PROVOKING MCAUSLAN - PLANNING LAW AND PROPERTY RIGHTS

Kim Bouwer and Rachel Gimson *

Introduction

It is an accepted truism that 'every [person] … [has] a right to use his own land by building on it as he thinks most to his interest'.[1] This sentiment reflects a prevailing belief that common law protections exist solely to protect private interests in land, including against encroachment into private land rights by third parties, the latter being the primary focus of this chapter. Thus, the law governing land and property relations has traditionally been classified as 'private', being concerned with rights and priority interests in estates in land as fundamentally constitutive of private property relations. In contrast, administrative regimes, such as those involving planning and environmental issues are typically defined as 'public'. These public regimes are commonly seen as presenting an incursion on private rights,[2] rather than as being part of an intertwined and complimentary body of property law principles.

Despite these entanglements, the role and impact of planning law continues to be neglected in academic analysis of land law. It is telling that few property law textbooks give planning law a distinct treatment,[3] despite its growing importance in modern day land use. Indeed, an increasing number of the decisions discussed therein refer to, or turn on, the regime of planning control.[4] Moreover, where it is discussed, planning law is very much perceived as something that is *imposed* on private property law protections, rather than being a *part of* property law principles.[5] By recognising that property law also exists to protect the social utility of land, discussed next in this chapter, it is possible to reconcile planning law principles as being part of the foundational principles of land law.

If there is a planning law canon, central to it is Patrick McAuslan's thesis that argues there is an ideological tension between the private values of property rights, and the quasi-democratic nature of public land administration.[6] McAuslan discusses three ideologies. First, the traditional common law (private) approach, in which courts mediate between competing parties, frequently for the protection of private property and its institutions.[7] Second, the administrative (public) approach which characterises planning law as existing to advance land management goals, if necessary against the interests of private property, and in the public interest. In this way, he argues that planning law can be seen as both imposing constraints on private property rights and existing for the legal preservation of the public interest. The third ideology is that of public participation. Participation can inform and legitimise decision-making within planning processes, for instance, Eloise Scotford and Rachael Walsh highlight how privileged a position property rights-holders frequently are in planning processes.[8] This gives property rights-holders a 'distinctive voice' in land use decisions,[9] and a greater capacity for influence in democratized decision-making processes. However, understanding the potential and shortcomings of these processes lie beyond the scope of this chapter, although these issues are touched on or further explored throughout this volume.

The purpose of the chapter is to analyse McAuslan's assumed opposition between private land rights and public administrative regimes. Interestingly, even as McAuslan asserts the competition between these ideologies, a recognition of their entanglement is to some extent implicit in his work. He explains that these seemingly opposing regimes in essence are different aspects of the same legal and political establishment. The legal status quo, according to McAuslan, is preserved by systemic protection of property rights within an administrative system which purports to represent the public interest.[10] Despite its publication over 40 years ago in a breathtakingly dynamic area of policy and practice,

McAuslan's analysis of this tension still informs scholarly practice in planning,[11] even if the balance between the competing ideologies can be understood to shift over time.[12]

Our project here is to interrogate McAuslan's understanding of public and private ideologies as being fundamentally opposed. While we do not dispute his thesis entirely, we argue that the public and private aspects of property governance are more entangled – and, at times, more complementary – than he suggests. We argue that the conception of private property rights as necessarily entirely deployed for selfish purposes,[13] is to some extent misconceived. We motivate for a better understanding of the social contribution and role of property, which includes a recognition of its 'symbiotic' relationship with land planning law.[14] Our conception of the social utility of land challenges the idea of a law of property concerned solely with the protection of private rights and interests. We also argue that planning law, by using the example of compulsory purchase, can shape and determine property rights. By so doing we emphasise two points. First, the conception of 'public interest' reflected in administrative planning frequently does not resemble the ordinary meaning of the term. Second, that the conception of the 'public interest' planning regime and 'private rights' property law, are more intertwined than supposed. We use the term social utility when discussing a public ethos in land law, and the term public interest to describe the purported goal of planning. Whilst so doing it is important to note that the terminology we use are not terms of art and are not precise; this is because these principles are not clearly defined or used consistently in practice.

The chapter is structured as follows. In the next section, we challenge the notions of strictly private conceptions of property in land by arguing that the courts also consider the promotion of the social utility of land in their decision-making. Subsequently, we discuss compulsory purchase and compensation in planning, arguing that these do not always advance the public interest. Finally, we conclude.

