

## ■ CHAPTER SEVEN

# *Recouping Betterment via the Town and Country Planning System*

**T**his chapter, contributed by Nathaniel Lichfield, is based on Lichfield and Connellan's working paper *Land Value Taxation in Britain for the Benefit of the Community: History, Achievements and Prospects* (1998; see also Appendix A for further reference).

### **Introduction**

In this chapter on capturing value for the community by recouping betterment, we define *betterment* as the increase in land value arising from development activity. The objective of betterment legislation is to capture this development value for the benefit of the community, as confirmed by the Uthwatt Committee that "The principle of betterment [legislation] is that the public authority are entitled to require the owner of land increased in value by their works to pay over in money part of the increase which he hereby enjoys" (1942, 116).

### **History of Betterment Legislation**

Betterment has been collected in Britain under ad hoc legislation for many centuries. In 1909 it was incorporated into the town and country planning system; since then it has gone through many changes, particularly after World War II.

Two threads in the fabric of Britain's history indicate the application of the principle of betterment in legislation:

- payment *according to* benefits received or dangers avoided, most frequently represented by sewers and drainage rates; and
- payment (whether by direct charge or set off against compensation) *in respect of* benefits received by public improvements, e.g., through the widening of roads.

The first thread remains unbroken from the Middle Ages; nowadays it makes an appearance in the differential rates under the Land Drainage Act, 1930. The

second thread first appeared in 1662 but disappeared after a few years and did not reappear until about 1830. Thereafter, although somewhat tenuous for long periods, this thread persisted, and it appeared in full strength and colour in the London County Council Improvement Acts of the 1890s and in the Town Planning Acts from 1909 onwards.

### **Evolution of the British Planning System, 1909–1991**

The planning of towns is an ancient art and science, but it is mainly in the twentieth century that governments around the world intervened to ensure its application in their country. Britain did so in 1909, instituting a statutory planning system consisting of statutes, regulations and guidance. It is within this system that the statutory planning process is carried out.

#### *Pre-World War II*

Town and country planning as a governmental task developed from public-health and housing policies (Ashworth 1954, chap. 1). The nineteenth century's increases in population and the subsequent growth of towns due to immigration from rural areas led to public-health problems that demanded a new role for government. The first statute, the Housing, Town Planning, Etc., Act of 1909, empowered local authorities to prepare town planning schemes with the general object of "securing proper sanitary conditions, amenity and convenience," but only for land that was being developed or appeared likely to be developed (Cullingworth and Nadin 1994, 2–4). After World War I, this legislation was revised to form the Housing and Town Planning Act of 1919. The preparation of schemes was made obligatory on all borough and urban districts having a population of 20,000 or more. Although some procedural difficulties were removed, no change was made in the basic concepts.

As difficulties increased, further legislation was passed. The Town and Country Planning Act of 1932 (TCPA1932) aimed to control the development of both urban and rural land so as to secure proper sanitary conditions, amenity and convenience; to preserve existing buildings, other objects of architectural, historic or artistic interest, and places of natural interest or beauty; and generally to protect existing amenities (Jennings 1946, 12). It extended planning powers to almost any type of land, whether built up or undeveloped. TCPA1932 schemes relied on *zoning* as their main tool; land was zoned for particular uses, with provision for such controls as limiting the number of buildings and the space around them.

But Britain's planning system between the first and second world wars was defective in several ways: it was optional for local authorities; planning was local

in character; central government had no effective powers of initiative or of coordinating local plans; and the issue of compensation deterred local authorities from applying effective measures (Cullingworth and Nadin 1994, 9).

### *Changes During World War II*

TCPA1932 was amended by the Town and Country Planning Interim Development Act of 1943. This related only to the interim development period (the period between when a resolution to prepare a scheme takes effect and the date on which the scheme becomes operative). It introduced two changes: it brought the whole of England and Wales under planning control; and interim development decisions became enforceable in the interim period (Jennings 1946, 7).

### *Post-World War II*

The new Labour government, after the end of World War II, introduced the Town and Country Planning Act of 1947 (TCPA1947). It differed from TCPA1932 in that it introduced “development plans” instead of planning schemes. Whereas previously the rules for granting permission for development were stated in the planning scheme, which was a “local law” for the area, under TCPA1947, development (to works on or under land or a material change of use) could take place only with a specific permit (Lichfield and Darin-Drabkin 1980, 137). TCPA1947 provided the whole country with powers of development control, which became mandatory and not permissive. Thus, it brought all development under control, with only minor exceptions, by making it subject to planning permission.

