ENGLAND'S COMMUNITY LAND ACT: A YANKEE'S VIEW†

*CHRISTOPHER J. DUERKSEN**

> Community land is the most radical single item in Labour's programme, and will do more to transfer real power and wealth than all the other nationalization proposals put together.[1]
>
> —Anthony Crosland, former Secretary of State for the Environment

While American land use authorities explore the taking issue and methods to ensure reasonable compensation,[2] the English[3] have

† This Article is based upon research conducted under the auspices of the Conservation Foundation's (Washington, D.C.) Comparative Land Use Project with support from the German Marshall Fund of the United States and other donors. The author would like to thank Fred P. Bosselman and David L. Callies for their helpful comments during the preparation of this Article.

* Associate—Ross, Hardies, O'Keefe, Babcock & Parsons, Chicago, Illinois. B.A., Kansas State Teachers College, 1970; J.D., University of Chicago, 1974.

1. Crosland, *Socialism, Land & Equality*, SOCIALIST COMMENTARY, March 1974, at vii.

2. Various aspects of the taking issue, and compensation therefor, are discussed in F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973) [hereinafter cited as THE TAKING ISSUE]; J. COSTONIS, SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE (1974); Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Hagman, *Windfalls for Wipeouts*, in THE GOOD EARTH OF AMERICA: PLANNING OUR LAND USE 109 (C. Harriss ed. 1974), also published as *A New Deal: Trading Windfalls for Wipeouts*, in 40 PLANNING No. 8, at 9 (1974) and *Windfalls for Wipeouts*, in TRANSFER OF DEVELOPMENT RIGHTS 265 (J. Rose ed. 1975).

3. Because the Community Land Act will be applied in a slightly different fashion in Scotland and Wales, this article deals only with its use in England.

mounted a major assault on the thorny problem of "betterment" recapture—recoupment for the public of a part of the increased land values resulting from community development.[4] The Community Land Act of 1975[5] provides for the eventual control by local governments of all land available for development.[6] The Act ultimately will place a duty upon local planning authorities to buy up all development land within their respective jurisdictions, thus in effect establishing mammoth land banks. Compulsory purchase—the English equivalent of eminent domain—of such development land will be at current use value instead of market value as is now the case. Local authorities will negotiate with developers to construct new projects, including housing, on acquired land. The finished product will be either leased to businesses and industries or sold to home buyers, with profits flowing to the local community and the central government according to a prescribed formula. With a few exceptions, no development whatsoever will be allowed except where it is carried out by, or on behalf of, a local authority on land owned by that authority. The result is a truly radical program that, if fully implemented, will fundamentally alter the planning system and distribution of wealth and power in England.

The Community Land Act thus will attempt to solve the other side of the taking controversy that continues to rage in the United States. To equate the two situations, however, is misleading. Because England has no written constitution, it has no taking issue in the American sense of the term. Parliament may and has enacted stringent land use regulations without providing compensation for the landowner who is denied permission to develop his property.[7] But the "betterment" side of the controversy remains. If a landowner receives nothing in the way of compensation when denied permission to develop his land, and his chance for profits is wiped out, what becomes of the windfalls which are

4. "Betterment" is the English equivalent of "windfalls." Betterment was originally defined as any increase in the value of land (including the buildings thereon) *arising from central or local government action*, whether positive (public improvements) or negative (imposition of restrictions on other land). EXPERT COMMITTEE ON COMPENSATION & BETTERMENT (UTHWATT COMMITTEE), FINAL REPORT, CMND. NO. 6386 (1942) ¶ 260 (emphasis added) [hereinafter cited as UTHWATT COMM. RPT.]. It is now taken to mean any increase in value from any cause whatever.

5. Community Land Act 1975, c. 77.

6. For a full discussion of the Act, see notes 72-97 and accompanying text *infra*.

7. *See* Garner, *The Law of Land Use Planning in England Today*, 15 NATURAL RESOURCES J. 491, 506 (1975). The English view such restrictions as a mere regulation of property, and because an owner's property is not actually taken from him, no compensation need be paid. This view is similar to the one advocated in THE TAKING ISSUE, *supra* note 2. When a person's land is actually expropriated (compulsorily purchased), however, Parliament almost without exception has provided compensation.

doled out to other landowners when their developments are allowed to proceed? The English have grappled with this question for over three decades; the history of this effort is marked by one frustration after another as each successive program came in with a flourish and went out like a flash. Community Land is the latest and most far reaching effort at dealing with this fundamental dilemma of land regulation. This Article examines the basic system of English land control, the predecessors of the Community Land Act, and the Act itself.

I. THE ENGLISH DEVELOPMENT CONTROL SYSTEM

> This country has a planning system that would have made the Ottoman Empire drool with envy.
>
> —Lord Goodman

Since the passage of the Town and Country Planning Act of 1947[8] England has been subject to a comprehensive system of land development controls.[9] This system has two basic facets. First, elected local planning authorities[10] must draw up two types of development plans, structure and local.[11] Structure plans are written statements formulated by county councils outlining broad policy goals for a certain area and indicating the manner in which land is to be used and the stages by which development is to be carried out. These plans provide a framework within which local plans must be drawn. These local plans are much more detailed and are accompanied by a map similar to an American zoning map. These plans differ, however, from American zoning maps

8. Town and Country Planning Act 1947, 10 & 11 Geo. 6, c. 51.

9. For an excellent summary of the English development control system by an American writer see N. ROBERTS, THE REFORM OF PLANNING LAW (1976). *See also* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW, ch. 21 (2d ed. 1975). A good comparative article is Garner & Callies, *Planning Law in England and Wales and in the United States*, 1 ANGLO-AM. L. REV. 292 (1972). More up-to-date commentary is found in Garner, *The Law of Land Use Planning in England Today*, *supra* note 7. Standard references by English writers include D. HEAP, AN OUTLINE OF PLANNING LAW (6th ed. 1973) and A. TELLING, PLANNING LAW AND PROCEDURE (3d ed. 1970).

10. England is divided into 38 county councils and six metropolitan authorities (*e.g.*, Greater Manchester). These authorities have power over regional functions and "strategic" planning. Each country council is divided into several district councils that perform local functions (street repair etc.) and operate the planning system on a day-to-day basis following general policies set down by the counties. Metropolitan councils are also typically divided into smaller borough councils. London has its own organization which is basically similar, with the Greater London Council acting as a county authority with 33 borough councils constituting a second tier. For a chart depicting this scheme see Garner, *An Introduction to English Planning Law*, 24 OKLA. L. REV. 457, 458 (1971).

11. The first structure plans are only now being approved. In other areas, old-style development plans remain in force. Conversation with George Dobry, in Chicago, Ill., Aug. 25, 1976.

in that they act only as a guide to developers and planners.[12]

The second facet of development control relates to the individual planning application. Generally, all development[13] must receive individual approval from the local planning authority, either a county or district council depending on the size or impact of the project. While the applicable development plan serves as a guide, the local authority is not bound by it and may consider each application on its merits.[14] As in this country, a good deal of give and take may occur between the local authority and the developer before planning permission is granted. If the application for planning permission is denied, however, neither the owner of the property nor the developer is entitled to any compensation, except in rare instances.[15]

The central government in England plays a much more important role in the planning system than the federal government in the United States. All power emanates from the central government and local authorities have only those powers granted to them. Within the central government, the Department of the Environment (DOE) oversees all land use and environmental planning. DOE is a super-agency combining many of the functions of our Departments of Interior, Housing and Urban Development, and the Environmental Protection Agency. It is headed by the Secretary of State for the Environment, a cabinet minister who is a member of Parliament belonging to the majority party—in this case, Labour.[16] The Secretary frames new planning legislation, issues orders

12. Theoretically they also ensure that the local planning authority does not have unbridled discretion in considering individual planning applications. Because of long delays in the appeals system, *see, e.g.*, Garner, *An Introduction to English Planning Law*, *supra* note 10, at 464-66, local authorities have a great amount of discretion, limited for the most part only by economic and political considerations. A penetrating critique of the system is found in G. DOBRY, REVIEW OF THE DEVELOPMENT CONTROL SYSTEM, FINAL REPORT (1975).

