuaded local authorities by promoting good practice and commenting upon the perceived legitimacy of various courses of action. The personalised checking and overseeing of agreements by officials was replaced by more generalised pronouncements. Circulars operate on a broad rather than individuated basis. Their function is to communicate the acceptable or thinkable within a given policy context. Policies, it has been said

“...are more generic than discreet actions ... and more specific than broad social goals...discussions of policy involve discussions of ends and means”.¹⁴⁰

They function to foster close relations, interaction and responsiveness, and the target communities can be much broader. A use of policy can be more effective than the explicit individuated interventions of Government. Steering supplants express direction, and there may be no simple causal relation between Government and the community

¹³⁸ They have been termed, *the formal means of departmental influence*, by Griffith, J., A., G., *Central Departments and Local Authorities*. London: Allen and Unwin, 1966.

¹³⁹ Ibid., p. 54.

¹⁴⁰ McLoughlin, J., op. cit., p. 161.

concerned.¹⁴¹ It may provide also a measure of purchase for other, sometimes unintended groups to assume regulatory roles.

The use of policy guidance by Government emerges as a strong regulatory feature after 1968. In part this functions as a compensating strategy in the absence of the formal consent mechanism. As a 'material consideration' decision-makers must have regard to (but not necessarily follow) the policy advice given in circulars. Whilst the use of circulars can function as a regulatory mechanism by making local authorities accountable to the Centre it is an inherently risky strategy for Government. Aside from the planning appeals system and the limited oversight exercisable by the court by way of review, it is very difficult for Government to gauge (except in the most patent cases) whether the advice has been given appropriate weight. The promulgation of policy guidance has the advantage of being universal in its application – there is no room for particular exceptions or omissions (whether accidental or otherwise), and it can be revised with administrative simplicity.¹⁴² Although ranking below statutes and statutory instruments, case law, by incorporating policy into law has sometimes elevated the status of departmental advice.¹⁴³ At times the legal status of policy has been accepted rather than queried.¹⁴⁴ Intra governmental relations however remain a pivotal focus in the shaping of agreements. Government used circulars or guidance as a form of control,

¹⁴¹ Ibid., p.162 offers a conception of policy that functions as the intermediary between goals and specific decisions that link *...the day to day administrative actions and decisions ... they serve as statements of means to provide for progress towards the goals and objectives of the organization.*

¹⁴² It is normal for Government to consult with interested parties on the draft before finalising the circular or guidance.

¹⁴³ McAuslan (1975) p. 91.

¹⁴⁴ In contrast to the dictum of Lord Wilberforce in *Coleshill and District Investment Co v. MHLG* (1969) 2 All E.R. 525 at p. 538, where it was stated that, *...[a] circular has no legal status, [but in the case of*

but also the courts (often indirectly) as a medium for bolstering its regulatory authority, particularly in those instances where it intervened in judicial challenges.

Government began to use circulars to regulate agreements in a manner similar to its use of precedents in earlier times. It set the parameters for their use. Circular 102/72¹⁴⁵ indicated how agreements could be used to overcome sewage and highway deficiencies. The Circular, like the advice contained in Circular 22/80¹⁴⁶, advocated a use of agreements to overcome infrastructure deficiencies in preference to a refusal of permission. They highlighted the legitimate ambit of agreements in the Government's view. Circular 22/83¹⁴⁷ had a clearly (restrictive) regulatory aim.

Circular 22/83

Circular 22/83 outlined Government's perspective on planning gain. The Circular highlighted how gains whether achieved via the imposition of conditions or secured through agreements were to be assessed for validity, and showed how the use of agreements was viewed by the Centre. As I outlined previously, departmental guidance was used by Government to articulate its position and regulate the activities of others. Local authorities were expected to conform to central government policy, as a subordinate to central government (that had participated in its promulgation through a consultation process), so that applicants could rely upon policy statements as material

Circular 67/49] ...acquired vitality and strength when, through the years, it passed ...into planning practice and textbooks, [and] was acted upon.

¹⁴⁵ paras. 8–10.

¹⁴⁶ *Development control-policy and practice* (28 November 1980), Annex A.

¹⁴⁷ *Town and Country Planning Act 1971. Planning gain. Obligations and benefits which extend beyond the development for which planning permission has been sought.* (25 August 1983).

considerations within the planning decision-making process. The policy outlined the normative framework within which negotiations to secure planning gains should take place, and provided a measure of control over those using agreements, particularly where planning applications were refused and appeals lodged.¹⁴⁸ The Circular, was drafted after a wave of public expressions of concern on the subject. The earlier Property Advisory Group Report *Planning Gain* (commissioned by the Department of the Environment) although marginal in its reference to agreements had highlighted Government's concern about damage to the overall credibility of the planning system.¹⁴⁹ The Report noted that a system of development gains going beyond the planning merits of an application could subvert the transparency and impartiality of the planning system. The Group whilst defining 'gain' as negotiations entered into,

“...with a would-be developer for planning permission in respect of land not owned by the local authority, [that] tries to incorporate ...some element of public benefit or advantage which the developer, left to his own devices, would not have volunteered, but which he is expected to provide, or in some cases is offering to provide, at his own expense as part of his scheme”¹⁵⁰

did not view the mechanism for its delivery, namely agreements as significant. For some this represented a failure to appreciate the existence of the economic forces driving the phenomenon and accordingly how the practice might be structured.¹⁵¹ Circular 22/83 was an attempt by Government to restate its policy and check the perceived excesses of local authorities in obtaining development benefits for the community. The guidance focused on the test of reasonableness, by ensuring that that the obligation

¹⁴⁸ The Department whether via the Planning Inspectorate or through 'recovered' cases acted as decision-maker, subject only to the possibility of judicial challenge of its decision.

¹⁴⁹ Op. cit., effectively the work of a sub-group Chaired by Derek Wood QC at section 6.02.

¹⁵⁰ Ibid., section 2.02.

imposed or covenant agreed to “is needed to enable the development to go ahead”.¹⁵² It indicated that any benefit sought should be fairly and reasonably related qualitatively and quantitatively to the proposed development, and applied similar tests to assess the validity of conditions to agreements. Failure to adhere to the guidance cast doubt on the legality of the permission granted. In practice, agreements were being used for broader objectives, and the Circular demonstrated a particular vision of negotiations with planning authorities imposing requirements on developers. This was at variance to reality. It was often developers taking instrumental decisions to offer benefits, after making rational calculations setting the cost of providing benefits against the costs of delaying development and the profitability to be secured should permission be obtained and implemented swiftly. Jowell and Grant (1983) in their critique of the draft circular consider this issue.¹⁵³ They note the naiveté with which the Department crafted the concept of planning gain and that it largely misunderstood the culture of the negotiations in land-use planning activity.

Although the impact on developers was seen as marginal owing to the small number of agreements, and developers “generally took a pragmatic and positive attitude” to their negotiation, agreements were the visible instrument through which gains were largely sought.¹⁵⁴ By articulating the tests that would regulate the validity of agreements Government raised expectations that would subsequently be challenged in the courts. A use of circulars facilitated the participation of another actor in the regulation of

¹⁵¹ Grant (1982) p. 374.

¹⁵² Circular 22/83 op. cit., para. 6.

¹⁵³ Jowell, J. and Grant, M., *Guidelines for Planning Gain?* (1983) JPL 427–431.

¹⁵⁴ As noted in the DoE Research Report, *The Use of Planning Agreements* (February 1992), p.vii.

agreements, the court. Circulars provide the basis to understanding how relations between Government and the judiciary moulded the regulatory structure.

7.2 Judicial oversight as a regulatory form

With the deepening economic crisis of the mid-seventies, developers became more aware of tightening profit margins and that easy profits would not readily be available. The benefits sought by local authorities became subject increasingly to debate and sometimes challenge, through the courts. This was to become more noticeable in the years to come. There are many cases concerned with the interpretation of the lawfulness of planning agreements, both in terms of the local authority's objectives and substantive terms of the agreement itself, which have proved to have regulatory significance. In this section I highlight some key decisions to illustrate the point. The courts have assumed responsibility, often unwillingly, for deciding the validity of agreements and the obligations contained within them, through the construction of the relevant statutory provisions, but in doing so they have functioned as a regulatory brake on local authority and developer activism. They have assumed a role very similar to that previously undertaken by Government officials when deciding the parameters of the use of agreements, as had occurred much earlier. During the pre-modern era, the Ministry had compiled a series of precedents which served to set the limits to a use of agreements, and a similar role is assumed by the courts during this high-modern period. Often court pronouncements have amounted to little more than *obiter dicta* during the course of deciding challenges to decisions of the Planning Inspectorate or the Secretary of State on appeal, or by way of third party applications for judicial review. They have carried

significant weight nonetheless serving a purpose similar to that of the statements of officials.

In the *Brandrose* decision, Lawton LJ explained that the statutory provisions enabled, "... a local planning authority to make agreements to achieve ends which they could not achieve without the consent of the applicant for planning permission".¹⁵⁵ Subsequently a different line was taken. In *City of Bradford Metropolitan Council v. Secretary of State for the Environment and Another*¹⁵⁶, the court considered the status of advice issued by the Secretary of State in Circular 1/85, and whether it represented an accurate statement of the law as well as policy. The Circular, which related to the validity of planning conditions, contained the explicit statement that, "...an unreasonable condition does not become reasonable because an applicant suggests it, or consents to its terms"¹⁵⁷, and as such impliedly narrowed the scope of agreements, and moreover the dicta in *Brandrose*. Lloyd LJ observed

"If the condition is manifestly unreasonable, the willingness of the developer is irrelevant. Vires cannot be conferred by consent ... Next I should turn to the role of the section 52 agreement in cases such as the present. ... I propose to confine myself to two observations, one general and one particular. The general observation is that the practice under section 52, convenient and beneficial though it undoubtedly is, may have gone beyond what the strict language of the section justifies...I do not accept...that the present condition would have been lawful if incorporated in a[n] agreement. If the condition was manifestly unreasonable, and so beyond the powers of the planning authority to impose it, whether or not the developers consented, it must follow that it was also beyond the powers of the planning authority to include the condition as 'an

¹⁵⁵ *Windsor and Maidenhead Royal Borough Council v. Brandrose Investments* (1983) 1 All ER 818 at p. 822.

¹⁵⁶ (1987) 53 P & CR 55.

¹⁵⁷ Paragraph 35 Circular 1/85, *the use of conditions in planning permissions* (January 7, 1985).

incidental or consequential provision of an agreement restricting or regulating the development or use of land' under section 52.”¹⁵⁸

The facts of the case indicate the scale of the planning gains problem. The developers made an application for permission to build 200 homes three miles from the city centre. The planning authority were concerned by the additional burden on the existing highway infrastructure. They sought to have the road widened for a distance of ¼ mile by one metre. The developer owned part of the land affected. Following negotiations the developer submitted an amended application and the authority in due course granted permission subject to a condition to that effect. The developers subsequently appealed to the Secretary of State who discharged the condition and the planning authority applied to the High Court to challenge that decision. Certain *obiter* statements were made as to the effect of section 52. Lloyd LJ, who gave the sole judgment of the Court of Appeal,¹⁵⁹ indicated that the decision might have been different if the developer had not been required to undertake the road widening and dedicate it as highway, and instead make a contribution to the cost of the work. By considering the potential scale and substance of any notional agreement, the approach mirrored the earlier activities of Government in expressing the functional limits of local authority and developer activity in this domain. This statement was supported in the Court of Appeal decision *R v. Westminster City Council, ex p. Monahan*.¹⁶⁰

Whilst not specifying the *types* of agreements considered lawful, as central officials' had purported to do in an earlier era, judicial control has attempted to determine the validity

¹⁵⁸ pp. 64–65.

¹⁵⁹ Composed additionally of O'Connor and Croom-Johnson LJ.

of agreements in terms of their scope, through the construction of the relevant legislation. This at times has resulted in a narrow interpretation that relegates the instrument to an extended form of planning condition, and as such subject to similar tests. In *Newbury v. SSE*, the House of Lords had promulgated the series of tests, which a valid planning condition must satisfy, mentioned earlier.¹⁶¹ Agreements were viewed as mechanisms simplifying the planning process¹⁶², but so closely linked to it that the obligations contained within the planning agreement had to satisfy the test of *Wednesbury* reasonableness, and furthermore should be imposed for a planning purpose and not for some ulterior motive.¹⁶³ This interpretation had the effect of marginalising the impact of the agreement, by making the powers under the section little wider than those relating to the planning condition.

The decision of *R v. Gillingham Borough Council, ex p. Parham Ltd*¹⁶⁴ posited the nexus between the validity of agreements and conditions, by holding that agreements were subject to the same requirement of reasonableness for validity as the planning condition. The company was a residential developer, which had identified a potential site. Although in several ownerships, the planning authority considered that the land should be developed in a continuous way. The history of the site involved applications from

¹⁶⁰ (1989) 1 P.L.R. 36.

¹⁶¹ (1981) A.C. 578 *supra*.

¹⁶² See the dicta of Kerr LJ in *R v. Westminster City Council, ex p. Monahan* (1989) 1 P.L.R. 36.

¹⁶³ In *Bradford MCC v. SSE* (1987) 53 P & CR 55, Lloyd LJ indicated that *vires cannot be conferred by consent* (p.64). This is to be contrasted with the dicta of Roch J in *R v. Gillingham BC, ex p. F. Parham Ltd*, (1989) 58 P & CR 73 at pp 82-3 who stated that the terms of section 52, were such as to ...allow a section 52 agreement to go beyond matters that fairly and reasonably relate to the permitted development. Section 52 agreements could encompass matters which restrict or regulate the use of land. This is not surprising because there would be little point in enacting section 52 ...if section 52 agreements were confined to those matters which could be dealt with by way of conditions. Both decisions however diminish the role of validating the bargain between the parties.

rival developers. An outline application had been submitted to the planning authority to build 8 dwellings and Parhams being informed of this lodged an objection. An owner of part of the land held a ransom strip, and subsequently the authority resolved to grant permission to the rival developer subject to a section 52 agreement. The agreement was to cover an extension of the existing highway and its necessary modifications, with a covenant to enter into an agreement under the provisions of the Highways Act 1980. Parhams sought to challenge the grant of planning permission, on the basis of *Wednesbury* unreasonableness to the extent that no reasonable planning authority could have required a section 52 agreement to ensure the continuous and progressive development of the site having the effect of creating another ransom strip, thus frustrating the objective. Referring to section 52(1) of the 1971 Act, Roch J. noted

“...Those words allowed a section 52 agreement to go beyond matters that fairly or reasonably related to the permitted development. Section 52 agreements could encompass matters, which restricted or regulated the use of the land. This was not surprising because there would be little point in enacting section 52 of the 1971 Act if section 52 agreements were confined to those matters which could be dealt with by way of conditions”.¹⁶⁵

The agreement required was one that the planning authority could have lawfully made.

These decisions (with the exception of *Parham*, which marks the beginnings of challenges by competing developers) relate predominantly to putative breaches of trust in the bilateral relations of developer and local authority. They reflect the recourse to law by a party, where an expectation of the bargain has been frustrated. This was made possible through the generalised statements promulgated by Government to shape the

¹⁶⁴ (1989) 58 P & CR 73.

practice. The close linkage of local authority and developer tended to marginalise third parties and that included Government. It allowed however the court to oversee the validity of the parties' agreement and the scope of the substantive power.

8. Conclusion

In this chapter I have explored how the changing economic and social context within which the main actors, Government, local authorities and developers operated fed into a major overhaul of the planning system as a whole and reshaped the regulation of agreements. As land use remained important to economic development, so too were agreements to the extent that the practice remained a flexible alternative to the procedural morass of the development control system. Substituted for conventional command are more discrete techniques that in many instances are equally effective. In place of individuated central oversight, are substituted more generalised mechanisms. The character of regulation shifts to the art of governance in the fullest sense. Whilst Government appears to move backstage or behind the scenes, the regulation of agreements remains a Central concern. Although other actors appear in less than supporting roles, it is inaccurate to infer that these agents assume primary regulatory responsibility for what remains a largely state-sponsored form of control.

The revisions that took place affected profoundly the regulatory strategies used by the existing players, permitting innovative regulatory techniques to be adopted that allowed for the participation of new actors, including courts to assume an albeit limited form of control. The regulatory impetus remained, for the most part, internal to those closely

¹⁶⁵ Ibid., p. 341.

concerned with agreements, namely Government, the developer and local authority. Government moved away from individualistic regulatory strategies to generality through the use of policy. Whilst Government stepped back from the front line of direct control to regulate agreements, its use of guidance to establish a regulatory framework set the parameters of what was considered permissible. The developer community remained concerned with particular development sites, but their interest extended to the activities of their competitors. This functioned as specific form of regulation. In the next chapter I explain the effects of further developer pressure and competition on the regulation of agreements in what was becoming an increasingly uncertain economic climate.

Chapter 6. Late modernism (1990-2004): the end of agreements?

“...The philosophy of the bazaar has been rejected. The governing principle is that planning permission may not be bought and sold... It is in the language of Dworkin a principle and not a rule. It is fuzzy round the edges. The application of the principle gives rise to difficult problems”
per Steyn LJ in *Tesco v. SSE*¹

1. Introduction

In the previous chapter I described how a use of agreements intensified with the property boom of the 1970's and 1980's, acquiring a higher profile as a result. Developers, politicians, the judiciary and academics all sought to rationalise the role of agreements within the statutory development framework. Whilst the practice was an integral part of the planning system, it was also separate from it to the extent that there was an absence of 'fit' with other development control processes. The negotiation of agreements remained, for the most part beyond the reaches of the closely defined procedure for determining planning applications. The practice was perceived as marginal to the development control regime, yet its continuing use highlighted defects within that process. Within a context of economic uncertainty and the existence of an increasingly unresponsive and encumbered planning system, the practice remained important to Government, developers and planning authorities alike. Agreements could deliver development control solutions (that benefited the developer and all tiers of Government), which the remainder of the system could not; speed, efficiency and pragmatic, flexible solutions. The late-modern era illustrates Government's attempts to integrate the practice further into the statutory framework, and in so doing prevent the ostensible sale of permissions to the highest bidder by

¹ CA 25 May 1994, p. 37 D–G (unreported transcript).

rejecting the, “philosophy of the bazaar”. Much of the discussion in this chapter centres on the extent to which the obligations delivered through the instrument are material to the determination of planning applications. The issue of materiality is closely allied to a project of assimilating the opaque practice into the more transparent statutory process, and confining the relevance of those gains secured in the determination of planning applications. This was the objective of Government; to regulate agreements and control both the process of negotiations and the solutions delivered. The means by which this was achieved however would be characterised in the main by steering rather than directive control.

The late-modern era represents a regulatory continuum of the trends established by Government to control agreements. Their use in the residential and retail domains symbolised the changing development culture and signalled a possible hyperextension of both the practice and its regulation. Consolidation of the practice resulted in difficulties in control that became more apparent as the era progressed. Regulation by Government remained general in character, focusing on principle rather than individual oversight. Government continued to use policy as a control mechanism to inform, influence and set the parameters of acceptable practice. This strategy led to increasing litigation on the impacts of central guidance, often as a consequence of the discrepancy between policy content and the situations it sought to address. It engendered also an intensity of activity on Government’s part, in its efforts to promulgate guidance that kept apace with evolving practices. Regulation by strategic direction lessened the Centre’s capacity to order individual outcomes and caused Government to revisit the ways in which regulation could be enhanced and local authority influence reduced. In this chapter I consider the effects of

Government's various attempts to remodel agreements to achieve this objective. I concentrate on the retail and residential sectors to illustrate how these two areas would influence the political, economic and legal thinking that would shape the future regulatory landscape.

2. The context: embedding agreements within specialised development cultures

By the late 1980's, a use of agreements to secure community benefits or infrastructure works through large-scale developments, was well established. The practice extended throughout England and Wales and was not limited to the more prosperous south-east region (despite a growing disparity in growth between that region and the North)², nor to residential developments. Healey's study of the tool during the 1980's and 1990's identifies a limited number of agreements being concluded, but a significant interest in the practice.³ A Departmental study of 1998 had indicated a greater use of obligations arising from the increasing complexity and scale of development, constraints on local and central government budgets and the emergence of new policy agendas including environmental protection, affordable housing, sustainable development and local economic development.⁴ In the late-modern era, agreements acquired iconic status (for good or ill) as the emblem of

² Healey, et. al. (1995), p.119 note a use of agreements across the UK despite continuing disparities in economic growth. The growth ratio of the Yorkshire and Humber region in relation to the south-east had steadily declined since the 1970's (at approximately 94%) falling to 75% during the 1980's and 62% in the 1990's. The share of GDP between the two regions has remained constant. [source: Cambridge Econometrics, as quoted by Memorandum of the Yorkshire and Humberside Assembly and Yorkshire Forward to the ODPM Ninth Report 2003<
<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmodpm/492/492m23.htm>> 23 August 2005.

³ Healey et. al. (1995), p.112.

⁴ *Planning Obligations and Future Considerations* (unpublished Department of the Environment Transport and the Regions Report, July 1998).

planning negotiation and its product planning gain.⁵ Icons can lose however their symbolic force.

Changes in the development culture influenced the practice and the regulatory space. The development game shifted from being a predominantly local initiative. Land-use planning was concentrated in the hands of fewer, if larger players whose interests and expertise extended nationally. This reconfigured development community included often consortia with large corporate end users for which developers would act especially in the retail sector. Functional differentiation led developers to concentrate on specific domains (whether residential or retail) and to use their specialist knowledge as leverage to secure planning permission. The economic recession of the early 1990's resulted in a greater awareness of costs for developer and Government alike. Economic fluctuations and tightening public expenditure constraint led also to a greater reliance on the more informal and flexible mechanisms like agreements to compensate for public funding deficits. Local authorities had already caught on to the advantages of planning gains, as had Government. Both sought to maximise benefits through agreements, sometimes with competing ideals. More generally, broad political interest in a use of agreements occurred in particular sectors especially retail.