The Town and Country Planning Act of 1968 (TCPA1968) also brought about a major shift in planning philosophy, in the scope and content of plans. Whereas TCPA1947 was mainly concerned with land use, TCPA1968 emphasised major economic and social forces, as well as broad policies and strategies for large areas (Cullingworth and Nadin 1994, 52). TCPA1968 also ushered in an era of centralised policy making that continued into the 1990s (Cullingworth and Nadin 1994, 53). TCPA1968 was later repealed and consolidated with the Town and Country Planning Act, 1971.

### *Current Position*

The Town and Country Planning Act of 1990 also consolidated earlier legislation; it was soon modified by the Planning and Compensation Act of 1991 (PCA1991), which retained the major principles of the acts of 1947 through 1971 but brought changes to the planning framework, for example, as related to development control.

Section 54A of PCA1991 introduced what has come to be called the plan-led system:

Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise.

But this meant that the development rights for any parcel of land, and thereby the consequential land value, could not be determined with any certainty in advance of the decision on the planning application, and, should there be an appeal to the Minister or the courts, the decision would flow from them. Although the balance shifted in PCA1991, the same uncertainty still remained. In Chapter 14 and Appendix D, we examine the government's latest proposals to update the British planning system and consider their likely effects upon this issue.

### **Compensation and Betterment in Principle**

Just as the concept of betterment emerges when development values rise, so does compensation to owners when their land loses development value. Betterment and compensation—the inseparable twins of the financial provisions of planning legislation—are better known in the United States as “windfalls” and “wipe-outs” (Hagman and Misczynski 1978, chaps. 1, 17). This principle was recognised in the 1909 Housing, Town Planning, Etc., Act and continued in the Town and Country Planning Act, 1932 (Uthwatt, paras. 231, 271–274).

In 1942 Lord Reith, the Minister of Works, appointed experts to examine the subject of compensation-betterment and reconstruction after World War II. These experts formed the Expert Committee on Compensation and Betterment (Uthwatt Committee), 1942, which fully introduced the link between compensation and betterment:

In this connection two well recognized facts must be borne in mind. The first is that potential development value created by the expectation of future development is spread over many more acres than are actually required for development in the near future or are ever likely to be developed. The second is that wisely imposed planning control does not diminish the total sum of land values, but merely redistributes them, by increasing the value of some land and decreasing the value of other land. (paras. 22–28)

It was these considerations that led the Uthwatt Committee to adopt the proposal initially put forward by the Barlow Commission (1940) for the unification of state landownership of development rights in undeveloped land; this was termed the “Development Rights Scheme” (para. 48). For developed land they recommended wider and simpler powers of purchase (sec. 50).

## **Compensation and Betterment in Practice**

### *Town and Country Planning Act of 1947*

Based on the general principles of the Uthwatt Report, the postwar Labour government enacted the Town and Country Planning Act of 1947 (TCPA1947), which nationalised development rights. With minor exceptions, no development would be allowed without the permission of the local planning authority. If permission were refused, no compensation would be paid, except in a limited range of special cases. If permission were granted, any resulting increase in land value would be subject to a development charge. The landowner had the right to continue the existing use of land so that any interference by the state would attract compensation (McAuslan 1984, 84; Cullingworth and Nadin 1994, 107).

Under TCPA1947, loss of development value due to the nationalisation of development rights (which was calculated to be the difference between the unrestricted use value and the existing use value) attracted compensation. This was based on admitted claims to an *ex gratia* fund of £300 million, plus one-seventh of the total fund for the accrued interest on the amount of the claim. The *ex gratia* fund was not described as “compensating” since, the government argued, none of the claims were payable under common law. A Central Land Board was also set up with powers to facilitate the supply of land at existing use prices.

But TCPA1947 did not work as expected. Land was being widely offered and bought at prices including the full development value, even though developers were to pay a development charge amounting to 100 percent of the land-value increase that resulted from development (Cullingworth and Nadin 1994, 10). This was largely due to the severe restrictions imposed on construction; building licenses were very scarce, and developers able to obtain them were willing to pay a high price for land upon which to build (Cullingworth and Nadin 1994, 108). Thus, developers often found themselves forced to pay more for land than its existing use value, which was all they should have been ready to pay (McAuslan 1984, 78).