Land as a social utility

By presenting private interests and public rights as competing ideologies, our concern is that McAuslan's theory leads to an overfocus on property law's role in the protection of private interests. A private interest approach would see the courts settle property disputes purely on the basis of who has the better title claim. We are not disputing that the legal protection of property in land largely centres on the protection of private interests. Certainly, examples such as *Bradford Corpn v Pickles,*[15] demonstrate the capacity of the courts to focus purely on the private interest, at the expense of everything else. Here, the title holder's right to siphon off water running through his land was upheld, despite the fact that it limited the water access to the entire city of Bradford, which was rapidly expanding at the time. Similarly, in *Phipps v Pears*[16] the title owner was perfectly entitled to pull down his house, even though it exposed his conjoined neighbour's property wall to the elements when it had not been properly rendered. Focusing on cases such as these, it is no wonder that public interests in land are seen as incompatible with – or somehow alien to – such an approach. However, we argue here that public interests are less separate from the foundational principles of property law and that land law has a clear interest in protecting public rights, particularly when considering more recent property cases.

The protection of individual rights has never been the sole focus of the courts; land law has never sought *solely* to protect private rights. Title disputes do not exist in a vacuum and property law has historically sought to ensure that land remains useful and does not stagnate when determining property disputes, even if this is at times at the expense of the private right. We loosely describe this phenomenon as the social utility approach in land law. The implicit endorsement of the social utility of land grew during the Second Industrial Revolution through the creation of devices such as restrictive covenants, and the recognition

of recreational easements. These rights in rem, as part of a general law of servitudes, sought to manage property interests and can be described as a precursor to modern planning law.[17] It is important to note that we are not arguing that social utility always takes priority over private interests, but rather we seek to establish here that the courts, when seeking to resolve land disputes, do not simply consider who has better claim. Therefore, the protection of property rights is not always the 'selfish' endeavour suggested by McAuslan. Acknowledging a social utility approach to land can illustrate how the courts have sought to mediate disputes taking public interest considerations into account.

Although protecting the social utility of land is an inherent consideration in the protection of property rights, it is not a novel concept. Curiously, whilst this is extensively debated in the literature in the US,[18] this concept is largely ignored in English academic discourse. Kevin Gray and Susan Francis Gray are a fairly lone voice in explicitly acknowledging the protection of the social utility of land,[19] but they never directly advocate it or develop it as a thesis. Other academic texts touch on the concept, but do not discuss it fully.[20] There is clearly more to be said about the theoretical underpinnings of the social utility approach to land law, however this is beyond the scope of this chapter. Rather, this section seeks to establish that there is case law that reflects the concept of social utility. In particular, we argue here that it has gained increasing prominence in recent property law decisions. In doing so we suggest that the recognition and protection of public interests in land, such as planning law, is not at direct odds with the protection of private rights as McAuslan supposes.

So, to provide some examples of the existence of the social utility approach: a stark reminder of the social utility of land occurred 20 years before Lord Cranworth's statement, cited in the first sentence of this chapter, in the seminal judgement of *Tulk v Moxhay.*[21] Even though the Court of Chancery acknowledged that 'the price [of the land] would be affected

by the covenant' to 'keep and maintain ... Leicester Square garden',[22] they nonetheless recognised that an equitable restrictive covenant could run with the land. This decision can demonstrate how land law recognises, and also implicitly protects, the social utility of the land. Decided during the Second Industrial Revolution, when increasing urbanisation resulted in a greater need for land control,[23] the restrictive covenant provided an important tool through which competing land use could be resolved.[24] *Tulk v Moxhay* went against the *laissez-faire* instincts present in much of Europe at this time, where land obligations were largely seen as a contract between two parties.[25] However, where 'modern patterns of high-density land use have necessarily placed a premium on neighbourly co-operation and the avoidance of foreseeable harm to adjacent occupiers', the law of contract was seen as inadequate protection for neighbours.[26] 30 years after *Tulk v Moxhay*, Leicester Square was donated to the local government authority to be used as a public square, which undoubtably played an important role in maintaining this area of central London as open and public. Nevertheless, had the restrictive covenant not been created in *Tulk v Moxhay,* Leicester Square would look very different today.[27] Although the scope of the restrictive covenant remains narrow,[28] it nevertheless provides a powerful tool in ensuring social utility, where the preservation of open space and gardens 'uncovered with buildings' took precedence over the private rights of a developer.[29] Indeed, its very existence demonstrates how controls over land are not purely public in nature but can also occur through private land controls.

The post Second World War period has seen a growing, albeit somewhat implicit, desire to ensure land's social utility. For example, although restrictive covenants have been confirmed, reluctantly,[30] as having only equitable status,[31] their presence in property titles is ubiquitous. Approximately 79 per cent of households are subject to a restrictive covenant,[32] demonstrating the impact protecting the social utility of land can have on private interests. Moreover, the durability of such covenants has been expanded due to the presumption that

the benefit of the covenant passes with the land, as a result of *Federated Homes'*[33] interpretation of section 78 Law Property Act 1925 (LPA). Involving a dispute about future development as part of a convoluted land acquisition of land, the court created a presumption that the benefit of a covenant would run with the land unless there was an express contrary intention. Although *Federated Homes* remains controversial,[34] it has significantly expanded the ease in which the benefit of a restrictive covenant, and its associated promotion of land's social utility, can pass with the property. There are also growing calls for the expansion of covenants, to allow them to operate in law and to impose a positive burden, with the Law Commission stating 'that the market has made its own case'[35] for positive covenants. This statement is equally applicable to the equitable status of restrictive covenants.