Competition, contracting, value for money and the slimming of state bureaucracy became key features of late-modern government. Market ideals influenced not only the processes of government. The satisfaction of demand was enacted most publicly in the retail setting. The market system transformed consumerism. It contributed

⁵ Healey et. al., (1995) p.113.

also to the visibility of agreements. Whilst residential development remained upbeat, the reshaping of consumer society revolutionised shopping, removing it from the conventional town centre and developers capitalised on this. Shopping became a key leisure pursuit. Developers, just as in the 1970's property boom, sensed the possibilities, but this time it resulted in more complex development activity. Rather than continuing the town centre redevelopment schemes, developers moved out of town, where land was cheaper and more readily available. Schemes needed to be profitable and time became money. For the developer, the satisfaction of demand involved identifying suitable sites, processing developments expeditiously, keeping credit ratios low and attenuating development time-lines and where at all possible avoiding protracted appeals. Often only out-of-town sites could fulfil these criteria. Unlike the earlier local authority joint venture schemes, retail developments more often involved private land assembly rather than being reliant upon the compulsory acquisition procedures or the redevelopment of municipally owned areas. The sites developed were not suited always to the proposal. They required major highways works to link communities, added pressure to already stretched (and often ageing) public infrastructure, and had potentially detrimental effects for local citizens. Moreover by involving only indirectly the public authority, potentially wide-ranging adverse consequences could not be overcome by using the extensive public powers that authorities had for the purpose (including their powers of comprehensive redevelopment) that had characterised the redevelopment schemes of the modern era. Local authorities had become facilitators rather than providers of development solutions, a trend already emerging in the preceding era. More significantly, authorities became dependent increasingly upon the private sector to initiate development schemes and provide much needed infrastructure works.

Local authorities, keen to secure sustainable economic development in their area (and thus appease both local inhabitants and the Centre) found that their own development plan policies often lagged behind both Government and private sector demands. For the ideal of the proactive plan-led system that underpinned the architecture of the system, was substituted a more reactive and defensive decision-style. Planning was again in a state of crisis, not least through a fear that restrictive development plan policies could result in higher unemployment and an economic downturn. No longer were solutions delivered purely through development plan policies (according to the grand design of the technocratic professional planner) and indirectly centralised control. Instead, 'the market', influenced solutions. Competitive strategies became a sub-species of regulation compensating for the systemic drift in land-use allocation that was characterised by an overburdened Centre and delays in processing development plans and appeals. Government needed however to maintain control. Councils had to satisfy the rigorous performance targets and reporting measures set by the Centre in order to secure efficient and effective public service delivery. Government whilst keeping a tight rein on public expenditure was quick however to harness private funding for public purposes. In combination these factors and the unstable socio-economic context were to redefine agreements and their regulation.

3. The use of agreements: between theory and practice

The use of agreements became a widening trend in, and a more prominent facet of, land-use control. Local authorities were routinely including in their development plan policies statements of when agreements would be required. Jowell in his study had identified this aspect earlier as one restricted to the large London Boroughs and

metropolitan authorities.⁶ Increasingly, less innovative planning authorities and developers adopted the strategies of their more creative peers in using agreements to regulate development. A Department of the Environment study noted a, “persistent annual increase”⁷ in the number of agreements, and that approximately 75% of authorities were referring to agreements in their development plan policies.⁸ The confidence of proactive local authorities in seeking out opportunities, in conjunction with the knowledge of the local development market led to a winning combination for other planning authorities to emulate. Knowledge of successful outcomes led others to copy the strategies of their peers, whether small districts like Wokingham⁹ or their larger London or metropolitan counterparts.

The more widespread the practice became, the greater Government’s concerns about potential counterproductive effects. The White Paper, *Releasing Enterprise* highlighted these stating

“...there is evidence that ...agreements are sometimes required where they are not necessary for the development to proceed, and the Government is considering the issue of further policy guidance to curtail abuse of these powers.”¹⁰

Such was the prominence of agreements that the Department of the Environment (DoE) commissioned research into the practice between April 1987 and March 1990, because of the paucity of statistical and detailed information available to the

⁶ Jowell (1977a), pp. 416–418.

⁷ *The Use of Planning Agreements* (1992), para 4.6.

⁸ Ibid., para 6.16. The Campbell et. al. (2001) study estimated the percentage to have risen to 84.5% for the year ending June 1998 (Table 3 p. 9).

⁹ Henry (1982).

¹⁰ *Releasing Enterprise*, prepared by the Department of Trade and Industry and the Central Office of Information, Cm. 512 (2 November 1988), para. 6.5.2

Centre.¹¹ The information elicited provided the foundations for Government's exercise of further techniques of control.

The study surveyed a sample of English authorities negotiating agreements during the period 1987 to 1990. A total of 852 agreements were concluded over that timescale and a further 300 aborted. The extrapolated statistics implied that between 6,500 to 8000 agreements were being entered into annually. The study suggested that 55% of agreements were being used to restrict the use or occupancy of the development permitted and that 61% related to residential development.¹² Many related to the provision of infrastructure works associated with the development, and in particular to secure highways improvements. Only 5% were concerned with the "wider planning and community objectives".¹³ Most related to the provision of on-site works relating to the development rather than broader off-site community provision (e.g. park and ride schemes or the payment of commuted car parking sums). Only 12% of agreements dealt with financial payments.¹⁴ Another research project supported these findings. Healey et al. in their case study between 1984 and 1991 found that 65% of all agreements contained negative obligations, and that most were associated with residential projects.¹⁵ This was so for 48% of agreements and 42% of planning obligations. Retail, hotel, catering and leisure and mixed

¹¹ *The Use of Planning Agreements* (HMSO, 1992). The unpublished Instructing Brief for the Department stated *the Department wishes to know more about how and in which circumstances local planning authorities make use of their powers to enter into planning agreements with developers...[and to] ascertain to what extent the scope, contents and terms of those agreements are consistent with its published policy and the reasons for any such divergence.* (para. 4).

¹² *The Use of Planning Agreements*., paras. 4.11 and 4.20.

¹³ *Ibid.*, p. v, by which was meant off-site provision.

¹⁴ *Ibid.*, para 4.36

¹⁵ Healey et. al., (1995) op. cit., p.124. These were defined as the restriction of landowners' rights, e.g. imposing occupancy requirements, or limiting the nature of the development and obligations to adjust, limit or extinguish existing permissions, the imposition of controls over the phasing and timing or development and the manner in which that development is to be carried out, as well as *post* development control.

development schemes generated 10% each of all negative obligations and proportionately more positive obligations.¹⁶ The anomalous use of agreements in the residential and commercial sectors had raised the profile of the practice and provided Government with a means to review their place in the planning system.

The DoE research pointed to an understanding of the planning system as adversarial, “characterised by a considerable amount of bargaining between local planning authorities and developers”.¹⁷ A use of agreements functioned to facilitate and instantiate that strategy. It confirmed that agreements were being used to, “achieve requirements not strictly or properly related to the particular developments proposed”¹⁸, the Property Advisory Group’s earlier perception (and one maintained by the developer community). The studies did not support nor necessarily demonstrate that this occurred in the majority of cases. A potential divide between theory and practice is apparent from the diverging standpoints taken by developer, Government and local authority.

The Town and Country Planning Act 1990 consolidated the earlier provisions as they related to agreements.¹⁹ By section 106, agreements could be used for, “restricting or regulating” the use and development of land, and contain incidental or consequential provisions as appear necessary to the local authority for its purposes. The provisions did not vary substantively from those of the 1971 Act. Government policy in the form of Circular 16/91 restated effectively the earlier pronouncements

¹⁶ Ibid., p.151. Positive obligations were defined to include the provision of infrastructure, car parking or community facilities, at p.125.

¹⁷ *The Use of Planning Agreements* (1992) p. iv.

¹⁸ Ibid., p. iv.

¹⁹ There was no substantive debate on the provisions relating to agreements during the progress of the Bill through both Houses in 1989–90.

of Circular 22/83, by requiring that the facilities to be provided or financed should be directly related to the land in question. Circular 16/91 issued by the Department at Annex B, gave advice on the proper use of planning agreements. It set out from the Government's perspective the criteria against which the validity of agreements would be measured in policy terms.

Uses of agreements remained similar to those in previous eras. Local authorities reported difficulties however in securing funding for public transport measures and for dealing with the cumulative impacts of successive smaller-scale developments.²⁰ The generation of wider community gains, in contrast to Government's perceptions, remained substantively marginal to the system as a whole, save for some prominent exceptions, particularly in the retail sector. This domain provides insight into how the practice had developed, and its potential.

3.1 How economic instability sharpened actor interests and the use of agreements.

The 1990's were characterised by recessionary cycles²¹ and a level of economic uncertainty that lead to curbs on central and local government expenditure. The recession of the 1980's, continued into the next decade, making economic regeneration and job creation key concerns of Government. With the rise of consumerism and the service sector, it was often through retail development that employment would be generated. The sector provides a model for understanding some of the defects in the planning system. Central and local planning policy failed to keep pace with the economic climate. In the retail sector, development plan policy

²⁰ *Planning Obligations and Future Considerations* op. cit.

reflected a functional compartmentalisation that denied holistic thinking. It was an approach that failed to acknowledge that out-of-town development could, “...bring real benefits to a town”.²² The spin-off benefits obtainable from retail redevelopment could, as developers emphasised, provide financial respite for industries under threat.

Political interest was such that during the 1990's, the House of Commons Environment Committee twice considered the impact of planning gain as part of its inquiry into town centre shopping.²³ Agreements, as a symbol of, and vehicle for, development gains, were understandably a focus of attention. Some developers saw the practice as one that

“... opened the floodgates of local authority expectations just as it has tended to close the wallets of the main food retailers.”²⁴

The demands could frustrate developer profitability and thus general enterprise. They could facilitate however community regeneration and save the public purse. Economic instability was reshaping practice. It is against this background that the ongoing transformation of agreements must be viewed.

Conflicting understandings of local and central economic need and the modus of achieving it continued. Land-use planning was a means to secure general economic prosperity, but it was becoming insufficiently responsive to the demands of the multiple players concerned. For Government, the development plan as the

²¹ Between 1990 and 1991, GDP fell from 0.8% to -1.4%, moving to 4.7% in 1994 [source: Office of National Statistics].

²² Fourth Report House of Commons Environment Committee 1993-4, *Shopping Centres and their Future* 1993-4 (HC 359 I-III), 19 October 1994 Memorandum by Carter Commercial Developments Limited (the specialist out-of-centre retail development arm of the Higgs and Hill Group plc) HC 359-III 23-33 Ap 3 para 8.2.

²³ Ibid., and House of Commons Environment Committee: *Shopping Centres and their Future* and *Shopping Centres* 1996-7 (HC 210-I) (5 March 1997).

cornerstone of the planning framework was to be reinforced by departmental policy to facilitate industrial and economic development and thus employment. One of the many examples linking planning policy to economic regeneration can be found in Planning Policy Guidance 12 where the Secretary of State advocated

“Planning authorities should have regard to the importance of encouraging industrial and commercial development if the national economy is to prosper... All local economies are subject to change and the planning system should make adequate provision for this. Local authorities need to be alive to the future needs of local business.”²⁵

The vehicle of the development plan was not sufficiently malleable to both developer requirements and economic needs. One of the many witnesses submitting evidence to the Environment Committee inquiry into the future of shopping centres indicated some of the difficulties in promoting retail development on industrial sites in current use

“Some...companies are in severe financial difficulties and the income from retail development would underpin their very survival. The proposals relocate these businesses within the immediate locality. Yet local politics dictate that every protection should be given to the protection of employment land as supported by Government policies, such that an appeal inquiry [is] necessary.”²⁶

Developer profitability was more constrained than in the earlier ‘boom’ period and with tightening margins it was necessary to obtain permission expeditiously rather than pursuing failed applications to appeal. Flexibility was achievable through using agreements. By entering into negotiations with the local authority, cemented by agreements, developers could often short-circuit the planning process, streamline the planning applications procedure and avoid appeals. For the local authority, the

²⁴ Fourth Report Environment Committee 1993–4, *supra* para. 98 referring to the Memorandum by Carter Commercial Developments Limited.

²⁵ *Planning Policy Guidance 12: Development Plans and Regional Guidance* (1992) para. 5.44.

practice facilitated pragmatic solutions, often distant from central control. Agreements became the representation of compromise, and a symbol of, “ ...the balancing exercise involved in the realistic determination of most planning applications”.²⁷ Trade-offs for detrimental effects, including any adverse impact to the local community could be negotiated and where necessary addressed through the provision of community gains.²⁸ Economic demand had generated an alternative, if optimal, system of norms often in conflict with the rest of the development control process. Agreements secured efficient outcomes satisfying local preferences and goals. The practice delivered what the statutory planning system could not – flexibility and speed in an efficient manner. It channelled the focus of activity away from the Centre and enlarged the power-base of local authorities. Agreements became more widespread, but simultaneously detracted from the transparent, if more prescriptive plan-led approach.

The Centre’s emphasis on market ideals resulted in a restructuring of the public sector through processes of privatisation and competition. The use of market-style strategies (especially competition) in the exercise of public functions impacted upon both local authority service delivery generally including land-use control. In its own words

²⁶ n. 22, *supra* Ap 3 para 8.2, discussing a retail development in Penzance.

²⁷ per *Hutchison J R v. Plymouth City Council, ex p. Plymouth and South Devon Co-operative Society Ltd.* (1993) QBD CO/1299/92 (unreported transcript).

²⁸ Anecdotal evidence suggests that, in practice, they did not always do so. The Memorandum submitted by Carter Commercial provides two examples of potential counterproductive effects where, “the ability to offer planning benefits can lead to greater public expenditure” HC 359-III para 8.3 Ap 3 *supra*. One proposal (in Scotland) led to the regional authority programming its own expenditure for the works in question. The other was in Cornwall where, ... *As a matter of principle...Cornwall County has refused an offer of £40,000 to carry out pedestrian safety work which is desirable but not necessary in relation to a Carter proposal on the basis that it might have to use compulsory purchase powers to acquire the land to provide a pathway alongside a busy road.* The substantive planning merits of each proposal are not apparent from the evidence.

“...the Government [had] reshaped planning into a slimmer more flexible system, responsive to real strategic issues.”²⁹

This implied a greater reliance on instruments such as agreements. It posited also the functioning of a normative system that could if unregulated conflict with the extant plan-led system. The boundary between public and private activity had become more permeable. The province of government was being colonised by the greater involvement of private actors in public provision, and land-use control was no exception. It led to the Centre’s revision of its strategy for environmental protection and development control, which would promote closer collaboration between planning authority and developers. Government’s key objectives for land-use control were contained in its first comprehensive White Paper on the environment, *This Common Inheritance*.³⁰ The document underlined Government’s strategy, particularly its preference for market solutions. This is clear from the vocabulary used. In reciting the history of land-use development control the White Paper indicated that, “... the framework for land use ... aims to secure the most efficient and effective use of land in the public interest”.³¹ It went on to emphasise the developer role in securing community facilities through a use of agreements

“[that] provide for the developer to supply, or pay towards, some kind of infrastructure – such as road junction or extra sewage treatment capacity – in connection with a grant of planning permission.”³²

Government’s expressed intention of issuing revised guidance on a use of agreements, signalled also their role in drawing in developer funding

²⁹ *This Common Inheritance: Britain’s Environmental Strategy* Cm 1200, (1990) para. 6.10.

³⁰ *Ibid.*

³¹ *Ibid.*, paragraph 6.3.

³² *Ibid.*, paragraph 6.41.

“... to compensate for amenities or resources on the development site that would be lost or damaged as a result of the construction”.³³

By now the practice was used to secure the effective provision of a range of facilities, regulate development, provide for ways of conducting resource management, as a mechanism for conflict resolution and to secure more effective enforcement.³⁴ Government had endorsed the practice to achieve broader planning objectives and to deliver social and physical infrastructure.

The search for optimal solutions through a use of agreements as market-type instruments resulted however in conflict between local authorities and the Centre. Government sought to channel the use of private funds for public purposes, but when planning authorities did likewise (through agreements) they were often criticised. Effectively, two divergent market systems were operating simultaneously, at different tiers of government. Many of the debates on the use of agreements centred on a suspicion of ‘profit making’ on the part of the planning authority through the obtaining of community benefits as planning gains. Government’s aim remained that of maintaining a measure of control over local authorities’ negotiating agreements. The growing closeness between public and private actors had resulted in closer scrutiny of agreements as the archetype of planning gains.

4. Planning gains as a focus for regulating agreements

Concerns about planning gains had a long history. It centred upon a suspicion of planning determinations by local authorities being influenced by the existence of

³³ Ibid., paragraph 6.42.

³⁴ Findings of the DETR unpublished research report *supra* para. 3.3.

extraneous benefits (as irrelevant considerations).³⁵ It resurfaced in the late-modern era. The questioning of the propriety, objectivity and indeed capacity of local authority decision-making had been a common motif throughout the history of land-use control. In 1981 the Property Advisory Group's Report, couched in terms of public interest considerations was no exception. By the 1990's both developer and public suspicion focussed on the creation of a system of unofficial taxation, and a market for permission. This concern was registered also in the Environment Committee's Fourth Report, *Shopping Centres and their Future* referred to above.³⁶ Planning gain was said to be, "a very difficult area"³⁷, and the Committee raised the issue of corruption³⁸, reporting that, "we are concerned lest flexibility in the planning regime, assisted by the present vagueness, should provide a climate in which poor practice might flourish".³⁹ Witnesses from the Department of the Environment noted that, in the context of retail development,

"... the reality of the hot pursuit for planning permission... makes ... a very warm place for a negotiation about what it is that could or could not be entered into as a planning obligation. ... retail developments, particularly out-of-town and edge-of-town, have been extremely remunerative for landowners and for the developers involved in bringing them about and that is known by local government and therefore there is an attempt to get a fair contribution, under a planning obligation, to mitigate some of the effects of the development. ... we shall see local authorities seeking planning obligations that will want contributions to the hardware of public transport systems and maybe to some of the revenue costs as well; it seems to me that they will all be within the frame of the future."⁴⁰

³⁵ The basic legal principle established in *R v. Secretary of State for the Environment, ex p. Nottinghamshire County Council* (1986) A.C. 240 was said to be that planning permission cannot be bought and sold, but as Henry L.J. in *R v. South Northamptonshire D. C. ex p. Crest Homes plc* 93 LGR 205 at p. 213 indicated, *it is more often declared than defined*.

³⁶ HC 359 I-III *supra*

³⁷ Fourth Report Environment Committee (HC 359-II) Q 1062, Mr David Curry Minister for Local Government and Planning

³⁸ *Ibid.*, at QQ 48-49, at 247 and at para. 94 (HC 359 I-III) of its Report the term, "bribery" was used.

³⁹ Fourth Report Environment Committee (HC 359-I) para. 95

⁴⁰ *Ibid.*, Q 55 Mr Lock (HC 359-II).

Difficulty remained in regulating a practice that by now reflected the clear political objective of harnessing private funding for public works. The planning system was ill-designed to address questions of betterment as had been shown in the modern era. It was defined also by mechanisms that sought ultimately to couple local decisions to central control. The Centre's orientation towards market mechanisms exacerbated the situation in two ways. Firstly, Government's political objectives promoted and actively encouraged a use of private capital to provide essential services and infrastructure, formerly the province of the local authority. Secondly public expenditure constraints confined the opportunity for community provision by public agencies. For district councils (most often concerned with deciding locally controversial planning applications for residential and retail development) local plan policy was often stifled by county-wide structure plan requirements over which they had limited control, sometimes to the detriment of local need. The hierarchical configuration of the development plan system that situated structure planning as the broad statement of planning policy extending beyond the local planning authority's area, sometimes frustrated planning policy locally. Government's commitment to a plan-led approach to development control, prior to 1991 had envisioned but not achieved a requirement that local authorities would comply with plans. The relation between development planning and development control remained loosely coupled with development plan policy being taken into account so far as material to the application. In 1991, an amendment to the Town and Country Planning Act 1990 enhanced the status of the development plan in relation to development control.⁴¹ Section 70 of the 1990 Act required that regard be had to the provisions of the development plan, 'so far as material to the application' and to any other material

⁴¹ Section 54A Town and Country Planning Act 1990, as amended by section 26 of the Planning and

considerations.⁴² The amending provisions required determinations to be made in accordance with development plan policy unless other material considerations existed to outweigh the presumption in favour of the plan.⁴³ Authorities had to both subscribe to the practicalities of a system that gave pre-eminence to the development plan, and make it sufficiently malleable to accommodate economic demands. These factors forced local planning activity to the point of creative necessity. Agreements provided the means to do so.

Developers in particular were concerned by delays in determining planning applications. Again the system was creaking under the weight of continual review of both structure and local plans. Development plans were often out of date and insufficiently responsive to subtle changes in the economy. Negotiations became therefore more significant to obviate any prospect of convoluted appeals, where the role of development plan policy (ratified by the Secretary of State) would be given greater weight than other existing material considerations. Time was of the essence. The combination of time and expenditure constraints exposed pathological defects in the planning system, intensifying bargaining in development control. The result was more suspicion in the planning arena and the spotlight fell on the instrument most often used to secure gains. By the time of the 1990 Act, Government attempts to legitimate private funding for public purposes were already coming under closer scrutiny. Whilst the Minister for Planning noted in Committee that

Compensation Act 1991.

⁴² 70.—

(2) In dealing with such an application the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations.

⁴³ 54A.—

Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise.

