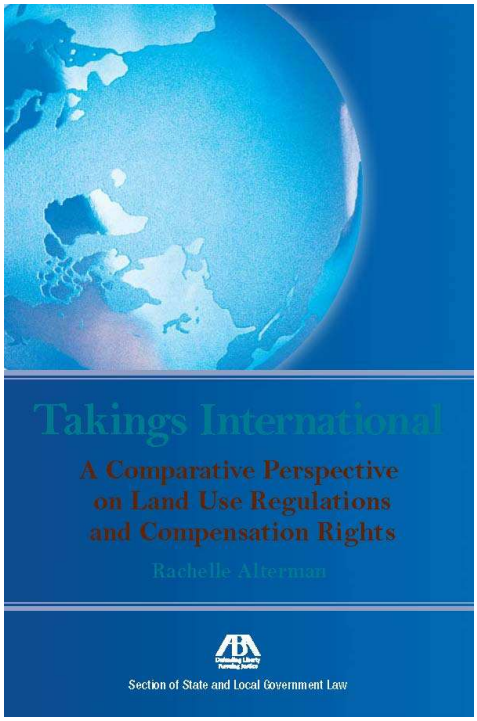

Takings International

A Comparative Perspective on Land Use Regulations and Compensation Rights

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Chapter 6

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CHAPTER 6

UNITED KINGDOM

Long ago, the UK pioneered in granting compensation rights for regulatory takings and exported the idea to many other countries. But in 1947 an "about turn" removed these rights, and adopted a new, clear philosophy and planning system that holds to date. Compensation rights apply only in a few special situations.

Michael Purdue*

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

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

H1 HISTORIC BACKGROUND

Early statutes, such as the Town and Country Planning Act 1909 and the Town and Country Planning Act 1932, imposed a duty on local authorities to pay compensation to owners who suffered losses as a result of the authorities' planning schemes. However, just as local authorities had a duty to pay compensation for losses, they were also empowered to recoup the betterment (the increase in value) created by these planning schemes.

Later, the Town and Country Planning Act 1947[2] nationalized the prospective development value of land. A compensation fund was established at the fairly arbitrary sum of

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[1] "Planning permission" in the U.K. means that permission to develop is granted on a case-by-case basis in a discretionary manner. One may view this as similar to a "spot zoning", or a combination of a PUD, a site plan and a building permit. Development plans do not grant development rights.

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

£300 million.[3] Claims could be submitted for the development rights that were abolished by the 1947 Act. Afterwards, no development rights would be granted by development plans, and no compensation could be claimed for the refusal of planning permission (except in special circumstances).

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

H1 INTERFERENCE WITH EXISTING PLANNING RIGHTS

The Town and Country Planning Act 1947 distinguished between "new" development and the "existing" use of land. Following this distinction, the Act provides for compensation where there is an interference with development, which was either lawfully developed or has become lawful because of a failure to take enforcement action. Even where development has not yet been carried out, compensation rights can arise where planning permissions are revoked or modified.

H2 Orders Requiring the Discontinuance of an Existing Use, Limitations to That Use, or the Removal or Alteration of Buildings

Under section 102 of the Town and Country Planning Act 1990 (the "1990 Act")[4], local planning authorities (LPAs) have broad powers. Where local authorities "consider it expedient in the interests of proper planning of their area (including the interests of amenity)," they are empowered "to require the discontinuance of any use of land, or to impose conditions on its continued use, or to require . . . steps . . . for the alteration or removal of buildings or works."

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

Compensation is calculated according to the ordinary rules for the compulsory purchase of land as laid down in section 5 of the Land Compensation Act 1961, subject to obvious modifications because no interest in land is actually being purchased. Thus, compensation should not include any value derived from a use that is unlawful. The Lands Tribunal has held that the date for assessing the value of the damage is the date of the confirmation of the order.[5] This means that compensation includes the damage incurred by a landowner who bought new equipment (which would have to be sold at a loss) after the service of the discontinuance order but before its confirmation.