The desire of the courts in recent times to protect the social utility of land can be more keenly seen in easements, specifically recreational easements. Despite the fact that the courts have repeatedly stressed the need for easements to remain flexible, the notion that recreational rights can run with the land has historically been anathema to the courts.[36] The problem with recreational rights running in rem is twofold. Firstly, recreational rights often lack the necessary definition to satisfy the criteria for being an easement.[37] Secondly, and more importantly for this chapter, they have the potential to substantially curtail the private rights of the title holder by affording an enduring right of use of land for what could be seen as relatively trivial activities. As a result, recreational easements are seen to be at odds with the need to protect private interests.

These somewhat dramatic consequences are reflected in *re Ellenborough Park,*[38] significant here for its recognition that a recreational right, here a right to access a shared garden, can amount to an easement. Prior to *Ellenborough Park* the dicta relating to recreational rights *in rem* conflicted.[39] However, the courts in deciding that the *re Ellenborough Park* right operated in rem were at pains to state that recreational rights were a

long-established property law principle. In the High Court, Judge Dankwerts pointed out that 'the enjoyment of amenities [considered here] is no modern novelty',[40] while the Court of Appeal also looked to the importance of parks such as St James' Park and Kew Gardens for public enjoyment.[41] As a result, it is possible to conclude that whilst *re Ellenborough Park* is perceived to be a seminal judgment, it simply consolidated existing discourse and practice. Indeed, the Supreme Court recently reiterated that the *Ellenborough Park* criteria had been 'well-established … by the 1950s'.[42] The fact that *re Ellenborough Park* situated its judgment in current practice reinforces our argument that social utility has been a thread running through the law (and commentary) for some time.

Recently, the Supreme Court in *Regency Villas* went even further, holding that a right of 'mere recreation and amusement'[43] – here involving access to leisure and sporting facilities from one holiday complex to another – can operate *in rem*, and amount to an easement. At first glance, *Regency Villas* might be read as another instance of land law's determination of competing private interests. After all, the fundamental issue to be decided in this case was whether the interests of the freeholders of Regency Villas prevail over the interests of Diamond Resort. However, this case is also an interesting demonstration of the social utility approach for two interlinked reasons. First, *Regency Villas* explicitly recognised the value recreational rights could have on society to justify why such rights should operate *in rem*.[44] This goes beyond simply ensuring that the land does not become stagnant but is an explicit recognition of how property rights can be used to benefit society as a whole. Such a recognition goes against a historical reticence to create new categories of easements.[45] Moreover, by compelling the owners of the servient land to pay for the upkeep of the easements over their land, recreational 'social utility' was prioritised at the expense of the private interests in this case. Second, the justices 'were well-aware of the novelty and reach' of their decision, and the decision was carefully drafted to ensure the precedential value of

the case.[46] This means that *Regency Villas* is not specific to the unique facts but is an explicit acknowledgment that recreational rights can operate *in rem* precisely because of their benefit to society; the court clearly had in contemplation the protection of a wider range of 'social' interests. Although the implication of this decision has not been universally accepted by land lawyers,[47] nevertheless it provides an interesting example of our assertion that property law seeks to protect the social utility of land.

Land law has never existed to simply protect the private interests in land as McAuslan supposes. This section aimed to demonstrate that promotion of social utility is a foundational and enduring approach in land law. Our argument that land law protects the social utility of land is not to undermine the need for clear, consistent, and coherent definitions of land rights and obligations.[48] We do not argue that the recognition of social utility changes the definitions of easements or restrictive covenants, for example. Nor do we argue that social utility is at the heart of every judicial decision. Rather, we argue here, that the need to protect the social utility of land is an often overlooked but fundamental component of English land law's *modus operandi*. Recognising this is not only vital to fully understanding modern judgments such as *Regency Villas*, but it also helps us to appreciate considerations of the public interest as embedded in the determination of private rights in land. We continue to consider this entanglement of public and private considerations in the next section, when we question how these supposedly competing ideologies are reflected in one area of planning law.

Entangled ideologies in planning and land use

The tension between public interest considerations and property rights is a constitutive feature of planning law. As a starting point, it might be said that powers of compulsory purchase represents a 'serious invasion of proprietary rights' of property owners.[49] Thus,

property rights are subject to and shaped by regulatory incursions through planning law. Therefore, it can be argued that the effect of planning law is to constrain private property rights 'in the public interest'. In short, inherent in planning law is the idea that it is legitimate for the state to regulate land use, although in effect this is already done through the common law of property – extensively codified and streamlined through statute. Compulsory purchase is a fruitful starting point for a study of this nature, because it certainly does represent an area in which supposedly inalienable private property rights are overridden in the furtherance of (a perception of) the public interest, through planning law.

