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THE LAW ON COMPENSATION RIGHTS FOR REDUCTION IN PROPERTY VALUES DUE TO PLANNING DECISIONS IN THE UNITED KINGDOM

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INTRODUCTION

Under the current law of Town and Country Planning in the United Kingdom, owners of land have no direct legal right to compensation for any financial loss caused by the particular designation of land in a development plan. In addition, landowners do not have a right to compensation for the refusal of planning permission or for the placement of conditions on land-use planning.

As we will see, rights to compensation in the U.K. are very limited and are largely related to the revocation or modification of a valid planning permission.¹ In some situations, landowners may also be able to require authorities to purchase their lands. This is limited to cases where either (1) the land is zoned for public works that requires the land to be publicly owned, or (2) a development control decision renders the property incapable of any beneficial use. The overriding principle, however, is that where the development of land is restricted in the name of the public interest, landowners do not have the right to compensation.

A. *History*

Early statutes, such as the Town and Country Planning Act 1909 and the Town and Country Planning Act 1932, imposed a duty on local authorities to pay compensation to owners who suffered losses as a result of the authorities' planning schemes. However, just as local authorities

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1. "Planning permission" in the U.K. means that planning law is granted on a case-by-case basis in a discretionary manner. One may view this as similar to a combination of a Planned Unit Development, a site plan, and a building permit. Development plans do not grant development rights. Although the local authorities are obliged to prepare development plans, they are not binding like an American zoning bylaw or a Continental European detailed plan. In the U.K., the planning authorities may digress from these plans if they have good reason. Furthermore, U.K.-style locals plan are usually not as detailed as American zoning or Continental European detailed plans.

had a duty to pay compensation for losses, they were also empowered to recoup the betterment (the increase in value) created by these planning schemes.

Later, the Town and Country Planning Act 1947² adopted the “shifting value theory”³ and nationalized the prospective development value of land. A compensation fund was established at the fairly arbitrary sum of £300 million.⁴ Claims could be submitted for the development rights that were abolished by the 1947 Act. Afterwards, no development rights would be granted by development plans, and no compensation could be claimed for the refusal of planning permission (except in special circumstances).

This right to the “unexpended balance of established value” remained as an historic vestige until it was abolished on September 25, 1991 by the Planning and Compensation Act 1991.⁵ By that time, the amounts had become very small because of inflation, and the whole process had become largely obsolete. However, the distinction between “new” and “existing” development can still be found in some existing legislation, but its importance is marginal.⁶

2. Town and Country Planning Act, 1947, c. 53 (Eng.).

3. This theory was proposed in AUGUSTUS ANDREWES UTHWATT, EXPERT COMMITTEE ON COMPENSATION AND BETTERMENT: FINAL REPORT (His Majesty’s Stationery Office 1942). According to this theory, in each region, the demand for land uses of each type is more or less finite; therefore, granting development rights in advance, as done by traditional land-use plans (or zoning), enriches some landowners while depriving others. This was the rationale for abolishing development rights in preference for a system where decisions on whether to approve a particular proposed development would be decided on a case-by-case basis, according to the real demand when the development initiative is ripe. The role of plans is to provide the longer-range strategy.

4. In return, a betterment levy was imposed when this development value was accrued by the granting of planning permission. However, following a change of government in 1954, the betterment levy was abolished.

5. *See generally* Planning and Compensation Act, 1991, c. 34 (U.K.).

6. The heading of Schedule 3 to the Town and Country Planning Act 1990 is “Development Not Constituting New Development.” Town and Country Planning Act, 1990, c. 8, sched. 3 (Eng.). Schedule 3 then distinguishes between “development not ranking for compensation” and “development ranking for compensation.”

“Development not ranking for compensation” is set out in Part 1 of Schedule 3 and covers certain rebuilding and alteration operations as well as the change of use to two separate dwelling houses. “Development ranking for compensation” is set out in Part 2 of Schedule 3 and covers various operations and uses.

The rationale seems to be that all these operations and uses of land, although technically requiring planning permission as development, were closely related to the existing buildings (or past buildings, in the case of Part 1) or the current ways in which the land was being put to use. Presumably because of the high costs that would be involved, the 1990 Act only provided for a right to compensation in the case of Part 2 when permission was refused. This right to compensation, which was set out in section 114 of the 1990 Act, was abolished in September 1991, and Part 2 of the schedule is gone. Yet, as we will see, Part 1 of Schedule 3 and this old distinction between “new” and “existing” development may still have roles to play in deciding whether a purchase notice can be served. In addition, this distinction may affect the amount of compensation payable if property is compulsorily acquired.

B. The European Convention on Human Rights

The basic absence of compensation rights for denial of permission to develop does not contradict the European Convention on Human Rights.⁷ The jurisprudence of the European Court of Human Rights and United Kingdom courts strongly indicate that the United Kingdom law is not incompatible.

Development control decisions can raise issues concerning article 8 of the European Convention (the right to respect for private life, family life, and a home),⁸ both in respect of the applicant and those opposed to the development. However, in all but the most exceptional circumstances, any interference is justifiable as pursuant of a legitimate aim.

Similarly, planning decisions could bring into play article 1 of the First Protocol to the Convention, which protects property rights from interference.⁹ However, again an outright deprivation of property is normally justifiable as long as reasonable compensation is paid, and control over property without the payment of compensation is justifiable unless the restriction is so severe that it amounts to a taking of land. The enactment of the Human Rights Act 1998¹⁰ brought into force in United Kingdom law most of the rights set out in the European Convention on Human Rights. The Human Rights Act does not seem to have substantially altered the assessment that U.K. law is in compliance with the European Convention.

C. Situations Where Compensation Rights Do Exist

We will now look at U.K. law in more detail and analyze the situations—infrequent in practice—where some rights to compensation do exist in the current law.

I. INTERFERENCE WITH EXISTING PLANNING RIGHTS

As we have seen, the Town and Country Planning Act 1947 distinguished between “new” development and the “existing” use of land.

7. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

8. *Id.* art. 8. Article 8 § 1 provides: “Everyone has the right to respect for his private and family life, [and] his home”

9. Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262 [hereinafter Prot. 1 ECHR].

10. Human Rights Act, 1998, c. 42 (Eng.).

Following this distinction, the Act provides for compensation where there is an interference with development, which was either lawfully developed or has become lawful because of a failure to take enforcement action. Even where development has not yet been carried out, compensation rights can arise where planning permissions are revoked or modified.

A. Orders Requiring the Discontinuance of a Use, Limitations to That Use, or the Removal or Alteration of Buildings

Under section 102 of the Town and Country Planning Act 1990 (the “1990 Act”), local planning authorities (LPAs) have broad powers. Where local authorities “consider it expedient in the interests of proper planning of their area (including the interests of amenity),”¹¹ they are empowered “to require the discontinuance of any use of land, or to impose conditions on its continued use, or to require . . . steps . . . for the alteration or removal of buildings or works.”¹²

The compensation rights are set out in section 115 and cover damages suffered by any person because of the depreciation of the value of an interest in land or mineral which that person owns.¹³ Compensation rights also extend to damages caused by the disturbance of the enjoyment of land and for the reasonable expenses involved in complying with the order.¹⁴

Compensation is calculated according to the ordinary rules for the compulsory purchase of land as laid down in section 5 of the Land Compensation Act 1961,¹⁵ subject to obvious modifications because no interest in land is actually being purchased. Thus, compensation should not include any value derived from a use that is unlawful. The Lands Tribunal has held that the date for assessing the value of the damage is the date of the confirmation of the order.¹⁶ This means that compensation includes the damage incurred by a landowner who bought new equipment

11. Town and Country Planning Act, 1990, c. 8, § 102 (Eng.).

12. *Id.* It is not clear why section 102 specifically refers to interests of amenity, as the need to promote and protect amenity would be one of the standard purposes of planning. However, it is worth noting that in *Re Lamplugh*, (1967) 19 P. & C.R. 125 (Q.B.), the court held that an order could be made to protect potential damage to amenities. The facts of the case reveal the draconian nature of the power as it was used to require the demolition of an old watchhouse on a cliff, which it was accepted, did not at present damage amenities but which might if it later were to be unused and fall into disrepair. However, all such orders require the confirmation of the Secretary of State, and persons who object to a proposed order have a right to a hearing. Town and Country Planning Act, 1991 c. 8, § 103.