H2 Revocation and Modification of Planning Permissions That Have Not Yet Been Implemented

The most significant right to compensation applies in cases where planning permission is revoked. Interestingly, this right applies not only to planning permission actually granted (termed "express permission" and applying to most types of significant development) but also to

[3] In return, a betterment levy was imposed when this development value was accrued by the granting of planning permission. However, following a change of government in 1954, the betterment levy was abolished.
[4] Town and Country Planning Act, 1990, c. 8, § 97 (Eng.)
[5] K. & B. Metals Ltd. v. Birmingham City Council, (1977) 33 P. & C.R. 135 (Eng.).

permission "deemed to have been granted". The latter refers to a development request falls within one of the classes of automatically permitted development (mostly minor additions or minor use changes) set out in "development orders". A right to compensation applies even when the right to carry out the permitted development is lost, not by revocation of a particular permit, but by the central government's amendment of the development order itself. However, since planning permission is granted for a limited period of 5 years (unless otherwise specified), the right to compensation is limited in time as well. In practice, there are very few cases in which authorities revoke planning permissions and pay compensation.

This contrasts with the position of the Use Classes Order 1987,[6] which has the effect of taking the change out of the definition of development rather than granting (automatic) permission for changes of use. As long as the order is amended before the development has commenced, there is no right to compensation even though prior to the amendment, permission would not have been needed for the change. Compensation is not payable even though the landowner may have incurred costs in anticipation of making use of the order's protection, which was then taken away. Presumably the logic behind the Use Classes Order is that no permitted development rights are granted. However, the distinction seems anomalous because the effect on the people who will now have to seek planning permission (provided the change is material and so within the definition of development) is the same as with the amendment of a development order.

Under section 97, a local planning authority may revoke or modify express grants of planning permission if the LPA considers it to be expedient with regard to the development plan and any other material considerations. Confirmation of the Secretary of State is required.[7] Revocation can only apply where the development permitted has not yet been carried out. Under section 107, compensation is payable for both expenditures in carrying out abortive works and losses directly attributable to the revocation or modification. This can include loss of anticipated profits where the damage resulting from the loss of a contract is not too remote.[8] The wording makes clear that there has to be a direct link between the damage and the revocation or modification. Therefore, losses or damages resulting from actions taken before the grant of permission are excluded from compensation.

In calculating the depreciation in the value of the land, it must be assumed that permission would be granted for rebuilding and building alterations.[9] This would normally result in a reduction in the amount of compensation because under this assumption, the notional value of the land would be higher. This is illogical because permission may well be refused for such development and today, there is no right to compensation following a refusal to grant planning permission. These harsh consequences were forcefully illustrated in the House of Lords decision in *Canterbury City Council v. Colley*,[10] which involved the revocation of a permission to demolish and rebuild an existing building (permitted before 1947). The effect of the statutory assumption was to eliminate all compensation for the depreciation of the land value occasioned by the revocation. The Court ruled that there was no escape from the need to apply the assumption even when, as in this case, the notional permission to be assumed is the very permission that has in fact been revoked.

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[6] *See* The Town and Country Planning (Use Classes) Order, 1987, S.I. 1987/764.
[7] There are similar confirmation procedures for discontinuance notices.
[8] *See* Hobbs (Quarries) Ltd. v. Somerset County Council, (1975) 30 P. & C.R. 286, 291 (Eng.).
[9] Town and Country Planning Act, 1990, c. 8, § 107(4) (Eng.); *Id*. c. 8, sched. 3, pt. 1.
[10] (1993) 1 All E.R. 591 (H.L.) (Eng.).

The compensation claim has to be made by a person with an interest in the land. In *Pennine Raceways Ltd. V. Kirklees M C (No 1)*,[11] the Court of Appeal held that this wording included enforceable contractual rights, such as licences, as well legal or equitable interests in land. The liability for paying compensation falls on the LPA. As is the case with discontinuance notices, the Secretary of State has a default power to issue a revocation order to a planning permission. In this case too, the liability to pay falls on the local planning authority that granted the permission.[12] In an answer to a Parliamentary question, the government made clear that the default power would only be used where the grant of planning permission was grossly wrong and damaging to the wider public interest, or when similar planning applications have been treated inconsistently without justification.[13]

In practice, cases of revocation of planning permission are very rare. The need to compensate probably deters local planning authorities and the government. Is the local planning authority authorized to take the financial burden into account? In *Alnwick D.C. v. Secretary of State for the Environment Transport, and the Regions*,[14] Mr. Justice Richards ruled that they are not because financial consequences are not "material considerations". However in practice, both the local planning authorities and the Secretary of State will inevitably be influenced by the high costs of making such orders.