### *Unscrambling: The Acts of 1953, 1954 and 1959*

The new Conservative government in 1951 sought to remedy the problems of TCPA1947 through a series of measures under the Town and Country Planning Acts of 1953 and 1954. One of these measures was the abolition of the development charge and the termination of the Central Land Board. Abolishing the development charge caused land speculation: as long as owners could expect to receive only existing use value, there was little point in buying land to hold in anticipation of a price rise, but when development values were given back to private sellers, the prospect of speculative profits emerged again (Parker 1965, 67).

With the new scheme, the £300 million fund was extinguished as well. Instead of the compensation for development rights lost in 1947 being paid on a pro rata basis out of the fund, compensation was only payable when the loss was actually realised on refusal of permission. The local authority was made responsible to pay this compensation in cases where the claim attached to a site that was being compulsorily acquired. In other cases, it was the central government's responsibility (Parker 1965, 66).

The owners who sold their land privately in the market were now in a privileged position compared to owners whose land was subject to compulsory purchase (Parker 1965, 66). The former received the full market price for the property sold and retained the development value. The latter, however, only received existing use value because the development rights belonged to the state. This situation was tackled by the act of 1959, which re-established market price as the basis of compensation for compulsory acquisition (Parker 1965, 67). An owner could thus obtain the same price for his land irrespective of whether he sold it to a private individual or to a public authority, at least in theory. For the public authorities, land purchase suddenly became extremely costly (Cullingworth and Nadin 1994, 110).

#### *Finance Act of 1965*

A capital gains tax enacted in the U.K. by the Finance Act of 1965 allowed the taxation of capital gains made on the disposal of assets, including land, whether by outright sale or the grant of a lease. This tax has continued as an enduring feature of the British taxation system, except that it is now seen as part of general taxation and not specifically in relation to land itself. (In Chapter 12 we examine how this tax might be adapted more closely to the recoupment of betterment by capital levy.)

#### *Land Commission Act of 1967*

The Labour government of 1964 made another, quite different attempt to secure for the community a substantial part of the development value created by the community and to reduce the cost of land that authorities needed for essential purposes. A Land Commission was created to buy, by agreement or compulsorily, land suitable for development, with the objective of supplementing local authorities' powers to facilitate an orderly programme of approved development. The Land Commission was designed to be a site assembler; a planning agency to determine land use; and a development agency to manage, dispose of or develop land itself or engage either private or public developers. Thus, a central government agency was established to compete with the local authorities in determining where and how land should be used (McAuslan 1984, 78).

A betterment levy was introduced that was equal to a proportion of the development value on all land sold—either in the open market as a tax or in a sale to the Land Commission—and deducted against purchase at market value. Initially the rate of the levy was to be 40 percent to encourage early sale, and it was to increase over time (McAuslan 1984, 78).

Together with the betterment levy, the Labour government established a capital gains tax in the Finance Act of 1967. The tax was charged on the increases in the existing use value of land only, not on the increases in the development value, as in the betterment levy (Cullingworth and Nadin 1994, 111). Both of the taxes were measures for taxing the previously untaxed profits from land (Lichfield and Darin-Drabkin 1980, 144). But with a change of government, the Land Commission Act of 1967 was repealed in 1971 by the Conservatives (McAuslan 1984, 78).

### *Development Gains Tax*

On 17 December 1973 the Conservative government's chancellor Anthony Barber announced a proposal to introduce legislation to alter the basis on which tax was charged on "substantial" capital gains arising on the disposal of land or buildings with development value or potential. He also announced that the legislation would provide for tax to be charged on the occasion on which a building (nonresidential) was first let, following "material development."

Soon after, however, there was a change of government. Following the general election of 28 February 1974, it fell to a new Labour chancellor to put these proposals into legislative clothing (Finance Act, 1974). The Labour government regarded this as an interim measure only, until a more far-reaching one could be found (Prest 1981, 96). Consequently, these limited arrangements for a development gains tax were replaced after 1 August 1976 by the more comprehensive Development Land Tax Act of 1976.

### *Community Land Scheme*

The Labour government, elected in 1974, introduced its Community Land Scheme in two parts. The first was the 1975 Community Land Act, which provided wide powers for compulsory land acquisition, and the second was the Development Land Tax Act of 1976, which provided for the taxation of development values. This was going to be an achievement in "positive planning" (Lichfield and Darin-Drabkin 1980, 4) and in "returning development values to the community" (Cullingworth and Nadin 1994, 114).