13. Development is defined broadly in § 22 of Town and Country Planning Act of 1971, c. 78, as: "the carrying out of building operations, engineering operations, mining operations or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

14. Preliminary consultations with the developer are conducted by professionals within the local planning department. They then make recommendations to the elected officials of the local planning authority who have final authority on whether the project will be approved.

15. There has been some confusion among American commentators on this point, which has been expressed at planning law conferences attended by the author. Compensation is paid in England for revocation of planning permission once granted and in other exceptional circumstances. That country has a very liberal compensation code for persons or businesses detrimentally affected by government projects (highways, airports, etc.). In almost all instances involving a refusal of planning permission, however, there is no compensation whatsoever. Town and Country Planning Act 1971, c. 78, § 164.

16. At the time the Community Land Act became law, the head of the Department of

and regulations to clarify and carry out existing law, and provides guidance to local planning authorities. He must confirm all structure plans before they take effect and also hears most appeals from decisions of local planning authorities.[17] When a development application has regional or national importance, the Secretary can call in the application and make the decision himself after holding a public inquiry.

The courts and legal profession play a comparatively minor role in the English planning system. There are two overriding and related reasons for this situation. First, England has a unitary system of government in which Parliament is supreme. While a court can interpret legislative intent or statutory meaning, it has no power to declare a law unconstitutional. Thus Parliament has the power to enact any legislation, however absurd or oppressive; the safeguards against such are political and traditional, not legal.[18]

Secondly, in planning legislation Parliament has left little room for the courts to interfere. The planning process is viewed as being political and discretionary, not inflexible and adversarial. Legislation is of two types. It either spells out definitions and procedures in great detail, leaving the courts little to interpret, or more commonly, it delegates to the Secretary of State for the Environment broad powers to draft discretionary regulations and procedures. Similarly, the planning appeals system is almost entirely administrative, with the Secretary's decision final in all but exceptional instances. And while lawyers function as advocates in the appeals system, their role is much different from that of their counterparts in the United States, since there is no body of binding precedent in the planning appeals system and no decisions are regularly published by the Department of Environment. The belief is that there are no right answers in planning and therefore each case must be treated individually. Thus lawyers have served basically to present their client's case and attack their opponent's. There is, however, a recent trend

---

the Environment (DOE) was Anthony Crosland. Crosland was recently elevated to the position of Foreign Secretary under the new Labour Government of Prime Minister James Callaghan. Crosland was replaced at DOE by former Secretary of Trade, Pete Shore. The Manchester Guardian Weekly, Apr. 18, 1976, at 5, col. 4.

17. A planning inspector actually hears appeals and makes nonbinding recommendations to the secretary who renders the final decision. Although the secretary gives "reasons" for his decision, these are often brief and cannot be challenged in court since his decisions are based on policy grounds.

18. S. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 72-73 (1974). During the past year, however, there has been increasing concern in England that a bill of rights may be needed to protect individual liberties. This concern has been brought about in part by what has been perceived as an increased willingness of Parliament to enact oppressive legislation. *See* THE ECONOMIST, Feb. 21, 1976, at 28, col. 1.

away from even this minor role. As one commentator observed: "All recent developments in administrative procedures . . . have one common denominator—the retreat from the adversarial process."[19] This movement toward conciliation and investigatory inquiries in the planning system is illustrated by the Town and Country Planning Act of 1971.[20] The act adopted an informal procedure for presenting structure plans rather than the old system of a development plan inquiry with its courtroom atmosphere.[21]

England thus has a complex planning scheme featuring what is perhaps the most sophisticated system of land development control in the Western World. It is a planner's dream deifying professional planners, not lawyers.[22] In spite of this, no one was entirely satisfied with the system. For example, English planners chafed at its so-called negative orientation.[23] The planners could approve or reject a project once proposed by a developer, but they viewed themselves as impotent until a plan was proposed. If they had actual control of development land, the yellow cross-hatching on the development plan indicating offices, for example, would result in real office space. The Community Land Act was designed to remedy this and other perceived shortcomings.

II. Compensation and Betterment in England—The Early Planning Acts

Prior to World War II, English planning faced the basic dilemma that restrains land use planning in the United States today. Under the earliest planning acts,[24] local authorities were required to pay compensation to any person whose property was "injuriously affected" by any provision of a planning scheme, unless the restrictions imposed related to protection of health or certain aspects of the "amenity of the area."[25] Thus while the law empowered local authorities to limit an owner's rights to do as he pleased with his land, they found exercising such powers to be prohibitively expensive.

19. G. Ganz, Administrative Procedures 109 (1974).

20. Town and Country Planning Act 1971, c. 78.

21. *Id.* §§ 6-15. *See also* Ganz, *supra* note 19, at 110.

22. As a lawyer, this author cannot fail to note that when the English found their planning machine grinding slowly to a halt, they called upon a barrister to grease the works. *See generally* G. Dobry, *supra* note 12.

23. Interview with David Hall, Director of Town and Country Planning Ass'n, in London, Dec. 12, 1974.

24. Housing, Town Planning etc., Act 1909, 9 Edw. 7, c. 44; Housing, Town Planning etc., Act 1919, 9 & 10 Geo. 5, c. 35; Town and Country Planning Act 1932, 22 & 23 Geo. 5, c. 48.

25. *See, e.g.*, Housing, Town Planning etc., Act 1909, 9 Edw. 7, c. 44, § 59(1); Town and Country Planning Act 1932, 22 & 23 Geo. 5, c. 48, § 18.

The early acts of 1909 to 1932 also addressed the betterment issue.[26] They authorized the recovery of fifty percent of any increase in the value of property arising from approval of a planning scheme. But such provisions were unsuccessful, since no betterment was ever recovered under these acts.[27]

A. *The Uthwatt Report*

During the Second World War the mood in England "hardened significantly in favor of central planning and there was a deep determination to create a new social order and put an end to the urban and community problems of the past."[28] A number of committees were appointed to examine proposals for a new planning system. In 1941 the Expert Committee on Compensation and Betterment, chaired by Mr. Justice Uthwatt, was directed "to make an objective analysis of the subject of the payment of compensation and recovery of betterment in respect of public control of the use of land."[29] The underlying assumption of the Uthwatt Report was that betterment should be recaptured to a certain extent by the community. It defined betterment as: "any increase in the value of land (including the buildings thereon) *arising from central or local government action*, whether positive, *e.g.*, by the execution of public works or improvements, or negative, *e.g.*, by the imposition of restrictions on other land."[30] The committee also examined two factors to which it attached particular importance in solving the betterment and compensation problem—"floating value"[31]

---

26. *See, e.g.*, Town and Country Planning Act 1932, 22 & 23 Geo. 5, c. 48, § 21.

27. A. TELLING, *supra* note 9, at 271.

28. G. CHERRY, THE EVOLUTION OF BRITISH TOWN PLANNING 120 (1974).

29. *Id.* at 121. *See also* K. DAVIES, LAW OF COMPULSORY PURCHASE AND COMPENSATION 218-21 (1973) (detailed treatment of the Uthwatt Report).