H2 Voiding a Permit through Judicial Review (With No Compensation Rights)

Where a grant of planning permission is judged to have been grossly wrong, there are very likely strong grounds for holding the grant to be not only wrong, but invalid in law. An alternative to a revocation order that has the advantage of not requiring the payment of compensation is to get the grant quashed by resorting to an application for judicial review. This, however, requires the rather strange spectacle of the LPA or one of its members bringing an application to strike down its own previous decision. The courts have held so far that this remedy is a possibility, but it may depend on the particular facts.[15] However, when it is apparent that an LPA is applying for judicial review to invalidate a planning permission as a way of saving compensation money, the courts might refuse the application, unless the applicant had induced the grounds of invalidity. However, there is no direct court ruling on this issue[16].

H1 PURCHASE NOTICES

The closest that United Kingdom law gets to providing for compensation for an adverse development control decision is the mechanism of the purchase notice. However, successful

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[11] [1983] Q.B. 382.
[12] *See* Town and Country Planning Act, 1990, c. 8, sched. 1, ¶ 18 (Eng.).
[13] See Hansard in 164 PARL. DEB., H.C. (6th ser.) (1989) 327–8w.
[14] [2000] 79 P. & C.R. 130 (Q.B. 1999).
[15] *See* R. v. Bassetlaw D.C. exp Oxby, [1999] P.L.C.R. 283 (rejecting the argument that it was wrong for a local planning authority to seek judicial review of its grant of permission.).

[16] In *R. v. Restormel Borough Council ex parte Parkyn and Corbett*, The Court of Appeal refused the application for judicial review, but the exact ratio of the decision is difficult to ascertain because the refusal to quash the decision was based on a wide range of factors. However, the basic reasoning of the majority seems to have been that justice required that the owners of the land should not be deprived of compensation. See [2001] J.P.L. 445 (Q.B.D. 2000).

purchase notices are extremely rare. For example, in 2000–2001, only fourteen notices were referred to the Secretary of State, and all of these were unsuccessful because they were rejected, found to be invalid, or withdrawn [17]

The underlying requirement is that "the land must have become incapable of reasonable beneficial use in its existing state." The rationale is that when the control over development is equivalent of a taking of the land, the LPA should be required to purchase what has become a worthless piece of land. This process is sometimes referred to as a reverse compulsory purchase.

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

Situations meriting a purchase notice are usually distinguishable from the (frequent) situations where LPAs require that the landowner dedicate lands to the public. In the latter cases, the developer may still benefit from the development. LPAs today would simply subject the commencement of the development to certain pre-conditions, such as dedication of land.

H2 The Correct Unit of Land

Under section 137, a pre-condition for a successful notice is that "the land" has been the subject of an adverse planning decision, normally a refusal of planning permission. It is the owner[18] of the land that can serve the purchase notice. The courts have held that the person or persons serving the notice must own *all* of that land, and the purchase notice cannot relate to *part* of that land[19]. The purchase notice can however relate to only part of the land the subject of the planning decision where that decision, in effect, severs the land by granting permission for part of the land and refusing permission for the rest of the land. More importantly, the need to relate the purchase notice to all of the land means that it is not enough if just part of the land is not capable of reasonable beneficial use. This question must be determined by looking at the totality of the land.

H2 No Need to Show Causation and need to apply for planning permission

Section 137 does not expressly state that it is necessary to prove that the land has become incapable of reasonable beneficial use *because* of the adverse planning decisions[20]. However, it is not enough simply to produce evidence that under the current use, the land is incapable of reasonable beneficial use; claimants must also have either applied for planning permissions or been served revocation or discontinuance orders.

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[17] VICTOR MOORE, A PRACTICAL APPROACH TO PLANNING LAW § 5.28 (9th ed. 2005)..