Thus, the concept of absolute inalienability of owned land is in itself challenged by an administrative regime that can commandeer property, albeit purportedly for the purpose of the common good. Orthodox property theory prescribes that rights in estates in land confer on the owner a right to control access to the property in question and to exclude others from it.[50] Below, we first argue that a state's (or certainly, the Crown's, notional) capacity to reclaim land is not just created through regulatory imposition; this to some extent constitutes an inherent part of land ownership. We go on to discuss statutory compulsory purchase in more detail, illustrating how perceptions of public good and private (or privatised) gain are thoroughly entangled in this exercise of state power in the 'public interest'.

The right or power by the state to reassert fundamental domain over property,[51] to force a sale, or to curtail owners' rights through regulation, is recognised as inherent in property ownership.[52] Even if notional, in such instances the basis on which property is returned or reclaimed, form part of the property right. The concept of the right to compensation in cases of expropriation is recognised in most legal systems, which allow 'market rate compensation' when rights in land are acquired for public purposes.[53] This is demonstrated by the extent to which peaceful possession of property is protected as a human right. In *James v UK*,[54] the applicants challenged their tenants' right to purchase the freehold

estates of their leasehold properties. In spite of the protection of property under Article 1, Protocol 1 of the European Convention on Human Rights, the ECtHR reinforced the legitimacy of compulsory purchase. The entitlement of the state to compulsorily acquire land was part of the protected right, and not 'distinct' from the general principle of peaceful possession.[55] In short, the right of a state to legislate for forced sales in the public interest – seemingly an anathema to a conception of private property rights – is inherent in the concept and protection of property.

The ECtHR recognised that compulsory purchase that reallocated land between private parties, could be 'in the English expression' in the public interest.[56] The Court said, that '...the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being "in the public interest."'[57] The right inherently requires compensation 'reasonably related to its value',[58] but nevertheless the legislation was considered not to offend human rights protection despite the calculation methodology of the value of the freehold transfer frequently resulting in a considerable windfall for transferees.[59] In the most part, planning compulsory purchase will differ from the factual matrix in *James*, as it is more likely to consolidate land ownership than serve redistributive purposes. However, this decision is relevant because it clarifies the conception of rights in private property. Also, the court's characterisation of the wider distribution of privately owned land as being in the public interest (as conceptualised by English courts), is significantly in contrast to the way in which land is being redistributed using planning compulsory purchase.

McAuslan's time of writing was not too far from the post-war shift towards development-friendly policies that formed part of the rebuild and regeneration agenda after World War Two. In England and Wales, compulsory purchase for land management purposes has always been regulated by statute.[60] At the time, the Compulsory Purchase Act

1965, McAuslan argued, reflected the interests of private property. In particular, the regime ensured that private landowners were sufficiently compensated if their property needed to be acquired for development.[61] He also argued that the procedural and administrative provisions of the Act, whilst having as their goal the protection of private property, also significantly reflected the need to encourage development.[62] Julie Adshead recognises that these '...are areas of planning law firmly underpinned by the fundamental ideology of society' which in addition to shaping the law, also 'shape politics and society'. On the face of it, these are most closely aligned to McAuslan's public interest ideology.[63] But as we illustrate below, developments in the way compulsory purchase have been dealt with over the years paint an interesting picture in terms of how and why the regulatory regime intrudes on individual property rights. The rationales for property taking, and permitted compensation calculation methodology, also raise questions about the values underpinning the 'public interest'. We explain this in more depth below, but first we need briefly to clarify how compulsory purchase works.

Compulsory purchase in the planning sense, is a statutory right afforded to a local authority to acquire land in their area, if it is needed for development, redevelopment, or 'improvement',[64] or is necessary in 'the interests of the proper planning of the area'.[65] This must be done with due regard to the development plan, and if and as 'the public interest decisively so demands'[66] but does not have to be carried out by the local authority itself. As such, decisions about compulsory purchase are, at least in theory, required to be made in accordance with what has been determined to be in the public interest for that particular area, at that particular time.[67] This also 'must not' be done unless it is likely to contribute to any or all of the 'promotion or improvement' of the economic, social, and environmental well-being of the relevant area.[68] Similar provisions are made in relation to nationally significant infrastructure projects,[69] and arise in cases where publicly-owned land is acquired (or de

facto acquired) for some purpose.[70] Objections to compulsory purchase are afforded to holders of private rights, who have significant participatory rights in relation to proposed development plans.[71]