30. UTHWATT COMM. RPT., *supra* note 4, at ¶ 260 (emphasis added).

31. "Floating value" was explained by the Uthwatt Committee in the following manner:

> Potential development value is by nature speculative. The hoped-for building may take place on the particular piece of land in question, or it may take place elsewhere; it may come within five years, or it may be twenty-five years or more before the turn of the particular piece of land to be built upon arrives. The present value at any time of the potential value of a piece of land is obtained by estimating whether and when development is likely to take place, including an estimate of the risk that other competing land may secure prior turn. If we assume a town gradually spreading outwards, where the fringe land on the north, south, east and west is all equally available for development, each of the owners of such fringe land to the north, south, east and west will claim equally that the next development will "settle" on his land. Yet the average annual rate of development demand of past years may show that the quantum of demand is only enough to absorb the area of one side within such a period of the future as commands a present value.

and "shifting value."[32] These concepts have "profoundly influenced the policies of successive Governments, and they may fairly be described as the basis of the present system of compensation for planning restrictions."[33]

The Uthwatt Comittee concluded that the answer lay not in dealing with individual owners—that is, taking from Peter the gain arising from a grant of planning permission to pay Paul who was denied unfettered use of his property. Rather, the committee suggested the immediate nationalization of all development rights in undeveloped land outside urban areas upon payment of fair compensation.[34] Compensation, the Committee believed, would be nominal because of the location and lack of development demand for such property.[35] Foreshadowing the Community Land Act, the Uthwatt Report further recommended that when undeveloped land in the countryside was ripe for development, government should acquire such land at existing use value for development by

---

Potential value is necessarily a "floating value" and it is impossible to predict with certainty where the "float" will settle as sites are actually required for purposes of development. When a piece of undeveloped land is compulsorily acquired, or development upon it is prohibited, the owner receives compensation for the loss of the value of a probability of the floating demand settling upon his piece of land. The probability is not capable of arithmetical quantification. In practice where this process is repeated indefinitely over a large area the sum of the probabilities as estimated greatly exceeds the actual possibilities, because the "float," limited as it is to actually occurring demands, can only settle on a proportion of the whole area. There is therefore over-valuation.

Id. ¶¶ 23-24.

32. With respect to "shifting values," the committee wrote:

The public control of the use of land, whether it is operated by means of the existing planning legislation or by other means, necessarily has the effect of shifting land values; in other words, it increases the value of some land and decreases the value of other land, but it does not destroy the land values. Neither the total demand for development nor its average annual rate is materially affected, if at all, by planning ordinances. If, for instance, part of the land on the fringe of a town is taken out of the market for building purposes by the prohibition of development upon it, the potential building value is merely shifted to other land and aggregate values are not substantially affected, if at all. Nevertheless, the loss to the owner of the land prohibited from development is obvious, and he will claim compensation for the full potential development value of his land on the footing that but for the action of the public authority in deciding that development should not be permitted upon it, it would in fact have been used for development. The value which formerly attached to his land is transferred and becomes attached to other land whose owners enjoy a corresponding gain by reason of the increased chance that their land will be required for development at an earlier date.

Id. ¶ 26.

33. A. TELLING, *supra* note 9, at 272.

34. UTHWATT COMM. RPT., *supra* note 4, at ¶ 368.

35. *Id.* ¶ 27.

a public authority or for resale or lease to a private developer.[36] For developed land, the major proposal was to have a general valuation every five years in conjunction with continuing property tax valuations. An annual value, the amount for which the property would rent for a year, would be established initially and a charge of seventy-five percent levied on any increase in annual value thereafter.[37] If the increase was attributable, however, to further development or improvement on the property, there would be no recapture.[38]

One of the key conceptual aspects of the Uthwatt Report, often overlooked, relates to the definition of betterment and the final recommendation respecting recapture of the increase in annual value. Instead of recouping only that portion of betterment attributable to government action, as explicit in its original definition,[39] the Uthwatt Report avoided identifying the cause of that betterment, aside from actual cost of construction on the property,[40] and levied on the increase in value from any cause whatever.[41] Thus even if the value of vacant land skyrockets because of an adjacent private housing development, the increase should flow to the community. Although the Uthwatt Report never admitted that it departed from the original definition of betterment, this shift in theory presaged further changes found in later planning legislation and finally the Community Land Act.

B. *The 1947 Act and the Boom Years*

After the war, a rash of progressive social legislation was enacted in England, including the Town and Country Planning Act of 1947.[42] While the Act did not adopt the Uthwatt proposals, its underlying spirit was quite similar.

Development rights in all land were nationalized. No development could take place without planning permission,[43] a one hundred percent development tax was levied when permission was granted,[44] and in most

36. *Id.* ¶ 58.

37. *Id.* ¶ 311.

38. *Id.* ¶ 319.

39. *See* text at note 30 *supra.*

40. *See* text at note 38 *supra.*

41. UTHWATT COMM. RPT., *supra* note 4, at ¶ 310.

42. Town and Country Planning Act 1947, 10 & 11 Geo. 6, c. 51. This Act included, in addition to its betterment provisions, a complete reform of development control law. For general discussion of the Act see J. CULLINGWORTH, TOWN AND COUNTRY PLANNING IN ENGLAND AND WALES 147-49 (4th ed. 1972).

43. Town and Country Planning Act 1947, 10 & 11 Geo. 6, c. 51, § 12.

44. *Id.* § 69; [1948] 1-3 STAT. INSTR. 4164 (No. 1189).

cases no compensation was payable if permission was refused.[45] If the state compulsorily acquired land, it paid only existing use value since it already owned the development rights.[46] The basic premise was that all betterment was created by the community and, because it was unrealistic and undesirable to distinguish between values increased by government action and those due to private activity within the community, the whole increment would be retained by the community. Due to political realities, however, the operation of the new law was softened by the establishment of a £ 300 million fund to partially compensate owners who could successfully claim their land had some development value on the date the Act came into operation.[47]

As J.B. Collingworth, a noted planning expert, has written, "These provisions . . . were very complex, and, together with the inevitable uncertainty as to when compensation would be paid and how much it should be, resulted in a general feeling of uncertainty and discontent which did not augur well for the scheme."[48] In practice, the financial provisions proved a disaster and, at the behest of developers and private property interests, were soon dismantled.[49]

The Conservatives took office in 1951 intent upon increasing construction activity, especially in private housing. Because development charges were viewed as a hindrance to this effort, the Tories abolished them and denationalized development rights in 1953.[50] New provisions were introduced in 1954 under which compensation for refusal of planning permission was restricted to loss of the development value which accrued up to 1947 only.[51] No development charges were imposed if permission was granted.[52] One commentator has satirized:

> . . . the strange tragedy of Miss Bett (who had disappeared, apparently seduced by the wicked landowner) and Mr. Comp (a con-

45. Town and Country Planning Act 1947, 10 & 11 Geo. 6, c. 51, § 20.

46. *Id.* §§ 50-51.

47. *Id.* § 58.

48. J. CULLINGWORTH, *supra* note 42, at 148.

49. MINISTRY OF HOUSING AND LOCAL GOVERNMENT, REPORT 1951-1954, CMND. NO. 9559 (1955). Pressure to jettison the financial provisions intensified when a certain Mr. Pilgrim committed suicide upon learning that land for which he had paid full development value (£500), in ignorance of the act, was to be compulsorily acquired at existing use value (£65) by local authority. "Why," Winston Churchill asked Harold MacMillan, "have you done this man to death—you and your minions." Schaffer, *The Town and Country Planning Act, 1947*, 60 THE PLANNER, May 1974, at 694.