13. *Id.* § 115. There are special provisions relating to minerals discontinuance orders. *Id.* § 116.

14. *Id.* § 115.

15. Land Compensation Act, 1961, c. 33, § 5 (U.K.).

16. *K. & B. Metals Ltd. v. Birmingham City Council*, (1977) 33 P. & C.R. 135 (Eng.).

(which would have to be sold at a loss) after the service of the discontinuance order but before its confirmation.

B. Revocation and Modification of Planning Permissions That Have Not Yet Been Implemented

The right to compensation applies in cases where an “express” planning permission¹⁷ is revoked. Interestingly, this right also applies to revocation of a planning permission “deemed to have been granted,” where a development request falls within one of the classes of permitted development set out in development orders.¹⁸ A right to compensation applies even when the right to carry out the permitted development is lost, not by revocation of a particular permit, but by the central government’s amendment of the development order itself.

This contrasts with the position of the Use Classes Order 1987,¹⁹ which has the effect of taking the change out of the definition of development rather than granting (automatic) permission for changes of use. In the case of the Use Classes Order, as long as the order is amended before the development has commenced, there is no right to compensation. This holds even though the result is that prior to the amendment, permission would not have been needed for the change. Compensation is not payable even though the landowner may have incurred costs in anticipation of making use of the order’s protection, which was then taken away. Presumably the logic behind the Use Classes Order is that no permitted development rights are granted. However, the distinction seems anomalous because the effect on the people who will now have to seek planning permission (provided the change is material and so within the definition of development) is the same as with the amendment of a development order.

Under section 97, a local planning authority may revoke or modify express grants of planning permission if the LPA considers it to be expedient with regard to the development plan and any other material considerations.²⁰ Confirmation of the Secretary of State is required.²¹

17. An express planning permission is one that is actually granted by the Local Planning Authority. An express permission is necessary in most cases of development, unless it falls under an automatically “permitted development.”

18. A development order sets out a list of types of development (mostly minor additions or minor use changes) in which a permit is “automatically” deemed to have been granted.

19. See The Town and Country Planning (Use Classes) Order, 1987, S.I. 1987/764.

20. Town and Country Planning Act, 1990, c. 8, § 97 (Eng.).

21. There are similar confirmation procedures for discontinuance notices.

Revocation can only apply where the development permitted has not yet been carried out. A case of a “material change of use” involves the difficult task of determining just when the development took place; in the case of an operation, revocation or modification has no effect regarding an operation that has already been carried out. In this regard, a case that was concerned with the Scottish equivalent of the provision held that the crucial date is the date that the local planning authority made the order, not the date of confirmation.²² To hold otherwise would make it very easy for a landowner or occupier to defeat the revocation by commencing development as soon as an order is received. Of course, even when it is too late to serve a revocation order, the same objectives can be achieved by using the discontinuous notice powers.

Under section 107, compensation is payable for both expenditures in carrying out abortive works and losses directly attributable to the revocation or modification. This can include loss of anticipated profits where the damage resulting from the loss of a contract is not too remote.²³ The wording makes clear that there has to be a direct link between the damage and the revocation or modification. Therefore, losses or damages resulting from actions taken before the grant of permission are excluded from compensation.

In calculating the depreciation on the value of the land, it must be assumed that permission would be granted for rebuilding and building alterations.²⁴ This would normally result in a reduction in the amount of compensation because, in calculating the value of the land following the revocation, one would have to assume that planning permission would still be granted for such development, thus increasing the notional value of the land. However, this is illogical because permission may well be refused for such development; today, there is no right to compensation following a refusal to grant planning permission. These potentially harsh and absurd consequences are a hangover from the 1947 Act.

These harsh consequences were forcefully illustrated in the House of Lords decision in *Canterbury City Council v. Colley*,²⁵ which involved the revocation of a permission to demolish and rebuild an existing building (permitted before 1947).²⁶ The effect of the statutory assumption was to eliminate all compensation for the depreciation of the land value

22. See *Caledonian Terminal Inv. Ltd. v. Edinburgh Corp.*, 1970 S.L.T. 362 (1970) (Scot.).

23. See *Hobbs (Quarries) Ltd. v. Somerset County Council*, (1975) 30 P. & C.R. 286, 291 (Eng.).

24. Town and Country Planning Act, 1990, c. 8, § 107(4) (Eng.); *Id.* c. 8, sched. 3, pt. 1.

25. (1993) 1 All E.R. 591 (H.L.) (Eng.).

26. *Id.*

occasioned by the revocation.²⁷ While it was accepted that the provision was anomalous, the provision was nevertheless held to be mandatory.²⁸ It followed that there was no escape from the proposition that it must be applied even in the case of the notional permission to be assumed is the very permission that has in fact been revoked.²⁹

As is the case with discontinuance notices, the Secretary of State has a default power to issue a revocation order to a planning permission.³⁰ The compensation claim has to be made by a person with an interest in the land. In *Pennine Raceways Ltd. v. Kirklees M C (No 1)*,³¹ the Court of Appeal held that this wording included enforceable contractual rights, such as licences, as well as legal or equitable interests in land.

In practice, cases of revocation of planning permission are very rare. The fact that the service of such notices results in compensation means that they are rarely used by local planning authorities and the government. In an answer to a Parliamentary question, the government made clear that the default power would only be used where the grant of planning permission was grossly wrong and damaging to the wider public interest. However, this power does extend to situations when similar planning applications have been treated inconsistently without justification.³²

In the case of orders served by the Secretary of State, the liability to pay compensation falls on the local planning authority that granted the permission.³³ In a way, this is logical because the LPA presumably caused the problem by granting permission in the first place. However, the amount of compensation can be very high, thus potentially having a very adverse impact on the finances of the local authority.

When deciding whether to issue a revocation order, one legal question is whether the local planning authority is authorized to take the financial burden into account. In *Alnwick D.C. v. Secretary of State for the Environment, Transport, and the Regions*,³⁴ the plaintiff argued that the Secretary of State should have taken into account the financial consequences of a modification when considering whether it was expedient to make the order. Mr. Justice Richards rejected this argument on the grounds that in order for the financial consequences to be material considerations, they would have to relate to the

27. *See id.* at 598.

28. *See id.*

29. *See id.*

30. *See* Town and Country Planning Act, 1990, c. 8, § 100 (Eng.).

31. [1983] Q.B. 382.

32. *See* Hansard in 164 PARL. DEB., H.C. (6th ser.) (1989) 327–8w.

33. *See* Town and Country Planning Act, 1990, c. 8, sched. 1, ¶ 18 (Eng.).

34. [2000] 79 P. & C.R. 130 (Q.B. 1999).

use and development of land.³⁵ The council had tried to argue that the financial loss would have adverse consequences for their proposed leisure facilities, but Mr. Justice Richards found these to be too indirect to be material considerations. This decision makes logical sense because, as Mr. Justice Richards pointed out, it would be odd if the statutory provision for compensation for revocation would itself be a reason for not making an order. However in practice, both the local planning authorities and the Secretary of State will inevitably be influenced by the high costs of making such orders.

C. Voiding a Permit Through Judicial Review (With No Compensation Rights)

In situations where revocation is necessary, local planning authorities may have an alternate legal option that spares them from the need to compensate. Where a grant of planning permission is judged to have been grossly wrong, there are very likely strong grounds for holding the grant to be not only wrong, but invalid in law. An alternative to a revocation order that has the advantage of not requiring the payment of compensation is to get the grant quashed by resorting to an application for judicial review. This, however, requires the rather strange spectacle of the LPA or one of its members bringing an application to strike down its own previous decision. The courts have held so far that this remedy is a possibility, but it may depend on the particular facts.³⁶

When it is apparent that an LPA is applying for judicial review to invalidate a planning permission as a way of saving compensation money, the courts might refuse the application. In *R. v. Restormel Borough Council ex parte Parkyn and Corbett*,³⁷ not only was the application for judicial review made after a long delay and after the Secretary of State had decided to make a modification order, but the applicant had done nothing to cause the grant to be invalid. The error of law had been made by the local planning authority. The Court of Appeal refused the application. The exact rationale of the decision is difficult to ascertain because the refusal to quash the decision was based on a wide range of factors. However, the basic reasoning of the majority seems to have been that justice required that the owners of the land should not be deprived of compensation. In this

35. *Id.* at 192.