The above can be associated with, although is distinct from, 'reverse compulsory purchase',[72] where under Part VI of the Town and Country Planning Act 1990 (TCPA), landowners are permitted to serve purchase notices on local authorities, requesting an acquisition of their land.[73] These fall into two categories – adverse decisions and adverse proposals. Taking these in turn:, where adverse planning decisions (or the failure to obtain it) either requires that they discontinue using,[74] or otherwise constrains their capability to put their land to 'reasonably beneficial use',[75] any owner of land can request a purchase of their own property.[76] Although not uncontroversial and not conclusive, it has become permissible to calculate the question of what constitutes 'reasonably beneficial use' by having regard to the land's value had it been granted planning permission.[77] Adverse planning proposals – also called 'planning blight' – arise where the threat of compulsory purchase implicit in a planning proposal depreciates the value of land, or makes it unsaleable. This could include where provision in a development plan suggests that the land may be designated for 'relevant public functions', including the development of new towns or highways.[78] Under such circumstances any person with proprietary rights 'qualifying for protection',[79] can serve 'blight notices' on the relevant public authority. Where the specific conditions are met,[80] owners can require the local authority to purchase the blighted land.[81]

Thus, the various assumptions about planning permission we outline below, are deployed to determine when a piece of land may no longer be said to be available for beneficial use. One of these assumptions relates to how compensation for the extinguishment of proprietary rights (but not other forms of property rights, for instance licenses[82]) is calculated in cases of compulsory purchase (including reverse compulsory purchase). Where

land is acquired by a local planning authority or the Secretary of State 'for some public purpose', the compensation paid for the interest acquired is normally based on its 'market value'.[83] However, the determination of a property's market value is 'fraught with complexity and obscurity.'[84] The broad picture is that the Land Compensation Act 1961 permits the market value to be calculated with the assumption that, 'were it not for the acquisition, planning permission would have been granted for development of a specific kind.'[85] The practicalities determining this have always been quite difficult, because the 'no-scheme rule' prohibits the consideration of the impact of the proposed scheme on the land's value at the relevant time,[86] but doing so required the calculation of an uncertain counterfactual. The line between compensating the owner for their property's value in the 'real world',[87] which should include its development potential,[88] yet not providing a windfall, was difficult to draw.

The solution has been the progressive introduction of assumptions about planning permission that the land had, or could have had. The so-called 'planning assumptions' specify that account 'may' be taken of extant planning permission,[89] but also of the prospect of permission being granted.[90] As such, these assumptions to some extent take account of permissions that were already contemplated when the acquisition was set in train. Newer amendments permit such assumptions to be made on the basis of only a possibility that planning permission might have been approved. The effect of the amended Act is that '...in relation to land where there was only the prospect of the grant of planning permission, if that prospect amounts to a reasonable expectation, the reasonable expectation is transformed, for the purposes of assessing compensation, into a certainty.'[91] The planning assumptions permit the identification of 'appropriate alternative development' – planning permission which 'could … reasonably have been expected to be granted on an application',[92] and which may be assumed to be in force at valuation.[93] Certification of 'appropriate alternative

development' can be sought from the relevant local authority.[94] This requires the relevant authority to determine hypothetical applications for the purpose of certifying planning permission (or development consents) that had never previously been sought. There also appears to be constraint in terms of the extent to which said authorities can take proper account of factors that would almost certainly be material considerations in 'real' applications.[95] It is also difficult to understand the justification of placing a burden on a public authority to determine hypothetical planning applications, for the sole purpose of inflating the cost of acquisition which they – at least in theory – have to pay. While it is a stretch to say that the state funds this transfer of property – due to the use and structuring of s106 agreements with developers – local authorities at least notionally fund compulsory purchase, and are largely forced to underwrite the risk of future development.[96]

This presents a conundrum; the supposedly inalienable rights in land can be corroded, or entirely extinguished, if deemed in the public interest or if forming part of a broader programme of spatial development. Yet this deprivation of rights could result in a considerable windfall for the (forced) seller, where the planning regime constructs fictions that are about and applied to the property.[97] It is difficult to justify how the concept of 'development potential' has been interpreted into a fiction of actual planning permission.[98] In many cases such assumptions serve to justify an inflated 'market value' of the acquired land, resulting in the sort of windfalls that the 'no scheme rule' was intended to prevent. This inflation of 'market value' is emblematic of the valorisation of capital accumulation, and continued property price inflation, making it difficult to argue that compulsory purchase operates entirely in the 'public interest'.

Furthermore, despite frequent assertions of the 'public interest' in compulsory purchase, the *benefit* of compulsory acquisitions is not always public, or at least entirely public. This brings us to an important distinction, which is between protection of private

property rights or interests through law, and conceptions of the public interest which seek to protect (and bolster) the property *market*. These are not the same thing. The distinction can be difficult to make, not least for those of us whose conceptions of the public interest do not include value inflation or capital consolidation for the benefit of a small (and shrinking) group of property developers and investors.[99] The point, however, is that this is not the same as the protection of a private right through law. In addition, as we explain above, this cannot be seen as in favour of *individual* (private) property rights, as any rights in property would have been forcibly acquired, and thereby extinguished. Certainly, both approaches to social utility in common law decisions, and regimes for compulsory acquisition of land reflect an understanding that land serves a public function in part, and that sometimes private rights in land must cede to the needs of the common good, if an area requires development. So much for the eradication of private rights through compulsory purchase.