50. Town and Country Planning Act 1953, 1 & 2 Eliz. 2, c. 16.

51. Town and Country Planning Act 1954, 2 & 3 Eliz. 2, c. 72.

52. *Id.*

> sumptive who had for forty years been chasing Miss Bett but to no avail). . . . In 1947 they were nearly brought together by that distinguished matchmaker, Lord Silkin. In 1954, Mr. Macmillan, the well known magician, while producing 300,000 houses in one year out of a hat with one hand has spirited Miss Bett away with the other. Do not miss our thrilling next instalment. Will Miss Bett be found? Will Mr. Comp survive?[53]

Unfortunately the situation produced by the 1954 act turned out to be even more complex and bewildering than that existing before. Private sales continued to take place at current market prices, but compensation for compulsory purchase (eminent domain) was at existing use value plus any established 1947 development value, a smaller amount than current market value in most instances. In effect, a dual market in land was created. The unlucky landowners who were refused planning permission still received nothing, and if their land was taken for public use, they pocketed less money than they would have on the open market. But if a landowner or developer did secure permission to build, he reaped a double windfall because the 1954 scheme had put nothing in place of the development charge.

This situation, with its obvious inequalities, could not last long. Public opinion became aroused as private pressures for development grew into the beginning of London's ill-famed development boom.[54] The government was forced to take action. The Town and Country Planning Act of 1959[55] brought things full circle by restoring fair market value as the basis of compensation for compulsory acquisition. In theory, the same price was received for land whether it was sold to a private individual or to a public authority.

On the surface things looked much better, but the results were costly for local authorities that now had to pay full market value for land acquired for public purposes. Further, the 1959 act did nothing about the fundamental problem of betterment. The basic injustice was that an owner refused planning permission still received no compensation, since the state owned all development rights as a result of the earlier planning acts, while an owner granted permission was in effect given back his development rights free of charge. To exacerbate matters, the

---

53. G. CHERRY, *supra* note 28, at 153.

54. This development boom has been ably chronicled in O. MARRIOTT, THE PROPERTY BOOM (1967). Mr. Marriott, who was financial editor of The Times (London), apparently decided to cash in on the boom as he later left the newspaper to head a large property investment company. Another interesting publication is COUNTER INFORMATION SERVICE ANTI-REPORT ON THE PROPERTY DEVELOPERS, THE RECURRENT CRISIS OF LONDON (1973).

55. Town and Country Planning Act 1959, 7 & 8 Eliz. 2, c. 53, § 1.

owner who did receive permission was in effect given a bonus—his land values were inflated due to operation of the planning system which refused development on other sites and thus restricted supply.

C. *The Land Commission and Beyond*

Mounting disenchantment with this situation, coupled with a reaction against the runaway property boom in London, enabled the Labour Government, which was returned to power in 1964, to employ a double-barreled attack. The 1965 Finance Act[56] introduced for the first time a capital gains tax of about thirty percent aimed at increases in existing use value. In addition, the Land Commission Act of 1967,[57] created a new betterment levy on increases in development value.[58] It also established a commission to hold development land[59] so that it would be available when needed for local and regional plans and so that it would not be withheld from the market as happened under the 1947 act. The levy was charged on the sale, lease or material development of property[60] and was deducted from the price paid by the commission on its own purchases.[61] The levy was pegged at forty percent, instead of the one hundred percent required by the 1947 act, in hopes of providing some development incentive.[62]

But from its inception, the Land Commission Act was plagued with problems.[63] Local government units resented a central government agency's interference with local planning. And because a wealth-distribution policy was piggy-backed onto the planning aspect of the act, it was predictably unpopular with landowners. Viewing the act as an unwarranted infringement on private property rights, the Conservatives, upon regaining power, abolished the Land Commission in 1971.[64] Up to this time the Land Commission had completed purchase of just 2,800 acres of land and only £ 100 million of betterment levy had been collected.[65]

56. Finance Act 1965, c. 25, §§ 19-22.

57. Land Commission Act 1967, c. 1.

58. *Id.* §§ 27-36.

59. *Id.* §§ 1-5.

60. *Id.* § 29(1).

61. *Id.* § 72, sched. 9.

62. STAT. INSTR. 1967, No. 544.

63. *See* N. ROBERTS, *supra* note 9, at 245.

64. Land Commission (Dissolution) Act 1971, c. 18.

65. 808 HANSARD, Dec. 16, 1970, col. 1474. It should be noted, however, that all development prior to April 6, 1967, was exempt from the Land Commission Act of 1967, and developers rushed into projects to beat the cut-off date. Thus much development land

Ironically, in the midst of this confusion and in spite of a welter of new legislation, developers continued to line their pockets. Office blocks popped up overnight in London like mushrooms, helping to make fortunes for a covey of developers,[66] and the price of development land throughout England skyrocketed. By late 1973, however, the public was so disenchanted with these developers that the Tories were persuaded to introduce a new "windfall" recapture measure—a development gains tax that substantially tightened up the taxation of capital gains on the sale of land and buildings. Certain development gains were to be taxed at the maximum income tax rate (eighty-three percent for individuals, fifty-three percent for corporations), and the first leasing of any nonresidential development was treated as a disposal for tax purposes. The Conservative Party fell from power in 1974 before the measure was passed, but the Labour Government adopted the original proposal[67] which remained in force until the Community Land Act was adopted.

The Labour Government, however, was not satisfied with this solution since each time Labour had attempted to attack the betterment question, its actions had been repealed by a subsequent Conservative Government. The Labour Party decided to try a new approach. Anthony Crosland, then Secretary of State for the Environment, said: "We must now come to the fundamentals of the matter and commit ourselves to the public ownership of land."[68] Thanks to the excesses of the property developers who had become a symbol of all that was inequitable, the Labour Government was able to gain the necessary support for this policy. As journalist Simon Jenkins noted:

> It is a remarkable feature of British politics in the Seventies that Labour Party plans for nationalization of urban development land should have been regarded as relatively noncontroversial, so much so that they were safely elevated from the status of a campaign slogan to that of actual legislation . . . . For private development

---

was available which was not subject to the Act. In addition, the old pattern of developers holding back on plans in anticipation of a victory by the Conservative Party, which would repeal the law, was repeated. Again, the developers were rewarded for their patience.

66. *See* O. MARRIOTT, *supra* note 54, at 121-45, 181-96. Harry Hyams purchased Oldham Estates Co., Ltd., in 1958 for £50,000 with its assets valued at about £20,000. By November 1973, Hymans had parlayed this into property with an equity value of £110 million!

67. Finance Act 1974, c. 30, §§ 38-48, sched. 3-10. Because of its complexity and because the bottom dropped out of the property market in 1975, the development gains tax was never implemented. For a discussion of these provisions see Moore, *The Taxation of Development Gains*, J. PLAN. & ENVIRONMENT L., Nov. 1974, at 634.

68. Labour Party, Notes for Speakers 18 (1974). Labour was particularly impressed with the Swedish approach to land banking. *See* N. ROBERTS, *supra* note 9, at 259.

has become so profoundly suspect that hardly a voice is raised in protest at its being run politically out of town.[69]

In September of 1974 the Labour Government published a White Paper[70] outlining its proposals to municipalize all development land, not just development rights, at existing use value. New legislation would be designed to secure positive planning, reduce the cost of development land and capture betterment values for the community.[71] By March 1975 the government had introduced a Community Land Bill that embodied the ideas set forth in the White Paper. John Silkin, Minister of Planning and Local Government under Anthony Crosland and a Labour Party left-winger, was given charge of the Bill and immediately began to shepherd it through Parliament. After a bloody battle, Community Land became a reality.