36. *See R. v. Bassetlaw D.C. exp Oxby*, [1999] P.L.C.R. 283 (rejecting the argument that it was wrong for a local planning authority to seek judicial review of its grant of permission.).

37. [2001] J.P.L. 445 (Q.B.D. 2000).

regard, Lord Justice Schiemann argued that where there is a choice between putting the burden of loss on the applicant or the council, it should fall on the council rather than the individual. Lord Justice Sedley disagreed with this approach, arguing that the injustice of depriving the applicant of compensation for the loss of the permission was no greater in principle than the injustice of awarding the applicant a windfall at the public's expense. In this regard, it can certainly be argued that if the grant is grossly wrong, the applicant should not benefit from the mistakes of the local planning authority because the permission should never have been granted in the first place.

Even when the Secretary of State has no intention of revoking or modifying a permission, theoretically a local planning authority could use judicial review as an alternative to seeking revocation and having to pay compensation, if there were grounds on which to challenge the validity of the permission. Basically, the same principles would apply; however, the courts would be even less likely to allow this remedy, except in cases where the applicant had induced the grounds of invalidity.

D. Revocations or Modifications of the Classes of Permitted Development

Rights to permitted development³⁸ can be lost in three main ways. First, article 4 of the Town and Country Planning (General Permitted Development) Order 1995 provides that the Secretary of State and LPAs can make directions that restrict the operation of a class of permitted development within a specified area or to a specified development.³⁹ Such directions normally require the confirmation of the Secretary of State when made by a local planning authority. Second, the Secretary of State may simply use the power to amend the Order and so abolish or restrict a class. Third, the descriptions of the classes of permitted development mean that the designation of the land or building can change the permitted rights. For example, if land is designated as a conservation area, it becomes article 1(5) land. And in the case of the right to install a telecommunication apparatus under Part 24 Class A, the right will be lost or restricted unless the right to carry out development has somehow

38. Permits that are "deemed to have been granted" apply to some types of small-scale development or minor changes.

39. The Town and Country Planning (General Permitted Development) Order, 1995, S.I. 1995/418, art. 4. The Order provides for various limitations and exceptions to this power.

crystallized.⁴⁰ In this third situation, there is no provision for the payment of compensation.

In the first two situations, under section 108, compensation is payable if subsequently there is a refusal or conditional grant of (express) planning permission for development that formerly would have been permitted under the 1995 Order, so long as the pre-condition that the application be made within twelve months of the date when the revocation or amendment took place is satisfied.

The 1990 Act distinguishes between express grants of permission and the classes of permitted development. This is justified by the fact that the classes of permitted development are development rights that are available to all who come within the terms of the grant and are not specific to a particular piece of land. Thus, those seeking compensation must first test whether, despite the restrictions, express planning permission in regard to a specific development may be acceptable. Presumably, the time limit is imposed so that only those who were in the process of preparing for a development will, in practice, be compensated. However, there is nothing to prevent anyone who is made aware of the restrictions from deciding to set up the pre-conditions for a compensation claim.

The right to compensation is provided by section 108(1), applying section 107 as if there had been a revocation or modification of an express grant of planning permission.⁴¹ There is a provision for the fact that compensation has become payable to be registered as a land charge,⁴² and section 111 provides for a claw back of compensation that has been made.⁴³ This is done by making it unlawful to carry out the development for which compensation has been registered, but only in cases of complete revocation of the rights, not a modification.⁴⁴

II. PURCHASE NOTICES

The closest that United Kingdom law gets to providing for compensation for an adverse development control decision is the

40. In the case of *R (on behalf of Orange PCS Limited) v Islington London Borough Council Times*, January 24 2006, [2006] J.P.L. 1309, it was held that the rights had crystallized when the developer had submitted plans for the installation under the prior approval process.

41. Town and Country Planning Act, 1990, c. 8, § 108(1) (Eng.).

42. *Id.* § 110.

43. *Id.* § 111.

44. *Id.*

mechanism of the purchase notice. However, successful purchase notices are extremely rare.⁴⁵

The underlying requirement is that “the land must have become incapable of reasonable beneficial use in its existing state.”⁴⁶ The rationale is that when the control over development is so restrictive that the land cannot be put to a beneficial use, it is the equivalent of a taking of the land and so the LPA should be required to purchase what has become a worthless piece of land. This process is sometimes referred to as a reverse compulsory purchase. Of course, a condition that in substance requires landowners to dedicate their lands to the public or requires land to be occupied by certain persons may be challenged on the grounds of legality.⁴⁷ However, this is a rather different situation because the developer may still benefit from the development. In any case, LPAs today would simply subject the commencement of the development to certain pre-conditions, such as dedication of land.

The purchase notice process applies when the planning decision is lawful but very restrictive. It applies not only when planning permission has been refused or granted subject to conditions, but also when discontinuance or revocation orders have been made. In such cases, the person served with such an order has a choice of seeking compensation for the revocation (as explained above) or serving a purchase notice on the LPA. However, the provisions relating to purchase notices are very narrowly drawn; thus, successful notices are very rare.

A. *The Correct Unit of Land*

Under section 137, a pre-condition for a successful notice is that “the land” has been the subject of an adverse planning decision, normally a refusal of planning permission. It is the owner⁴⁸ of the land that can serve the purchase notice. The courts have held that the person or persons serving the notice must own *all* of that land, and the purchase notice cannot relate to *part* of that land. Thus, in *Smart & Courtney Dale Ltd. v.*

45. VICTOR MOORE, A PRACTICAL APPROACH TO PLANNING LAW § 5.28 (9th ed. 2005). In 2000–2001, only fourteen notices were referred to the Secretary of State, and all of these were unsuccessful because they were either rejected, found to be invalid, or withdrawn.

46. Town and Country Planning Act, 1990, c. 8, § 137 (Eng.).

47. See *Hall & Co. Ltd. v. Shreham-by-Sea Urban Dist. Council*, [1964] 15 P. & C.R. 192 (Q.B.D. 1963); *Regina v. Hillingdon London Borough Council Ex Parte Royco Homes Ltd.*, [1974] Q.B.D. 720.

48. Defined by section 336(1) as the person entitled to the rack rent and so would exclude a freeholder who had let the land for less than a rack rent. For a detailed consideration of the definition in relation to purchase notices, see Ministerial Decision, [1980] J. Plan. L. 53 (U.K.).

Dover R.D.C.,⁴⁹ the Lands Tribunal held that a purchase notice is invalid if the claimants do not own all the land but several owners can join together and serve a notice. The purchase notice can however relate to only part of the land that is the subject of the planning decision where the decision, in effect, severs the land by granting permission for part of the land and refusing permission for the rest of the land.

More importantly, the need to relate the purchase notice to all of the land means that it is not enough if just part of the land is not capable of reasonable beneficial use. This question must be determined by looking at the totality of the land. Thus, in *Wain v. Secretary of State for the Environment*,⁵⁰ Lord Denning stated that where a part of the land is the subject of a purchase notice and is of beneficial use, and part of the land is not of beneficial use, the owner cannot require that the land be purchased from him. In such a situation, the landowner can apply for permission to develop the part of the land that had been held to be incapable of beneficial use.

B. No Need to Show Causation

Section 137 does not expressly state that it is necessary to prove that the land has become incapable of reasonable beneficial use *because* of the adverse planning decisions. It is not enough simply to produce evidence that under the current use, the land is incapable of reasonable beneficial use; claimants must also have either applied for planning permissions or been served revocation or discontinuance orders.