More generally, an analysis of the scholarship and cases discussed in this chapter reveals a pattern of community-led and -serving spaces being transformed into 'retail-led regeneration projects', with very low percentages of 'affordable' housing or accessible space not dedicated to consumerism.[100] Antonia Layard identifies the homogenising effects of spatial restructuring, where the diversity and multiplicity is sanitised out of existing community spaces, to be replaced with corporatised uniformity.[101] A feature of these 'malls without walls' and the cession of land management to private entities, frequently results in little public space that is not devoted to retail consumerism.[102] The loss of such public space entails the loss of community assets such as libraries, public playing fields and allotments, which are rarely replaced once lost.[103] It is ironic that we are losing these community assets at the same time as the scope for recreational easements is broadening. The planning applications discussed by Edward Mitchell feature the acquisition of community assets

including bus stations, doctors' surgeries, local businesses, sheltered accommodation and day-care centres, all for the purpose of homogenised retail development.[104]

The cases include an unsuccessful challenge to the permission application, for the reconstruction of a housing development with its own market space. This would inevitably eradicate the existing Latin American market in Seven Sisters. The contribution made by community members to this asset was dismissed both by the London Borough of Haringey in granting permission, and the High Court.[105] In this volume, although they do not discuss compulsory purchase directly, Steven Vaughan and Brad Jessup describe how the safety and sense of community offered by queer spaces are eroded by the provision of sanitised 'replacements'.

The extent to which applications for compulsory purchase reflect a genuine commitment to the fulfilment of 'the public interest' is therefore questionable. Increased state licence for private developers and a monetisation of property seems to underlie a focusing of planning policy that supports swift and under-scrutinised development, for instance by relaxing scope for local participation.[106] While not universally the case, compulsory purchase land acquisition is increasingly employed to implement '...the delineation, characterization, and commodification of "retail-led" development sites flourishing in city centres.'[107] This happens through the transformation of property, including housing into 'high-quality collateral, supported by deregulation, by [lending practices], and by new patterns and opportunities for investment.'[108] These issues of financialisation of property and planning recur throughout this volume, especially in Vaughan and Jessup, Maria Lee and Mitchell's chapters. Theoretically, the role of the public body, in these instances frequently the local authority, can be seen to favour the interests of corporate capital accumulation, more than genuine notions of the public benefit.[109] The transfer of land from one private owner to another can be seen to rest on 'the desire of states to help capitalists overcome barriers to

accumulation'.[110] This does not, in itself, protect or advance *individual property rights,* but rather the accumulation of private wealth including by facilitating profit-taking from commodified assets.[111] The extent to which this is genuinely in the public interest, is questionable.

Conclusion

Our chapter aimed to demonstrate the entanglement between the so-called public and private aspects of the legal regime that governs land and land use. There exists a continuing perception that planning is governed by ideologically distinct legal regimes, the protection of private rights through the courts, and the advancement of the public interest through administrative planning law. We argue that this division is not always so stark.

As we explain in our discussion of social utility, private property protections are not simply designed for individualised and 'selfish' property rights. This social utility approach demonstrates that the courts do not always seek to promote private interests above all else. Judges have considered the public interest in interpreting property entitlements, for instance in recreational easements and restrictive covenants. We have also argued that the nature of estate ownership in English land law entails that forced acquisition is 'built into' the property right itself.

Using the example of compulsory purchase, we challenge the conception that planning law advances the public interest through administrative processes, and that the owners of estates in land can counter these public benefits by enforcing their private property rights through courts. Indeed, as we argue, neither of these present a definitive account of what is done through these processes, and how. As such, our discussion of compulsory purchase and social utility in land, demonstrates the respects in which public and private

ideologies are entangled in the space between administrative and private rights protections in the planning law regime.

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[1] *Tapling v Jones* (1865) 11 HL Cas 290 [311] per Lord Cranworth.

[2] But see Scotford and Walsh (2013).

[3] The most prominent textbook to consider planning law in any depth is Gray and Gray's seminal *The Elements of Land Law.* Although it must be noted that in this bemouth of books, comprising of 1434 pages, the planning law chapter is a mere 8 pages.

[4] For instance, in *Cuckmere Brick v Mutual Finance* [1971] EWCA Civ 9, the mortgagee's breach of duty was determined by its failure to capture a sufficient price, taking the planning permission into account.

[5] See, for example, Gray and Gray (2009) 1378-1386; and Cowan et al (2012) 138-144.

[6] McAuslan (1980).

[7] McAusland (1980) 2.

[8] Scotford and Walsh (2013) 1012.

[9] Ibid.

[10] McAuslan (1980) 268 - 269.

[11] See for instance Lees and Shepherd (2015); Adshead (2014); Davy (2020).