“A planning gain would do more than merely provide facilities that would normally have been provided at public expense. It would provide facilities that the public purse could never have afforded [including]...schools, community centres and infrastructure. A mixed economy, with the energy of the private sector being added to the resources of the public sector, is a process that I hope one would want to encourage”⁴⁴

the oscillation in Government policy between protecting enterprise, promoting a mixed economy and maintaining the integrity of the system did little to help. Government refocused on the regulation of agreements, again attempting to control the problem through a mix of policy and political pronouncement⁴⁵, and in doing so resolve the conflicts between those most closely concerned, namely the developer and local authority. Actors other than Government exercised however a measure of effective control over the practice. The language of the market was by now firmly embedded within the vocabulary of Government. It was also being gradually assimilated into the regulatory processes.

5. Spatial congestion in regulating agreements

Legal challenges to the validity of agreements made by third parties, especially disappointed developers, intensified in the late-modern era. Developer competition had emerged as a mechanism to regulate agreements, a process that involved ultimately the court. As with the *Parham* decision⁴⁶ and the subsequent case of *R v. Wealden District Council & Federated Homes Ltd ex p. Charles Church South East*

⁴⁴ Sir George Young MP, Minister for Planning, House of Commons Standing Committee F, vol. IV col. 116, (16 April 1991).

⁴⁵ Minutes of evidence taken before the Environment Committee HC 359-III, 4 May 1994 from the British Retail Consortium. The Memorandum by Carter Commercial Developments Limited (the specialist retail development arm of Higgs and Hill plc) 359-III 23-33 Appendix 3 notes at para 1.9, *Current planning guidance is being camouflaged by untested ministerial statements which have not been subject to consultation.*

⁴⁶ (1989) 58 P. & C.R. 73.

*Ltd*⁴⁷ the quest for profit had resulted in third party developers seeking to regulate the practice. The regulatory field was broadening to include more distant actors⁴⁸, putative developers and ultimately the court. The advances can be viewed as a breakdown in trusting relations between planning authority and developers generally given the, “hot pursuit for planning permissions”.⁴⁹ Competition for profitability at a time of economic uncertainty made developers suspicious of one another. Furthermore, the greater the dependency of local authorities on developers to secure essential infrastructure works and community benefits, the deeper the potential relation between the two. Agreements cemented this symbiotic relation, to the exclusion of Government. Competition in the development market had generated paradoxically a level of mistrust sufficient to act as a brake on rampant developer self-interest, as well as providing an efficient solution to the dilemma of public expenditure constraints. Calls to the Centre could have limited effect on the regulation of the practice on the ground, as at this stage, Government had no powers to challenge directly the ‘bargain’ itself. Instead judicial challenge would assume significance as a facet of control. Government continued to adopt a strategy of using indirect means to regulate agreements.

5.1 Central and local government relations as regulatory tools

By continuing the process of centralisation through strategic direction, Government sought to secure local authority compliance with its objectives. Individuated oversight was no longer an option being burdensome and costly for the Centre to pursue. In the absence of direct intervention, Government sought to steer local

⁴⁷ (1989) 59 P. & C.R. 150.

⁴⁸ The unpublished report *Planning Obligations and Future Considerations* refers at para. 3.21 to government agencies, e.g. the Housing Corporation, English Nature and the Environment Agency, professional bodies and trade bodies such as the House Builders’ Federation in addition to pressure groups all making claims for participation in this process.

authorities through policy guidance. Whilst planning authorities sought 'room to manoeuvre' and to facilitate the smooth running of the system, the diffuse strategies adopted by Government in the late-modern era illustrate the complex of governance strategies used to maintain control. In marshalling an array of tools from self-regulation to direction, engendering the trust of all interested actors (especially the developer and the planning authority) was to become a significant regulatory strategy in the policy arena.

Critical to appreciating Government's use of policy in planning as a regulatory form is the measure of trust between the Centre and the planning authority. The local policy context is also important. Section 70(2) Town and Country Planning Act 1990, required regard to be had to the provisions of the development plan and other material considerations when deciding planning applications. With the enactment of section 54A, central government advice ranked as a material consideration, but was subordinate to the development plan.⁵⁰ The conventional central/local hierarchy was modified by the priority given to development plan policy. Policy guidance is given fullest weight in the fora closest to the exercise of central control; applications called-in by the Minister and planning appeals. Here central scrutiny is at its most intense to ensure that planning authorities conform to advice. The existence of policy does not necessarily reflect the construction given to the statutory provisions by the court, much less actual practice.⁵¹

⁴⁹ Q 55 Environment Committee Report HC 359-II (Mr Lock).

⁵⁰ The local plan procedure is subject the approval of the Secretary of State, and thus according with central guidance will be a prerequisite if the plan is to be approved, unless the following of central policy is outweighed by other material considerations.

⁵¹ The guidance at paragraph B5, Annex B, of Circular 16/91 states,

The following paragraphs set out the circumstances in which certain types of benefit can reasonably be sought in connection with a grant of planning permission. They are the circumstances to which the Secretary of State and his inspectors will have regard in determining applications or appeals.

Government's agenda for regulating agreements was subtle; to control their use by providing guidance setting the normative parameters for local authority action and developer expectations. Policy, whilst a directive (as opposed to co-operative) regulatory form, is reliant as much upon the status and credibility of the promulgator to provide the guidance as much as its content. The Departmental research of 1992 noted a failure on the part of local authorities to adhere to guidance regarding what may be properly embodied in conditions and in agreements.⁵² This stemmed from a divergence of views as to the enforcement of the former, and where uncertainty existed planning authorities naturally sought security by using agreements. Government policy (whether as Departmental Guidance or, "untested ministerial statement"⁵³) was becoming a pivotal mechanism in the regulation of agreements. The preferred strategy was to set, "a new framework [so as to establish] the ... new culture".⁵⁴

5.2 Regulating activity through Departmental guidance – establishing a 'new culture'

Circulars outlined Government's policy perspective on the use of agreements by advocating good practice and attempting to set boundaries for the legitimate use of the instrument. The policies indicate very different cultural understandings at times, at variance to both judicial interpretation and local practice. Regulating agreements, through policy and law, was difficult. Government tended (contrary to Ministers'

⁵² *The Use of Planning Agreements* p.vi and para. 2.43.

⁵³ *Ibid.*, p. vii.

⁵⁴ Q 1060 The Environment Committee Fourth Report HC 359- II Mr David Curry, Minister for Local Government and Planning, 6 July 1994.

statements⁵⁵) to revise its guidance each time its policies were subjected to criticism or judicial scrutiny. The formulation and revision of policy guidance resulted in a form of 'hyper' regulation, often with counterproductive results. This activity led to a level of uncertainty for those most closely concerned with agreements (developers and local authorities) providing them with sufficient space to use the instrument according to their own particular instrumental rationalities.

Substantive Departmental advice regarding the use of agreements was contained by now in Circular 16/91.⁵⁶ Paragraph B5 of the Circular indicated that benefits sought must be, "related to the development and necessary to the grant of planning permission". The two-part test sought to closely couple obligations to the development and the criteria to be adopted in the determination of planning applications. In doing so it would restrict also agreements' ambit.⁵⁷ By narrowing the purpose of agreements, there would be minimal advantage to their use. Conditions (a more straightforward mechanism, and one that could be controlled by the Centre through the appeals system⁵⁸) would be relied upon instead. The objective was to regulate gains through a regime that established clear procedures and control mechanisms where Government could exert more influence. The power to impose conditions was defined by an established body of case law that had refined over many years the statutory provisions. It eliminated many of the uncertainties

⁵⁵ In evidence to the Environment Committee of the House of Commons, the Minister of Local Government and Planning stated, ... *I am reluctant to keep on, as it were, titivating guides and elaborating them, because one wants to try to set a framework and it takes a certain time before people come to terms with a new framework*, Q. 1060 (HC 359-II), 6 July 1994.

⁵⁶ DoE Circular 16/91, *Planning and Compensation Act 1991: Planning Obligations*, (8 October 1991).

⁵⁷ The Instructing Brief of the DoE on the use of agreements indicated at para 3 that the practice was *designed to be fairly limited in scope*.

⁵⁸ Conditions could be appealed against under section 78 Town and Country Planning Act 1990.

present with a use of agreements, and tied control ultimately to Government through the statutory framework.

Circular 16/91 posited a slightly wider role for agreements than for conditions. This accorded with Government's objective of using private funding for public purposes. They could be used in circumstances where conditions would have been unlawful (as in *Hall v. Shoreham-by-sea Urban District Council* scenario). The policy censured the practice of local authorities seeking benefits wholly unrelated to the development proposed or which were in planning terms disproportionate to the development as a whole. Government in drafting the Circular had not accounted for the competitive developer climate that had exposed a market for planning permissions, nor the extent to which planning authorities could, as a matter of law consider as material the scale of off-site benefits offered by developers in competition with one another.

The Circular established Government's normative position defining the circumstances in which obligations could be sought by planning authorities. Obligations could be required only where the planning objective could not be secured by the imposition of conditions and only then when a series of further tests were satisfied. The Circular set more rigorous tests than the legislation. The criteria to be satisfied were those of necessity, reasonableness and relevance in both planning terms and to the specific development. The imposition of the test of 'reasonableness' was an attempt to contain planning gain. Paragraph B8 in providing illustrations of the test of reasonableness, linked benefits closely to the development proposed. Paragraph B8(3) defines a reasonable obligation as one which,

“...is ...so directly related to the proposed development and to the use of land after its completion, that the development ought

not to be permitted without it, e.g. the provision whether by the applicant or by the authority at the applicant's expense, of car parking in or near the development, of reasonable amounts of open space related to the development, or of social, educational, recreational, sporting or other community provision the need for which arises from the development...planning obligations can therefore relate to land, roads or buildings other than those covered by the planning permission, provided that there is a direct relationship between the two."

By imposing a proximity or nexus test, the policy imposed also the requirement of proportionality, so that any benefit proposed, "is fairly and reasonably related in scale and kind to the proposed development".⁵⁹ The policy was essentially an attempt at damage limitation; to contain the then current practice and maintain some degree of credibility for the system by setting the parameters of planning gain.

Circular 1/97 elevated the importance of obligations by emphasising the positive role they played in development control by, "provid[ing] a means of reconciling the aims and interests of developers with the need to safeguard the local environment or to meet the costs imposed as a result of development".⁶⁰ Government advocated the incorporation of policies relating to planning obligations into development plan policy and in doing so conferred legitimacy upon the practice. Not only did this signal an acceptance of its greater use to mitigate the effects of development, it raised the possibility of enhanced oversight through approving development plans and a calibration of Government's regulatory powers.

Guidance became the key regulatory mechanism of Government throughout the 1990's. It was more responsive and flexible in process terms than legislation and

⁵⁹ Paragraph B9, Annex B of Circular 16/91.

⁶⁰ *Planning Obligations* (28 January 1997), para 5.

could be revised as required. This marked a continuation of the emerging trend of the previous era. Statements of policy were used to do more than encourage or persuade, however. They were used by Government to alter the mindset of planning authorities and the methodology of determining planning applications, not least the considerations taken into account during that process. Policy was used to manipulate the received wisdom of what could or could not be a material consideration in deciding applications. From Government's perspective, planning policy was most effective as a regulatory tool in the forum of the planning appeal, where Inspectors gave full weight to the policies promulgated. It was less efficient in the context of local authority decision-making. Here the planning authority was required in law to give preference to the development plan and all other material considerations, in deciding an application. It was not legally obliged to give priority to the Centre's guidance. Whilst the courts had for many years set the legal parameters of materiality through a series of keynote decisions⁶¹, and this was an ongoing process, Government sought to do likewise through policy. Determination of the legitimacy of Government policy ultimately rested with the court and both local authorities and developers knew this. Judicial actors became significant, if marginal, in assessing the effects of the Centre's ambitions.

In the absence of credibility, policy guidance had limited utility, and Government attempts to steer local authority and developer behaviour was not always achieved. As a third party to the deal, the Secretary of State could not through agreements control directly the behaviour of the parties. Government was effectively excluded. The Secretary of State could not require the planning authority to enter into an

⁶¹ *Stringer v. Minister of Housing and Local Government* (1971) 1 All ER 65, *R v. Westminster City*

agreement, and on an appeal, could only impose conditions to regulate land use.⁶² Government policy came under judicial scrutiny where developers, disappointed on appeal, attempted to challenge the Secretary of State's decision. Alternatively, the Secretary of State would intervene in statutory challenges or applications for judicial review in an attempt to bolster or enhance Government's regulatory authority with the support of the court.

5.3 Regulating agreements via the court

With a multiplicity of actors present in the regulatory space, the courts assume a more prominent role in this late-modern era, an emerging trend in the high-modern era. In terms of hierarchy, court decisions assume a meta-regulatory position, obliquely controlling the activity of others. This is a reactive form of regulation that is initiated by others. The court provides an authoritative reading of the legality of key actors' interpretation of the law, including that of the Secretary of State. The *dicta* and observations emerging from the courts invoke regulation at the margins of accepted practice, through a process of definition. For agreements, this is achieved by defining the functional and procedural limits of the practice. This can extend to the procedures adopted in their negotiation as well as agreements' content. Regulation extends beyond the parties to the agreement and includes Government; whose decisions (through the promulgation of policy, or decisions given on appeal) often form the subject matter of judicial challenges. In the first instance decisions of *Parham*⁶³ and *Charles Church*⁶⁴, the Centre's general policy relating to planning

Council, ex. p. Monahan (1989) J.P.L. 107.

⁶² The Secretary of State could issue a letter of intent indicating that he is minded to grant permission subject to an agreement. This does not however constitute a grant of planning permission nor a final determination susceptible to statutory challenge, *Solihull MBC v. SSE* (1988) JPL 701; *Eagle Star Insurance Co. v. SSE* (1992) JPL 434.

⁶³ *R v. Gillingham B.C., ex p. Parham Ltd.* (1988) J.P.L. 336.

⁶⁴ *R. v. Wealden D. C., ex p. Charles Church (South East) Ltd.* (1990) 59 P. & C.R. 150.

gain, as set out in Circular 22/83 was held to be an inaccurate interpretation of the law. Government had sought to couple the validity of agreements to the restrictions that could be imposed by way of condition, whilst simultaneously enabling a use of private funding for off-site infrastructure. In rejecting that approach and maintaining a distinction between the two devices, the court attempted to distinguish the practice from the effects of conditions within the statutory land-use framework.⁶⁵ Whilst the policy distinction between conditions and agreements narrowed, judicial logic was more flexible than Government policy, resulting in subsequent refinement of the latter. The effect was twofold, to regulate the practice and other regulatory actors including Government.

Regulating agreements through the courts provided an overall framework for regulation by others. As Lloyd LJ stated in *City of Bradford Metropolitan Council v. SSE*⁶⁶ (and approved in both the *Parham* decision and *Eagle Star Insurance Company Ltd v. Secretary of State for the Environment and another*⁶⁷)

“...The general observation is that the practice under section 52, convenient and beneficial though it undoubtedly is, may have gone beyond what the strict language of the section justifies.”⁶⁸

A series of landmark decisions illustrate the some of the problems evident for the court when entering the regulatory space. The cases highlight the interplay between law and policy in the context of regulating agreements. They show also the route taken by the judiciary in attempting to manage some of the legal dilemmas shown by the creative ambitions of developers, Government and local authorities. One of the

⁶⁵ *Good v. Epping Forest DC* ((1994) 1 W.L.R. 376 where the Court of Appeal upheld the validity of obligations contained in a section 52 agreement, which could not have been lawfully imposed by condition.

⁶⁶ (1986) 53 P. & C.R. 55.

⁶⁷ (1992) J.P.L. 434.

difficulties was that the transformation of the practice was not necessarily matched by commensurate political accountability measures within an enlarged policy space that included by now an increasing number of private actors.

The decision of *R v. Plymouth City Council, ex p. Plymouth and South Devon Co-operative Society Ltd*⁶⁹ illustrates the extensive benefits that developers were providing through the device of agreements. Authorities were using agreements to secure both necessary infrastructure and enhance public service provision, given the strictures imposed on local government capital expenditure. In that case the City Council had granted planning permission to both Tesco and Sainsbury (fourth and second respondents respectively) for the construction of large superstores, on the eastern approach to the City. The application by a rival store, the Co-operative Society for a similar proposal had been deferred. Each of the successful applications had been supported by the offer of a section 106 agreement, with Sainsbury's offering various on-site facilities including the provision of a Tourist Information Centre, a bird watching hide and a static art feature. The developer offered off-site benefits including a park and ride facility and the contribution of £1m towards highways and drainage infrastructure for an industrial site in recognition of the loss of industrial land should planning permission be granted. Tesco had promised various benefits including the provision of a crèche, a wildlife habitat, a moving water sculpture and the sale to the planning authority of land for park and ride facilities. The Co-op made an application for judicial review to challenge the Council's decision to grant planning permission for each development on the grounds that in doing so, the authority had taken into account factors immaterial to

⁶⁸ (1986) 53 P. & C.R. 55 at p. 65.

the application. The applicants pleaded that the obligations contained in the section 106 agreements were such that the Council was not lawfully entitled to accept as material considerations. At first instance the application failed, and the Co-op appealed to the Court of Appeal.

Whilst the applicant's proposal was not situated in close proximity to their rivals' successful proposals⁷⁰ it did accord with local plan policy. The draft first alteration to the local plan (following the commissioning of a report that had recommended that the number of out-of-town superstores be restricted) was approved recommending a series of sites (three) for out-of-town superstores, only one of which was located in the approved designation. The Council's policy on superstore development whilst closely linking community benefits to planning merits required, "...that the local community benefits more directly and is not disadvantaged by the new development".⁷¹ The Council's approach to planning was to negotiate with developers. Both successful applications were the subject of extensive negotiations with the planning authority. The Council had a history of unsuccessfully defending its former local plan policies relating to out-of-town shopping developments in the past on appeal, especially since they did not accord with the Secretary of State's guidance contained within Planning Policy Guidance 6.⁷² Although the decision centred upon the concept of materiality, as pleaded by the applicants, it was held that the planning authority had broad scope to decide what amounted to a material consideration and this extended to the benefits offered by the applicants. In the Court of Appeal, Russell LJ. indicated that the tests articulated in the decision of

⁶⁹ (1994) 67 P. & C.R. 78.

⁷⁰ It was some three miles east of the successful development sites.

⁷¹ Draft first alteration to the local plan 1992, referred to per Russell L.J. (1994) 67 P. & C.R. 78 at p.86.

*Newbury*⁷³ for the validity of a planning condition applied equally in assessing the legality of agreements. In the absence of bad faith or an ulterior motive and none was established, any allegation of *Wednesbury* unreasonableness was ‘unarguable’.⁷⁴ Both on and off-site obligations were held to fulfil a planning purpose.

The judgment of Hoffmann LJ is however the most accurate observation of the dilemmas facing local planning authorities, in satisfying the requirements of the planning system, the broad policy objectives of Government and the changing face of consumerism. The dicta alludes to the dependency of the local planning authority on both developers and the Centre in determining planning applications. They could not mould the preferences of developer or the local inhabitants. Whilst planners had insisted that large retailers remain in the urban and suburban areas, the authority’s stance had been undermined by the Secretary of State on a number of occasions, and the economics of viable development had prevailed. Hoffmann LJ observed, “...Planning authorities have had to adapt their policies to the pressure of demand for these new superstores”.⁷⁵

The Court of Appeal had become an arbiter on the merits of a decision taken by the local planning authority, something beyond the parameters of its scrutiny powers in deciding an application for judicial review. Developer competition in land-use development, driven by the economic motor of demand and profitability had drawn judicial actors into the regulatory space. The planning system had been shown to be insufficiently responsive to economic demand and the result had exacerbated a use of

⁷² *Major Retail Development* (1988).

⁷³ *Newbury District Council v. Secretary of State for the Environment* (1981) A.C. 578.

⁷⁴ (1994) 67 P. & C.R. 78 at p. 82.

⁷⁵ *Ibid.*, p. 85.

creative solutions by local authorities. Government could not control a use of agreements through statements of policy however clear. Neither could the courts.

The *Plymouth* decision indicated the continuing evolution of the practice. The Co-op's appeal was refused and in treating the benefits offered by both Tesco and Sainsbury, as material considerations, the Court of Appeal left little space for disappointed developers to challenge grants of permission where significant planning gains were offered. The market for planning permission in the large-scale development stakes had become similar to a game of poker; potentially the winner could take all.

By the mid-1990's agreements and obligations extended to the provision of off-site works as the case of *R v. South Northamptonshire DC and others ex p. Crest Homes plc*⁷⁶ illustrates. The facts of the case are significant because they highlight how authorities by using agreements attempted to address the practical defects of the plan-led system. It indicated the extent to which for the future Government would endorse local practice. Authorities found it difficult complying with centrally imposed policies and balancing local development pressures in times of economic constraint. Often local planning authorities were incapable of challenging overtly the policies fixed by Government or their superiors at County level and remained dependent upon commercial developers to compensate for the broad impacts of their development proposals on the local community. The *Crest* decision highlights also how relations between developer and local authority continued to be regulated by

⁷⁶ *R v South Northamptonshire District Council and Others, ex p. Crest Homes plc* QBD (1993) 68 P. & C.R. 187 and (1994) 3 PLR 47.

developer competition, and how far the courts would exercise their powers of review to regulate that practice.

During 1988 the Council prepared its district-wide plan. The Secretary of State's proposed alterations to the county-wide structure plan had provided for the town to expand by one third during the life of that plan (to the period 2006). The planning authority envisaged that the policy proposed and the subsequent legislative changes in the form of the Planning and Compensation Act 1991, required a reappraisal of its local plan strategy. Any policy change could not be achieved without major infrastructure provision, in particular the construction of a new by-pass. No public funding was available to secure the necessary works. The approved structure plan required the allocation of residential land and in 1990 the Council allocated six sites. Given the, "surge of interest"⁷⁷ in the town from both landowners and developers, negotiations took place between the planning authority and developers interested, "... into the terms in which section 106 agreements might be framed should planning permission be forthcoming".⁷⁸ After negotiation with interested landowners and developers, and commissioning an external feasibility study, the Council found an agreed solution. This required the fixing of contributions towards the essential infrastructure and services at 20% and 17.5% of the enhanced value of the land proposed for residential and commercial development respectively. In achieving this solution (at the time agreed upon by all landowners and developers concerned, including the applicants) the planning authority had undertaken a meticulous exercise, assessing expansion levels anticipated by development plan policy and making this commensurate to the contributions that might be forthcoming from

developers. It was an express requirement that no major development would be permitted unless the funding requirements had been agreed.