But the courts have held that landowners do not need to show that the adverse planning decision directly caused the land to be so incapable. In *Purbeck District Council v. Secretary of State of the Environment*,⁵¹ which involved a purchase notice concerning an area of marshland, Mr. Justice Woolf held that it was not incumbent on the server of the notice to show that there was a causal connection between the adverse planning decision occasioning the notice and the fact that the land is incapable of reasonable beneficial use. It also does not even matter that the owner may have caused the land to be in its current state,⁵² unless this was the result of unlawful development and it is not too late to take enforcement action.⁵³

49. *Smart & Courtenay Dale Ltd. v. Dover R.D.C.*, (1972) 23 P. & C.P. 408.

50. *Wain v. Secretary of State for the Environment*, (1982) 44 P. & C.R. 289 (Q.B.D.).

51. *Cf. Purbeck Dist. Council v. Secretary of State of the Env't*, (1983) 46 C. & P. R. 1 (Q.B.D.).

52. *See West Bromwich BC v. Minister of Hous. and Local Gov't*, [1968] R. & V.R. 349.

53. This was made clear by the Court of Appeal in *Balco Transport Services Ltd. v. Secretary of State for the Environment No. 2*, [1986] 1 W.L.R. 88 (A.C.). There, agricultural land had been made

C. The Meaning of “Incapable of Reasonable Beneficial Use”

The key word here is “beneficial.” While the fact that money can be derived from the existing use is clearly evidence that the use is beneficial, the absence of income is not necessarily conclusive that the use is not beneficial. Thus, a series of ministerial decisions has held that “garden” use may be a reasonably beneficial use because a garden will usually increase the value of an owned house, even though the garden itself does not produce income. In the Court of Appeal decision *Colley v. Secretary of State for the Environment*,⁵⁴ land was capable of being used for the production of wood through forestry. While there would be no significant income in the early years of forestry, the capital value of the land would increase. The Inspector therefore held that the land was capable of reasonable beneficial use as commercial woodland. Mr. Justice Evans stated:

The Inspector concluded that the land was capable of reasonably beneficial use as commercial woodland, and I agree that this conclusion was open to him. Whatever he may have taken “reasonably beneficial” to mean, it cannot have been financial benefit, because on the evidence this was non-existent on any sensible accounting basis. But it is not wrong in principle to say, as Circular 13/83 does, that the concept is not synonymous with profit.⁵⁵

Although Circular 13/83 said that it is relevant whether there is a market for the land or not, Mr. Justice Evans left this point open.

I prefer to leave open what the connection is, if there is one, between land becoming “incapable of reasonably beneficial use in

incapable of reasonable beneficial use because hardcore (hard material such as builder’s rubble) had been laid down without obtaining planning permission. It was now too late to take enforcement action because of the “four-year” rule.

The context of the four-year rule is the following. Generally, an unauthorized development becomes lawful if, after a specified length of time, no enforcement action has been taken. In the case of operational development, the span of time is four years. Town and Country Planning Act, 1990, c. 8, § 171 (Eng.).

Lord Justice Glidewell said that the conditions for confirming a purchase notice would not have been satisfied if an enforcement notice could still have been served and this would have restored the land to a beneficial state. On the other hand, it has been held that if improvements could be made to the land that would make it capable of reasonable beneficial use, this can be grounds for defeating a purchase notice if those works can be carried out lawfully without planning permission. *Balco Transp. Services Ltd. v. Sec’y of State for the Env’t* No. 2, [1986] 1 W.L.R. 88 (A.C.).

54. *Colley v. Sec’y of State for the Env’t*, (1999) 77 P. & C.R. 190 (A.C.).

55. *Id.* at 200.

its existing state” within section 137(3)(a) of the 1990 Act and the existence or otherwise of a market for the land. “Market” is an elusive concept. It may mean no more than that a purchaser can be found, who may have a special reason for buying the land in question, or it may be intended to have the same meaning as “available market,” the phrase used in the Sale of Goods Act 1979, s.51(3). It seems to me that introducing the idea of “market” and “market value” creates a possible source of confusion. Section 137(3)(a) is concerned with use, rather than the value of the land.⁵⁶

Thus, it seems that the use must be beneficial to the owner or prospective owner; it is not sufficient that the use, such as open land, might be beneficial to the public generally.⁵⁷

The qualifying word “reasonably” might indicate that some sort of comparison can be made to other kinds of uses to which the land can be put. However, it is clearly irrelevant that the land in its existing use is less beneficial than it would be if planning permission had not been refused for the proposed use.

This question of comparison is made very obscure by section 138.⁵⁸ The section first provides that, in deciding whether land is incapable of beneficial use, no account shall be taken of any unauthorized prospective use of that land.⁵⁹ This is logical because it is irrelevant that land is capable of beneficial use if such a use is unlawful. Of course, such development can be authorized by the grant of planning permission, and there is an express provision for the Secretary of State to direct that permission should be granted.⁶⁰ The converse, of course, is that account can be taken of authorized development.⁶¹

Section 138(2) goes on to state that a prospective use of land shall be regarded as unauthorized if it would involve the carrying out of development other than Part 1 of Schedule 3 development.⁶² This seems to suggest that one can take account of such development, which could mean

56. *Id.*

57. *See* Adams & Wade Ltd. v. Minister of Hous. and Local Gov’t, (1967) 18 P. & C.R. 190 (Q.B.D.).

58. Town and Country Planning Act, 1990, c. 8, § 138(1) (Eng.).

59. *Id.*

60. Town and Country Planning Act, 1990, c. 8, § 141(3) (Eng.). This power arises where the purchase notice is referred to the Secretary of State because a land planning authority refuses to accept the notice.

61. *See, e.g.,* Gavaghan v. Sec’y of State for the Env’t, (1988) 59 P. & C.R. 124 (Q.B.D.); Gauaghan v. Sec’y of State for the Env’t, (1989) 60 P. & C.R. 515 (A.C.).

62. Town and Country Planning Act, 1990, c. 8, § 138(2) (Eng.).

that a purchase notice could not be served, if such development would make the land capable of beneficial use. This, however, is absurd because (as pointed out above) there is neither a right to carry out such development nor a right to get compensation if permission is refused.

This result is explained by the Government in Circular 13/83 on the grounds that the remedy, by way of a purchase notice, is not intended to be available when an owner merely shows that he or she is unable to realize the full development value of the land. However, now that there are no rights to compensation for refusal of such development, this justification is gone, but the provision has not been amended. Although the Circular has not been cancelled or updated, it seems that the government has changed its mind. It seems that the Secretary of State now considers schedule 3 development irrelevant to the question of whether the land is incapable of beneficial use and relevant only to the assessment of the land's value should the purchase notice be confirmed.⁶³ This interpretation goes against the literal meaning of the words and the history of the provision, but as the *Encyclopedia of Planning Law and Practice* points out,⁶⁴ it makes sense because there is no right to carry out such development, and so in fact, it cannot make the land capable of beneficial use unless express permission is granted.

III. PLANNING BLIGHT AND INJURIOUS AFFECTION

“Planning blight” is described by the report *Future of Development Plans* as “the depressing effect on existing property of proposals which imply public acquisition and disturbance of the existing use.”⁶⁵ Planning blight is dealt with in section A below.

The value of property can of course be depressed not just by the threat of compulsory purchase, but also by the prospect of the construction and use of public works (such as highways), even where these works are not going to take place on compulsorily purchased land. This problem is known as “injurious affection” and is discussed in section B below.

63. See *Hillingdon London BC v. Ashton Homes Planning Inspector*, (1987) 2 P.A.D. 341.

64. 2 *ENCYCLOPEDIA OF PLANNING LAW AND PRACTICE* ¶ 137.09 (Malcolm Grant ed., Sweet & Maxwell 1959).

65. *PLANNING ADVISORY GROUP, MINISTRY OF HOUSING AND LOCAL GOV'T, THE FUTURE OF DEVELOPMENT PLANS: A REPORT BY THE PLANNING ADVISORY GROUP 50* (Her Majesty's Stationery Office 1965). This important government paper served as the basis for the major reform of the British planning law in 1967.