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

[19] In *Smart & Courtney Dale Ltd. v. Dover R.D.C.*,[19] the Lands Tribunal held that a purchase notice is invalid if the claimants do not own all the land but several owners can join together and serve a notice.

[20] *Cf.* Purbeck Dist. Council v. Secretary of State of the Env't, (1983) 46 C. & P. R. 1 (Q.B.D.). The case involved a purchase notice for an area of marshland, Mr. Justice Woolf held that it was not incumbent on the server of the notice to show that there was a causal connection between the adverse planning decision occasioning the notice and the fact that the land is incapable of reasonable beneficial use.

It also does not even matter that the owner may have caused the land to be in its current state,[21]unless this was the result of unlawful development and it is not too late to take enforcement action.[22]

H2 The Meaning of "Incapable of Reasonable Beneficial Use"

The key word here is "beneficial." While the fact that money can be derived from the existing use is clearly evidence that the use is beneficial, the absence of income is not necessarily conclusive that the use is not beneficial. Thus, a series of ministerial decisions has held that "garden" use may be a reasonably beneficial use because a garden will usually increase the value of an owned house. In the Court of Appeal decision *Colley v. Secretary of State for the Environment*,[23] land was capable of being used for the production of wood through forestry.

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

> "Market" is an elusive concept. It may mean no more than that a purchaser can be found, who may have a special reason for buying the land in question.. Introducing the idea of "market" and "market value" creates a possible source of confusion. Section 137(3)(a) is concerned with use, rather than the value of the land.[24]

The use must be beneficial to the owner or prospective owner; it is not sufficient that the use, such as open land, might be beneficial to the public generally.[25] The qualifying word "reasonable" might indicate that some sort of comparison can be made to other kinds of uses to which the land can be put. However, it is clearly irrelevant that the land in its existing use is less beneficial than it would be if planning permission had not been refused for the proposed use.

Government in Circular 13/83 explains that the remedy by way of a purchase notice, is not intended to be available when an owner merely shows that he or she is unable to realize the full development value of the land. It has however recently been held by the Lands Tribunal in the decision of **Greenweb Limited v Wandsworth London Borough**[26[1]] that in the case of a successful purchase notice the claimant is entitled to compensation on the assumption that planning permission would be granted for development set out in paragraph 1 of schedule 3 (some situations related to replacement of existing buildings that do not require planning permission). As a result the owner of the land received an undeserved windfall as the value was assessed at £1.600,000 instead of £15,000!

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

[22] This was made clear by the Court of Appeal in *Balco Transport Services Ltd. v. Secretary of State for the Environment No. 2*, [1986] 1 W.L.R. 88 (A.C.). There, agricultural land had been made incapable of reasonable beneficial use because hardcore (hard material such as builders' rubble) had been laid down without obtaining planning permission. It was now too late to take enforcement action because of the "four-year" rule. Town and Country Planning Act, 1990, c. 8, § 171 (Eng.).

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

[23] Colley v. Sec'y of State for the Env't, (1999) 77 P. & C.R. 190 (A.C.).

[24] *Id*.

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

[26[1]] Decided 17th September 2007 but unreported as yet.

H1 PLANNING BLIGHT AND INJURIOUS AFFECTION

"Planning blight" is described by the report *Future of Development Plans* as "the depressing effect on existing property of proposals which imply future public acquisition and disturbance of the existing use."[27]Planning blight is dealt with in the follwing section.

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

H2 Blight Notices

A blight notice is similar to a purchase notice in that it is a form of inverse compulsory purchase because it forces the potential acquiring authority to purchase the land ahead of the scheme. However, the blight notice remedy differs from purchase notice in that it applies only where the land falls within a specified set of categories which includes typical public services such as schools. Furthermore, the blighted land may still be capable of beneficial use, so that a purchase notices would not apply. In addition, the person serving the blight notice must have a "qualifying interest."[28]

H3 The Qualifying Land Designation

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

A development plan[29] may designate land as required for various public functions. The plan does not have to have been formally adopted – it may have been submitted to the Secretary of State for independent examination. Also included is land indicated for public functions in a non-statutory plan (approved by a resolution passed by a local planning authority for the purpose of exercising its development control functions), or where the planning authority has resolved or been directed by the Secretary of State to safeguard the land for the public purpose.[30] The word "indicated" has been held by the Lands Tribunal to even include diagrams.[31]

The land must clearly fall within the specified public purposes. In *Bolton Corp. v. Owen,* the Court of Appeal held that the person serving the blight notice had not shown that the land indicated in a development plan for residential purposes clearly falls within the functions of a local authority because the redevelopment could be carried out by a private developer (though in

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

[28] Town and Country Planning Act, 1990, c. 8, § 149 (Eng.).