The outcome of the negotiations was incorporated into the local plan consultation process. By the time of consultation on the emerging plan, one agreement had been concluded but no planning permission had been granted. Over time it became clear to the Council that the required improvements could not be achieved without some form of development pre-dating the by-pass construction. By now the value of residential land had fallen. Two of the sites not dependent on the by-pass for construction were allocated for development before its construction. Another site (the one of interest to the applicant) was placed in the *post* by-pass phase. After the consultation period on the plan proposals ended, more section 106 agreements were completed that incorporated the formula. For the two agreements entered into, the funding for community facilities was £1.85m and £227,000, with each site covering 28 hectares and 10 hectares and having the potential for up to 500 dwellings and 85 dwellings respectively. Each agreement recited both section 106 of the Town and Country Planning Act 1990 (as amended) and section 111 Local Government Act 1972 (a general enabling provision). The agreements recited both the local plan process and the planning Brief for the development of the area. They were expressed to be conditional on the local plan incorporating the proposal and the grant of planning permission. The agreements included a covenant to pay the Council 20% of the enhanced development land value and a covenant to convey land for community purposes – a primary school, community building, and playing field and to reserve a percentage for affordable housing. Adjustments were made to these

⁷⁷ per Brooke J, *R v. South Northamptonshire District Council and Others, ex p. Crest Homes plc*,

sums in the event of land being conveyed with the owner paying $\frac{3}{4}$ of drainage infrastructure costs. The Council covenanted to use the funds received

“For the benefit of the community in Towcester and any residual money not so accounted for shall be reserved as a contribution to any privately or part privately funded A5 Towcester by-pass proposal. In the event that a centrally funded scheme is implemented then such monies [moves in the report] will be allocated for further community benefit in Towcester and its environs”⁷⁹

The Council agreed to begin building the community facilities development as soon as the land was conveyed.

Another agreement contained a covenant to pay 20% of the sale consideration received by the owner to the Council, the contribution being towards the cost of providing, “...infrastructure and community facilities for the wider public benefit”.⁸⁰ Each obligation was systematically tied to community needs on a detailed basis, by estimating the costs of the facilities and allocating the costs amongst the landowners concerned. Subsequently outline permission was granted for the two sites identified previously, both of which were subject to section 106 agreements.

Crest, the applicants, sought to challenge the validity of the section 106 agreements, after their own application (which did not include a section 106 agreement) had been refused. They alleged that the setting of a formula amounted to an unlawful development tax. Another significant factor was the approval of development, which according to the applicant's may have prejudiced their interest in the emerging

QBD (1993) 68 P & CR 187, at p.189.

⁷⁸ Ibid., p.187.

⁷⁹ Ibid., p.195.

⁸⁰ In this case the provision of public open space, footpaths and cycle ways over a lagoon and a footbridge over the river *ibid.*, p.196.

development plan. The Council had found, because of its inability to meet the targets for residential development set by the structure plan and evident lack of infrastructure provision, a creative solution to the local problems, the fixing of a local tariff.

The court held that the Council's policy of requiring developers to contribute to the cost of relevant infrastructure provision was neither unlawful nor constituted an illegitimate levy. In reaching their findings, dismissing Crest's application, both Brooke J. at first instance and those sitting in the Court of Appeal⁸¹, were careful to emphasise the meticulous investigations undertaken by the planning authority including conducting negotiations which were agreed between all concerned. Brooke J. summed up both the procedural rigour on the authority's part and the significance of the practice for securing, "[that] the necessary infrastructure and community facilities are in place to support any very large new residential development".⁸² The use of agreements in the circumstances was a prudent course to take.

The reliance by both courts on the rigorous procedures adopted by the planning authority to justify the dismissal of the applicant's case, is perhaps a measure of the difficulty the court found itself in. The process of obtaining extensive statistical and expert evidence insulated the policy decisions from legal review. The case highlighted the role of local government in a changing world and how far authorities could protect local communities from the effects of substantial development. A use of agreements assumes greater importance as the mechanism to cement the

⁸¹ Henry, Neill and Simon-Brown LJJ (1995) 93 L.G.R. 205.

negotiated solutions overcoming spillover effects. The facts themselves highlighted a breakdown in the level of trust between the authority and developer and between the developers *inter se*. It also showed the unsuitability of the judiciary to regulate less than transparent negotiations.

Diverging regulatory understandings of the relevant actors to the practice remained. *Tesco Stores Ltd v. Secretary of State for the Environment*⁸³ illustrates this further. For Government, regulation signified the instrumental aim of integrating agreements within the statutory framework. The court had more fluid objectives that were process orientated, in keeping with its purpose of exercising powers of review. The House of Lords considered the materiality of planning obligations in determining planning applications. The facts again concerned developer competition. The decision however was that of the Secretary of State.

At an earlier local plan inquiry various developers had submitted proposals to build an out-of-town superstore. Whilst the proposals had been refused, the local plan inquiry highlighted the need for a relief road to ease traffic congestion within the town centre. The local plan Inspector had noted that development on the periphery would be beneficial in planning terms and further suggested that the planning authority negotiate with the developers concerned to secure funding for the relief road. Two submitted rival applications for permission. Both applications were called-in for determination by the Secretary of State. At the inquiry Tesco offered to provide the full funding for the relief road to the cost of £6.6m, and entered into a planning obligation under section 106 with the highway authority. At the inquiry

⁸² *Ibid.*, and (1993) 68 P.& C.R. 189 at p. 206.

held into the application, the Inspector recommended that Tesco's application be permitted and the rival application dismissed. The Inspector (appointed by the Secretary of State) observed that the grant of planning permission for a new superstore on the outskirts could not lawfully be made conditional on the successful developer providing funding for the new link road. Any new development would have a marginal traffic impact (estimated at approximately 10% of the normal traffic flows) and there would be thus a tenuous connection between the new link road and the new development. The Inspector stated further that the Council would be acting perversely by refusing the applicant's offer to fund the new link road. The Inspector noted that whilst it may be unreasonable for the planning authority to require from a developer with an approved permission full funding of the highway improvements, the negotiation of funding (as provided for in the local plan) might result in just that.

The Secretary of State rejected the Inspector's recommendation⁸⁴, instead granting the rival competitor (Tarmac, in association with Sainsburys) permission. In doing so he closely followed his stated policy contained in Circular 16/91. Tesco made a statutory challenge to the High Court. At first instance the judge quashed the Secretary of State's decision, holding he had wrongly failed to treat Tesco's offer of funding as a material consideration.⁸⁵ On appeal by the other applicant, the Secretary of State's decision was reinstated. Tesco appealed to the House of Lords. Both the Court of Appeal and the House of Lord upheld the Secretary of State's decision.

⁸³ (1995) 1 W.L.R. 759.

⁸⁴ In the Minutes of evidence of the Environment Committee's Fourth Report, HC 359-II the Minister for Local Government and Planning, Mr David Curry, had indicated at Q1063 that, *...the Secretary of State would need very strong arguments in order not to follow the broad judgement of the Inspector*

⁸⁵ Before Nigel MacLeod QC, sitting as a deputy judge of the High Court, in the Queen's Bench Division, 7 July 1993, (1994) 67 P. & C.R. 216.

The Court of Appeal acknowledged the importance of the case with Sir Thomas

Bingham MR stating that this was

“...a question of unusual public importance bearing on the conditions which can be imposed, and the obligations which can be accepted, on the grant of planning permission and the point at which the imposition of conditions, and the acceptance of obligations, overlaps into the buying and selling of planning permission, which are always agreed to be unacceptable.”⁸⁶

Tesco’s argument was that in applying his own policy in Circular 16/91, and in particular the test of necessity, the Secretary of State had misdirected himself by treating the applicant’s offer of funding as immaterial in determining the application.

The House of Lords held that the offer of off-site benefits (through the vehicle of an obligation) was a material consideration in determining a planning application, in contrast to the stated policy of the Secretary of State. It held also that the planning authority was not bound to apply the Secretary of State’s policy. Whilst the offer of an obligation, provided it was not *de minimis* would be material to the consideration of an application for the decision-maker, the House declined to attribute the weight or significance to be given to any relevant benefit. The majority of the House (Lords Ackner, Browne-Wilkinson and Lord Lloyd of Berwick) concurred with Lord Keith in finding that the Secretary of State had considered Tesco’s obligation. Being entitled to adhere to his own policy, it was for the Minister himself to attribute the weight to be given to the offer, which he had done, and providing that the decision was not *Wednesbury* unreasonable, the court would not intervene. Accordingly the appeal was dismissed.

⁸⁶ (1994) 68 P. & C.R. 219, at p. 240.

Lord Hoffmann's dicta demonstrate the difficulties the court encountered in exercising a regulatory role. Although supporting the rest of the House, the dicta are striking in terms of their realist interpretation. His observations highlight the ongoing dynamic between development and community cost, or as he termed it the, "consequences involving loss or expenditure by other persons or the community at large".⁸⁷ Although his analysis is not particularly accurate (situating the emergence of planning agreements at the seventies), it does draw out the dilemma planning authorities' faced. They needed to secure from developers contributions for the impact of their development proposals, against a backdrop of public expenditure constraint, a restrictive interpretation by the courts on the ambit of planning conditions, and the existence of a power with seemingly few limitations. This narrative is tied very closely to the impact of the property development boom, although in reality it only emphasised an ongoing problem.

The rise of developer competition generated alternative mechanisms of control and exposed pathological defects in attempts to regulate agreements through law and policy. Planning regulation through the democratic processes, founders potentially in a context of the seemingly boundless levels of private finance available to support development proposals bolstered by Government's encouragement of the mixed economy to fund public provision. Regulation instead comes very close to functioning as an all-encompassing discipline, which could draw in and subsume constitutional divisions. This was the reason why the House declined to consider the planning merits of the Secretary of State's decision.

⁸⁷ (1995) 1 W.L.R. 759 at p.771, per Lord Hoffman.

Regulating agreements through the judicial process was contentious. Through *Tesco* the courts had retrenched from *Plymouth*. Regulation by the courts assumed a very specific form. It was process-oriented rather than policy centred and functioned at the margins of activity. It was far removed from considering the planning merits, the regulatory focus of other actors, especially Government. None of the key actors were particularly willing to accept the court's observations without critique and future engagements between them. Governments approach to control was different; to amend the statutory provisions.

6. The advent of the planning obligation

Economic uncertainty highlighted both the limitations in the Centre's endeavours to steer through policy guidance and the democratic process. More effective regulation derived from developer activity although this too showed the limits of judicial control. Concerns about the, "...growing influence of planning gain on decisions made by local authorities"⁸⁸ extended to many organisations and professions and permeated the regulatory space. Government was committed by now to easing the 'logjam'⁸⁹ in the development process by providing

"... a safety valve that can be used when recalcitrant local authorities obstruct otherwise sensible developments."⁹⁰

Creating a new instrument, the planning obligation, did this. Agreements were repackaged as planning obligations and comprised also unilateral undertakings, which developers could provide where it was not possible to reach agreement with the planning authority. According to Government, undertakings would both minimise the risk of authorities' seeking, "excessive planning gain" and overcome

⁸⁸ Mr Win Griffiths HC Debs vol. 197 col. 366, (19 Jun 1991).

⁸⁹ Sir George Young HC Debs vol. 187 col. 819, (12 March 1991).

potential delays in the applications process arising from the negotiation of agreements.⁹¹ Previously, where a planning authority refused to negotiate, the applicant would have had to capitulate or risk a protracted appeal. On appeal, even if the proposal could be made acceptable with an agreement, the Inspector could not impose a requirement to that effect.

The Planning and Compensation Act 1991 amending the Town and Country Planning Act 1990, created the planning obligation. The reform had been proposed by the Department of the Environment in a 1989 consultation paper *Planning Agreements*. The themes troubling Government repeated earlier dilemmas, particularly how to accelerate the planning decision process and regulate agreements remotely because it was not a party to the agreement. Delay was a major concern for Government, particularly in planning appeals. The paper proposed unilateral undertakings (as an alternative to agreements) to be used in circumstances where the developer was unable to reach agreement with the local planning authority. The undertaking would

“... be enforceable by the local authority [but] ...it would not be necessary for the local planning authority to agree the terms.”⁹²

It could be used also in appeal situations, overcoming inability of the Secretary of State or Inspector to require an agreement in that forum.⁹³ This meant the Secretary of State could exercise further control over the practice.

⁹⁰ Official Report Standing Committee F, vol. IV col.114 (16 April 1991).

⁹¹ n 89 *supra*.

⁹² Department of the Environment, consultation paper: *Planning Agreements* (1989) para 5.

⁹³ *Ibid.*, para 4.

The consultation document had suggested broadening the power to discharge agreements, enabling landowners to apply to the planning authority rather than the Lands Tribunal. The revision would enlarge the existing grounds for discharging agreements to include the basis that the agreement no longer had any planning purposes. Previously applications could only be made on the ground of obsolescence, unless both parties by agreement entered into a deed of waiver or variation. The paper suggested also that the provisions should be amended to allow the Crown to enter into agreements. The proposals amounted to a repackaging of the regulatory form, enlarging Government's capacity to regulate the practice, moving it further from its bilateral origins, and altering the power distribution between local authority and developer. Each proposal was contained in the 1991 amending legislation.

When Parliament considered the proposals for unilateral obligations many organisations including the Council for the Protection of Rural England were opposed.⁹⁴ They perceived the proposal as one that could distort the planning process by removing it further from the public domain.⁹⁵ Potentially undertakings would privatise further the provision of development benefits (including infrastructure). Government, however, did not share this view. Baroness Blatch speaking for Government in the House of Lords during the progress of the Bill indicated that the amendment provided

⁹⁴ A failed amendment proposed by Mr Win Griffiths MP to limit undertakings to situations of abortive negotiations with the local authority and a lodged appeal refers to this in detail. HC Debs. vol. 193 col. 366 et. seq., (19 June 1991).

⁹⁵ The Nolan Committee in its Third Report *Standards in Public Life* at Ch6 (and at R36 and R37) recognised the use of agreements in recouping from developers the additional costs to communities of developments permitted but had advocated that the practice should be made more transparent and tightly regulated if necessary through legislative change.

“[no] substantive difference [to the 1990 provisions]... The specific provision to allow for financial payments to be made is perhaps a little wider than the present provision, but it reflects practice”.⁹⁶

Section 106(1) of the Town and Country Planning Act 1990 (as amended by section 12 of the Planning and Compensation Act 1991⁹⁷) provided for a use of unilateral undertakings. It clarified the ambit of the instrument by providing that any person interested in land may *by agreement or otherwise* enter into an obligation (known as a, ‘planning obligation’)

- (a) restricting the development or use of land in any specified way;
- (b) requiring specified operations or activities to be carried out in, on under or over the land;
- (c) requiring the land to be used in any specified way;
- (d) requiring a sum or sums to be paid to the authority on a specified date or dates or periodically.⁹⁸

The provisions did not state expressly however who might seek the requirements. Although enforceable at the suit of the local planning authority, subsection (1) emphasises the role of the landowner rather than the local authority. It is the former who, in the case of the unilateral obligation triggers the restriction or requirement. The renaming of the instrument as an, “obligation” points to a movement away from a bargain, towards an enhanced level of trust between the parties – one where duty might override instrumental rationality.

Obligations can be conditional or unconditional, imposing restrictions for a finite or indefinite period and if requiring the payment of sums of money, these may be determined by the terms of the instrument with payment being made periodically for

⁹⁶ HL Debs vol. 525, Col. 561, (29 January 1991).

⁹⁷ The section came into effect on 25 October 1991 by S.I. 1991 No 2272.

⁹⁸ Section 106(1) Town and Country Planning Act 1990 (as amended).

a term or indefinitely. The subsection emphasises that the instrument can contain both positive and negative stipulations, and removes the reference to *regulating* land use. It clarified any doubts regarding whether the earlier statutory provisions enabled positive covenants to be imposed⁹⁹ and expressly provided for monetary payments to be made. The amendments have been said to, “considerably widen... the express ambit of planning obligations”¹⁰⁰ and to, “reflect the political objective of permitting greater use of private capital for what are described as ‘off site infrastructure costs’, which formerly were borne by the public sector alone”.¹⁰¹ The express reference to obligations including monetary payments reaffirmed current practice. Obligations to make financial payments had been an incidental aspect of the restriction or regulation of land use. Implicit in the provisions is a distancing of the instrument from the particular development that could be construed as a power to impose local taxation. The question of betterment had been a continuing concern for Government and the provision could be seen as an attempt to address this issue. It was to become a factor significant in Government’s future thinking.

The 1991 amendments are an express acknowledgement of the evolving practice that had been adopted in *Crest*. They are an attempt at combining both the regulatory objectives of the planning authority (under the heads of, “restricting” and, “requiring”) and Government by listing in detail the objects achievable. The provisions signal also the potential gains achievable through private development activity. In the words of Lord Hoffmann in *Tesco* the amending provisions

⁹⁹ Local authorities relied previously upon other statutory provisions e.g. local Act powers or section 33 of the Local Government (Miscellaneous) Provisions Act 1982, to secure satisfactory enforcement.

¹⁰⁰ per Brooke J. *R v. South Northamptonshire District Council and Others, ex p. Crest Homes plc*. (1993) 68 P. & C.R. 187 at p.199.

“... encouraged local planning authorities to enter into agreements by which developers will pay for infrastructure and other facilities which would otherwise have to be provided at the public expense. These policies reflect a shift in Government attitudes to the respective responsibilities of the public and private sectors. While rejecting the politics of using planning control to extract benefits for the community at large, the Government has accepted the view that market forces are distorted if commercial developments are not required to bear their own external costs.”¹⁰²

The unilateral undertaking passed initiative to the developer to assess how best environmental and community impacts might be addressed. This was consistent with the ‘new religion’ that Government is best suited to facilitating rather than delivering.¹⁰³ The interactions between local planning authority and developer remained important because of the configuration of the development control system, which places significant power in local authority hands, but the relations of the parties have shifted subtly. The reciprocal initiative is transmuted to include unilateral developer action. Rather than agreements being a form of regulation supplementary to the local planning authority powers of granting planning permission, and in essence a consensual gloss on the unilateral style of land-use regulation, driven by the planning authority, the process is inverted. For the first time binding obligations may be proffered by developers without the agreement of the planning authority. The unilateral undertaking can be used to overcome planning objections to a proposal in such a way that more control is given to the landowner or developer, particularly at the appeal stage. This displaces the level of control the authority previously held. The issue of materiality becomes more closely linked to

¹⁰¹ per Evans LJ in *R v. Plymouth City Council and Others, ex p. Plymouth and South Devon Co-operative Society Ltd.*, p.84 quoting para. P106.8 of the *Encyclopaedia of Planning*, Vol. 2. This was not a particularly accurate statement because agreements had been used for this purpose.

¹⁰² *Op. cit.*, at p.777.

¹⁰³ As Osborne and Gaebler note, “steering rather than rowing”, *op. cit.*, p.35. The same ethos can be found in the DTI paper *Releasing Enterprise* Cm 512 (November 1988).

developer perception of the worth of the development, and Government's normative construction of the practice. The amending provisions gave Government more purchase to regulate obligations, including a power to decide when agreements should be discharged. Although widely drawn, a use of obligations was underpinned by negotiation. The provisions made no explicit reference to the difficult questions surrounding the negotiation of the instrument and the vexed issue of planning gain. Negotiation secured acceptable solutions in a manner broadly similar to the functioning of a market, and this was largely how these issues were resolved; by the actors themselves.

6.1 Regulating obligations

Like the regulation of agreements, practice, central policy, law and developer competition shaped a use of obligations. Through the amendments another actor entered the already congested regulatory space, the planning inspector. In *R v. SSE ex p. Wakefield MBC*¹⁰⁴ an Inspector awarded costs against a planning authority for reasons including its refusal to enter into a planning agreement, or to consider the terms of a unilateral undertaking. The authority sought to quash the decision. The High Court rejected the authority's application. In the absence of active co-operation in the negotiation of an obligation, the local planning authority was at risk as to costs where planning permission is granted on appeal. The decisions of the Inspectorate functioned as another potential brake on planning authority activity.

The interaction between local authority and developer still shapes the practice and acts as a regulatory mechanism. Developers remain, "key agents in the physical

¹⁰⁴ *The Times* 29 October 1996.

transformation of Britain” and the use of obligations.¹⁰⁵ Government assumes a clearer role in defining the practice, especially in appeal situations through the amended statutory provisions. The relations between developer and planning authority shift, as do negotiating strategies. Developers remain the main protagonists in economic development and change, especially in areas with limited development prospects. In more affluent areas, developers are often forced to negotiate to overcome the vociferous objections of the more articulate and influential sections of a community.¹⁰⁶

Changes in the relations between the actors appear to make little appreciable difference in the functioning of obligations in the late-modern era as opposed to the use of agreements, and developers continue to contribute to the provision of off-site infrastructure. The Urban Task Force identified obligations as important instruments in securing improvements to the urban environment.¹⁰⁷ They have been recognised by Government as a key mechanism in securing environmental and social benefits in the countryside including job creation.¹⁰⁸ A recent study entitled *Planning Obligations and the mediation of development* undertaken for the RICS estimated that 1.5% of all planning permissions granted each year include section 106 obligations.¹⁰⁹ However, the same survey showed that for the year ending June 1998, 17.6% of all major developments involved planning obligations. This included 25.8% of major housing schemes and 18.9% of major retail schemes. Of those

¹⁰⁵ Healey et. al (1995) p.5.