III. THE COMMUNITY LAND ACT

The *Communist* Land Bill is the most odious compendium of horrors since the works of Edgar Allen Poe.
—Hugh Rossi, Conservative Party Spokesman on Housing and Land

Mr. Silkin did not expect Tory approval when he brought the Community Land Bill before Parliament, yet no one quite expected what he

69. S. JENKINS, LANDLORDS TO LONDON: THE STORY OF A CAPITAL AND ITS GROWTH 272-73 (1975).

70. LAND WHITE PAPER, LAND, CMND. NO. 5730 (1974).

71. The White Paper said:

> It is not generally disputed that the community itself must control the development of land, and the planning system that has evolved has often been a potent force in preventing development that is harmful to the community. But our system of planning control is largely a negative one. The community, via its elected local authority and, in the final analysis, central Government, can veto proposals for development, but the initiative is left largely in private hands. The community does not at present have sufficient power always to plan positively, to decide where and when particular developments should take place. Public ownership of development land is designed to give this power to its rightful owner, the community.
>
> Side by side with the need to secure positive planning, the nation has to deal with another problem, that of land prices and betterment. "The growth in value, more especially of urban sites, is due to no expenditure of capital or thought on the part of the ground owner, but entirely owing to the energy and enterprise of the community. . . . It is undoubtedly one of the worst evils of our present system of land tenure that instead of reaping the benefit of the common endeavour of its citizens a community has always to pay a heavy penalty to its ground landlords for putting up the value of their land." (Rt. Hon. David Lloyd George - Official Report 29th April 1909, Vol. IV, Col. 532). The public ownership of development land will secure these increments for the community that has created them.

Id. at 1. A more complete discussion of the reasoning behind Labour's position on development land can be found in D. LIPSEY, LABOUR & LAND (Fabian Tract No. 422, 1973); Crosland, *Socialism, Land & Equality, supra* note 1, at iii.

ultimately presented. As is typical with English legislation, the bill itself established only a skeletal framework, with implementation to be accomplished by DOE's secretary. The bill envisioned a transitional period of two to three years;[72] during this period local authorities were to have the power (but no duty) to purchase and develop all development land within their jurisdictions. In other words, "the squires of Barsetshire will be free to acquire no land at all, but the red-hot activists of little Moscow Borough Council will be able to acquire everything in sight."[73] By placing land acquisition powers with local authorities, the Labour Government hoped to avoid the animosity generated by the former Land Commission's interference with local planning. The bill also required land acquistion and management schemes to be drawn up for DOE review. Under such schemes, regard was to be paid to the relevant development plan, but the local authority was given great discretion in this respect.[74]

Also, during the transitional period developers who were allowed to proceed with projects would pay a new development land tax of about eighty percent, a tax not embodied in the Community Land Act itself but to be enacted in separate legislation.[75] The tax would be levied when development was initiated not when it was finished.[76] Land purchased by local authorities during the transitional period, whether compulsorily or by agreement, would be compensated for at market value minus the

72. Community Land Bill 1975, cl. 9.

73. Widdicombe, *The Community Land Bill—A Commentary*, 234 ESTATES GAZETTE 522 (May 17, 1975). This view was borne out during a recent interview with the chief planning officer of a Conservative-dominated local authority. Interview by Fred Bosselman with J. Henwood, Chief Planning Officer, Torbay Borough Council, in Torquay, Jan. 7, 1976. Mr. Henwood thought the Conservative Council would be slow to respond to the Act.

74. Community Land Bill 1975, cl. 17. Such schemes will be prepared on a five-year basis and must contain a "planning statement" defining the broad geographical areas in which the local authorities plan to operate and indicate the categories of land identified for acquisition and disposal. DOE has indicated that the schemes will serve to provide orderly plans for the operation of the act and to enable the government to ascertain progress as to implementation, to provide a means of economic control over local authority spending, and to inform the private sector of the local authorities' intentions. *See The Community Land Bill & Local Authorities*, 234 ESTATES GAZETTE 601 (May 24, 1975).

75. DEVELOPMENT LAND TAX 1975, CMND. NO. 6195. Only increases in development value will be taxed. Increased in current use value will be subject to the capital gains tax. The proceeds of the tax will be split as follows: 40% to the central Treasury; 30% among all local authorities; 30% to the local authority where the development takes place. Local authorities have expressed anger at the substantial cut the central government has taken for itself.

76. Criticism has been leveled at this aspect of the tax because of the absence of any cash realization to meet tax liability at this point. Johnson, *Development Land Tax Bill*, J. PLAN. & ENVIRONMENT L., Apr. 1976, at 212.

development land tax which would have been payable had the land been sold privately. A tribunal was established to ameliorate cases of financial hardship.[77]

The transitional period would end when the DOE secretary thought appropriate, and at that point local authorities were to be vested with a duty to buy up all land needed for "designated relevant development" within the next ten years.[78] As a result, no development could take place thereafter except on land which was in or had passed through local authority ownership. These authorities could either build themselves or lease the land for development by others. At this point the development land tax would not be levied but a new type of compensation would be established under which an owner received not market value minus the tax, but current use value only.

One generalization that can be made of the Community Land Bill is that few people liked it. Editorial comments ran from "Recipe for Failure"[79] to "Without a Friend."[80] Yet, with the exception of several significant amendments, the bill was eventually enacted as written.

Foremost among critics was the powerful English planning profession led by the Town and Country Planning Association (TCPA). Maurice Ash, its chairman, lamented, "The Bill drags planning through the dirt. When all is done, there will be nothing left of planning."[81] Among other things, the planners revolted against Clause 17(3) allowing local authorities to acquire development land without any reference to the planners' development plans. Planners immediately took the offensive and the end result was the first major concession; as enacted, the Act requires local authorities to acquire land with regard to the relevant development plan.[82]

Planners also joined with lawyers and others to question abrogation of the long-established right to a public inquiry whenever a local authority exercised its power of compulsory purchase (eminent domain).[83] The

77. Development Land Tax Bill, cl. 29 (the bill was enacted and became effective Aug. 1, 1976).

78. *Id.* at cl. 27.

79. The Observer, May 4, 1975, at 10, col. 1.

80. 234 ESTATES GAZETTE 963 (June 28, 1975).

81. Ash, *The End of the Affair*, 43 TOWN & COUNTRY PLAN. 244 (May 1975).

82. Community Land Act 1975, c. 77, § 17.

83. The public inquiry process is the English equivalent of the environmental impact statement required by the National Environmental Policy Act. Objectors to a planning scheme or compulsory purchase order are given the opportunity to object and present

government relented and the Act now requires a local public inquiry if there has been no previous opportunity for such an inquiry through normal planning procedure (*e.g.*, during adoption of the relevant structure or local plans).[84] Local authorities, however, may ignore objections that the acquisition is unnecessary or inexpedient. This is a major alteration in public inquiry law,[85] and one which has caused great concern for environmentalists.[86] On the other hand, councils will be required to state the reason for acquiring land, although not the precise purpose for which it is to be used.

The legal profession also worried about the broad discretion given the Secretary and local authorities. The Administrative Law Committee of Justice, a group of lawyers concerned not with the policy reasons for the legislation but with "upholding and strengthening the role of law and preservation of the fundamental liberties of the individual," joined the debate:

> The Committee considers that the Bill in its present form is unacceptable from a constitutional point of view because so much of major importance to the proposals is left to delegated legislation, and because the Bill confers wide and unprecedented discretionary powers on local authorities and on the Secretary of State. . . . [L]egislation which is merely a loose frame for future administrative action and which gives no real guide to what is going to happen in practice should not be accepted by Parliament. Apart from being constitutionally unacceptable, this mode of proceeding creates an impossible degree of uncertainty, which the Committee believes is inconsistent with the role of law.[87]

In the face of such criticism, the government whittled down the discretionary powers to some extent in another major concession.[88]

---

alternative schemes. Environmental groups such as the Council for the Protection of Rural England (CPRE) view the public inquiry as a key weapon to their arsenal against environmentally unsound development. Interview with Robin Grove-White, CPRE, in London, June 27, 1975.