The scheme, like its two predecessors, had little chance to prove itself. The economic climate of the first two years of its operation could hardly have been worse, and the consequent public-expenditure crisis resulted in a central control,

which limited the scheme severely (Cullingworth and Nadin 1994, 114). With a change in administration, the Community Land Scheme was abolished by the Conservative Thatcher government in 1979. But the law as to the ownership of development rights remained the same, having survived the acts of 1953, 1954 and 1959. Development rights are still separated from the balance of the ownership title and are owned by the Crown, so that the denial of compensation for refusal of planning permission or imposition of unsatisfactory conditions still prevails.

### **Summary: Compensation and Betterment in 2004**

The three postwar measures for betterment tax on development value in Britain, introduced by successive Labour administrations, were all withdrawn by the Conservative administrations that succeeded them. But one critically important feature of the 1947 act remains unaffected: the Crown continues to own all landed property development rights. Despite the amending planning legislation of subsequent governments and the Thatcher government's pressure for privatisation in the 1980s, these rights have not been returned to the property owners. Consequently, there is now no "compensation problem" to form the other side of the betterment coin: if a planning application is refused, or it is granted with conditions, no claim for loss of development rights can be admitted. Prest puts it succinctly: "[A]t least one thing does seem clear in the fog: the issue of planning compensation for planning refusal can be considered truly dead and buried" (1981, 189).

However, this now has an additional importance beyond the solution to the compensation problem when land value is mooted as a new taxation base. Any objections from landowners, for example, to an incremental betterment tax on the development rights, which they do not own but nevertheless can enjoy, as envisaged in the Uthwatt Report (1942, 135–154), would hardly make for a credible case at the Court of Equity.

### **Community Betterment from Development Value: An Evaluation of Past Proposals**

We now evaluate the past proposals for community benefit from development value in order to draw lessons for the future.

#### *What Went Right?*

- After the Barlow Commission opened up the issue (RCDIP 1940), the Uthwatt Committee's classic report on compensation and betterment (Uthwatt 1942) provided a very good basis for postwar legislation and practice.

- Three successive Labour governments tried in quite diverse ways to tackle the issues of recoupment for the community. Through these attempts, vast experience was obtained of what could and could not be done.
- Despite opposition, developers have come to widely accept the thesis that some recoupment to the community is expected and accepted.
- It is now generally accepted that the community should not have to compensate landowners for restrictions on land value that result from denial of compensation for refusal or for composition of unsatisfactory conditions.

### *What Went Wrong?*

- Betterment legislation became a political plaything. Each of the three Labour governments' ventures were opposed by the Conservatives and then unscrambled and/or repealed by them as soon as the opportunity arose and before the wrinkles could be ironed out. Furthermore, the Conservatives produced no reasonable replacement for the repealed systems, and, accordingly, there was no opportunity to amend any of the three ventures in the light of experience.
- All three Labour governments' attempts were very laborious and complex and therefore required a great deal of time to implement; none of them could be fully implemented before being repealed by the Conservatives.
- The Labour governments switched to a new concept each time around, missing opportunities to refine previously rejected schemes.
- The schemes themselves contained real defects, which have been recorded by commentators.

### *Flaws in the Labour Government Schemes*

- The Town and Country Planning Act of 1947 (TCPA1947) failed because, while it allowed the private market to operate, the 100 percent development charge took away from the private market incentive to develop (Cox 1984, 82, in Blundell 1993, 5).
- Under TCPA1947, landowners retained land value increases that were not due to development or redevelopment. In practice, the majority of land value increases were of this kind, and therefore they could not be returned to the community (Blundell 1993, 12).
- TCPA1947 and the Land Commission Act of 1967 both encouraged speculation by leading landowners to believe that if their land increased in value they would not be liable to the development charge (Blundell 1993, 7–8).

- By 1952 the financial benefits of collecting development charges under TCPA1947 had proved discouraging:

[T]he total sum received in development charges in the three and a half years which had elapsed since the “appointed day” was but £8.6 million, with a further £4.9 million set off against the compensation fund. The revenue which the charge was producing was negligible; the disincentive to development was massive. (Douglas 1976, 214)

- Similarly, under the Land Commission Act of 1967, the Commission completely failed to collect the forecast yield from levy; expecting to bring in £80 million in its first year, it in fact yielded a mere £15 million, and £32 million in the next year (1969–1970). And it had compulsorily purchased a derisory 2,207 acres of land and sold 913 acres (Cox 1984, 151).
- The Community Land Act of 1975 faced difficulties after the government’s spending cuts in December 1976 reduced the borrowing capacity of local authorities by £70 million, and funding problems restricted their acquisition of land (Blundell 1993, 12). By April 1979 the Community Land Account was in deficit to the tune of £33 million (TCPA1997, 31, in Cox 1984, 187).
- The Community Land Act had many major problems. The government allowed no new staff to be hired; there were conflicts between planning, finance and surveying staff; lease provisions were for 99 years, but lending institutions preferred 125 years; some landowners were withholding deliberately; almost 98 percent of potential land was exempt because it was already held in land banks by statutory undertakers and builders; and there was a building slump, which meant that this exempted land was not used up as expected (TCPA1997, 31, in Cox 1984, 187–191).