¹⁰⁶ As noted in Campbell et. al. (2001) Ch 4 pp.21-27. This observation has been supported by Cullingworth, B., *Town and Country Planning in Britain*. London: Allen and Unwin 1988 (11th ed.) p.117.

¹⁰⁷ Urban Green Spaces Task Force *Our towns and cities: the future – Delivering an urban renaissance* Cm 4911 (November 2000).

¹⁰⁸ Elson et. al. (1999) and MacFarlane (2000).

¹⁰⁹ Campbell et. al. (2001).

permissions for major development with planning obligations secured, 14.8% were in the North and 22.9% in the South.¹¹⁰ Extrapolating these statistics from the small sample, Government estimates that in a typical year where around 400,000 consents are granted, some 6000 planning agreements are concluded.¹¹¹ Obligations continue to be used to secure the provision of affordable housing¹¹² and retail development as well as to secure infrastructure provision and community facilities. The RICS study has identified that the use of obligations has broadened in terms of the requirements sought of developers. In a survey of over 500 obligations, 45.7% of those required developers to provide off-site capital works, 44.6% restricted the use of the development, with 32.2% requiring the provision of services or facilities (either directly or by payment of a commuted sum). 25.9% of the obligations required on-site capital works and the remainder other (unspecified) action.¹¹³

The resilience of the practice defied Government's attempts at regulation by statutory amendment. After *Tesco*, Government revised its policy so as to regulate obligations. Circular 1/97 showed a refinement in Government's general policy perspective. The Circular stated

“... the policies to which the Secretary of State and the Planning Inspectorate will have regard in determining applications or appeals and which local planning authorities should also take into account when considering planning applications and drafting development plan policies.”¹¹⁴

¹¹⁰ Ibid., p.5.

¹¹¹ Statistics extrapolated by the ODPM *Planning Obligations: Delivering a Fundamental Change* op. cit., para. 3.5.

¹¹² As is emphasised in the *Seventeenth Report of Environment, Transport and Regional Affairs Committee* 1998–99 (HC 490-I) (1 September 1999) and the *Review of Housing Supply – Delivering stability: securing our Future Housing Needs* (Interim Report - Analysis), Barker, Kate, December 2003, HM Treasury (2004)

¹¹³ Campbell et. al (2001) p.7.

¹¹⁴ Circular 1/97, Annex B' para. B1.

The document drew a careful distinction between the domains of law and policy, an indicator of the consequences of judicial constructions of the policy statements. According to the Circular, obligations existed to supplement the planning system and to promote the public interest. The Circular assigns two key functions to the obligation, both of which are, “output” directed. These are to enhance the quality of development, and to facilitate development proposals that may otherwise be refused. Whilst reference is made to negotiation being an integral element of the planning system, the use of obligations to cement the bargain, (or it’s symbolic or ritualistic significance) is not directly referred to. The broad policy principle, in keeping with the stated public interest objectives, was to retain public confidence by promoting, “fair, open and reasonable”¹¹⁵ negotiations, which will ultimately enhance the quality of development. Through a use of policy, Government sought to satisfy the requirements of the Nolan Committee¹¹⁶ and to structure the practice by ensuring that policies relating to obligations were articulated in development plan policy.

In *Planning Obligations delivering a Fundamental Change* (2001), Government’s attitude towards its guidance was said

“...[to set] out a tightly drawn regime on the use of planning obligations, incorporating a series of policy tests which have collectively become known as “the necessity test”, to determine the acceptability of a planning obligation. This requires that obligations should be necessary, relevant to planning, directly related to the proposed development, fairly and reasonably related in scale and kind to the proposed development, and reasonable in all other respects.”¹¹⁷

¹¹⁵ Ibid., para. 6.

¹¹⁶ Committee on Standards in Public Life, Third Report *Standards of Conduct in Local Government* Cm 3702-1 (July 1997).

¹¹⁷ Op. cit., (2001) para. 3.3.

Regulation is viewed in terms of words rather than deeds. The policy locates power firmly in the hands of the local planning authority. It is the planning authority that seeks the planning obligation. This is at odds with both practice and the statutory provisions. Policy would not, “stifle innovation and market development”, it would instead facilitate it.¹¹⁸ As a control mechanism it was not particularly effective.

The regulation of obligations through statements of policy has continued into the new Millennium. Government continues to consider how best, “to align its policy tests with the tests applied by case law to planning obligations”.¹¹⁹ In advancing this approach to control Government remained, “determined” to achieve this, through “new guidance”.¹²⁰ In 2004, the Minister for Housing and Planning advised of the publication of a revised draft circular.¹²¹

Government continues to construct systematically the practice according to its own rationality, impervious to the views of those other actors within the regulatory space most closely involved with it – especially developers, planning authorities and professional groupings. This divergence in vision is shown most clearly in the proposals to revise the regime and abolish the instrument. Following a written statement of the Minister for Housing and Planning dated 6 November 2003¹²², Government issued a consultation paper on the reform of planning obligations.¹²³

The consultation document proposed numerous policy changes and raised the

¹¹⁸ Examination of witnesses 15 Jan 1997, Mr John Ballard, Planning Directorate Q.5, in evidence to the Environment Committee, *Shopping Centres* HC 210-II 1996–7.

¹¹⁹ *Contributing to Sustainable Communities – A New Approach to Planning Obligations*. Statement by The Office of the Deputy Prime Minister 30 January 2004.

¹²⁰ HC Debs vol. 396 col. 731, 733 Statement, (17 December 2002), Planning and Compulsory Purchase Bill, Mrs Roche.

¹²¹ Mr Keith Hill, *Statement of the Deputy Prime Minister on Planning Obligations*, HC Debs vol. 426 col. 6WS, (2 November 2004).

¹²² HC Debs vol. 426 col. 40 WS, (6 November 2003).

possibility of introducing a tariff-based system in the form of an optional planning charge (to be incorporated within the Local Development Framework) payable by applicants as an alternative to the planning obligation. The introduction of local development charge would attenuate a use of obligations. It is reminiscent also of Government's adoption of land development charges *post*-1947. Land taxation, as a regulatory mechanism substitutes central control for local negotiation. It overcomes any regulatory difficulties regarding the negotiation of development gains in a planned system, because it functions largely outside its parameters. It may lead yet to obligations becoming obsolete.

Reforms of the development control system led to the enactment of the Planning and Compulsory Purchase Act. The Act, whilst giving power to the Secretary of State to make regulations for planning contributions (a form of development charge) made no reference to planning obligations.¹²⁴ A new Circular 05/05, issued by the Office of the Deputy Prime Minister raises again Government's concern regarding the complexity of obligations and the protracted negotiation procedure that can delay the planning process.¹²⁵ The policy encourages planning authorities to use formulae and standard charges as part of the framework for negotiating agreements, (as had occurred in the *Crest* decision) and include in their development plans substantive details of the circumstances in which obligations will be sought. The policy orientation towards a use of formulae operates independently of Government's proposal to introduce a form of development charge. Advocating standardisation (especially by the inclusion of standard obligations within the development plan)

¹²³ *Contributing to sustainable communities – A new approach to planning obligations* (2003)

¹²⁴ Part 4 Planning and Compulsory Purchase Act 2004, sections 46-8.

¹²⁵ ODPM Circular 05/2005 *Planning Obligations* (18 July 2005).

reaffirms the plan-led system, linking control to development plan approval, and thus the Centre.

Developers and planning authorities remain wedded to the use of the instrument, as both studies¹²⁶ and consultation responses have shown.¹²⁷ Developers acknowledged a need to enter into obligations provided the profitability of the development was not detrimentally affected, and highlighted the efficacy of the instrument in terms of its flexibility. Representatives of the professional bodies such as the British Property Federation¹²⁸, the CBI¹²⁹ and the Royal Institution of Chartered Surveyors (RICS) have been reticent to support any proposal that could lead to greater centralisation and potentially structural inflexibility. This level of resistance is indicative of Government's failing attempts and potentially continuing failure to control or steer the practice solely according to its vision.

7. Conclusion

In this chapter I described the effect that economic uncertainty and a process of marketisation of the planning system had on the use of agreements and obligations. The three key cases focussed on illustrate an emergent, if largely suppressed, problematic; the effects of the greater reliance upon private finance to redress the impacts of development and fund public works. The repackaging of agreements as

¹²⁶ For example those by *Healey* (1995) and *Campbell* (2001).

¹²⁷ In consultation responses to the draft revised circular on planning obligations <http://www.odpm.gov.uk/stellent/groups/odpm_planning/documents/page/odpm_plan_039097.hcsp> 27 September 2005, *Planning Obligations: Delivering a Fundamental Change* (referred to in a press release of the Prime Minister's Office 20 December 2001). An initial analysis of the consultation responses by the ODPM (to the 2003 consultation) indicates that of the 137 business consultation responses 83 were against any proposal to introduce a tariff based system.

¹²⁸ Memorandum by the BPF (PGP 47), Transport, Local Government and the Regions Committee Memoranda, Thirteenth Report *Planning Green Paper* 2001-02 HC 476-II.

obligations, especially in terms of providing expressly for the payment of financial sums raised again questions of the recoupment of betterment and perhaps made it inevitable that Government would favour a generalised system of development charges.

One key and continuing approach of Government (with one exception notably the 1991 Act) has been to steer activity through a use soft-regulation in the form of policy guidance rather than resorting to overt mechanisms of control including legislation. This has been a consistent trend since the abolition of the consent mechanism in 1968. Policy has tended to become more vague, despite calls by House of Commons Committees in particular for greater clarity in central policy.¹³⁰

The strategy being more subtle (and thus potentially more powerful a tool) has resulted however, in other actors working to their own agendas rather than heeding policy advice. This is so in the case of local authority developer relations where the use of obligations has broadened at a time when Government has sought to confine them in order to maintain a measure of (public) confidence and control. Central and local relations, become more fragmented where the circular is used as a mode of governance. With the weakening of public funding, the dependency of local government on the Centre lessens. Government's use of circulars as a regulatory strategy, whilst more diffuse and all-embracing than the particularistic control of the consent mechanism, led to greater role for other actors (especially the court) at the expense of regulatory uniformity. Regulation by the legal system posits a level of particularity to general problems at odds with generalised statements of policy. Law facilitates regulation rather than attempting to impose solutions. Government's

¹²⁹ The CBI's *Planning for Productivity – A Ten Point Action Plan* July 2001.

strategy of steering through policy has succeeded in engendering other facets of control that have become the defining characteristics of the late-modern era; that of (almost) spontaneous ordering by other actors.

The cases discussed highlighted a transformation in the practice that in turn gave a raised profile to actors other than Government, particularly developers and the courts as sources of regulatory control. By the end of the era, agreements were not solely a symbol of bilateral agreement but also developer unilateralism although the implications of this development took some time to be recognised.¹³¹ Negotiation remains fundamental to the practice. The accommodation or assimilation of market ideals within what remains a predominantly hierarchical setting, has resulted in developer authority relations moving from the more trust-oriented bilateral accommodation to a subjection to market demands. The relation between the two is one characterised less by trust than distrust. Essentially, as trusting relations become more strained, at local levels, the capacity of Government to generate both local authority and developer trust and thus regulate the obligation becomes more difficult, leading to a propensity by the Centre to seek out more directive strategies of control. From Government's perspective, developer faith in policy is required if planning activity is to be controlled, and local authority quiescence is needed to mitigate

¹³⁰ Third Report Transport, Local Government and Regions Committee, *Public Spaces: the Role of PPG 17 in the Urban Renaissance* (2002).

¹³¹ In 1993 it was still being said per Brooke J in *R v. South Northamptonshire District Council and others, ex p. Crest Homes plc* 93 L.G.R 205 at p.209 *supra* that *the policy behind the relevant amendment provisions in the [...]1991 Act appears to encourage such solutions to emerge from a process of agreement between landowners and the local planning authority.*

external intervention. Almost counterfactually the evolving distrust amongst the players has resulted in a more responsive and, arguably effective form of regulation, that of developer and end-user competition.

Chapter 7. Conclusion: agreements in the wider regulatory field

1. Introduction

In Chapters 3 to 6, I described the substantive transformation of planning agreements as mechanisms of land-use control. Chapter 1 outlined a series of assumptions derived from the literature regarding their use. The literature identified the practice as a phenomenon associated largely with *post*-1960's development booms used as a mechanism by local authorities to negotiate and recover planning gains potentially damaging the objectives of Government in constructing a coherent planning system. This saw the practice as one of limited utility. It was perceived by central government as a reactive and anachronistic form unsuited to the modern plan-led system of development control.¹ In regulatory terms, a use of agreements was seen as paradoxical to the extent that an individuated mechanism was used to secure policy objectives that included community benefits. By reason of its bilateral form, agreements were viewed as difficult for third parties, especially Government to regulate.

In adopting a historical perspective I have challenged these assumptions and shown the practice to be of significance to both Government and planning authorities from before the creation of the modern planning system. Agreements represent more than a bilateral market form controlled primarily by the parties to them. Although ostensibly a form of self-ordering, where the parties to them exhibit a high level of commitment to the obligations secured, agreements combine also the benefits of central accountability and control mechanisms. I use this Chapter to explain the substantive findings derived from

the study. Some will challenge or elucidate the literature. In particular, I will demonstrate that agreements, being neither a post-modern nor a neo-liberal phenomenon (and as such difficult for third parties to regulate), have been used for purposes beyond those identified within the planning literature and remain inextricably linked to the evolving planning system itself. I will show how their use has been deployed for policy ends by Government through the adoption of different oversight mechanisms. By referring to the many different techniques of control to regulate the practice, I will offer some insights as they relate more generally to understandings of regulation. I describe also how the findings amplify a regulatory space analysis.

There are many facets to a use of contracting practices for regulatory ends. Aside from the direct contracting for public service provision, the introduction of negotiation and bargaining strategies into regulatory processes acquires a distinctive form. This can have the potential of undermining important public law norms and interests.² The history of planning agreements is a specific illustration of the effects of incorporating contracting arrangements, especially further forms of negotiation and bargaining, into a statutory regime. Much of the critique, that planning agreements are a controversial form³, has centred upon the extent to which private and opaque practices, incompatible with the planning system overall and shielded from public oversight have a propensity to damage the integrity of that system.⁴ Yet agreements have over time performed a

¹ ODPM *A new approach to planning obligations – statement on the reform proposals*.

² Freeman, *op. cit.*, (2000) pp. 190–191.

³ Grant, *op. cit.*, (1986) p. 333.

⁴ *Planning Gain* *op. cit.*, (1981) para. 6.07.

significant role and continue to do so. Those functions have not remained constant as will be discussed in the next section.

2. The role of planning agreements within land-use control

Planning agreements have been viewed as statutory contracts providing an opportunity for local authorities (especially *post*-1968) to acquire substantial and significant gains.⁵ The practice has been seen as of marginal significance, although growing as a trend, consistent with the emphasis towards a harnessing of private resources for public purposes. Agreements have played an important role within the planning system, one dating from the early 1900's. As a precursor to the statutory system, agreement instantiated a role for structured negotiation and discretion into modern planning. This role has not changed necessarily nor acquired greater significance after 1968 when the requirement of ministerial consent was abolished. A level of continuity exists in the obligations secured by the practice and the uses of agreements extend beyond the recovery of betterment. In functional terms agreements have been used to zone land, provide for open space provision, allocate financial liability (whether to avoid compensation payments or to provide for private financial contributions) in all eras. In the pre-modern era, agreements were used to zone land in the rural areas where initially no statutory mechanisms of control existed and elsewhere.⁶ This function continued in the modern era (as the records of the Ministry of the time demonstrate) and remains as contemporary studies indicate.⁷ The practice has been important in the provision of

⁵ Grant, *op. cit.* (1986), Telling, A., E., and Duxbury, R., M., C., *Planning Law and Procedure* London: Butterworths, 1993 (9th edition) p. 237

⁶ As in the East Suffolk (Samford) Planning Scheme 1937 *op. cit.*, and the activities of Banstead UDC referred to in Chapter 3.

⁷ Campbell *et. al.* (2001); Healey *et. al.* (1995).

open spaces and recreational uses from its inception. Contrary to some understandings⁸, the practice has been used to secure financial contributions from landowners and developers since birth. From the pre-modern era agreements determined financial responsibilities and payments as between planning authority and developer. Initially they were used to insulate authorities from compensation claims, then to minimise developer liabilities to pay betterment in the modern era and by the late-modern era to set local tariffs.⁹ Securing infrastructure provision remains an important function.

This distinctive continuity indicates that agreements compensated for the many shortcomings of emerging statutory control, by complementing the scheme provisions in the pre-modern era and served a similar function, providing more flexible regulatory solutions in later eras. The practice overcame both the rigidity of the town planning scheme and was a mechanism to regulate land-use development in the rural areas, which were initially beyond the scope of those provisions. Thus their use has ranged from providing a mechanism for controlling land-use activity in the absence of a statutory framework (as in the rural areas pre-1932) to compensating for the deficiencies within the modern planning system in the high- and late-modern eras.

A use of agreements has not functioned solely as a mechanism enabling planning authorities to extract development gains, an expression of orthodoxy by the Property Advisory Group suggested in 1981. The practice has facilitated structured negotiated solutions as between planning authorities and developers to development control

⁸ per Evans LJ in *Plymouth*.

⁹ *R v. South Northamptonshire DC ex p. Crest Homes plc supra*.

dilemmas in a context of the variable dependency relations between the two. Often these relations point to a strong role being played by the landowner or developer as occurred both in the pre-modern and high-modern eras. In both eras local solutions could not have been achieved without the strategic altruism of the landowner; in the pre-modern era effective zoning was rarely possible without landowner consent similarly in the later era. This indicates that the use of agreements does not necessarily function to permit opportunistic local authority or developer practices and has a wider role of enhancing the effectiveness of the planning system, something recognised by Government in its strategies to regulate agreements. In the high- and late-modern eras when the planning system was in crisis and failing to deliver planning decisions expeditiously, agreements functioned to fulfil developer and planning authority expectations.

Agreements have remained an integral part of a system that in its embryonic form sought to capture and redress industrialisation effects through to post-war centralisation and the more hybrid forms mirroring late twentieth century post-Welfare State predicaments. The persistence of the practice indicates its flexibility such that it has been accommodated within both a centralised planning system (as in the modern era) and the more flexible system of later eras. This is hardly suggestive of an anachronistic form, that is inherently damaging to the credibility of the planning system overall and the longevity of agreements points to the existence of a relevant, coherent and responsive practice. The strategies used by central government especially, to integrate agreements within the planning system will be discussed in the next section.

3. The regulatory techniques deployed

Concerns have been raised regarding a use of agreements which, whilst adding further flexibility to the planning system provide greater propensities for abuse within it.¹⁰ This underpins debates regarding planning gains including those of central government as recently as 2004 in its proposals to move towards a tariff based system. It implies that agreements are both difficult to regulate and can lead ultimately to the sale of planning permission and bad development. The debate on planning gains is highly suggestive that the mechanisms adopted are ineffective to regulate the practice especially those activities of both local authorities and developers. The history of agreements challenges this view by illustrating the integration of private contracting solutions into a statutory regime to replace or supplement governmental activity both centrally and locally through regulatory control. This is far-removed from seeing the practice as incompatible with and damaging to the prevailing system of land-use control. A use of agreements replicates the existence of discretionary activity found within the system itself, where negotiations occur to sanction appropriate development. The manner in which the practice has been regulated is hardly indicative of a form incompatible with the system overall. Policy, law and central government oversight have been used at various times to regulate agreements. Many are consistent with and mirror those techniques found in the modern planning system. Central government plays a particular role in regulating agreements and this is discussed below.

¹⁰ Grant (1986) *op. cit.*, pp. 359 and 374.

3.1 Central Government's techniques of oversight

The regulatory styles adopted alter across time and through space as the configuration of the modern planning system changed from centralisation to strategic steering. The history of agreements indicates that whilst locally strategies are characterised by a use of negotiation and bargaining, agreements have been regulated by central government in an effective manner by adopting a number of techniques. The primary objective of successive governments has been to control and secure conformity of the practice with the dynamics of an evolving planning system through its regulation. Successive governments' have shaped the practice according to their own vision for land-use control. The mechanisms for securing these objectives have altered and with it the regulatory techniques according to the changing vision of the development control system. Government has regulated agreements by the provision of advice and guidance through to the mechanism of consent. The tool's local and lateral character may have led logically to regulatory forms that were shielded from central intervention. In fact, the ostensibly self-regulatory form even in the pre-modern era was susceptible to many techniques of central oversight and even here agreements were regulated by civil servants through the issuing of precedents and checking the content of drafts. The role of central government oversight is an important challenge to those who suggest that the practice is shielded from review or scrutiny. The techniques deployed are closely tied to characteristics of the planning system, whether centralisation or strategic control. They have ranged from a use of direct action to a harnessing of the resources of others and the regulation of the regulatory techniques adopted by them. In the pre-modern era, the *modus* of advice and guidance was a key strategy by which the parties to agreements

(especially planning authorities) were regulated. This was consistent with the Centre's emphasis on planning solutions being resolved locally and constructing a climate of dependency by planning authorities in this embryonic phase. Planning authorities were encouraged to rely upon central officials for definitive advice. These techniques were predominantly informal mechanisms created by central officials, who saw themselves as protectors of individuals against the potentially far-reaching powers of incompetent (or worse) municipal authorities.