84. Community Land Act 1975, sched. 4. Environmentalists are still dissatisfied, arguing that hearings on abstract development plans are not a substitute for close scrutiny of particular development decisions.

85. *Id.*, Sched. 4, ¶ 6(b).

86. Statement by Lord Henley, Chairman, CPRE, in CPRE Newsletter 6 (Autumn 1975). *See* note 83 *supra.*

87. J. PLAN. & ENVIRONMENT L., July 1975, at 344.

88. For example, the definition of "relevant development" was originally to be prescribed by the Secretary, but under clause 3 of the definition is spelled out in much greater detail. Even so, other provisions would be termed apoplectic by Professor K.C. Davies, such as the provision giving local authorities great discretion in establishing disposal notification areas wherein the landowner must notify the local authority if he intends to sell his land. Community Land Act 1975, c. 77, sched. 8. *See* Davies, *supra* note 29, at 218-21.

A third major concession centered around land and development which would be excepted or exempt from the Act. Owner-occupied housing was exempted originally, but little else. As finally passed, the Act "exempts"[89] land use for agriculture, forestry, mining and rebuilding or altering buildings which increase floor space by no more than ten percent.[90] Furthermore, the government has promulgated regulations which will "except"[91] small development projects such as housing schemes of 1,000 square meters floor space or less or industrial buildings of 1,500 square meters or less and most recreational buildings.[92] These concessions were based as much on the country's economic problems as they were on political considerations.[93] While giving way on these points, the Labour Government successfully opposed numerous other amendments, including further restrictions on the secretary's discretionary powers, greater rights for objectors at public inquiries, and the placing of priority on completion of structure and local plans over the duty to acquire land.[94]

Once the Community Land Act passed on November 12, 1975, the government set to work promulgating various guidelines and regulations. Local authorities were instructed to draw up their initial land acquisition management schemes by the end of 1975 in preparation for the "first appointed day," April 6, 1976.[95] Simultaneously, the govern-

89. "Exempt" development will be totally excluded from the scheme's operation and local authorities will thus have no power to acquire such development. Community Land Act 1975, c. 77, sched. 1.

90. *Id.*

91. "Excepted" development will be within the scope of acquisition power, but the presumption will be that the power will not normally be used to acquire land for such development except in unusual circumstances, *e.g.* land assembly for large-scale redevelopment. PLANNING BULLETIN, Sept. 29, 1975.

92. The Times (London), Jan. 16, 1976, at 2, col. 5.

93. Interview with David Hall, Director, Town & Country Planning Association, in Chicago, Oct. 30, 1975. Chancellor of the Exchequer Dennis Healey has pushed through a wide range of stringent economic measures aimed at cutting government expenditure. Local government has been the prime target of such cuts, which have been so deep that Anthony Crosland reportedly considered resigning his cabinet position in protest. *See* THE ECONOMIST, Feb. 28, 1976, at 75; PLANNING BULLETIN, July 26, 1976, at 1.

The government has made clear that the costs of the Community Land Act will not be allowed to become a charge on rates (property taxes). Borrowing for land purchases will be secured by the local authorities revenues, although receipts and expenditures will be recorded in a separate account subject to yearly governmental approval. Initial gearing up costs will be subsidized by the central government. DOE Circular 128/75 (Dec. 19, 1975).

94. COMMUNITY LAND BILL, COMMON REASONS FOR DISAGREEING WITH CERTAIN OF THE LORD'S AMENDMENTS (1975).

95. PLANNING BULLETIN, Dec. 8, 1975, at 1. After the "first appointed day" local authorities will have the power but no duty to acquire development land.

ment began work on its development land tax which will operate in tandem with the Act until "existing use value" compensation for compulsory purchase is introduced.[96] A Development Land Tax Bill has recently been presented to Parliament and came into effect during August, 1976.[97]

IV. Development Control and Community Land

Under the Community Land Act, as of April 6, 1976, planning authorities have the power to acquire land needed for "relevant" development.[98] Because local authorities are not under an immediate *duty* to acquire such land, most planning applications will still be handled in the normal way.[99] When local authorities are finally given a duty to acquire development land, the English land development control scheme will be completely altered.[100]

Under the Act's procedure, when an authority receives an application for "relevant" development it must decide whether or not to acquire the land; this decision must be made within the time allowed for deciding a planning application, eight weeks, or a longer period if extended by agreement.[101] At the same time, the authority is to consider the planning merits of the application. If the authority decides to acquire the land, it must serve a notice of its intention to do so.[102] Planning permission, if granted, is then suspended for twelve months to give the authority time to acquire the property either by agreement or compulsory purchase. Should the authority elect not to acquire the property, it must issue a notice to that effect.[103] Even if the local authority decides not to purchase the land, however, it may still refuse planning permission and no compensation is payable to the landowner. Should planning permission be granted and no notice of acquisition served, the authority loses its

96. *See* notes 75-77 and accompanying text *supra.*

97. As presently conceived, the tax would not apply to development gains under £10,000, and the first £150,000 of development gain above £10,000 would be levied at a rate of 66 2/3%. Development Land Tax Bill, cls. 12-13. Sales in excess of £150,000 would be taxed at 80%. *Id.*, cl. 1.

98. "Relevant" development is basically any development that is not "exempt" or "excepted." *See* notes 89, 91 and accompanying text *supra.*

99. *See* notes 13-15 and accompanying text *supra.* A minority of applications, however, will be handled according to a new procedure under the Act.

100. This will be on the "second appointed day," perhaps in the mid-1980's. Community Land Act 1975, c. 77, § 25d, sched. 2.

101. *Id.* § 20. It should be noted that although a planning application must by statute be decided within eight weeks, it is a deadline seldom met. *See* G. Dobry, *supra* note 12, at 36.

102. Community Land Act 1975, sched. 7.

103. *Id.*

powers to compulsorily acquire the land for a period of five years,[104] and development may proceed in accord with any conditions imposed.

If the local authority[105] buys the land, it has two alternatives: 1) develop the land itself after receiving consent from the Secretary of State for the Environment; or 2) dispose of it to a private developer.[106] To encourage private developers to continue to identify land ripe for development by submitting planning applications, the authority must give the developer or the former owner of the land "prior negotiating rights."[107] While these rights do not guarantee the ability to buy back the land to carry out the development or even to act as the developer under a building agreement, the developer and former owner are in theory given an "inside track" in dealings with the local authority. If they are not interested, the local authority must try to obtain the best possible financial deal from another developer.[108]

It should be noted that if the land is used for homebuilding, the freehold will generally be disposed of directly to the final purchaser. For all other types of development, the property will typically be disposed of by leasehold or terms which ensure that the community shares in any future increases in value.

V. Will Community Land Succeed?

Probably the only safe prognostication that an American lawyer should make about the Community Land Act is that the English countryside will not turn red, or even pink—at least not for the time being. But the specter of Communism haunts Conservatives who are pledged to repeal the whole scheme should they regain power. This promise could prove to be the very undoing of the Act if private property owners sit back and wait for a change of government, concealing land suitable for development and possible acquisition.

A related worry must be that the landowners themselves will have insufficient incentive to submit planning applications, as occurred under both the 1947 and 1967 acts, because of the development land tax. The government fortunately intends to peg the tax at only 66 2/3 percent

104. *Id.*

105. Initially compensation will be paid on the basis of market value minus development land tax. Later, it will be limited to existing use value only. Development Land Tax Bill, cl. 27.

106. Community Land Act 1975, § 42.

107. *Id.*, sched. 6.