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

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

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

the circumstances this would seem rather unlikely).[32]

H3 The Qualifying Interests

The qualifying interests are defined narrowly so as to only include those persons who might be expected to suffer particular hardship as a result of planning blight. This essentially means that blight notices can only be served by the owner-occupiers of residential properties or the owner-occupiers of non-domestic property, in which the annual income from the business is less than an amount prescribed by the Secretary of State.[33]

H3 Proof of Injury

Individuals serving blight notices must be able to establish injury to their interests in land by showing that they have made reasonable endeavors to sell their properties, but are unable to sell their interests except at prices that are "substantially lower"[34] than otherwise. The burden is on the person serving the notice, and the notice may be unsuccessful if there are other reasons why the owner has been unable to sell the land.[35] What constitutes a "reasonable endeavor" is a question of fact and depends on the particular circumstances.[36]

H3 The Process

The notice must be served on the public body that will acquire the land. On being served with a blight notice, the public authority has to decide whether to accept the notice or serve a counter-notice that specifies the grounds on which the public authority is rejecting the notice. An obvious ground is that the land does not come within any of the specified categories. The authority can also head off a counter-notice by stating that it does not intend to acquire the property,[37] or in certain circumstances, the public authority can disclaim any intention of acquiring any part of the land during the period of fifteen years from the date of the counter-notice. Where there has been such a "disclaimer to purchase," the powers to purchase cease to have effect.[38] These provisions mean that the public authority can, in effect, change its mind about compulsorily purchasing a property. Once a counter-notice has been served, it will have the effect of overriding the blight notice, unless it is referred to the Lands Tribunal within two months.[39] If no counter-notice is served or it is not upheld by the Lands Tribunal, the legal effect is that the named authority is deemed to have been authorized to compulsorily purchase the land and to have served a notice that cannot be withdrawn.[40] Therefore, the public authority is forced to acquire the land at a price that will be calculated in the same way as if the compulsory purchase had been initiated by the authority itself. One possible objection in a counter-notice is that the authority only requires part of the land. However, this right is qualified, as under ordinary compulsory purchase principles, the claimant's right to require that the entire plot be

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[32] Bolton Corp. v. Owen, [1962] 1 Q.B. 470.
[33] Town and Country Planning Act, 1990, c. 8, § 149 (Eng.).
[34] Town and Country Planning Act, 1990, c. 8, § 150 (Eng). The courts have not yet given any guidance as to the meaning of the term "substantially lower" used in section 150(1).
[35] *See* Malcolm Campbell v. Glasgow Corp., [1972] S.L.T. 8 (Lands Tr. 1972).
[36] Lade and Lade v. Brighton Corp., (1971) 22 P. & C.R. 737 (Lands Tr.).
[37] Town and Country Planning Act, 1990, c. 8, § 151(4)(c) (Eng.).
[38] Town and Country Planning Act, 1990, c. 8, § 155 (Eng.).
[39] *See* Town and Country Planning Act, 1990, c. 8, § 153 (Eng.).
[40] *See* Town and Country Planning Act, 1990, c. 8, § 154 (Eng.).

acquired is transposed onto the blight notice procedures.[41]

H2 Injurious Affection

Where planning permission is granted to a private developer, the grant does not override any private law rights of neighboring land.[42] In contrast where a statute authorizes public works and activities, it will usually be implied that the Act confers immunity from being sued in nuisance.[43]

However in certain circumstances, Parliament provides for the alleviation of hardship caused by public works by paying compensation for what is usually termed "injurious affection."[44] This usually applies where the result of taking the land for public works is to sever the land from other land that is owned by the claimant. But even if there is no severance, there are circumstances where compensation can be claimed for adverse consequences on neighboring land of the construction or the use of public works. We will now examine the law governing injurious affection.