A. *Blight Notices*

A blight notice is similar to a purchase notice in that it is a form of inverse compulsory purchase because it forces the potential acquiring authority to purchase the land ahead of the scheme. The introduction of blight notices was necessary. Seriously blighted land normally is still capable of beneficial use, and a purchase notice does not afford a remedy for the fact that the land has become unsellable. However, it is important to realize that a blight notice can only be served if (1) the land falls within one of the specified categories of blighted land, which includes typical public services such as schools, and (2) the person serving the blight notice has a “qualifying interest.”⁶⁶

1. *The Qualifying Land*

The specified descriptions are complex and diverse. They all cover cases where there are proposals that imply that land is likely to be compulsorily purchased at some time in the future. The crucial part of the various descriptions is the stage at which the proposal must have reached before the land comes within the particular category. The present categories range from land allocated for public functions in development plans to clearance and renewal areas under the Housing legislation.

The category of development plans⁶⁷ covers land indicated in a development plan that may be required for various public functions. This category extends to development plans that have been submitted to the Secretary of State for independent examination. Thus, the proposal does not have to have been formally adopted.

Also included is land indicated as required for public functions in a non-statutory plan (approved by a resolution passed by a local planning authority for the purpose of exercising its development control functions), or where the planning authority has resolved or been directed by the Secretary of State to safeguard the land for the purpose of public functions.⁶⁸ The word “indicated” is rather vague and has been held by the Lands Tribunal to even include diagrams.⁶⁹

66. Town and Country Planning Act, 1990, c. 8, § 149 (Eng.).

67. The reform of development plans carried out by the Planning and Compulsory Purchase Act 2004 has resulted in changes to schedule 13 to take into account the new system of development plan documents. However, the basic principle has not altered. *See* Compulsory Purchase Act, 2004, c.5, § 13.

68. Town and Country Planning Act, 1990, c. 8, sched. 13, ¶¶ 5, 6 (Eng.).

69. *See* *Bowling v. Leeds County Borough Council*, (1974) 27 P. & C.R. 531.

The land must clearly fall within the specified description. In *Bolton Corp. v. Owen*, the Court of Appeal held that where a development plan stated that the land was to be cleared and redeveloped for residential purposes, the person serving the blight notice had not shown that the land was allocated for the purposes of the functions of a local authority because the redevelopment could be carried out by a private developer (though in the circumstances this would seem rather unlikely).⁷⁰

2. *The Qualifying Interests*

The qualifying interests are defined narrowly so as to only include those persons who might be expected to suffer particular hardship as a result of planning blight. This essentially means that blight notices can only be served by the owner-occupiers of residential properties or the owner-occupiers of non-domestic property, in which the annual income from the business is less than an amount prescribed by the Secretary of State.⁷¹

3. *Proof of Injury*

Individuals serving blight notices must be able to establish injury to their interests in land by showing that they have made reasonable endeavors to sell their properties, but because the lands are comprised in one of the specified categories, they are unable to sell their interests except at prices that are “substantially lower”⁷² than what they might otherwise have been reasonably sold. The burden is on the person serving the notice, and the notice may be unsuccessful if there are other reasons why the owner has been unable to sell the land.⁷³ What constitutes a “reasonable endeavor” is a question of fact and depends on the particular circumstances.⁷⁴

4. *The Process*

The notice must be served on the public body that will acquire the land. On being served with a blight notice, the public authority has to decide

70. *Bolton Corp. v. Owen*, [1962] 1 Q.B. 470.

71. Town and Country Planning Act, 1990, c. 8, § 149 (Eng.).

72. Town and Country Planning Act, 1990, c. 8, § 150 (Eng). The courts have not yet given any guidance as to the meaning of the term “substantially lower” used in section 150(1).

73. See *Malcolm Campbell v. Glasgow Corp.*, [1972] S.L.T. 8 (Lands Tr. 1972).

74. *Lade and Lade v. Brighton Corp.*, (1971) 22 P. & C.R. 737 (Lands Tr.).

whether to accept the notice or serve a counter-notice that specifies the grounds on which the public authority is rejecting the notice. An obvious ground is that the land does not come within any of the specified categories. The authority can also head off a counter-notice by stating that it does not intend to acquire the property,⁷⁵ or in certain circumstances, the public authority can disclaim any intention of acquiring any part of the land during the period of fifteen years from the date of the counter-notice. Where there has been such a “disclaimer to purchase,” the powers to purchase cease to have effect.⁷⁶

These provisions mean that the public authority can, in effect, change its mind about compulsorily purchasing a property. If the public authority argues that the land does not come within the specified category, this has to be decided as at the date of the counter-notice.⁷⁷ However, the time-reference may be different when the counter-notice is based on the intentions of the authority. In this type of a situation, if the question comes before the Lands Tribunal, a public authority may be able to support a counter-notice by demonstrating that a change in intentions took place after the date of the counter-notice.⁷⁸ This would seem rather unfair on the person affected by blight, and one can argue that the public authority’s intentions should be judged as from the date of the counter-notice.

Once a counter-notice has been served, it will have the effect of overriding the blight notice, unless it is referred to the Lands Tribunal within two months.⁷⁹ If no counter-notice is served or it is not upheld by the Lands Tribunal, the legal effect is that the named authority is deemed to have been authorized to compulsorily purchase the land and to have served a notice that cannot be withdrawn.⁸⁰ Therefore, the public authority is forced to acquire the land at a price that will be calculated in the same way as if the compulsory purchase had been initiated by the authority itself. One possible objection in a counter-notice is that the authority only requires part of the land. However, this right is qualified, as under ordinary

75. Or only part of the property. *See* Town and Country Planning Act, 1990, c. 8, § 151(4)(c) (Eng.).

76. Town and Country Planning Act, 1990, c. 8, § 155 (Eng.).

77. *See* Sinclair and Sinclair v. Sec’y of State for Transport, (1997) 75 P. & C.R. 548.

78. *Id.* *See also* Mancini v. Coventry City Council, (1982) 44 P. & C.R. 114.

79. *See* Town and Country Planning Act, 1990, c. 8, § 153 (Eng.). The Lands Tribunal’s jurisdiction is limited to determining whether the objections listed in the counter-notice are justified. The House of Lords has held this to mean that there is no separate jurisdiction to argue that the claimant does not have a qualifying interest, if this has not been made a ground of objection in the counter-notice. *Essex County Council v. Essex Incorporated Congregational Church Union*, [1963] A.C. 808 (H.L.) (appeal taken from Eng.).

80. *See* Town and Country Planning Act, 1990, c. 8, § 154 (Eng.).

compulsory purchase principles, the claimant's right to require that the entire plot be acquired is transposed onto the blight notice procedures.⁸¹ This generally applies when part of a house or factory cannot be taken without causing material detriment to the house or factory, or when a part of the park, garden, or house cannot be severed without seriously affecting its amenity or convenience.⁸²

B. Injurious Affection

Where planning permission is granted to a private developer, the grant does not override any private law rights of neighboring land. For example, if the use of the land granted by the planning permission is carried out in a way that interferes with the use and enjoyment of neighboring land, an action may be brought in nuisance. The authority granting the permission has no authority to authorize a nuisance.⁸³ In contrast where a statute authorizes public works and activities, it will usually be implied that the Act confers immunity from being sued in nuisance.⁸⁴

However in certain circumstances, Parliament provides for the alleviation of hardship caused by public works by paying compensation for what is usually termed "injurious affection."⁸⁵ This applies in situations where the result of taking the land for public works is to sever the land from other land that is owned by the claimant. But even if there is no severance, there are circumstances where compensation can be claimed for adverse consequences on neighboring land of both the construction and the use of public works. We will now examine generally the law governing injurious affection.

1. Injurious Affection Due to Severance of Land

Section 7 of the Compulsory Purchase Act 1965 provides that assessment of the amount of compensation for compulsory purchase can include the physical damage caused by the severance of the land from the

81. *See id.* § 166.

82. *See* Compulsory Purchase Act, 1965, c. 56, § 8; Town and Country Planning Act, 1990, c. 8, § 166(2) (Eng.).