108. *Id.*

(instead of 80 percent as originally planned)[109] for developments valued up to £ 150,000 and to exempt those valued at less than £ 10,000.[110] This should help to some extent, but surely landowners will not rush to notify planners that their land is developable. Once existing stocks of development land are exhausted (in about two years), then local authorities may be hard pressed to come up with more.[111]

And even if land is available, many observers wonder whether the local authorities can do the job,[112] in view of the ineptness some of them have displayed as developers in the past. Yet one must be cognizant of the major housing programs already completed by local authorities in England (one-half of all housing since World War II)[113] and a good number of successful town center redevelopment schemes, often undertaken in partnership with developers.[114] Some authorities will undoubtedly fail miserably under the Act, while others with sufficient staff, expertise and the ability to take advice from the central government and private property experts, will not only provide needed development but also turn a tidy profit for the community. If the failures come first and are spectacular, the Act may be doomed.

With local authorities acting as developers, one must also wonder what will become of the vaunted English development control system. Despite its so-called "negative" orientation,[115] that system has surely been successful in doing what it was asked—controlling development in a country with a population of about 55 million in an area about the size of Wisconsin. One can only marvel at the absence of sprawl and the resulting open countryside and coastline. Of course there have been

109. Goy, *Development Land Tax*, J. PLAN. & ENVIRONMENT L., Nov. 1975, at 638.

110. *See* note 77 *supra*. The Conservatives are pushing for a 52% tax rate on development gains. PLANNING BULLETIN, Feb. 23, 1976, at 1.

111. *See* James, *The Landowners' Role* in THE NEW LAW OF THE LAND 33 (1975). It should not be assumed that the compulsory acquisition procedures will be speedy, even though the ultimate acquisition will take place at near-existing value. In addition, local authorities will have to first identify the land desired and come up with the money to purchase it.

112. As one commentator notes, "They are sometimes accused of buying dear and selling cheap. They do not exist to take risks or make profits." Interview with Sir Desmond Heap, in London, June 26, 1975.

113. Interview with Roger Warren-Evans, former Managing Director of Bovis Homes Southern Ltd., in Uxbridge, Sept. 10, 1974.

114. Interview with John Delafons, Director of Civil Accommodations, Public Services Agency, DOE, in London, July 8, 1975. *See also* Boynton, *The Local Authorities' Role* in THE NEW LAW OF THE LAND 11 (1975). Many of these town center schemes are aesthetic disasters and others have become economic white elephants.

115. *See* note 24 and accompanying text *supra*.

costs,[116] but the English seemed overly anxious to muck about with their planning machine. Mr. Silkin, responsible for guiding the Act through Parliament, has spoken of the creative tensions and opportunities presented to local authorities, planners and developers.[117] No doubt such opportunities are there, but it is equally likely that local authorities may disregard the planners, their plans and even the people, to push through development proposals. As in the United States, local authorities in England have often run roughshod over any opposition to their large-scale grandiose redevelopment schemes.

Another serious problem involves the two-tier system of local government in England.[118] Already, disputes have occurred between the large county authorities and the smaller district councils over planning strategy and the formulation of land acquisition and management schemes.[119] A district authority may favor a big commercial development to ease its finances, but find itself opposed by the stronger county council which does not want to cope with the added traffic. Further problems may arise if one authority is Labour controlled and the other dominated by the Conservatives. Such disputes, which must ultimately be settled by the DOE Secretary, could hamstring implementation unless resolved quickly.

In spite of all these difficulties, there are several reasons why the Act may succeed. First of all, it will not become fully effective for some time. The duty to acquire development land remains distant, probably in the 1980's,[120] and financial restraints will hold back even the most zealous Labour councils, at least for the present. Thus with gradual implementation local authorities may have sufficient time to adapt to new roles at their own pace. Furthermore, it must be remembered that local authorities in England already have much development experience, notably in housing and city center redevelopment schemes. If they can draw on lessons from the acclaimed (and profitable) new town program, things may not be so bad. Many commentators have in the past criticized the English planning system for ignoring financial realities.[121] The Community Land Act should solve this.

116. For example, the cost of having land has been driven up by restriction on supply. *See* 2 P. HALL, THE CONTAINMENT OF URBAN ENGLAND 399 (1973).

117. Address by Rt. Honorable John Silkin, Minister for Planning & Local Government, Town & Country Planning Association National Conference, London, Dec. 4, 1975.

118. *See* notes 10-15 and accompanying text *supra.*

119. PLANNING BULLETIN, Jan. 12, 1976, at 1.

120. PLANNING BULLETIN, Feb. 23, 1976, at 1.

121. Interview with David Eversley, Centre for Environmental Studies, in London, June 23, 1975.

Perhaps the most encouraging portent for the Act comes from the development industry. Proving that necessity makes strange bedfellows, the powerful British Property Federation pledged itself to cooperate with the government and local authorities and urged the Conservatives to drop their promise to repeal the Act. Upon examination, however, the development industry's response is not all that surprising. For years English developers and builders have lamented the lack of certainty they have faced in dealing with land planning authorities.[122] The prospect of some fixed terms of reference in land development, albeit unpopular, reassures industry leaders.[123] On top of this, developers must be attracted by the land banking aspect of the scheme which releases them from the need to maintain expensive stocks of land while seeking planning permission.

The Labour Government also appears to have abandoned much of its early rhetoric concerning the Act and is pressing local authorities to cooperate with developers. In Community Land Circular 6,[124] "which may well become a procedural Bible on this complex piece of legislation and its interpretation,"[125] DOE noted that authorities "will have a special role as owners of development land" but stressed "they will normally look to the private sector both for finance and development skills needed to achieve development."[126] The Circular also made clear that the government expects local authorities to be flexible in setting disposal conditions so that developers can secure construction financing and meet market requirements.[127] In addition, the importance of certainty is stressed:

> [A]s authorities become major and, in due course, exclusive suppliers of land for different types of relevant development, builders and developers will need to be able to look to them with confidence for a continuing supply of land so as to ensure continuity of operation. Disposal procedures will have to cater for the needs of the building firms of differing sizes and levels of activity, recognize that the larger firms in particular have to be able to make forward plans often extending over a period of several years, and help smaller builders to operate efficiently. Appropriate methods will

122. Interview with Roger Warren-Evans, former Managing Director of Bovis Homes Southern Ltd., in Uxbridge, Sept. 10, 1974.

123. ESTATE TIMES (Oct. 24, 1975).

124. Land for Private Development: Acquisition, Management & Disposal, (Mar. 15, 1976).

125. J. Hillman, The Guardian, Mar. 18, 1976, *quoted in* PLANNING BULLETIN, Mar. 22, 1976.

126. DOE Circular 26/76, at 6.

127. *Id.* at 13-14.

need to be worked out in consultation with builders and developers.[128]

In the end, success may depend on the character of the English themselves. That spirit of compromise and cooperation which pervades English life in general and is clearly evident in the planning and environmental fields, will undoubtedly exhibit itself in the implementation of the Community Land Act.[129] The mood in England was perhaps best captured by a recent commentary:

> It was evident that there was a considerable variety of opinions as to the possibility of the new provisions succeeding where the 1947 and 1967 Act attempts failed. If the prevailing view was foreboding of a further failure to establish a workable system, this was perhaps tempered by an absence of any very clear and convincing reasons why the Act should necessarily fail.
>
> If it is assumed that wise and far-seeing decisions will be taken by the Secretary of State in relation to . . . the discretions and powers with which he will be invested, then perhaps the scheme of the Act will work, and the foretellers of doom be confounded. After all, a quarter of a century ago similar forebodings were voiced in great strength about legislation such as that establishing the New Town—to which tributes are now paid from all sides.[130]

VI. LESSONS FOR THE UNITED STATES

On a practical level, those interested in land use in America would be wise to observe the working relationships which evolve between local authorities and developers under the Community Land Act, which is basically a sophisticated land banking scheme. Across the United States developers are lamenting the increasing lack of uncertainty in this country's system of land use controls. They should consider the advantages of having a reliable set of rules to go by, guaranteed by a local government with a stake in the project.[131] Furthermore, with land carrying costs escalating in the face of an annual inflation rate of six percent, developers may begin to recognize the advantages of the government bearing such costs. Fewer and fewer investors are willing to make

128. *Id.* at 15.