H3 Injurious Affection Due to Severance of Land

Section 7 of the Compulsory Purchase Act 1965 provides that assessment of the amount of compensation for compulsory purchase can include the physical damage caused by the severance of the land being compulsorily purchased from the claimant's other lands. In addition, section 7 provides that damage by reason of the remaining land being otherwise injuriously affected can also be taken into account when assessing compensation.[45] Section 44 of the Land Compensation Act 1973 further clarifies that compensation covers damages caused by the whole of the works and not just the works on the part of the land compulsorily purchased. The courts have broadly interpreted this provision by holding that it covers any depreciation of the value of the retained land resulting from the exercise of the powers of the acquiring authority, including the depreciating effects of loss of privacy and amenity.[46] The result is that, at least where land is severed, the person owning neighboring land is in a stronger position if the damage is caused by the public works than if the activities are being carried out by a private person. The courts have held that term "severing of land" means that the land does not have to be actual physically contiguous,[47] but must at least be "so near to each other and so situated that the possession and control of each gives an enhanced value to all of them."[48]

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[41] *See id.* § 166.
[42] The grant of planning permission can result in a change in the character of a neighbourhood, which can alter what will amount to a nuisance. *See, e.g.*, Gillingham Borough Council v. Medway (Chatham) Dock Co. Ltd., [1993] Q.B. 343; Wheeler v. J.J. Saunders Ltd., [1995] 3 W.L.R. 466 (C.A.) (appeal taken from Eng.).
[43] *See* Hammersmith and City Railway Co. v. Brand, [1869–70] L.R. 4 H.L. 171; Allen v. Gulf Oil Refining Ltd., [1981] A.C. 1001 (H.L.) (appeal taken from Eng.).
[44] *Hammersmith*, L.R. 4 H.L. at 175, 178.
[45] *Id*.
[46] *See* Duke of Buccleuch v. Metropolitan Board of Works, [1871–72] L.R. 5 H.L. 418.
[47] *See* Cowper Essex v. Acton Local Board, [1889] L.R. 14 App Cases 153. The facts involved land taken for sewerage work that was separated by a railway from other land owned by the claimant. *Compare* Nisbet Hamilton v. Northern Lighthouses Comrs, [1886] 13 R. 710. In *Hamilton*, a small island, which was compulsorily purchased for a lighthouse, was some distance away from a house that was also owned by the claimant.
[48] *See* Cowper Essex v. Acton Local Board, [1889] L.R. 14 App Cases 153, 167 (Watson, L.).

H3 Injurious Affection Caused by the Construction of Public Works Even If No Land Is Taken

Section 68 of the Land Clauses Consolidation Act 1845 provides a right to compensation "[i]n respect of any lands. . . which shall have been taken for or injuriously affected by the execution of the works . . . ."[49] Section 10(2) of the Compulsory Purchase Act 1965 confirms this right"[50] It is doubtful that this provision was intended to give the right to compensation to those whose land was not being compulsorily purchased.[51] Yet in *Metropolitan Board of Works v. McCarthy*,[52] the House of Lords held that there was a right to compensation for damage to neighboring land as long as, but for the authorizing statute, the cause of action would be otherwise actionable at common law. However, the loss to the value of the land must have been due to the works and not the subsequent use.

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

Wildtree Hotels Ltd. V. Harrow L.B.C.,[53] a 2001 decision by the House of Lords, has broadened the scope of the right by holding that it extends to temporary damage caused by construction, even if the capital value of the property will not be diminished once the works are completed. On the other hand, the House of Lords also held that damage caused by noise, dust, and vibration could not normally be the subject of a claim for compensation because it is almost impossible for such a claim to satisfy the requirements that (1) the damage has to be caused by the lawful exercise of statutory powers, and (2) the damage would have been actionable at common law in the absence of statutory protection.[54] This is a catch: To succeed at common law, it would be necessary to show that the building works had been conducted without reasonable consideration for the neighbors. But if the works were carried out without all reasonable regard and care for the interest of other persons, they would not be made immune from liability by the authorizing Act. So either way, it would not be compensable under section 10. If landowners wished to recover for such damage, they had to assume and discharge the burden of proving in an ordinary action for nuisance that the undertaker of infrastructure construction had exceeded its statutory powers.