83. This principle is qualified by the fact that the grant of planning permission can result in a change in the character of a neighborhood, which can alter what will amount to a nuisance. *See, e.g.,* Gillingham Borough Council v. Medway (Chatham) Dock Co. Ltd., [1993] Q.B. 343; Wheeler v. J.J. Saunders Ltd., [1995] 3 W.L.R. 466 (C.A.) (appeal taken from Eng.).

84. *See* Hammersmith and City Railway Co. v. Brand, [1869–70] L.R. 4 H.L. 171; Allen v. Gulf Oil Refining Ltd., [1981] A.C. 1001 (H.L.) (appeal taken from Eng.).

85. *Hammersmith*, L.R. 4 H.L. at 175, 178.

claimant's other lands that are not being compulsorily purchased.⁸⁶ In addition, section 7 provides that damage by reason of the remaining land being otherwise injuriously affected can also be taken into account when assessing the amount of compensation.⁸⁷ Section 44 of the Land Compensation Act 1973 further clarifies that compensation covers damages caused by the whole of the works and not just the works on the part of the land compulsorily purchased. The courts have broadly interpreted this provision by holding that it covers any depreciation of the value of the retained land resulting from the exercise of the powers of the acquiring authority, including the depreciating effects of loss of privacy and amenity.⁸⁸ The result is that, at least where land is severed, the person owning neighboring land is in a stronger position if the damage is caused by the public works than if the activities are being carried out by a private person. The term "severing of land" would seem to suggest that the retained land must be physically touching the land taken. However, the courts have held that the land does not have to be actual physically contiguous,⁸⁹ but must at least be "so near to each other and so situated that the possession and control of each gives an enhanced value to all of them."⁹⁰

2. Injurious Affection Caused by the Construction of Public Works Even If No Land Is Taken

Section 68 of the Land Clauses Consolidation Act 1845 provides a right to compensation "[i]n respect of any lands . . . which shall have been taken for or injuriously affected by the execution of the works . . ."⁹¹ Section 10(2) of the Compulsory Purchase Act 1965 confirms the right to compensation under section 68 by stating that section 10 shall be construed "[a]s affording in all cases a right to compensation for injurious affection to land which is the same as the right which section 68 of the Land Clauses Consolidation Act 1845 has been construed as affording

86. Compulsory Purchase Act, 1965, c. 56, § 7.

87. *Id.*

88. *See* Duke of Buccleuch v. Metropolitan Board of Works, [1871–72] L.R. 5 H.L. 418.

89. *See* Cowper Essex v. Acton Local Board, [1889] L.R. 14 App Cases 153. The facts involved land taken for sewerage work that was separated by a railway from other land owned by the claimant. *Compare* Nisbet Hamilton v. Northern Lighthouses Comrs, [1886] 13 R. 710. In *Hamilton*, a small island, which was compulsorily purchased for a lighthouse, was some distance away from a house that was also owned by the claimant.

90. *See* Cowper Essex v. Acton Local Board, [1889] L.R. 14 App Cases 153, 167 (Watson, L.).

91. Land Clauses Consolidation Act, 1845, § 68.

...”⁹² This rather convoluted wording casts doubt on whether the way that section 68 has been construed is defensible. Certainly, it is doubtful that this provision was intended to give the right to compensation to those whose land was not being compulsorily purchased.⁹³ Yet in *Metropolitan Board of Works v. McCarthy*,⁹⁴ the House of Lords held that there was a right to compensation for damage to neighboring land as long as, but for the authorizing statute, the cause of action would be otherwise actionable at common law. However, the loss to the value of the land must have been due to the works and not the subsequent use.

The result is that those who own land next to public works, but do not have land acquired for those works, are in a much worse position than those who have land taken. The rather dubious rationale is presumably that the direct interference with their property rights justifies the special treatment. It seems arbitrary that owners of severed land who had small parcels taken can get compensation for depreciation caused by the use of the works, even if this would not be actionable in common law.

Wildtree Hotels Ltd. v. Harrow L.B.C.,⁹⁵ a recent decision by the House of Lords, has at least broadened the scope of the right by holding that it extends to temporary damage caused by construction, even if the capital value of the property will not be diminished once the works are completed. On the other hand, the House of Lords also held that damage caused by noise, dust, and vibration could not normally be the subject of a claim for compensation because it is almost impossible for such a claim to satisfy the requirements that (1) the damage has to be caused by the lawful exercise of statutory powers, and (2) the damage would have been actionable at common law in the absence of statutory protection.⁹⁶ To succeed at common law, it was necessary to show that the building works had been conducted without reasonable consideration for the neighbors. Conversely, if the works were carried out without all reasonable regard and care for the interest of other persons, they would not be made immune from liability by the authorizing act. So either way, it would not be compensable under section 10. In the latter case, if landowners wished to recover for such damage, they had to assume and discharge the burden of

92. Compulsory Purchase Act, 1845, § 10.

93. See *Argyle Motors (Birkenhead) Ltd. v. Birkenhead Corp.*, [1975] A.C. 99, 102, 129–31 (H.L.) (Wilberforce, L.) (appeal taken from Eng.).

94. [1874–75] L.R. 7 H.L. 243.

95. [2001] 2 A.C. 1 (H.L.) (appeal taken from Eng.).

96. *Id.*

proving in an ordinary action for nuisance that the undertaker of infrastructure construction had exceeded its statutory powers.

3. *Rights to Compensation Under the Land Compensation Act 1973*

The courts have frequently deprecated the state of the law regarding compensation for compulsory purchase. Recently in *Waters v. Welsh Development Agency*,⁹⁷ Lord Nicholls of Birkenhead summed up the position in the following words:

Unhappily the law in this country on this important subject is fraught with complexity and obscurity. To understand the present state of the law it is necessary to go back 150 years to the Lands Clauses Consolidation Act 1845. From there a path must be traced, not always easily, through piecemeal development of the law by judicial exposition and statutory provision.⁹⁸

In the same case in the Court of Appeal, Lord Justice Carnwath took the view that “[t]he right to compensation for compulsory acquisition is a basic property right. It is unfortunate that ascertaining the rules upon which compensation is to be assessed can involve such a tortuous journey, through obscure statutes and apparently conflicting case law, as has been necessary in this case.”⁹⁹ The case itself concerned the notorious “pointe gourde” rule,¹⁰⁰ but the comments could equally apply to the law on injurious affection.

However, the enactment of the Land Compensation Act 1973 has done something to address the problems¹⁰¹ of those who own land close to public works but cannot get compensation under section 7 of the Compulsory Purchase Act 1965 because no land of theirs has been taken. The Land Compensation Act 1973 attempts to redress the problem by providing for a right to compensation for depreciation caused by the use of public works.¹⁰² The claim is limited to depreciation resulting from the use

97. *Waters v. Welsh Development Agency*, [2004] UKHL (H.L.) 19, [2004] 2 All E.R. 915, 919 (H.L.) (appeal taken from Eng.).

98. *Waters*, 2 All E.R. at 919.

99. *Id.*

100. *See generally* *Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendant of Crown Lands*, [1947] A.C. 565 (P.C.) (appeal taken from Eng.).

101. In 1969, Justice pointed out that it was a sad commentary on the present law that an owner of land in an area through which a motorway was to be constructed should prefer that the motorway should take all his property rather than go near it. JUSTICE, COMPENSATION FOR COMPULSORY ACQUISITION AND REMEDIES FOR PLANNING RESTRICTIONS (1969).