129. Contrast this to recent rumblings from the Adirondack Park in New York. It was recently reported that a little old lady physically attacked an official of the Adirondack Park Agency which had the audacity to impose controls on her land. AUDUBON, March 1976, at 118.

130. J. PLAN. & ENVIRONMENT L. 625 (Nov. 1975).

131. *See* Hodges, *Planning Partnership is Best Course for Land Developers, Local Governments*, ENVIRONMENTAL COMMENT, March 19, 1975, at 6, which explores the possibilities of such a system.

long-term interest loans, again because of inflation, thus sources of capital are likely to start insisting on equity positions. Developers are therefore likely to rely more on building and management contracts as a source of profits as their English counterparts will be doing under the Community Land Act. Arrangements established in England should provide some valuable guidance for developers on this side of the Atlantic.

From a more theoretical standpoint, the most important lesson to distill from the English experience is that a system of stringent land use controls cannot work unless the problems of betterment and compensation are adequately handled. The English realized this three decades ago; only now is that fact being recognized here. For many years we have concentrated on the compensation aspect while ignoring betterment (windfalls). Now that strict land use controls are being upheld in courts,[132] attention has belatedly turned to windfall recapture as a means of obviating any losses or wipeouts resulting from land use restrictions. Ironically, development interests often insist that eminent domain is the only acceptable approach to strict land use control. But just as the failure to maintain betterment recapture led to a revolt against developers in England, so could such opposition to windfall recapture inevitably lead to increased police power regulation here.[133]

This is not to say the United States should or can adopt the English approach. The English disposed of the compensation problem in one stroke—Parliament merely said there would be none.[134] For a time, however, they ignored the betterment issue and consequently landowners were given huge windfalls when granted planning permission. When reaction set in, the accepted course was to tax development gains heavily but not to provide for transfer between winners and losers. This approach somehow seems "unfair" to an American audience and would probably be rejected on such grounds, aside from constitutional problems.[135] In the United States, because of concern over compensation,

132. *See, e.g.*, Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

133. *See* Costonis, *"Fair" Compensation, supra* note 2, at 1045-46.

134. *See* note 15 and accompanying text *supra*. *See generally* Garner, *The Law of Land Use Planning in England Today, supra* note 7, at 506. The original £300 million hardship fund is the only exception. *See* notes 43-47 and accompanying text *supra*.

135. "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as it does from technical concepts of property law." United States v. Fuller, 409 U.S. 488, 490 (1973).

The concept of fairness is woven throughout our approach to land use controls. As

the gap between winners and losers has not been as marked, and thus the pressure for windfall recapture has been considerably less intense. But things are changing. To ignore the growing problem of windfalls and wipeouts could doom any hope of adequate land use planning in this country.[136]

The "fairness" concept may also restrain us in another way from emulating the English approach. The Community Land Act is premised on the assumption that any development gain, from whatever source, should be recaptured for the community. Of course, not all such gains are attributable to governmental action, but beginning with the Uthwatt Report[137] the English have ignored this point. To finely tune our system to this reality would necessarily increase its complexity. Perhaps this can be avoided by simply levying a development gains tax at a relatively low rate.

On the other hand, windfall recapture in the United States could proceed without other aims complicating the scheme of the Community Land Act, namely, wealth redistribution and positive planning. Windfall recapture in this country simply has nothing to do with wealth redistribution,[138] nor with establishing the government as developer. The goal is to buttress our system of land development control by providing compensation for planning restrictions, and to direct growth rather than to allow local authorities actually to undertake development.

A second related lesson of the Community Land Act concerns the question of "who develops?" One of the underlying premises of the Act is that once government interference in land use is accepted, it is myopic to give government officials the power to say only where development should not occur.[139] Thus, local authorities are given considerable power to direct growth in a positive manner. But one of the strong points of the prior English planning system was the power of local authorities to say "no" to development. The Community Land Act casts the local

---

noted by one authority in a recent zoning dispute, "Throughout zoning's history the criticism, whatever its tilt, has had a common theme: Local zoning was abusive of due process, both procedurally and substantively." Brief for National Association of Homebuilders, American Society of Planning Officials and American Institute of Planners as Amici Curiae at 17, City of Eastlake v. Forest City Enterprises, Inc., 96 S. Ct. 2308 (1976). For an excellent exposition of the fairness concept as it relates to compensation, see Costonis, *"Fair" Compensation, supra* note 2.

136. For a good commentary on this point, see Hagman, *Windfalls for Wipeouts, supra* note 2.

137. *See* notes 28-41 and accompanying text *supra.*

138. Hagman, *Windfalls for Wipeouts, supra* note 2.

139. N. ROBERTS, *supra* note 9, at 248.

authorities as both the gamekeeper and poacher. The wisdom of such a dual role is questionable. In addition, even the English worry about the possibilities for corruption under the new system.[140] It might have been much wiser for the English to divorce the positive planning aspect (*i.e.*, government as developer) from windfall recapture; it would be imperative in this country.[141]

On the other hand, the English experience indicates that any windfall recapture or land banking scheme which usurps local government planning powers is in for trouble. Witness the fate of the 1967 Land Commission.[142] A delicate balance must be struck between the need for honesty and accountability and the political realities of local government control.

If nothing else, the history of betterment recapture attempts in England shows that a national consensus on the subject is needed not only for the sake of developers but also for local government, planners, environmental groups and the public. In the past, successive Labour Governments have forced legislation through only to have it repealed by the Conservatives. Because no consensus was reached before the legislation was introduced, it had little hope of surviving the changes of governments. Along the same line, the planning system itself seems to self-destruct every few years. The result in both instances is a lack of stability which is to the benefit of no one in the environment game. Unfortunately, the Community Land Act does not appear to have the kind of broad support that such a radical program will need to survive, although hopefully for England a consensus will evolve in time.

In the United States we face similar difficulties since there is no broad consensus on the proposed national land use act.[143] The taking issue continues to attract comment,[144] but developers are antagonistic to even those proposals which might forestall widespread police power regulation.[145] Without some solution to the wipeout problem, two unsatisfac-

140. Brackett, *The Developers' Role*, in THE NEW LAW OF THE LAND 40 (1975). A recent article in THE ECONOMIST, July 17, 1976, at 18, col. 2, noted that while public corruption is rare in England, most corruption centers on planning decisions and local government housing and development contracts.

141. The local government might be the land banking authority, but the land would be sold or leased to private developers in accord with existing development plans for the area.

142. *See* notes 42-71 and accompanying text *supra*.

143. *See, e.g.*, S. 632, 92d Cong., 2d Sess. (1972); H.R. 10294, 93d Cong., 2d Sess. (1974). *See also* Haskell, *A National Land Use Policy*, 7 NATURAL RESOURCES LAW. 257 (1974); Reilly, *New Directions in Federal Land Use Legislation*, 1973 URBAN L. ANN. 29.

144. *See* note 2 *supra*.

145. Costonis, *"Fair" Compensation*, *supra*, note 2, at 1045.

tory alternatives are on the horizon. Either the developers will find themselves painted into a corner when public opinion finally demands a change or the American planning system will continue to creak along ineffectually, unable to direct growth in an environmentally sound manner.