In the modern era express oversight in the form of Ministerial consent became the prevailing form of control at a time of the introduction of a, 'new concept of planning' that emphasised centralisation. The shift to formal oversight mechanisms of the modern era allowed Government officials to use and capitalise upon their already tried and tested techniques. The use of the consent mechanism between 1943 and 1968 is shown in the archives as being variable in regulatory effect and intensity. Whilst the early stages of the modern era were a formalisation of existing practice, it is possible to discern consent being used most heavily during the period of the early 1960's when the land-use planning system was failing. By the late 1960's, whilst agreements were used increasingly by developers and planning authorities, the regulation of the practice by Government through individuated direction appears to have lessened. This anticipates Government's strategy of streamlining the planning process through delegation. Scrutiny over local authority activity, especially novel situations, was however particularly intense.¹¹ Again during the modern era ostensibly similar regulatory styles are affected by changing contexts and actor behaviour. The centralisation of oversight

through the consent mechanism was only feasible with the centrist ambitions of Government itself. Its repeal can be understood partly from reference to the goal of, 'clearing the decks' of bureaucracy in an effort to streamline development control. The calibration of regulatory control reflects the demands and failings of the overall system in addition to the instrumental objectives of the parties to agreements and Government itself. When the planning system was criticised for its inefficiency, agreements functioned as a compensating mechanism, satisfying the needs of both public actors' and influential developer interests as occurred in the 1970's and again in the nineties.

The archives show that many regulatory strategies of control are influenced by changes in the configuration of the planning system. These changes are often a response to overall systemic demands, as in the case of the events culminating in the introduction of a formalised consent system in 1943, as part of an emergent centralised system of land-use regulation. Another illustration derives from the pre-modern era. During this period the regulation of agreements through the collection and dissemination of precedents by central officials mirrored the local and lateral forms of land-use control that existed at the time. This intensified through a calibration in the delivery of advice and guidance. The dissemination of the precedents gradually became an editorial process with central officials selecting appropriate clauses and then approving whole drafts after 1932. In this way regulation became more systematic and the level of control increased. It coincided with the independent statutory recognition of agreements under the 1932 legislation. It ended with the creation of an organised, but not yet statutory system of oversight that documented agreements according to type and subject matter. This gave

¹¹ Bullcroft Colliery.

central officials the capacity to regulate the practice by defining the parameters of the permissible. The reorganisation of local authorities and the creation of a modern planning system assisted the centralising techniques further. These factors made the primary object of regulation, the planning authority more responsive to the Centre and provided a means of further control, that of oversight, which gained statutory recognition under the 1943 Act. It coincided with the shift towards a centrally controlled planning system.

The use of policy guidance is a key strategy, by which the parties to agreements (especially planning authorities) are regulated, as we know. It derives however from the pre-modern era when the use of guidance was particularistic in form and tailored to the individual case. Over time a use of guidance became more general in form consistent with Government's project of exercising strategic control. The movement from particularistic oversight led to a more policy-orientated form of regulation. This facilitated a stronger role for party political interests in the high- and late-modern eras, when agreements were viewed as a mechanism for securing private funding for public projects consonant with the party political shift towards public-private partnerships, as in Circular 102/72 and *This Common Inheritance*. During the high-modern era, Government used guidance to regulate agreements in a manner similar to the dissemination of precedents in earlier times. The advice contained in Circulars 102/72 and 22/80 advocated using the practice to overcome infrastructure deficiencies. Circular 22/83 had however a more clearly restrictive aim. This sought to discourage the practice of negotiating for planning gain and confine a use of agreements. Circular 1/97 went

further by attempting to validate the practice and incorporate it within development plan policy. Through a use of guidance, the Centre sought at different times to encourage a use of agreements (to expedite planning procedures and overcome possible refusals of permission) and restrict their ambit. By the high-modern era the limits of welfarist techniques were by now more readily appreciated. The Centre and its officials could no longer rely upon status alone to legitimate Government's regulatory ambitions. As the Centre's regulatory strategies became more diffuse, they implicated other actors including at its most extreme competing developers and the courts during the 1980's and 1990's. The shift from individuated oversight towards more diffuse techniques included the steering of others, altered expectations of the developer community regarding the use of agreements and facilitated developers' and also the courts' participation in regulation. Thus the Centre harnessed the capacity of other actors (including the developer community in the high- to late-modern eras) to achieve its policy objectives.

3.2 Relations between state and non-state actors in defining regulatory techniques

As the effectiveness to regulate agreements through a use of policy guidance weakened other compensating mechanisms emerged. After the abolition of the consent mechanism, Government relied upon others to achieve its objectives in regulating agreements. By this time the regulatory space had widened to include professional actors and developers. The steps Government took in addition to a use of policy included engendering local authority reliance on the Centre so as to limit the range of obligations included in agreements. In addition to the dependency-enhancing mechanisms of structural and

professional reorganisation together with legislative change, other techniques appeared. These included the steering of others, especially non-state actors to achieve its policy objectives. Competition and its organisation had not been identifiable regulatory strategies in the early eras. Competition can be seen as a control mechanism in the regulation of planning agreements by the high- and late-modern eras. The rise of developer competition resulted also in the involvement of the courts. The latter through the articulation of legal norms effectively set the parameters for developer benefits through the jurisprudence of decisions such as *Plymouth*¹² and *Tesco*¹³. This is similar to the process of using law as a means to harmonise the rules of competition. Using competition law to facilitate the operation of markets is not an uncommon regulatory strategy and to an extent the regulation of agreements during these eras is consistent with the deployment of this tactic.

Central government, through a process of experimentation, sometimes harnessing the capacities of others, has regulated the use of agreements to useful effect and has had a measure of success in integrating the practice into the overall system. Like many other regulatory strategies this has not been a comprehensive success, neither has it been an absolute failure. When Government's strategies have been shown to be less effective in later eras, the Centre has succeed in fostering a climate of regulatory effectiveness often by channelling a use of compensating mechanisms (whether competition, or the adoption of trust-enhancing strategies, such as reconfiguring the local authority structure). The role of organisation as a trust-enhancing mechanism should not be

¹² [1994] 67 P. & C.R. 78.

¹³ (1995) 1. W.L.R. 759.

overlooked. Some of the regulatory techniques adopted by the Centre (particularly in the modern era) could not have been achieved without the dependency creating restructuring of local government. The deployment of these latter techniques indicates a role for actors aside from Government in regulating agreements. It requires also a revision of understandings regarding the limitations of a use of contracting practices for regulatory ends.

I have shown that in land-use control a use of agreements challenges perspectives that see the incorporation of contracting practices into the statutory schema as creating steering deficits on central government's part. This neo-liberal analysis draws heavily upon the perceived difficulties experienced by Government in steering markets.¹⁴ Planning agreements have been regulated by central government using a number of techniques, some of which involve non-state actors. Land-use control including a use of agreements can be characterised as creating a measure of dependency on public actors through a statutory system of licensing. Private actors are required to obtain permission if they are to carry out development lawfully. In reality, central and local government is heavily dependent upon non-state actors, especially landowners to effect the statutory schema. This is no less true of agreements.

3.3 The *dramatis personae* regulating planning agreements

Agreements are ordered by central government but they are structured too by the interests of parties that include professional actors, landowners, developers, planning authorities and their respective representatives in the political arena in addition to the

¹⁴ A view expounded by the Chicago School of Law and Economics.

parties to them. The practice is attractive to Government, given its potential efficiency savings (especially in terms of enforcement, which is the responsibility of the parties to the instrument) and its ability to surmount the problems associated with a use of command as a regulatory mechanism. Government regulates agreements through an exercise of oversight to secure benefits beyond those attainable through the remainder of the planning system. A use of agreement through the delivery of collective gains, benefits the community in addition to the individual developer. The groups regulating agreements can be viewed as forming a larger epistemic community linking state and non-state actors, where adversaries meet, tacitly negotiating the structure of planning regulation, its objectives, values and its outer limits or boundaries. Each group functions primarily according to a fluid rationality that will inevitably change through time and affect the regulatory mechanisms adopted. Government seeks to mould agreements to its own vision for a system of development control. Planning authorities balance local concerns with central demands. Developers and landowners have been concerned historically with economic viability (generating profit and minimising loss), particularly after the modern era. For landowners, the guiding instrumental rationality, especially in the pre-modern era could be said to be heavily influenced also by factors of autonomy or self-determination (using land as they thought fit, rather than according to local, national or regional demands). By the modern era developers superseded landowners as the dominant private group. Subsequently especially in the retail sector, the developer community would align with retail superstores and in so doing redefine that grouping.

The archives show how unrealistic it is to construct a regulatory model of an all-powerful Government that adopts only hierarchical methods to control the practice, as visions of classical command might require. During the modern era, after the abolition of the consent mechanism, it is clear how heavily the Centre relied upon others to achieve its objectives in regulating agreements. These steps included engendering local authority reliance, through restructuring the planning system and thus creating further dependency so as to limit the range of obligations included in agreements. Developer concern coinciding with Government interest provided another mechanism of control. When during the late-modern era developers challenged decisions for their own instrumental ends, their reasons for doing so were only possible because of the substantive central policy. The publicly stated concerns of the Centre contained in Departmental policy had another channel for dissemination, the developer. Thus central guidance still functioned to regulate the practice albeit through the vehicle of other intermediaries including competing developers. The fallacy in assuming the existence of an omnipotent central regulator is evident. It is problematic however, to absent Government from the scene by seeing agreements as lateral market mechanisms rooted in competitive strategies that in their most pure form are an anathema to hierarchy or viewing Government's capacity as a regulator as being necessarily diminished by its leveraging of other regulatory resources.¹⁵

¹⁵ Grabosky, P., "Using Non-governmental Resources to Foster Regulatory Compliance" (1995) 8 *Governance: An International Journal of Policy and Administration* 527-50.

4. The existence of regulatory variety

The involvement of numerous actors and interests tends to a presence of regulatory variety. The dispersal of power throughout the space leads to co-ordination being the most visible regulatory strategy used by Government especially to constrain the activity of other powerful actors. It appears also as the most effective. Regulation is achieved by co-ordination and consensus as much as directive control. It is modest in ambition and far more sensitive to contextual changes, because it can evolve organically. Co-ordination occurs at both central and local levels, and represents the harnessing, stimulation and manipulation of potentially conflicting and antagonistic interests through a use of novel solutions. Rather than attempt to regulate by command, Government adopted many strategies to engage the minds of others. This included promoting the practice in differing economic and political contexts predominantly through a use of policy. The reflexive nature of agreements (being as much regulated as regulating) suits this purpose well, given the responsiveness of the instrument to institutional change. This detracts significantly from a static view of regulation. As a dynamic practice, it represents an, “adaptability to new challenges [which] continues to evolve”¹⁶ and this is borne out by history. The opportunity given is to negotiate solutions, counterbalancing any propensity towards extremes by maintaining some form of equilibrium, and this may be another reason for the longevity of the practice. The unstable context provides a fertile ground for trust enhancing practices, which a use of agreements accommodates, at multiple levels.

¹⁶ Hollingsworth and Boyer (eds.) op. cit., p. 7.

The regulatory space metaphor highlights the significance of variety when viewing the mechanisms of regulatory control. Regulation cannot be seen as assuming a uniformity or coherence. This is particularly so regarding a use of contracting practices for regulatory ends which have been assumed to lead to an undermining of important norms and interests, and be an anathema to public regulation.¹⁷ A use of market-harnessing mechanisms for regulatory purposes has been acknowledged for eliminating the need for a command base¹⁸ and serving as a basis to encourage self-regulation. The history of agreements seriously challenges these assumptions. Here a variety of regulatory techniques accommodating various styles ranging from command, to consensus, permitting negotiated solutions and lateral dealings have been adopted. This “mix of competition and cooperation across various levels of government, within the branches or departments of government, and between regulators and non-governmental actors” serves to control and define regulatory outcomes pointing to an interaction between norms of various kinds, only one of which is law.¹⁹ Indeed the recourse to law has been only one facet of regulation, emerging in later eras along with the higher profile of developers. Its use is signalled by an expanding regulatory space, permeated by a dominance of private actors, especially developers and landowners who in tandem attempt to regulate their competitors. A use of agreements can incorporate the hierarchical exercise of central government powers as is demonstrated by the creation of formalised mechanisms of command, as occurred in the modern era with the imposition of the Ministerial consent mechanism. It can be present also where central government resorts to more diffuse strategies as with a use of policy to regulate the practice. In the

¹⁷ Freeman op. cit., p. 190.

¹⁸ Baldwin and Cave (1999) p. 46.

latter instance hierarchical oversight was perpetuated through the adoption of complementary and often dependency-enhancing strategies. Regulation through policy in later eras was only effective because of the structural configuration of local government and an economic climate that altered developer authority relations.

4.1 Multiple sites of regulatory activity

By embodying hierarchical and lateral facets, agreements cannot be taken to represent a pure form of self-ordering as may be assumed by the adoption of contracting practices for regulatory ends. Their use including the form and scale of the obligations delivered are closely regulated in a number of ways. Government through the use of legislation and the deployment of more diffuse forms of oversight, whether guidance, or in exercising controls more generally over local authority activity, regulates the practice. Developers through rivalry and competition attempt to do likewise. Local authorities also influence the use of agreements according to the human and physical geography of an area including the level of its economic prosperity.²⁰ Regulation occurs as much beyond as within the reaches of the parties to the agreement, and assumes a hybrid form that encompasses both lateral dealings and external controls. The location of agreements within the development control system, (itself hierarchical in form, with residual powers for individual development proposals lying with the Secretary of State) also colours the exercise of control. The existence of these hybrid forms of control has been said to lead to the greater scope for the existence of hierarchy.²¹ In the context of land-use planning

¹⁹ Esty and Geradin op. cit. pp. 31–32.

²⁰ Studies by Healey (1983) have shown that agreements tend to be most prevalent in the more prosperous South.

²¹ Murray, A. and Scott, C., “Controlling New Media: Hybrid Responses to New Forms of Power” (2002) 65 *MLR* 491–516.

the evolution of agreements indicates a use of diverse regulatory forms and that regulation occurs in many locations, locally as much as elsewhere. These sites of regulatory activity (whether Government and its officials, courts, or rival developers) perpetuate a use of different regulatory mechanisms.

Planning agreements have two regulatory effects. One relates to the activities of the parties to the agreement *inter se*, the other places the instrument within a broader regulatory context. Planning agreements thus regulate activity and are *regulated*. These 'layers of regulation'²² involve both state and non-state actors who use different norms. The self-regulation of the parties is influenced by the policy dynamics of government and especially the relations between economic actors including large developers (and more recently powerful lobbies such as interest groups e.g. the House Builders' Federation), and the professions as much as the normative ordering of law or markets. In the high- and late-modern eras agreements were controlled also by the legal principles articulated by the courts. These regulatory effects function laterally as between actors (as with competing developers) and vertically where Government harnesses the power of others to steer them towards its policy objectives.

The emerging historical pattern is one of a use regulatory strategies, combining local and often private, fragmented lateral regulatory forms (negotiation, bargaining and self-restraint) with commanding strategies such as direction, consent mechanisms and the dissemination of information, commonly associated with central intervention. The

²² Parker, C., Scott, C., Lacey, N., and Braithwaite, J., (eds.) *Regulating Law* Oxford: OUP, 2004, p.6.

existence of hierarchy²³ is not however the sole province of Government and in land-use planning can extend to landowners and developers who assume important roles in delivering development outcomes often through recourse to law.²⁴ It includes local authorities, particularly at times of economic recession when they assume a key role in local regeneration, as happened in the 1980's and 1990's. Regulation is achieved by co-ordination as a form of directive control, as much as through consensus.

5. The function of spatial metaphors in understanding agreements

The regulatory space metaphor is highly suggestive of non-hierarchical configurations influencing and shaping regulatory activity. Here wealth, information and organisational capacities are dispersed and fragmented throughout public and private space and regulatory activity transcends this boundary.²⁵ History shows that far from the parties to the agreement being the most influential actors regulating the practice, Government especially has retained a significant regulatory role, through the adoption of various strategies. The heuristic of regulatory space allows reference to be made to the creation and development of the policy domain. It permits the identification of those key actors present in the formulation of regulatory policy relating to agreements. Using spatial analogies with the archival materials helps to classify the epistemic community, its development over time, and the changing regulatory ambitions that shape the regulatory techniques. Throughout the history of agreements, planning authorities have retained a measure of regulatory control. This was achieved principally through

²³ The term hierarchy is adopted to signify relations of dependency whether public or private.

²⁴ As happened in the high profile retail development challenges of *Plymouth* and *Tesco* during the 1990's.

²⁵ Scott (2001).

negotiation with the individual landowners or developers concerned. The spatial metaphor delineates a role for professional actors in particularly the pre-modern and late-modern eras. In the pre-modern era, advisers to influential landowners like Lord Astor helped to shape agreements. Those such as Abercrombie were important also because they were highly influential in the creation of town planning as a practice and the conceptualisation as well as the negotiation of agreements. The archives indicate the significant profile of the landowners of the time with the role of planning professionals being largely parasitic upon this. During this early era the identity of the landowner and particularly his relation to Government was highly influential. This mirrors the significance of the individuated and particularistic forms adopted to regulate the practice. In this era, central officials as a professional grouping dominated the regulatory community.

From the high- and late-modern eras professionals influenced the regulatory space, linking public and private actors and developing a view of the legitimacy of agreements' use which ultimately drew in the courts. Reorganising the planning profession led to greater linkages between public and private actors tending toward a commonality in approach. The reorganisation facilitated both the further delegation of public decision-making and gave impetus to the creation of an independent planning professional. Planners became key actors in negotiating agreements and assumed an important role in articulating what could be achieved through the tool. It was the planner who defined substantive practice. In the late-modern era the views of lawyers advising private

developers often converged with that of Government.²⁶ Transcending the division between public and private actors simplified potentially the mechanisms of control, permitting Government to focus attention on the community as a whole and eased information gathering especially during consultations on proposals for change. This complemented a growing generality in the regulatory techniques adopted. During the high- and late-modern eras, bodies such as the Property Advisory Group (comprising representatives from the Royal Town Planning Institute, the British Property Federation, RICS, and the House Builders' Federation amongst others) were important in defining a role for agreements and their regulation.²⁷

By the modern era developers rather than landowners (who had been instrumental in the negotiation of agreements in the pre-modern era) entered the scene as the property boom coincided with oscillating economic cycles. In the later eras especially in the retail sector, a high level of interdependency exists between developers, retailers and landowners, with retailers often exercising options to purchase over land. This may account for the emergence of competition as a regulatory technique because of the greater focus on profitability for the end user in times of economic downturn; concerns of critical significance in the decisions of *Crest*²⁸ and *Plymouth*.²⁹ The objective of profitability may have remained a constant within the developer community, but the structural configuration of this grouping and its dependency upon others (whether local authorities, private landowners or large retail companies) shaped developer perspectives

²⁶ As is shown in argument and submissions in *Tesco*, and *Plymouth*.

²⁷ The Property Advisory Group was asked to prepare advice on the contents of a DETR consultation on planning obligations in 2000 in addition to its earlier Report in 1981 on Planning Gain.

²⁸ (1993) 68 P. & C.R. 187 and (1994) 3 PLR 47.

of the practice and in turn the regulatory techniques used. Developer competition as a regulatory form becomes more visible when competition for planning consent, economic recession and procedural delays within the planning system converge. Where the risk to profitability is less, the techniques used to regulate agreements favour individuated negotiation and control as in the modern era.

6. The value of the regulatory space metaphor

As a metaphor, the idea of regulatory space has been said to focus, “attention on the functional, spatial ...boundary conditions of regulatory activity and participation in it”.³⁰

This approach posits an interaction between public and private organisation within a given regulatory domain and provides the facility for viewing the activities of various actors at varying levels of detail in policy making. It provides a method for understanding practices at a micro level and consolidating existing empirical studies.³¹

A regulatory space analysis could provide an analytical framework from which to view the role of local actors (whether councillors, professional planners, or others) in shaping a use of agreements in particular locations, although this is beyond the scope of the thesis.

The state's incapacity to steer behaviour comprehensively can be inferred from an analysis that places significant emphasis upon high levels of interdependency between state and non-state actors in the formulation and implementation of regulatory policy.

²⁹ (1994) 67 P. & C.R. 78.

³⁰ Daintith, T., C., “A Regulatory Space Agency?” (1989) 9 (4) *Oxford Journal of Legal Studies* 534-546, at p. 543.

Hancher and Moran's logic has been shown to have a measure of critical relevance that extends beyond a vision of state regulatory controls in the late twentieth century. Their method has demonstrated that a use of agreement for regulatory ends, is in land-use planning, neither a recent post-modern form nor one that can be understood by reference to solely neo-liberal interpretations each of which downplays the role of Government in regulating ostensibly lateral dealings. It has highlighted also the array of regulatory techniques used to order the practice, and the dynamics between these and the objectives of those using them. It has shown also an existence of fluid instrumental rationalities of the main protagonists. Moreover it has demonstrated that regulatory control extends beyond the statutory framework allocating legal rights and duties.

The heuristic lacks comprehensive explanatory power. Spatial analyses indicate that multiple actors with many potentially conflicting interests inhabit the regulatory arena. This approach posits that the interaction between public and private organisation within a given regulatory domain is an illuminating basis from which to consider regulation. Whilst this is a forceful explanation of the existence of contestable regulatory domains, it provides limited insight into the configuration of regulatory arenas (that is how the players came to be there) and more importantly the shifting dynamics within that arena. In short it is limited in its capacity to explain change. The approach in offering a level of generality, requires the reinforcement of detailed empirical study and a recognition that the key objectives of the relevant players are fluid within the regulatory domain. It does provide an analytic base for further inquiry.

³¹ Healey, et. al. (1995); Campbell et. al. (2001).

The metaphor can be highly instructive when considering regulatory structures and can illuminate controlling forms designed to facilitate the instrumental capacities of state actors as in land-use planning which include hierarchical perspectives. History shows that levels of Government dependency upon others are variable and not suggestive necessarily of a decline in Government's overall regulatory capacities. Government responses to the entry of other, often private, concentrated interests (especially specialised developer communities) into the regulatory space can lead to a deployment of different regulatory techniques. One example is the intervention of the courts in the high- and late-modern eras. This caused Government to use different regulatory strategies, initially stronger policy guidance and ultimately legislation. The Centre's techniques of control have shifted from the provision of advice and guidance during the pre-modern era, through to more direct control during the next period and then towards the harnessing of other's capacities.