In conclusion, the unscrambling resulted in the abandonment of compensation for injurious affection (i.e., depreciation) to land value, except for those whose claims for development values had been accepted by the Central Land Board as “unexpended balance of development value” in the TCPA1947 national valuation. These would have been met on refusal of planning permission, which would then capture that accepted claim value.

Even so, the present position is that planning compensation for betterment has now been abolished in these limited situations in which it was previously obtainable, by the Planning and Compensation Act 1991 (s. 31), except for relatively uncommon cases (Johnson et al. 2000, 245). But betterment in general, immediately post-TCPA1947, was effectively abandoned much earlier, with the abolition of the development charge and the termination of the Central Land Board in the acts of 1953 and 1954. We can say, however, that the spirit of betterment lived on in the later attempts to introduce betterment levy, development

gains tax and development land tax. Although these particular measures also did not survive in securing betterment for the community, perhaps its long history will give it renewed strength for future reconsideration. With this in mind, in Chapter 12 we revisit this issue, with an examination of the possibility of reintroducing recoupment of betterment by capital levy.

**Summary**

Attempts by differing British governments to recoup betterment via the town and country planning system were largely frustrated. (Table 6 summarises the legislative underpinning for these attempts.) But, taking the wider view, betterment did indeed play a significant role in several value capture policies over the years.

**TABLE 6:** Summary of Post–World War II Betterment Legislation

Legislation	Provisions	Outcome
Town and Country Planning Act, 1947 (TCPA1947)	Inaugurated a Central Land Board to oversee the betterment and land assembly provisions of the act. Levied a development charge, based on enhancement of land value by grant of planning permission. Claims for loss of development value (due to nationalisation of those development rights) were invited, from a central fund of £300m.	Introduced by the post–World War II Labour government, TCPA1947 did not work as expected, and the disincentive to develop was very marked. The succeeding Conservative governments, in their Town and Country Planning Acts of 1953, 1954 and 1959, abolished development charges and the Central Land Board, and they ended the government obligation to distribute compensation to landowners.
Finance Act, 1965	Introduced a capital gains tax (CGT) payable upon the disposal of assets, including land, whether by outright sale or by the grant of a lease.	CGT continues as an enduring feature of the taxation system. It is now seen as part of general taxation and not specifically in relation to land itself.
Land Commission Act, 1967	Set up Land Commission to buy land for development and to act as a site assembler and development agency. Introduced a betterment levy, as a 40 percent proportion of development value on all land sold, either in the open market or to the Commission.	Introduced by a later Labour government, the Land Commission Act, 1967, failed to collect the forecast yield from the levy, and its land assembly results were disappointing. The succeeding Conservative government repealed the act and its measures in 1971.
Finance Act, 1974	Introduced a development gains tax on “substantial” capital gains arising upon the disposal of land or buildings with development value or potential, and on the first letting of a building following “material development.”	First introduced as a proposal by Conservative government in Dec. 1973, this development gains tax was put into operation by the succeeding Labour government in 1974 as an interim measure only. It was eventually replaced by a development land tax in 1976.
Community Land Act, 1975	Provided wide powers of compulsory acquisition for the “Community Land Scheme,” under which local authorities could purchase land for private-sector development and then dispose of that land by long lease.	Introduced by a Labour government but beset by national economic difficulties, this act failed in its aims, and the whole operation ran into deficit. Unsurprisingly, the Community Land Scheme was abolished by the succeeding Conservative government in 1979.
Development Land Tax, 1976	Taxed development gains, defined as the difference between market value and either current value or the cost of land plus special additions, whichever was higher. Tax was to be paid when land was developed or when land was sold or leased.	This was yet another frustrated attempt by a Labour government to tax betterment. When the Conservatives came to power in 1979, the tax was reduced to 60 percent, and it was eventually repealed completely in the Finance Act of 1985.