H3 Rights to Compensation Under the Land Compensation Act 1973

[49] Land Clauses Consolidation Act, 1845, § 68.
[50] Compulsory Purchase Act, 1965, § 10. States: "Section 10 shall be construed "[a]s affording in all cases a right to compensation for injurious affection to land which is the same as the right which section 68 of the Land Clauses Consolidation Act 1845 has been construed as affording. . . ."
[51] *See* Argyle Motors (Birkenhead) Ltd. v. Birkenhead Corp., [1975] A.C. 99, 102, 129–31 (H.L.) (Wilberforce, L.) (appeal taken from Eng.)
[52] [1874–75] L.R. 7 H.L. 243.
[53] [2001] 2 A.C. 1 (H.L.) (appeal taken from Eng.).
[54] *Id*.

The courts have frequently deprecated the state of the law regarding compensation for compulsory purchase. Recently in *Waters v. Welsh Development Agency*,[55] Lord Nicholls of Birkenhead summed up the position in the following words:

> Unhappily the law in this country on this important subject is fraught with complexity and obscurity. To understand the present state of the law it is necessary to go back 150 years to the Lands Clauses Consolidation Act 1845. From there a path must be traced, not always easily, through piecemeal development of the law by judicial exposition and statutory provision.[56]

The enactment of the Land Compensation Act 1973 has done something to address the problems[57] of those who own land close to public works but cannot get compensation under section 7 of the Compulsory Purchase Act 1965 because no land of theirs has been taken. The Land Compensation Act 1973 provides for a right to compensation for depreciation caused by the use of public works.[58] The claim is limited to depreciation resulting from a limited set of physical factors: "noise, vibration, smell, fumes, smoke and artificial lighting and the discharge on to the land . . . of any solid or liquid substance."[59] It creates a narrower version of the common law tort of nuisance; indeed, compensation is only payable if there is statutory immunity from actions in nuisance in respect of the public works.[60] Loss of privacy, loss of a view, and general loss of amenity are not included. Thus, the right to compensation is less generous than that provided under section 7 of the Compulsory Purchase Act 1965 for landowners who have had part of their land taken for public works.[61]

The public works covered under the Land Compensation Act 1973 are the use of any highway, any aerodrome, and any other works provided or used in the exercise of statutory powers.[62] The Act also tries to cover the problem where existing works are altered (the Act is not retrospective); however, intensification of the use is not covered. Even depreciation caused by a change of use in respect of any public works is covered, except in the case of highways or aerodromes.

The provisions of the Land Compensation Act 1973 can result in some rough justice. In the 2005 case of *Brunt v. Southampton International Airport*,[63] claims were brought by owners of houses in Twyford, near Winchester, who contended that the value of their houses had been diminished by increased noise from aircraft movements arising from the substantial works to the taxiways and aprons at the airport during that period. The dispute was over whether the main purpose of the works was to provide facilities for a greater number of aircraft, in which case the landowners would be eligible for compensation under section 9(6)(b). The Airport argued that the works had not been made for the purpose of increasing the numbers of aircraft, but rather to

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[55] Waters v. Welsh Development Agency, [2004] UKHL (H.L.) 19, [2004] 2 All E.R. 915, 919 (H.L.) (appeal taken from Eng.).
[56] *Waters*, 2 All E.R. at 919.
[57] In 1969, Justice pointed out that it was a sad commentary on the present law that an owner of land in an area through which a motorway was to be constructed should prefer that the motorway should take all his property rather than go near it. JUSTICE, COMPENSATION FOR COMPULSORY ACQUISITION AND REMEDIES FOR PLANNING RESTRICTIONS (1969).
[58] *See* The Land Compensation Act, 1973, c. 26, § 1.
[59] *See id*. § 1(2).
[60] *See id.* §§ 1(1), 1(2).
[61] *See*, *e.g.*, Shepherd and Shepherd v. Lancashire County Council, (1976) 33 P. & C.R. 296 (holding that the right to compensation does not cover a land's depreciation that was caused simply by being close to a refuse tip).
[62] Land Compensation Act, 1973, c. 26, § 1(3).
[63] [2005] EWCA (Civ) 93, [2005] 2 P. & C.R. 21 (C.A.) (appeal taken from Eng.).