The spatial metaphor whilst offering insights into the geography of regulation did not provide a means to understand regulatory change and in particular the changing strategies of control over time. By emphasising the historical timeline, I have noted that whilst modes of regulation may have changed, agreements' remain a significant regulatory tool to both Government and the parties most directly concerned with them. The regulatory space analytic does not provide substantial insight into Government's role in harnessing the capacities of others to steer their activities to achieve its objectives. Some changes in the techniques deployed to regulate agreements can be viewed as a reaction to the demands of the planning system as a whole. This is a valid

assumption but it does not necessarily explain the regulatory strategies of Government especially at times when central objectives have remained relatively stable. An illustration of this can be found in the gradual movement towards centralisation that intensified official oversight. What began as a dissemination of the precedents used by authorities, gradually became an editorial process by central officials culminating in approving whole drafts. This was not necessarily a response to any external demands of the developing system, although by 1943 the informal regulatory practices of this era had been formalised through the mechanism of express consent. Rather it seems to have been a trial bed for testing the efficacy of various approaches, which when rationalised were controlled more closely.

7. Conclusion

Using texts to unearth and understand the evolving use and regulation of agreements highlights how difficult it is to view the practice in terms of classical models of command³² or as a market mechanism.³³ The history of agreements and the mechanisms used to regulate them challenge historically the logic of viewing regulatory methods according to confined conceptual approaches or indeed purely in terms of an allocation of legal rights and duties. The archives show how unrealistic it is to construct a regulatory model of an all-powerful Government that adopts only hierarchical methods to control the practice, as classical command might require. In its most market-type form, when developer competition functioned as a brake upon the practice, the tool is a

³² Baldwin, R., 'Regulation: After Command and Control' in K. Hawkins (ed.), *The Human Face of Law: Essays in Honour of Donald Harris* Oxford: Clarendon Press 1997.

³³ Baldwin, R., and Cave, M., (1999) Ch4 pp. 46–7.

poor caricature of the spontaneous and lateral market mechanism. Instead, the evolving story points to how important it is to see regulation as occurring in many locations that suggest multiple facets of control. In this context regulation encompasses Government's instrumental opportunism in gauging and harnessing the capacities of others. It includes innovation through capacity building as has occurred in the later eras when developer activity in particular reinforced central policy. Regulation occurs through an economy of state action rather than a diminution in central government control.

A use of agreements signals the adoption of bargaining and negotiating strategies for collective ends where individual developers achieve their own objectives whilst also generating benefits to the community. Thus the incorporation of contracting practices within statutory regimes can be an effective form of regulation. Government, having established the regulatory frame, has successfully retained a degree of control over the practice and by adopting various regulatory techniques, individuated activity, as a generator of efficient solutions, produces collective benefits. Through the participation of many actors, the regulation of agreements brings a measure of local democratic accountability (via the planning authority), central co-ordination (through the involvement of Government and its officials) and limited transparency (through judicial process) to an ostensibly bilateral practice. By harnessing local knowledge and self-regulatory practices, Government has over time adopted a series of techniques to regulate agreements and in doing so secure efficiency gains. Those transformations occurring in regulating agreements result as much from endogenous factors as the context or environment. The idea of transformation is often associated with external

factors that influence regulatory processes rather than the reflexive responses to change. Regulatory strategies like other institutional set-ups can alter the worldviews of those concerned. A use of agreements shows that regulatory change can be generated as much by those keenly interested in the process as by external shocks.

Whilst the instrument itself has been shown to serve similar functions through time, the associated regulatory responses have altered significantly. Regulation combines community, hierarchy, markets and competition, synthesising private interest and institutional justifications. History indicates that the form itself undergoes a process of renewal according to the systemic demands and changing context of the functioning land-use planning system. Regulatory processes are certainly influenced by their institutional setting but also maintain a degree of independence sufficient to induce different effects. The story told is an illustration of the endless regulatory possibilities that can exist when public and private actors operate in a single policy space. In this context regulation is far more than a static toolkit. It is an evolving process that requires a sophisticated view that takes into account both the decision-style and the functioning context as well as legal principle.

By adopting a temporal approach to the evolution of agreements, it is evident that the developments cannot be easily understood solely according to the taxonomy of markets, hierarchy or bilateral contractual relations shielded from central oversight. The practice is coloured by institutional and cultural developments of such specificity that broad classifications tend to lose their relevance. Through detailed empirical enquiry I have

shown the many actors present in regulating agreements whose roles and ambitions are not constant. The use of agreements takes place in a contestable arena where the powerful and less powerful dispute the fundamental issues of when and where development should occur and professionals have turf wars to secure influential vantage-points. In this *locus* Government attempts to resolve the social, economic and policy concerns that planning control exemplifies. Developers and local authorities heavily influence the Centre's regulatory position. The regulatory styles adopted replicate the plurality of themes. This may provide a partial explanation for the persistence of agreements as a regulatory form. It does not account for why both Government and those others keenly interested (which the former seeks to regulate) have found the practice to be an effective one in securing their objectives notwithstanding their potentially conflicting goals.³⁴ Throughout the history of agreements multiple strategies have been deployed in a space at the interface of individuated activity and the generation of broad policy goals. Here, regulation must be viewed as a political process where the bargaining strategies of sophisticated actors are tempered by central involvement. But the involvement is one where Government recognises its own limitations in regulating land use, hence the importance of knowledge or information as a regulatory tool. In this space both state and non-state actors are present and manage to align their conflicting instrumental goals sufficiently to secure efficient outcomes. The durability of the practice may be attributed to a process of evolution and pragmatism, which in combination have generated an almost endless set of permutations in regulatory styles ranging from co-operation to command that are steered at times by those other than

³⁴ It is axiomatic that if the instrumental objectives of the parties did not have the potential to diverge, there may be no need of regulation.

Government. The presence of other, potentially equally powerful actors may have had a moderating effect on the Centre's regulatory ambitions leading to a more acute appreciation of the price of regulatory failure, and in turn a more realistic view of Government's regulatory capacities.

Appendix I

Methodology Outline

Having begun my research by conducting a series of semi-structured interviews, it became apparent from the limited response that it would be difficult to generate sufficiently representative and meaningful information from the main protagonists. The interviewees (drawn from both the public and private sectors) explained their roles in terms of broad-based themes common to both sectors, adopting very similar phraseology (almost verging on cliché) to describe their work and often resorting to the terminology found in Government circulars to explain their actions. In particular, when pressed they proved reluctant to describe how agreements were used other than in terms which were (a) very general and (b) that closely followed contemporary central government guidance on the use of agreements, especially in the context of planning gains. Actors consistently used the mantra that, “planning permission should not be bought or sold” without being able to coherently express the extent to which a use of agreements impacted on this idea. This is a common phrase (and almost a truism) expressing one of the fundamental dilemmas since the 1970’s if not before, concerning the practice. Even informal, “off the record” discussions with local authority officers, showed perhaps a surprising convergence in response with those working in the private sector. This may have been attributable to the training of professional planners and those advising them and their proximity within the relevant epistemic community leading to striking cultural similarities in outlook.

Whilst illuminating, the interviews did not assist in explaining the ongoing use of planning agreements even less their origins. The approach added little if anything to the various studies dating *post-1970* into the practice, and did not assist in appreciating the origins of the instrument and the differing regulatory strategies assumed by key actors since its inception. Most contemporary commentaries make scant reference to the origins agreements. Closer investigation showed that in fact the practice dated from before 1932, (the date when they were first given an independent statutory base). Annual reports of the Ministry of Health indicated that local authorities were using negotiations to allocate land uses with the consent of the landowner concerned well before that time. It became clear that by the early twentieth century the negotiated form had been co-opted by central government and that even at this stage a clearly defined group of influential regulatory players were present.

Further research of Government papers during the period 1909-32 demonstrated quite clearly some of the thinking behind a use of agreements and the functions the practice served. This proved to be more enlightening than pursuing interviews, and gave some structure to my research by allowing me to focus on how a key actor perceived the instrument as an element in the developing strategy of regulating land-use control and how this in turn affected others. Analysis of public records at the National Archives indicated some of the motives for legislative changes, such as the introduction of the mechanism of express consent, which at first sight appeared puzzling. From considering the role of one key actor it became easier to then fit the role of others into the regulatory landscape. The heuristic of regulatory space (Hancher and Moran: 1989) gave me a

method for investigating the roles of various actors (public and private) using of agreements at various key stages of their evolution, by linking both the actors and the regulatory techniques used to the evolving land-use planning system itself. The broad socio-economic developments of the twentieth century anchor the use of agreements within that context.

Access to information

Much of the relevant information was obtained by researching the public records at the National Archives, as and when they were made available under the provisions of the Public Records Act 1958 (as amended). The records included minutes of civil servants, cabinet papers, consultation responses and the working papers of specialist working parties such as the Management Study of Development Control. In the pre-modern and modern eras especially very detailed accounts are given of Government's perception of the practice, and the way in which agreements were regulated. The papers gave also a full account of proposed legislative changes to agreements to 1970. Limited reference is made to the Town and Country Planning Act 1971, and the emphasis shifts to key policy areas e.g. the Covent Garden redevelopment, the massive clearance programmes of derelict land and the Windscale development.¹

Reference to the National Archives allowed me to piece together Government and bureaucratic thinking on the use of agreements to the period of 1970 and to map whether this has changed in relation to the key eras and dates. The task became more difficult

subsequently. Although each public authority is required to make available through a publications scheme, information under the Freedom of Information Act 2000, this has proved difficult with regard to planning agreements. The provisions came into force on 1 January 2005. Section 1 of the Act imposes duties on public authorities to communicate with the applicant and to inform them, whether or not the information is held, within a period of 20 working days on the making of a request. In practice the authority may raise a number of procedural obstacles. Section 2 of the Act provides for a number of exemptions to the disclosure of information. These are extensive and disclosure is exempted if the demands placed upon the resources of the authority in answering are too great.² The exemptions, extend to matters including the nature of the request made (whether “vexatious”³, or unintelligible, if the authority is unable to understand what is being asked for⁴). These may be absolute or qualified. In the case of absolute exemptions, no rights of access exist. Qualified exemptions are public interest based, with the authority assessing the public interest in maintaining secrecy against that of disclosing the information. The values of promoting transparency in decision-making can be subverted in practice and the existence of subtle and complex exemptions together with an application of rigorous procedure can have the effect of overriding access rights. Internal review provisions apply and when these are exhausted an application can be made to the Information Commissioner⁵, with limited rights thereafter to appeal to the High Court on a point of law.

¹ Ibid. para. 7.1.3 “Annex One: Key Events” OSP 1.

² Ibid., section 12.

³ Section 14 Freedom of Information Act 2000.

⁴ Ibid., section 1(3).

The Environmental Information Regulations

Statutory rights of access to Government information exist also under the Environmental Information Regulations (EIR). Environmental Information is defined by applying Article 2 of Council Directive 2003/4/EC. This extensive definition includes information relating to the state of the elements of the environment, and the policies, programmes, plans, environmental agreements and activities affecting or likely to affect the environment, together with reports on the implementation of environmental information.⁶ The EIR have been relied upon by the ODPM (the lead Department for town and country planning issues). The Regulations impose a duty to make available environmental information (defined by applying Article 2 of Council Directive 2003/4/EC). The making of a request under Regulation 5 triggers disclosure. Whilst under Regulation 12, a presumption in favour of disclosure applies, requests involving the disclosure of internal communications, incomplete data, or unfinished communications may be refused, as may those requests considered to be formulated in too general a manner.⁷ The exemptions narrow significantly the prospect of disclosure.

I contacted the Departments of Constitutional Affairs (as the lead department for Freedom of Information (FoI)) and DEFRA (the Department for the Environment, Food and Rural Affairs) responsible for Environmental Information, together with the Office of the Deputy Prime Minister (ODPM), to obtain more recent information. Having been advised to consult the ODPM, I wrote formally requesting information under the FoI provisions on 1 March 2005. I had previously been in correspondence informally

⁵ Ibid., section 50(2).

⁶ Environmental Information Regulations 2004, Regulation 2.

with officials of the Department and its predecessor since 2001. It appears that the ODPM like other Government Departments has experienced difficulties regarding records' management. Discussion with civil servants has revealed that often delays in compliance with the FoI requirements derives from difficulties in locating past files, which have not been passed to the National Archives. It is anticipated that for the future the Government's commitment to adopting a system of electronic records management will enhance compliance. The ODPM relying upon the provisions of the EIR provided disclosure on 29 July 2005 after I clarified my request in May 2005. For the period *post-1971* I have relied mainly upon political and departmental statements (including consultation papers) already in the public domain in order to establish the attitudes of the time. I have also obtained the consultation responses of private actors (especially the professions or other interest groups) to more recent governmental proposals.

A Note on Government's statistical records

During the late 1960's Government kept records of the number of agreements entered into each year. The question is often asked regarding whether records were kept centrally of the numbers of agreements entered into before or after that period. My empirical research has highlighted that in the early stages of the formative planning system, Government had neither the means (or indeed the will) to maintain statistical data relating to agreements. Although broad records of schemes were kept during this early period these are neither comprehensive nor is it possible to determine from these any comprehensive information into the numbers of agreements entered into. The

⁷ Regulation 12(4) Environmental Information Regulations 2004.

central project was very different and focused on particular issues other than general data gathering. During the post-war period statistical information gathering focused on the broad categorisation of the labour force, the availability of land generally and its particular use (especially housing). Annual Reports on the land-use system disseminated by the relevant Ministries (originally under the auspices of the Ministry of Health) did not cover the practice of using agreements in any detail, even less so the numbers of agreements entered into annually. The project of Government keeping numbers of applications and decisions is a relatively modern phenomenon and still does not extend to agreements as has been confirmed by the ODPM (and also CIPFA).⁸ One exception to this is the statistical data obtained regarding the number of agreements entered into during the late 1960's. This was undertaken for a specific reason, namely to justify the proposed course of abolishing the consent mechanism, as is confirmed by the archives.

⁸ April 2005.

A Note on referencing at the National Archives

The Enquiries Manager at the National Archives advises that the referencing convention for archival documents is as follows: -

TNA: HLG 1/2/10

Or

TNA: HLG 1/5.⁹

National Archives issue a series of research guides but none relate directly to town and country planning. Archives are catalogued by reference to Department and subject. The National Archives Catalogue is said to contain 9.5million searchable descriptions of central government records. Records and descriptions are arranged according to the name of the originating department.¹⁰ The Catalogue is organised hierarchically to reflect the origin and structure of the records. Seven levels exist ranging from Department through to Division (the administrative section of a Department), Series (the functional subject grouping), Sub-series (smaller groupings), Sub sub-series (smaller groupings still), pieces (which may be a box or file), and items (as part of a piece). The latter can include bundles or sub-files. Each description in the Catalogue is described according to the *International Council on Archives, Committee on Descriptive Standards*.¹¹ The Catalogue (formerly PROCAT an electronic resource: Catalogue Reader v.2.2.3: 0) contains a quick reference and full details of each reference. Reference HLG contains

⁹ e-mail response 16/07/2005.

¹⁰ < <http://www.catalogue.nationalarchives.gov.uk/about.asp> > 21 July 2005.

¹¹ See postscript.

Records created or inherited by the Ministry of Housing and Local Government, and of successor and related bodies covering dates 1800-1996 according to the stated scope and content of the full details

Records created or inherited by the Ministry of Housing and Local Government, and of successor and related bodies, including those of the Local Government Board and Ministry of Health, relating to the administration of local government, housing and town and country planning.

They include:

- General records

Administrative records of the Ministry of Housing and Local Government

- Local Government branches and divisions
- Regional offices and committees of the Ministry of Town and Country Planning
- Rating and Valuation Committees
- Housing divisions
- Rent tribunals, Rent Assessment Panels and Rent Officers
- Planning divisions
- New towns and development divisions
- Housing and Planning Inspectorate
- Minerals divisions
- Countryside divisions
- Sanitary, water and sewerage divisions

- Central Land Board
- Ministry of Land and Natural Resources
- Ministry of Works and successor
- Land Commission
- Legal, orders and parliamentary departments
- Commissions
- Committees

Access is subject to the 30-year closure rule.

Records of Divisions with planning responsibilities can be found in the Papers of the Planning Divisions, mainly of the Ministry of Housing and Local Government in HLG 71, HLG 79, HLG 103, HLG 104 , HLG 119 , HLG 131 , HLG 134 and HLG 141 - HLG 146. There are in total 162 series (classified from TNA: HLG 1-161 and 900).

Most of the relevant files on town and country planning are located within the following series: -

TNA: HLG 4, [records 1905-51] Files of the Local Government Board and the Ministry of Health relating to general planning schemes of local authorities and joint planning committees, interim development and related matters. [The working plans of individual schemes have so far as possible been associated with the files.] Series Local Government Board and successors: Housing and Town Planning Department and successors: Planning Schemes, (Registered Files 4027 pieces).

TNA: HLG 5, Local Government Board and successors: Housing and Town Planning Department and successors: Planning Schemes, Maps and Plans 1905-1951 (3673 pieces).

TNA: HLG 52 Ministry of Health and successors: Local Government Administration and Finance, General Policy and Procedure, Registered Files (90,000 Series) 1898-1975.

The last series includes general files of correspondence of the Ministry of Health dealing with various miscellaneous matters, which according to the Catalogue details are generally unrepresented in more specialised series of correspondence. The series also contains files relating to town and country planning and housing policy, [2047 pieces]. General files of correspondence and other papers from various file series of the Ministry of Health dealing with a large number of miscellaneous subjects in the field of local government administration and finance are contained within this file series. The series also contains files relating to town and country planning and housing policy.

TNA: HLG 95. This series contains Local Government Board and Ministry of Health: Instruments and Consents to Planning Schemes and related Miscellaneous 1910-1939 [53 pieces].

It includes volumes of instruments and consents under the Housing, Town Planning, etc., Acts 1909 to 1925 and the Town and Country Planning Act 1932; progress statements; a register of local authority acreage (based on 1931 Census figures); precedent books and contemporary registers of Joint Committee Planning Schemes and Local Authority Planning Schemes.

Another important file source is that of the Cabinet Office. The records of the Cabinet Office 1863-1997 have been said to

comprise the most valuable single collection of modern (British) material for historical purposes that can be obtained from official sources (Report of the Committee on Departmental Records 1954 (Grigg Report), 147 (Cmd. 9163)).

TNA: LCO 1716-1999

Records of the Lord Chancellor's Office and of various legal commissions and committees relating to responsibilities for government policy in the fields of the administration of justice and law reform and consolidation.

Postscript

A Note on the International Council on Archives, committee on descriptive Standards

The International Council on Archives (an NGO funded partly by UNESCO) was established to standardise archival description in response to the demands of automation in the late 1980's. It developed international standards for archival authority records.¹²

¹² < <http://www.icacds.org.uk/eng/history.htm> > 21 July 2005

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Acquisition and Disposition Policy Project Manager, Records Management Department

Appendix II

Relevant Statutory Provisions

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Town and Country Planning Act 1932 – section 34

Town and Country Planning (Interim Development) Act 1943 – section 10

Town and Country Planning Act 1947 – section 25

Town and Country Planning Act 1962 – section 37

Town and Country Planning Act 1968 – section 108, Schedules 9 and 11

Town and Country Planning Act 1971 – section 52

Town and Country Planning Act 1990 – section 106

Planning and Compensation Act 1991 – section 12

as appear to be necessary or desirable having regard to the contents or proposed contents of the scheme :

Provided that the department concerned in making an agreement under this section, and the Treasury in considering whether their approval shall or shall not be given to the agreement, shall have regard to the purposes for which the land in question was acquired, or is held, by the department.

(2) Section twelve of the Crown Lands Act, 1927 17 & 18 (which relates to the power of the Commissioners of Geo. 5. c. 23. Crown Lands to make agreements in connection with town planning schemes), shall cease to have effect.

34.—(1) Where any person is willing to agree with any such authority as is mentioned in subsection (2) of this section that his land, or any part thereof, shall, so far as his interest in the land enables him to bind it, be made subject, either permanently or for a specified period, to conditions restricting the planning, development, or use thereof in any manner in which those matters might be dealt with by or under a scheme, the authority may, if they think fit, enter into an agreement with him to that effect, and shall have power to enforce the agreement against persons deriving title under him in the like manner and to the like extent as if the authority were possessed of, or interested in, adjacent land and as if the agreement had been entered into for the benefit of that adjacent land.

Power of
authorities
and owners
to enter into
agreements
restricting
use of land.

(2) Agreements may be entered into under this section by a local authority, a county council, or a responsible authority, not being a local authority or a county council.

(3) This section shall come into force upon the passing of this Act.

Provisions as to Garden Cities.

development orders included a reference to any contribution paid in accordance with the interim preservation order.

(5) Without prejudice to any exemptions for which provision may be made by an interim preservation order, no such order shall, while the Emergency Powers (Defence) Acts, 1939 and 1940, remain in force, prohibit or restrict the carrying out of any operations authorised by any government department in accordance with Regulations made under those Acts.

(6) The power to make interim preservation orders under this section shall include power to revoke or vary any such order by a subsequent order.

Provisions as
to joint
committees.

9.—(1) Provision may be made by an interim development order for empowering any joint committee specified therein to permit the development of land in accordance with the terms of the order, and where such provision is made the joint committee shall be deemed to have been appointed or constituted for that purpose as well as for the purposes for which it was originally appointed or constituted.

(2) A joint committee may delegate to any sub-committee appointed by them under subsection (5) of section three of the principal Act, or under that subsection as applied with modifications by an order under section four of that Act, any of their functions, including any powers exercisable by them under or by virtue of an interim development order.

(3) An order under section four of the principal Act for the constitution of a joint committee may be made by the Minister without the request of any of the constituent authorities; and accordingly in subsection (1) of that section the words "at the request of any one or more of them" shall cease to have effect.