[12] Willmore (2017).

[13] McAuslan (1980) 3.

[14] We rely heavily on Scotford and Walsh (2013).

[15] [1895] AC 587.

[16] [1965] 1 QB 76.

[17] This is something that Bevan argues in relation to restrictive covenants (2020), 456.

[18] See, for example, Caldwell (1974); Freyfogle (1999); Alexander (2009); Foster and Bonilla (2011); Shoked (2014).

[19] See, for example, Gray and Gray (2003) 253-265; Gray and Gray (1998).

[20] For example, by reframing property rights as going beyond the right to exclude as seen in Penner (1997). Also see France-Hudson (2017); Lucy and Mitchell (1996); Becker (2017); Austin (2018).

[21] (1848) 2 Philips 774.

[22] Per Lord Cottenham [779].

[23] Duxbury (2018) 1.01-1.04.

[24] McCarthy (1973) 1.

[25] McCarthy (1973) 1-2.

[26] Gray and Gray (2003) 255

[27] See Smith (2009).

[28] *Austerberry v Oldham Corp* (1885) 29 Ch.D. 750, *Rhone v Stephens* [1994] 2 WLR 429.

[29] (1848) 2 Philips 774, 777.

[30] See, for example, *Thamesmead Town Ltd v Allotey* (2000) 79 P&CR 557.

[31] *Rhone v Stephens* [1994] UKHL 3.

[32] Law Commission (2008).

[33] *Federated Homes Ltd v Mill Lodge Property Ltd* [1980] 1 All ER 371.

[34] Snape (1994) described the law as 'traumatised' by *Federated Homes* 68.

[35] Law Commission (2008) 5.36.

[36] See, for example, Fraewell J's decision in *International Tea Stores v Hobbes* [1903] 2 Ch 165.

[37] For further detail see Bray (2017).

[38] [1956] Ch 131.

[39] In *Duncan v Lounch* (1845) 6 QB 904 a right to walk for pleasure was an easement, whilst in *Mounsey v Ismay* (1865) 3 H&C 486 a customary public right to hold horse races was not.

[40] Per Danckwerts J [150].

[41] Moreover, the characteristics for an easement set out in re Ellenborough Park were not judicial invention, rather both the High Court and the Court of Appeal relied on academic commentary, specifically on the 7th Edition of Cheshire's The Law of Real Property. Per Danckwerts J [140] (for the High Court) and per Eversham MR [163] and [170] (for the Court of Appeal).

[42] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd & Others* [2018] EKSC 57 per Lord Briggs [35].

[43] *Regency Villas* [59].

[44] *Regency Villas*.

[45] Bray (2017); Baker (2012).

[46] Bevan (2019) 62.

[47] See, Bevan (2019); McLeod (2019); Pratt (2017).

[48] Which, as Gray and Gray note, is a consistent theme within land law (1998) 32.

[49] *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 211 per Watkins LJ. Also see Scotford and Walsh (2013).

[50] Penner (1997), Chapter 4.

[51] George and Layard (2019) 30-33. Of course, we are not suggesting that forfeiture or escheat constitute part of the day-to-day of land regulation. The point is that property repossession by the state is inherent in the very structure of (English) land law. This is emblematic of the relationship between private property rights and the state and goes well beyond the private social sharing discussed by Penner (1997) Chapter 4.

[52] Gray and Gray (1998) from 37.

[53] Seng Wei Ti (2019).

[54] [1986] ECHR 2.

[55] *James v UK*, [37].

[56] *James v UK*, [40-41].

[57] *James v UK*, [40].

[58] Bevan (2020) 611.

[59] *James v UK* [27-29], [54-57]

[60] *R (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20 [9].

[61] Prior to 1991 protection was even more extensive. These protections were terminated due to an (not entirely fair) perception that they were widely abused. See Bowes (2019).

[62] McAuslan (1980).

[63] Adshead (2014).

[64] s266(1)(a) TCPA.

[65] s266(1)(b) TCPA. Similar provisions exist for the acquisition of land by the Secretary of State – see s268.

[66] *Prest v Secretary of State for Wales* (1982) 81 LGR 193 per Lord Denning MR [198].

[67] The extent to which the formulation of neighbourhood plans can be said to be democratic is questionable. See Willmore (2017), Bogusz (2018).

[68] s226(1)A TCPA.

[69] Under s122 of the Planning Act 2008.

[70] De facto acquired refers to the granting of very long leases to private management companies, which Layard (2019) argues is an effective transfer to private ownership. The acquisition of publicly owned land for private purposes entails specific processes and has particular implications, not least because when the land is transferred into private ownership, the public law framework for land management is lost.

[71] s12 of the Acquisition of Land Act 1981 specifies that notice be given only to holders of rights in land – specifically freeholders and leaseholders (under s12(2)(a)) and under limited circumstances to those with interests in property (see s12(2)(b) read with s5 Compulsory Purchase Act 1965).