102. *See* The Land Compensation Act, 1973, c. 26, § 1.

of the public works creating the following physical factors: “noise, vibration, smell, fumes, smoke and artificial lighting and the discharge on to the land . . . of any solid or liquid substance.”¹⁰³ It creates a narrower version of the common law tort of nuisance; indeed, compensation is only payable if there is statutory immunity from actions in nuisance in respect of the public works.¹⁰⁴ It should also be noted that loss of privacy, loss of a view, and general loss of amenity are not included. Thus, the right to compensation is less generous than that provided under section 7 of the Compulsory Purchase Act 1965 for landowners who have had part of their land taken for public works.¹⁰⁵

The public works covered under the Land Compensation Act 1973 are the use of any highway, any aerodrome, and any other works provided or used in the exercise of statutory powers.¹⁰⁶ The Act also tries to cover the problem where existing works (the Act is not retrospective) are altered; however, intensification of the use is not covered. Thus, section 9 covers depreciation caused by alterations to the carriageway of an existing road, alteration of a runway or apron at an aerodrome, and reconstruction, extension, or alteration of other public works.¹⁰⁷ Even depreciation caused by a change of use in respect of any public works is covered, except in the case of highways or aerodromes.¹⁰⁸

The provisions of the Land Compensation Act 1973 can result in some rough justice. A good example is the recent case of *Brunt v. Southampton International Airport*,¹⁰⁹ where claims were brought by owners of houses in Twyford, near Winchester, who contended that the value of their houses had been diminished by increased noise from aircraft movements arising from alterations made at the airport between 1993 and 1995. There was no dispute that there had been substantial works to the taxiways and aprons at the airport during that period. The dispute was over whether the main purpose of the works was to provide facilities for a greater number of aircraft, in which case the landowners would be eligible for compensation under section 9(6)(b). It seems that the works had not been made for the purpose of increasing the numbers of aircraft, but rather to increase the

103. *See id.* § 1(2).

104. *See id.* §§ 1(1), 1(2).

105. *See, e.g.,* *Shepherd and Shepherd v. Lancashire County Council*, (1976) 33 P. & C.R. 296 (holding that the right to compensation does not cover a land’s depreciation that was caused simply by being close to a refuse tip).

106. Land Compensation Act, 1973, c. 26, § 1(3).

107. *See id.* § 9.

108. *Id.*

109. [2005] EWCA (Civ) 93, [2005] 2 P. & C.R. 21 (C.A.) (appeal taken from Eng.).

number of passengers that could pass through the airport by allowing larger aircraft to use the aerodrome. The majority in the Court of Appeal took a literalist approach and upheld the decision of the Lands Tribunal that the claim did not come within the wording of section 9(6)(b), even though the alterations undoubtedly had resulted in an increase in the disturbance to neighboring properties. Lord Justice Ward, in a robust dissenting judgment, argued that the Court should have taken a purposive or teleological approach to interpretation and read the provisions so that they covered all type of new works that resulted in increased disturbance.

To be eligible for compensation under the Land Compensation Act 1973, it is not enough for the claimant to show a qualifying interest; the claimant must have acquired the interest before the date that the works first came into use.¹¹⁰ Similar to blight notices, the right to compensation only applies to owners of residential dwellings, owner-occupiers of agricultural units, and owner-occupiers of small properties.¹¹¹

In calculating the depreciating effect, it is to be assumed that planning permission will not be granted for development. However, the development exception found in paragraph 2, schedule 3, which is concerned with the change of use of a single dwelling-house into two or more dwelling-units, apply here too. Thus, in assessing damage, the appraisers may take into account expectations that paragraph 2, schedule 3 development would have occurred.¹¹² Normally, this would not have an appreciable effect on the value of the property. In addition, there are provisions that require appraisers to take into account increases caused to the land by the use of the works¹¹³ and any right to mitigating works, such as insulation works, to be carried out on the property.¹¹⁴

IV. HUMAN RIGHTS ACT 1998

An adverse planning decision could bring into play the human rights set out in the European Convention on Human Rights (ECHR). The Human Rights Act was enacted in the U.K. in 1998, thereby making it unlawful in United Kingdom law for a public authority to act in a way that is incompatible with the convention rights set out in the Act.¹¹⁵ However, if the provisions of primary legislation, such as an act of Parliament, mean

110. The Land Compensation Act, 1973, c. 26, § 1(1).

111. *See id.* § 2(5).

112. *See id.* § 4(3).

113. *See id.* § 6(1).

114. *See id.* § 4(3).

115. Human Rights Act, 1998, c. 42, § 6(1).

that the authority was obliged to act as it has, the action is not unlawful.¹¹⁶ The fact that, prior to the commencement of the Human Rights Act 1998, no decisions of the European Court of Human Rights held that the United Kingdom's planning laws breached the Convention would suggest that the U.K. law is not incompatible. On the other hand, it has to be recognized that it is now possible for the United Kingdom courts to give the convention rights a stricter interpretation than the European Court has done; the U.K. courts are only required to take the European Court of Human Rights' jurisprudence *into account*.¹¹⁷ So far, there is little sign that the Human Rights Act 1998 will have much impact on this branch of the law.

However, as indicated in the introduction, an adverse planning decision could invoke not only article 1 of the First Protocol of the ECHR (protecting property rights), but also article 8 (protecting private life, family life, and the home).¹¹⁸ The obvious example would be where an applicant was refused planning permission for residential use of land. So far, most of the cases have been concerned with gypsies who, because of their nomadic way of life, are constantly in dispute with planning authorities.¹¹⁹

The human rights under both article 8 and article 1 are qualified.¹²⁰ The ECHR recognizes the authority of the state to interfere in article 8 rights when the interference is in accordance with the law and is necessary in a democratic society for the interests of national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or for the protection of the rights and freedoms of others.¹²¹ In the case of article 1, the state may limit the peaceful enjoyment of possessions where such control is in the general interest.¹²² In *R (on the application of Michael and Jenny Boyd) v. English Nature*,¹²³ Rabinder Singh QC, sitting as a Deputy Judge, pointed out that

116. *See id.* § 6(2).

117. *See id.* § 2(1).

118. Human Rights Act, 1998, c. 42, sched. 1, art. 8 (Eng.); *Id.* sched. 1, pt. 2; Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

119. The Human Rights Act 1998 has had a significant impact on the law concerned with the enforcement of planning law. *See* South Bucks Dist. Council v. Porter, [2003] UKHL (H.L.) 26, [2003] 2 A.C. 558 (H.L.) (appeal taken from Eng.).

120. The Human Rights Act, 1998, c. 42, sched. 1, art. 8 (Eng.); *Id.* sched. 1, pt. 2, Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

121. *See id.* art. 8.

122. *See id.* art. 1.

123. [2003] EWHC 1105.

article 1, unlike article 8, does not require the interference to be necessary for a pressing social need. He nevertheless held that the state's interference with the right of possession must be proportionate.¹²⁴

To date, the European Court of Human Rights and the United Kingdom courts have held that the public interest justifies the existence of planning controls and the interference with the rights that these controls entail.¹²⁵ Yet, the interference must be proportionate. Thus, in *Buckland v Secretary of State for the Environment, Transport and the Regions*,¹²⁶ a case concerning article 8, Justice Sullivan expressed the following view:

Our planning system is based on the premise that land owners “properly expect to be able to use or develop their land as they judge best unless the consequences for the environment or the community would be unacceptable” (see paragraph 36 of PPG1). Or, to use the language of the European Court of Human Rights, planning permission will be granted unless there is a “pressing social need for a refusal.”¹²⁷

In terms of article 1,¹²⁸ a planning control is categorized as a control over the use of property rather than a taking, unless the land is rendered useless because it cannot be used for an alternative purpose.¹²⁹ In the latter case, the purchase notice process would normally satisfy article 1 by affording compensation. Although, the Human Rights Act 1998 might require a more liberal interpretation of the meaning of “beneficial use,” so far, there has been no case on this issue.

Amendments to legislation that have the effect of taking away property rights, such as changes to the Use Classes Order, might also come within article 1 of the First Protocol. However, the Court of Appeal in *Trailer & Marina (Leven) Ltd. v. Secretary of State for the Environment, Food and Rural Affairs, English Nature*¹³⁰ rejected a claim that a change in the law, which had the result of taking away a right to compensation, was in breach

124. See *id.* ¶¶ 19, 20. For an analysis of how the courts have interpreted the need to show proportionality principle in planning law, see Michael Purdue, *The Human Rights Act 1998, Planning Law and Proportionality*, 6 ENV'T. L. REV. 161 (2004).