(4) A joint committee constituted by order of the Minister under the said section four or under any enactment repealed by the principal Act may be dissolved by a subsequent order of the Minister whether or not that order provides for the constitution of any other joint committee.

(5) Any land acquired, in accordance with any provision of the principal Act, by a joint committee being an interim development authority, shall be vested in the local authority for the district in which the land is situated, and shall—

(a) until the date on which the scheme comes into operation be held in trust for the joint committee;

(b) after that date, be held, transferred or disposed of in such manner as may be provided by the scheme.

Provisions
as to agree-
ments.

10. No agreement made after the commencement of this Act under section thirty-four of the principal Act for restricting the planning, development or use of any land shall have effect unless it has been approved by the Minister.

PART III.
—cont.
Agreements
regulating
development
or use of land.

25.—(1) A local planning authority may, with the approval of the Minister, enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement, and any such agreement may contain such incidental and consequential provisions (including provisions of a financial character) as appear to the local planning authority to be necessary or expedient for the purposes of the agreement.

(2) An agreement made under this section with any person interested in land may be enforced by the local planning authority against persons deriving title under that person in respect of that land as if the local planning authority were possessed of adjacent land and as if the agreement had been expressed to be made for the benefit of such land.

(3) Nothing in this section or in any agreement made thereunder shall be construed as restricting the exercise, in relation to land which is the subject of any such agreement, of any powers exercisable by any Minister or authority under this Act so long as those powers are exercised in accordance with the provisions of the development plan or in accordance with any directions which may have been given by the Minister under section thirty-six of this Act, or as requiring the exercise of any such powers otherwise than as aforesaid.

(4) The power of a local planning authority to make agreements under this section may be exercised also—

- (a) in relation to land in a county district, by the council of that district;
- (b) in relation to land in the area of a joint planning board, by the council of the county or county borough in which the land is situated,

and references in this section to a local planning authority shall be construed accordingly.

(5) Where the Minister is authorised by the regulations to make or approve any such order as is mentioned in the last preceding subsection, the regulations shall provide for the publication of notice of the proposed order in such manner as may be prescribed by the regulations, for the consideration of objections duly made thereto, and for the holding of such inquiries or other hearings as may be so prescribed, before the order is made or approved.

PART III

(6) Regulations made under this section may be made so as to apply to advertisements which are being displayed on the date on which the regulations come into force, or to the use for the display of advertisements of any site which was being used for that purpose on that date; but any regulations made in accordance with this subsection shall provide for exempting therefrom—

- (a) the continued display of any such advertisement, and
- (b) the continued use for the display of advertisements of any such site,

during such period as may be prescribed in that behalf by the regulations, and different periods may be so prescribed for the purposes of different provisions of the regulations.

35. Where the display of advertisements in accordance with regulations made under the last preceding section involves development of land, planning permission for that development shall be deemed to be granted by virtue of this section, and no application shall be necessary in that behalf under the preceding provisions of this Part of this Act.

Application for planning permission not needed for advertisements complying with regulations.

36.—(1) If it appears to a local planning authority that the amenity of any part of their area, or of any adjoining area, is seriously injured by the condition of any garden, vacant site or other open land in their area, then, subject to any directions given by the Minister, the authority may serve on the owner and occupier of the land a notice requiring such steps for abating the injury as may be specified in the notice to be taken within such period as may be so specified.

Proper maintenance of waste land, etc.

(2) Subject to the provisions of Part IV of this Act, a notice under this section shall take effect at the end of such period (not being less than twenty-eight days after the service thereof) as may be specified in the notice.

37.—(1) A local planning authority may, with the approval of the Minister, enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement;

Agreements regulating development or use of land.

PART III

and any such agreement may contain such incidental and consequential provisions (including provisions of a financial character) as appear to the local planning authority to be necessary or expedient for the purposes of the agreement.

(2) An agreement made under this section with any person interested in land may be enforced by the local planning authority against persons deriving title under that person in respect of that land, as if the local planning authority were possessed of adjacent land and as if the agreement had been expressed to be made for the benefit of such land.

(3) Nothing in this section or in any agreement made thereunder shall be construed—

(a) as restricting the exercise, in relation to land which is the subject of any such agreement, of any powers exercisable by any Minister or authority under this Act so long as those powers are exercised in accordance with the provisions of the development plan, or in accordance with any directions which may have been given by the Minister as to the provisions to be included in such a plan, or

(b) as requiring the exercise of any such powers otherwise than as mentioned in the preceding paragraph.

(4) The power of a local planning authority to make agreements under this section may be exercised also—

(a) in relation to land in a county district, by the council of that district;

(b) in relation to land in the area of a joint planning board, by the council of the county or county borough in which the land is situated,

and references in this section to a local planning authority shall be construed accordingly.

Special provisions as to industrial development

Industrial
development
certificates.

38.—(1) Subject to the provisions of this and the next following section, an application to the local planning authority for permission to develop land by—

(a) the erection thereon of an industrial building of one of the prescribed classes, or

(b) a change of use whereby premises, not being an industrial building of one of the prescribed classes, will become such an industrial building,

shall be of no effect unless a certificate (in this Act referred to as an “industrial development certificate”) is issued under this section by the Board of Trade, certifying that the development in question can be carried out consistently with the proper distribution of industry, and a copy of the certificate is furnished to the local planning authority together with the application.

(3) An order under this section may make such transitional provision as appears to the Minister to be necessary or expedient in connection with the provisions thereby brought into force, including such adaptation of those provisions or any provision of this Act then in force as appear to him to be necessary or expedient in consequence of the partial operation of this Act (whether before or after the day appointed by the order).

(4) The Minister of Housing and Local Government shall, for England, and the Secretary of State shall, for Wales, each maintain and keep up to date a register showing the effect of orders made under this section in such a way as enables members of the public to inform themselves—

(a) as to the provisions of this Act which have come, or are to be brought, into operation, and on which dates and in relation to which areas ; and

(b) as to whether, in the case of a particular area, any transitional provision has been made by such an order.

(5) The register maintained by the Minister of Housing and Local Government under this section shall be kept at his principal offices in London, and the register so maintained by the Secretary of State shall be kept at his principal offices in Cardiff ; and both registers shall be available for inspection by the public at all reasonable hours.

106. Schedule 9 to this Act shall have effect for adapting and interpreting Acts other than this Act and for making amendments and modifications to such Acts, being minor amendments and amendments consequential on the foregoing provisions of this Act. Adaptation, amendment and modification of enactments.

107. Schedule 10 to this Act shall have effect for the purpose of the transition to the provisions of this Act from the law in force before the commencement of those provisions and with respect to the application of this Act to things done before the commencement of those provisions. Transitional provisions and savings.

108. The enactments specified in Schedule 11 to this Act are hereby repealed to the extent specified in the third column of that Schedule. Repeals.

109.—(1) This Act may be cited as the Town and Country Planning Act 1968. Short title, citation and extent.

(2) The Town and Country Planning Acts 1962 to 1966 and this Act may be cited as the Town and Country Planning Acts 1962 to 1968.

borough or county district in whose area the building is situated, on being informed of the fact by the Minister, shall serve a notice in the prescribed form ”.

18. So much of section 34(4) (definition of areas of special control in connection with the control of advertisements) as provides for the definition of such areas by reference to the provisions of a development plan shall cease to have effect.

19. In section 37(1) (power of local planning authority to make agreements with land-owners restricting or regulating the development or use of their land), the words “with the approval of the Minister” shall be omitted.

20. In section 49(1) (supplementary provisions as to enforcement notices) for the words “any development” there shall be substituted the words “any breach of planning control (as defined by section 15 of the Act of 1968)” and for the words “by whom the development was carried out” there shall be substituted the words “by whom the breach of planning control was committed”.

21. In section 63 (enforcement of control of advertising) in subsection (1), after the words “this Part of this Act” there shall be inserted the words “or Part II of the Act of 1968”.

22. In section 64 (supplementary provisions as to appeals under Part IV)—

- (a) in subsection (1), after the words “this Part of this Act” there shall be inserted the words “or under Part II of the Act of 1968 or Part IV of Schedule 5 to that Act”;
- (b) in the second of the subsections numbered (3), after the words “this Part of this Act” there shall be inserted the words “or under Part II of the Act of 1968 or Part IV of Schedule 5 to that Act”.

23. In section 65 (recovery by local planning authority of expenses of enforcement), after the word “Act” there shall be inserted the words “or of the provisions of Part II of the Act of 1968 or Part IV of Schedule 5 to that Act”.

24. In section 66 (local authority land),—

- (a) in subsection (1), after the words “this Part of this Act” there shall be inserted the words “and Part II of the Act of 1968”; and
- (b) in subsection (2) after the words “this Part of this Act” there shall be inserted the words “or Part II of the Act of 1968”.

25. In section 71(1) (acquisition of land by agreement), for paragraph (b) there shall be substituted the following paragraphs:—

- “(b) any building appearing to them to be of special architectural or historic interest; and

SCH. 11

Chapter	Short Title	Extent of Repeal
9 & 10 Eliz. 2. c. 15.	The Post Office Act 1961.	In the Schedule, so much as amends paragraphs 5, 6 and 7 of Schedule 1 to the Post Office Act 1953.
9 & 10 Eliz. 2. c. 33.	The Land Compensation Act 1961.	In section 9, the word "designation". In section 39(1), the words "by the Minister".
10 & 11 Eliz. 2. c. 36.	The Local Authorities (Historic Buildings) Act 1962.	In section 1(1)(b), the words "with the consent of the Minister of Housing and Local Government".
10 & 11 Eliz. 2. c. 38.	The Town and Country Planning Act 1962.	Part II. In section 13, in subsection (6), the words from the beginning to "control; and" and subsection (10). Section 23(3). In section 29(5), the words "and, subject to" onwards. Sections 30, 31 and 33. In section 34(4), the words from "either" to "plans or". In section 37(1), the words "with the approval of the Minister". Sections 45 and 46. Section 47(7). Sections 52 to 55. Section 62(2) to (4). In section 64, subsection (2) and the first of the subsections numbered (3). Sections 67 to 69. In section 71(1)(a), the words in parenthesis. In section 73(1) the words from "specified" to "a purpose". Sections 74 to 76. Section 86(4) and (5). In section 125, in subsection (1), the words "or may under section thirty of this Act be made by a building preservation order" and subsection (2). In section 128(1), the words "or building preservation order". Section 138(1)(a) and (b). In section 139(3)(a), the word "designated" wherever it occurs. Section 143. In section 145, subsection (3), in subsection (4) the words "and (6)" and subsection (6). Section 150(5). Section 159(2), subject to the exception in section 70(3) of this Act.

PART III

(8) Where the requirements of an order under this section will involve the displacement of persons residing in any premises, it shall be the duty of the local planning authority, in so far as there is no other residential accommodation suitable to the reasonable requirements of those persons available on reasonable terms, to secure the provision of such accommodation in advance of the displacement.

(9) In the case of planning permission granted by an order under this section, the authority referred to in sections 41(1)(b) and 42(4) of this Act is the local planning authority making the order or, where the Secretary of State in confirming the order exercises his powers under subsection (5) of this section, the Secretary of State.

Agreements
regulating
development
or use of land.

52.—(1) A local planning authority may enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement; and any such agreement may contain such incidental and consequential provisions (including provisions of a financial character) as appear to the local planning authority to be necessary or expedient for the purposes of the agreement.

(2) An agreement made under this section with any person interested in land may be enforced by the local planning authority against persons deriving title under that person in respect of that land, as if the local planning authority were possessed of adjacent land and as if the agreement had been expressed to be made for the benefit of such land.

(3) Nothing in this section or in any agreement made thereunder shall be construed—

(a) as restricting the exercise, in relation to land which is the subject of any such agreement, of any powers exercisable by any Minister or authority under this Act so long as those powers are exercised in accordance with the provisions of the development plan, or in accordance with any directions which may have been given by the Secretary of State as to the provisions to be included in such a plan; or

(b) as requiring the exercise of any such powers otherwise than as mentioned in paragraph (a) of this subsection.

(4) The power of a local planning authority to make agreements under this section may be exercised also—

(a) in relation to land in a county district, by the council of that district;

(b) in relation to land in the area of a joint planning board,
by the council of the county or county borough in
which the land is situated,

PART III

and references in this section to a local planning authority shall
be construed accordingly.

Determination whether planning permission required

53.—(1) If any person who proposes to carry out any opera- Applications
tions on land, or to make any change in the use of land, wishes to determine
to have it determined whether the carrying out of those opera- whether
tions, or the making of that change, would constitute or involve planning
development of the land, and, if so, whether an application for permission
for planning permission in respect thereof is required under this required.
Part of this Act, having regard to the provisions of the develop-
ment order, he may, either as part of an application for planning
permission, or without any such application, apply to the local
planning authority to determine that question.

(2) The provisions of sections 24, 29(1), 31(1), 34(1) and (3)
and 35 to 37 of this Act shall, subject to any necessary modi-
fications, apply in relation to any application under this section,
and to the determination thereof, as they apply in relation to
applications for planning permission and to the determination of
such applications.

PART IV

ADDITIONAL CONTROL IN SPECIAL CASES

Buildings of special architectural or historic interest

54.—(1) For the purposes of this Act and with a view to the Lists of
guidance of local planning authorities in the performance of buildings of
their functions under this Act in relation to buildings of special special archi-
architectural or historic interest, the Secretary of State shall tectural or
compile lists of such buildings, or approve, with or without historic
modifications, such lists compiled by other persons or bodies interest.
of persons, and may amend any list so compiled or approved.

(2) In considering whether to include a building in a list
compiled or approved under this section, the Secretary of State
may take into account not only the building itself but also—

(a) any respect in which its exterior contributes to the
architectural or historic interest of any group of build-
ings of which it forms part; and

(b) the desirability of preserving on the ground of its

Town and Country Planning Act 1990

1990c. 8

Agreements regulating development or use of land.

106.—(1) A local planning authority may enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement.

(2) Any such agreement may contain such incidental and consequential provisions (including financial ones) as appear to the local planning authority to be necessary or expedient for the purposes of the agreement.

(3) An agreement made under this section with any person interested in land may be enforced by the local planning authority against persons deriving title under that person in respect of that land as if the local planning authority were possessed of adjacent land and as if the agreement had been expressed to be made for the benefit of such land.

(4) Nothing in this section or in any agreement made under it shall be construed—
(a) as restricting the exercise, in relation to land which is the subject of any such agreement, of any powers exercisable by any Minister or authority under this Act so long as those powers are exercised in accordance with the provisions of the development plan, or in accordance with any directions which may have been given by the Secretary of State as to the provisions to be included in such a plan; or
(b) as requiring the exercise of any such powers otherwise than as mentioned in paragraph (a).

Planning and Compensation Act 1991 (c. 34)

1991 Chapter c. 34

Planning obligations.

12.—(1) For section 106 of the principal Act (agreements regulating development or use of land) there is substituted—

106. — (1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A and 106B as "a planning obligation"), enforceable to the extent mentioned in subsection (3)—

- (a) restricting the development or use of the land in any specified way;
- (b) requiring specified operations or activities to be carried out in, on, under or over the land;
- (c) requiring the land to be used in any specified way; or
- (d) requiring a sum or sums to be paid to the authority on a specified date or dates or periodically.

(2) A planning obligation may—

- (a) be unconditional or subject to conditions;
- (b) impose any restriction or requirement mentioned in subsection (1)(a) to
- (c) either indefinitely or for such period or periods as may be specified; and
- (c) if it requires a sum or sums to be paid, require the payment of a specified amount or an amount determined in accordance with the instrument by which the obligation is entered into and, if it requires the payment of periodical sums, require them to be paid indefinitely or for a specified period.

"Planning obligations.

(3) Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection (9)(d)—

- (a) against the person entering into the obligation; and
- (b) against any person deriving title from that person.

(4) The instrument by which a planning obligation is entered into may provide that a person shall not be bound by the obligation in respect of any period during which he no longer has an interest in the land.

(5) A restriction or requirement imposed under a planning obligation is enforceable by injunction.

(6) Without prejudice to subsection (5), if there is a breach of a requirement in a planning obligation to carry out any operations in, on, under or over the land to which the obligation relates, the authority by whom the obligation is enforceable may—

- (a) enter the land and carry out the operations; and
- (b) recover from the person or persons against whom the obligation is

enforceable any expenses reasonably incurred by them in doing so.

(7) Before an authority exercise their power under subsection (6)(a) they shall give not less than twenty-one days' notice of their intention to do so to any person against whom the planning obligation is enforceable.

(8) Any person who wilfully obstructs a person acting in the exercise of a power under subsection (6)(a) shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(9) A planning obligation may not be entered into except by an instrument executed as a deed which—

- (a) states that the obligation is a planning obligation for the purposes of this section;
- (b) identifies the land in which the person entering into the obligation is interested;
- (c) identifies the person entering into the obligation and states what his interest in the land is; and
- (d) identifies the local planning authority by whom the obligation is enforceable.

(10) A copy of any such instrument shall be given to the authority so identified.

(11) A planning obligation shall be a local land charge and for the purposes of the [1975 c. 76.] Local Land Charges Act 1975 the authority by whom the obligation is enforceable shall be treated as the originating authority as respects such a charge.

(12) Regulations may provide for the charging on the land of—

- (a) any sum or sums required to be paid under a planning obligation; and
- (b) any expenses recoverable by a local planning authority under subsection (6)(b),

and this section and sections 106A and 106B shall have effect subject to any such regulations.

(13) In this section "specified" means specified in the instrument by which the planning obligation is entered into and in this section and section 106A "land" has the same meaning as in the [1975 c. 76.] Local Land Charges Act 1975.

106A. — (1) A planning obligation may not be modified or discharged except—

- (a) by agreement between the authority by whom the obligation is enforceable and the person or persons against whom the obligation is enforceable; or
- (b) in accordance with this section and section 106B.

Modification
and discharge
of planning
obligations.

(2) An agreement falling within subsection (1)(a) shall not be entered into except by an instrument executed as a deed.

(3) A person against whom a planning obligation is enforceable may, at any time after the expiry of the relevant period, apply to the local planning authority by whom the obligation is enforceable for the obligation—

- (a) to have effect subject to such modifications as may be specified in the application; or
- (b) to be discharged.

(4) In subsection (3) "the relevant period" means—

- (a) such period as may be prescribed; or
- (b) if no period is prescribed, the period of five years beginning with the date on which the obligation is entered into.

(5) An application under subsection (3) for the modification of a planning obligation may not specify a modification imposing an obligation on any other person against whom the obligation is enforceable.

(6) Where an application is made to an authority under subsection (3), the authority may determine—

- (a) that the planning obligation shall continue to have effect without modification;
- (b) if the obligation no longer serves a useful purpose, that it shall be discharged; or
- (c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications.

(7) The authority shall give notice of their determination to the applicant within such period as may be prescribed.

(8) Where an authority determine that a planning obligation shall have effect subject to modifications specified in the application, the obligation as modified shall be enforceable as if it had been entered into on the date on which notice of the determination was given to the applicant.

(9) Regulations may make provision with respect to—

- (a) the form and content of applications under subsection (3);
- (b) the publication of notices of such applications;
- (c) the procedures for considering any representations made with respect to such applications; and
- (d) the notices to be given to applicants of determinations under subsection (6).

(10) Section 84 of the [1925 c. 20.] Law of Property Act 1925 (power to discharge or modify restrictive covenants affecting land) does not apply to a planning obligation.

106B. — (1) Where a local planning authority—

(a) fail to give notice as mentioned in section 106A(7); or

(b) determine that a planning obligation shall continue to have effect without modification,

the applicant may appeal to the Secretary of State.

(2) For the purposes of an appeal under subsection (1)(a), it shall be assumed that the authority have determined that the planning obligation shall continue to have effect without modification.

(3) An appeal under this section shall be made by notice served within such period and in such manner as may be prescribed.

(4) Subsections (6) to (9) of section 106A apply in relation to appeals to the Secretary of State under this section as they apply in relation to applications to authorities under that section.

(5) Before determining the appeal the Secretary of State shall, if either the applicant or the authority so wish, give each of them an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose.

(6) The determination of an appeal by the Secretary of State under this section shall be final.

(7) Schedule 6 applies to appeals under this section.

"

(2) In section 296(2) of that Act (exercise of powers in relation to Crown land) after "authority-" there is inserted—

" (aa) in relation to land which for the time being is Crown land— (i) a planning obligation shall not be enforced by injunction; and (ii) the power to enter land conferred by section 106(6) shall not be exercised;"

(3) After section 299 of that Act there is inserted—

299A. — (1) The appropriate authority in relation to any Crown interest or Duchy interest in land in the area of a local planning authority may enter into an obligation falling within any of paragraphs (a) to (d) of section 106(1) (in this section referred to as a "planning obligation") enforceable to the extent mentioned in subsection (3).

(2) A planning obligation may not be entered into except by an instrument executed as a deed which—

(a) states that the obligation is a planning obligation for the purposes of this section;

(b) identifies the land in relation to which the obligation is entered into;

(c) identifies the appropriate authority who are entering into the obligation and states what the Crown or Duchy interest in the land is; and

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(d) identifies the local planning authority by whom the obligation is enforceable.

- (3) A planning obligation entered into under this section is enforceable—
- (a) against any person with a private interest deriving from the Crown or Duchy interest stated in accordance with subsection (2)(c);
 - (b) by the authority identified in accordance with subsection (2)(d).

(4) Subject to subsection (5), subsections (2), (4) to (8) and (10) to (13) of section 106 and sections 106A and 106B apply to a planning obligation entered into under this section as they apply to a planning obligation entered into under that section.

- (5) The consent of the appropriate authority must be obtained to—
- (a) the enforcement by injunction of a planning obligation against a person in respect of land which is Crown land; and
 - (b) the exercise, in relation to Crown land, of the power to enter land conferred by section 106(6) (as applied by subsection (4)).