[72] Seng Wei Ti (2019) 141. Further details as to the process may be found in Duxbury (2018), 14.34 - 14.69.

[73] Under s137(2)/150(2) of the TCPA respectively.

[74] s137(1)(c) TCPA.

[75] s137(1)(a) and (b) TCPA. See Duxbury (2018) 14.01-14.33.

[76] As defined in s366 TCPA.

[77] Under the amended s138 TCPA 1990. See Duxbury (2018) 14.07-14.22.

[78] s149(1) and Schedule 13 TCPA. This also covers land that is affected by development consent for a Nationally Significant Infrastructure Project, granted under the Planning Act 2008, see para 24, Schedule 13.

[79] s49(2) and (3), s168(4) TCPA, but not property speculators, see Duxbury (2018) 14.60. The position in relation to adverse decisions is altogether narrower, see s336.

[80] s149 TCPA read with Schedule 13.

[81] s150(1) TCPA.

[82] In *DHN Food Distributors v Tower Hamlets LBC* [1976] 1 WLR 852 Lord Denning was willing to find that the contractual licensees were entitled to compensation for the disruption to their businesses as a consequence of compulsory purchase. This approach has not been followed, see George and Layard (2019), 292. It is probably more often the case that licensees and occupiers face the inevitable end of their businesses due to rent increases in the new development. See the discussion in *Carlos Burgos and another v SS HCLG and Haringey* [2019] EWHC 2792 (Admin) – the claimants as licensees had no right to compensation, and the court endorsed the inspector's finding that the 'retention of the market is not dependent on the existing traders' [17], despite quite clear evidence that the market was embedded in a community.

[83] s5(2) of the Land Compensation Act 1961. Also, see the principles outlined by Lord Collins in *Transport for London v Spirerose Ltd* [2009] UKHL 44 [89-95].

[84] *Waters and another v Welsh Development Agency* [2004] UKHL 19 per Lord Nicholls [2]. This decision, however, predates the Localism Act 2011, which amended s14 assumptions about planning permission, and introduced s17 Certificates.

[85] Bowes (2019) 4.84.

[86] s6A(3) LCA.

[87] The 'reality principle' is the 'starting point' – see *SoS for Transport v Curzon Park and others* [2021] EWCA Civ 651 [43].

[88] See the comments of Lord Nicholls in *Transport for London v Spirerose Ltd* [2009] UKHL 44 [89-95].

[89] s14(2)(a) LCA.

[90] s14(2)(b) LCA. This includes conditional, deemed and outline planning permission – see s14(9)LCA. The previous section allowed a claimant that actual or assumed value of the land with planning permission – see discussion in *Waters v Welsh Development*.

[91] *SoS for Transport v Curzon Park and others* [2021] EWCA Civ 651 [21].

[92] s14(4)(b) LCA.

[93] s14(3) LCA. ss. 232(2), 240(2) read with s. 232(8) Localism Act 2011 amended this from a 'reasonable expectation' to a 'permitted assumption'.

[94] The process and significance of Certificates of Appropriate Alternative Development, and the scope and process of appeal to the Upper Tribunal, are set out in s17 and 18 LCA respectively. This process is entirely hypothetical and exists solely for the purpose of determining the 'market value of expropriated land: *Grampian Regional Council v Secretary of State for Scotland* [1983] 1 WLR 1340 [1343]; *Fletcher Estates Ltd v Secretary of State for the Environment* [2000] 2 AC 307 [316].

[95] See the discussion in *SoST v Curzon Park*. Here the relevant authority was the SoS Transport, seeking compulsory acquisition to clear space for Hs2. All four respondents sought CAADs in relation to hypothetical developments would never all have been granted, as the local authority would have been entitled to take account of the other applications as material considerations. The Court of Appeal determined that CAADs are not 'notional planning applications' such that other CAADs could be material planning considerations – see [69].

[96] Mitchell (2020).

[97] Indeed, even where the windfall for the seller arises from the strict application of statutory assumptions, leading to a result that would not be granted in the 'real world' – see *SoST v Curzon Park*.

[98] In *Transport for London v Spirerose Ltd* [2009] UKHL 44, Lord Nicholls emphasizes that

the value of property to the owner must include it's 'development potential' [89-95].

[99] Gallent et al (2017).

[100] Layard (2010) 418.

[101] Layard (2010) 419 and generally.

[102] Layard (2019) 161.

[103] Layard (2019).

[104] Mitchell (2020). In the Brent Cross application, the proposed development did include a new bus station – although it is difficult not to assume that this was intended to service the shopping centre.

[105] See *Burgos v SS HCLG*.

[106] This is observed in Adshead (2014).

[107] Layard (2010) 415 and generally.

[108] Gallent et al (2017).

[109] Mitchell (2020).

[110] Levien, cited in Mitchell (2020), Section 2.

[111] See generally Dorling (2014), Mitchell (2020), Section 2.

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