125. See *Buckley v. U.K.*, 1996-IV Eur. Ct. H.R. 1274; *Chapman v. U.K.*, 2001-I Eur. Ct. H.R. 47.

126. [2001] EWHC (Admin) 524.

127. *Id.* (internal citations omitted).

128. Human Rights Act, 1998, c. 42, sched. 1, pt. 2; Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

129. See *Sporrong v. Sweden* (1982) 5 E.H.R.R. 35; *Pine Valley Devs. v. Ireland*, (1992) 14 E.H.R.R. 319.

130. [2004] EWHC (QB) 153 (appeal taken from Eng.).

of article 1. The Countryside and Rights of Way Act of 2000 made changes to the Wildlife and Countryside Act of 1981 that resulted in the removal of the previous rights to compensation if operations were prohibited by designation of land as a "Site of Special Scientific Interest." The Court held that restrictions on the use of property in the public interest without compensation, which fell short of de facto expropriation, would not normally be in breach of article 1, unless the detrimental effect upon the individual far outweighed the public benefit.¹³¹

A similar rule would likely hold regarding injurious affection. In theory, the granting of planning permission for a development that seriously affects the use and enjoyment of neighboring land could equally be said to engage both article 8 and article 1.¹³² However, in the case of private development, the chances of success are very remote. The injurious affection would have to be very severe to engage either article 8 or article 1. Furthermore, the neighbor in these cases would have private law remedies in nuisance because the grant of planning permission does not give immunity for a nuisance action.

This issue came up in the Court of Appeal decision of *Lough v. First Secretary of State*,¹³³ where it was argued that the decision of a planning Inspector to grant planning permission for the development of a twenty-story building with twenty-eight dwellings and shops and restaurants in the Bankside area of Southwark would result in the loss of privacy, overlooking, loss of light, loss of a view, and interference with television reception.¹³⁴ The Court basically held that the Inspector, in coming to his decision, had fairly balanced the competing interests. The loss of value that would be caused by the development was significant, but that did not constitute a separate or independent basis for alleging a breach of the Convention rights involved.

On the other hand, articles 8 and 1 were successfully used in *Dennis v. Ministry of Defence*¹³⁵ to find a claim to damages with respect to aircraft noise caused by RAF harrier jets flying over property. The court held that there had been an interference with Mr. and Mrs. Dennis' human rights under article 8 and article 1 and that an appropriate assessment of damages at common law would provide "just satisfaction" under section 8 of the

131. *Id.*

132. See *Guerra v. Italy*, 1998-I Eur. Ct. H.R. 7; *Lopez Ostra v. Spain*, Eur. Ct. H.R. (ser. A) No. 302-c (1994).

133. [2004] EWCA (Civ) 905 (appeal taken from Eng.).

134. *Id.*

135. [2003] EWHC (QB) 793.

Human Rights Act 1998.¹³⁶ The court, however, refused to grant an injunction to stop the interference on the grounds that this was not in the public interest.¹³⁷ The court held that, while in this regard the public interest was greater than the individual private interests of Mr. and Mrs. Dennis, it would not be proportionate to pursue or give effect to the public interest without compensation.¹³⁸

Yet, in *Marcic v. Thames Water Utility Ltd.*,¹³⁹ the House of Lords rejected a claim that repeated flooding of a home garden with sewage from the public authority's overloaded sewers was in breach of article 8.¹⁴⁰ The House of Lords took the view that the statutory scheme was not incompatible with article 8 because it struck a reasonable balance between the interests of the customers paying sewerage charges and those affected by flooding.¹⁴¹

The problem with this approach is that it leaves open the question of whether, even if the statutory scheme itself is compatible with the ECHR, its operation in a particular case may be incompatible. If Mr. Marcic had complained to the Director General under the statutory scheme and then sought judicial review of the failure to take enforcement action, the court would have been faced with that question.

Lord Nichols seemed to have some sympathy for this reasoning by stating that he had some concern about the lack of compensation.¹⁴² It seems that section 7(2)(b) of the Water Supply and Sewerage Services (Customer Service Standards) Regulations¹⁴³ provides for a modest compensation scheme for internal flooding, while there is no statutory provision regarding external sewer flooding.¹⁴⁴ Lord Nichols then went on to observe at paragraph 45:

It seems to me that, in principle, if it is not practicable for reasons of expense to carry out remedial works for the time being, those who enjoy the benefit of effective drainage should bear the cost of paying some compensation to those whose properties are situated lower down in the catchments area and who, in consequence, have

136. *Id.*

137. *Id.*

138. *Id.*

139. [2001] 3 All E.R. 698.

140. *Id.*

141. *Id.*

142. *Id.*

143. Water Supply and Sewerage Services (Customer Service Standards) Regulations, 1989, S.I. 1159, § 7(2)(b).

144. *Id.*

to endure intolerable sewer flooding, whether internal or external. As the Court of Appeal noted, the flooding is the consequence of the benefit provided to those making use of the system: [2002] QB 929, 1001, para 113. The minority who suffer damage and disturbance as a consequence of the inadequacy of the sewerage system ought not to be required to bear an unreasonable burden. This is a matter the Director and others should reconsider in the light of the facts in the present case.¹⁴⁵

This suggests that the lack of compensation may mean that “injurious affection” may be actionable under the Human Rights Act 1998 as not being proportionate.

CONCLUSIONS

The general rule that there is no right to compensation for a refusal or conditional grant of planning permission is now so well established that it would be futile to call for any major change. It is true that it means that the development control system has similarities to a gambling machine in that, if planning permission is granted, this grant can ring the equivalent of three bells by providing a substantial windfall to the owner of the land. On the other hand, adverse planning decisions do not usually directly lower the value of the land, and there is provision for any obvious wipe-outs caused by discontinuance and revocation orders. Also, as planning decisions are made in the public interest, if LPAs had to pay out compensation for refusals, this could lead to bad planning. At the moment, the United Kingdom government is more concerned with taxing the uplift in value.

Nevertheless, in the case of the revocation and modification of grants of permission, there are certain anomalies and problems. In particular, attention should be given to the problems involving proof that damage was caused by changes to the Use Classes Order and designations that alter permitted development rights. To limit the amount of compensation, it might be necessary to limit the compensation to the cost of works and preparation incurred in reliance directly on the rights. Decreases in the value of the land should remain uncompensated. It is also high time that the remaining references to schedule 3 development be scrapped when assessing the value of land following revocation.

145. *Marcic v. Thames Water Utils. Ltd.*, [2003] UKHL (H.L.) 66, [2004] 2 A.C. 42, ¶ 45 (H.L.) (appeal taken from Eng.).

In the case of purchase notices, the fact that they are used so little might suggest at first that not much change is needed. On the other hand, the infrequent use of purchase notices by landowners may be caused by difficulties they encounter to prove that the land is not capable of reasonable beneficial use in its existing state. The present interpretation is too narrow and should be extended to cover situations where the adverse planning decisions do not leave any *economically* beneficial use.¹⁴⁶ Again, it is time for the references to schedule 3 to be removed.

The area of injurious affection deserves a complete overhaul. The old provisions in the Land Clauses Consolidation Act 1845 should go. The Lands Compensation Act 1973 should be extended to cover losses caused by both the construction and the use of public works. At the same time, the decision in *Brunt v. Southampton International Airport* could be overturned so that Lord Justice Wade could no longer complain that the result resembled the actions of the promise of the tyrant Temures. He promised not to shed the blood of the garrison of a town if they surrendered and then fulfilled the promise by burning them alive.¹⁴⁷

146. For more on this topic, see the approach to “takings” of land in the United States in Jeremy Rowan Robinson & Andrea Ross, *Compensation for Environmental Protection in Britain: A Legislative Lottery*, 5 J. ENVTL. L. 245 (1995); Michael Purdue, *When A Regulation of Land becomes a Taking of Land—A Look at Two Recent Decisions of the United States Supreme Court*, 4 J. PLAN. & ENV'T L. 279 (1995).

147. See *Brunt v. Southampton International Airport*, [2005] EWCA (Civ) 93, [2005] 2 P. & C.R. 21, ¶¶ 60–62 (C.A.) (appeal taken from Eng.).