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

To be eligible for compensation under the Land Compensation Act 1973, it is not enough for the claimant to show a qualifying interest; the claimant must have acquired the interest before the date that the works first came into use.[64] Similar to blight notices, the right to compensation only applies to owners of residential dwellings, owner-occupiers of agricultural units, and owner-occupiers of small properties.[65]

In calculating the depreciating effect, it is to be assumed that planning permission will not be granted for development.[66] Normally, this would not have an appreciable effect on the value of the property. In addition, there are provisions that require appraisers to take into account increases caused to the land by the use of the works and any right to mitigating works, such as insulation works, to be carried out on the property.

H1 THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE HUMAN RIGHTS ACT 1998

The basic absence in UK law of compensation rights for denial of permission to develop does not contradict the European Convention on Human Rights[67]. Prior to the commencement of the UK's Human Rights Act 1998, there were no decisions of the European Court of Human Rights that held the United Kingdom's planning laws breached the Convention. The jurisprudence of the European Court of Human Rights and United Kingdom courts strongly indicate that the United Kingdom law is not incompatible.

Development control decisions can raise issues concerning article 8 of the European Convention (the right to respect for private life, family life, and a home),[68] both in respect of the applicant and those opposed to the development. However, in all but the most exceptional circumstances, any interference is justifiable as pursuant of a legitimate aim.

Similarly, planning decisions could bring into play article 1 of the First Protocol to the Convention, which protects property rights from interference.[69] However, again an outright deprivation of property is normally justifiable as long as reasonable compensation is paid, and control over property without the payment of compensation is justifiable unless the restriction is so severe that it amounts to a taking of land.

The enactment of the Human Rights Act 1998 [70] brought into force in United Kingdom law most of the rights set out in the European Convention on Human Rights. However, if the

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[64] The Land Compensation Act, 1973, c. 26, § 1(1).

[65] *See id.* § 2(5).

[66] *See id*. § 4(3). However, the development exception found in paragraph 2, schedule 3, which is concerned with the change of use of a single dwelling-house into two or more dwelling-units, applies here too. Thus, in assessing damage, the appraisers may take into account expectations that paragraph 2, schedule 3 development would have occurred.

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

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

[70] Human Rights Act, 1998, c. 42 (Eng.).

provisions of primary legislation, such as an act of Parliament, mean that the authority was obliged to act as it has, the action is not unlawful.[71]The Human Rights Act does not seem to have substantially altered the assessment that UK law is in compliance with the European Convention.

However, it has to be recognized that it is now possible for the United Kingdom courts to give the convention rights a stricter interpretation than the European Court has done; the U.K. courts are only required to take the European Court of Human Rights' jurisprudence *into account*.[72] So far, there is little sign that the Human Rights Act 1998 will have much impact on this branch of the law.

However, an adverse planning decision could invoke not only article 1 of the First Protocol of the ECHR (protecting property rights), but also article 8 (protecting private life, family life, and the home). The obvious example would be where an applicant was refused planning permission for residential use of land. So far, most of the cases have been concerned with gypsies who, because of their nomadic way of life, are constantly in dispute with planning authorities.[73]

The human rights under both article 8 and article 1 are qualified. The ECHR recognizes the authority of the state to interfere in article 8 rights when the interference is in accordance with the law and is necessary in a democratic society for the interests of national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or for the protection of the rights and freedoms of others. In the case of article 1, the state may limit the peaceful enjoyment of possessions where such control is in the general interest.[74] In *R (on the application of Michael and Jenny Boyd) v. English Nature*,[75] Rabinder Singh QC, sitting as a Deputy Judge, pointed out that article 1, unlike article 8, does not require the interference to be necessary for a pressing social need. He nevertheless held that the state's interference with the right of possession must be proportionate.[76]

To date, the European Court of Human Rights and the United Kingdom courts have held that the public interest justifies the existence of planning controls and the interference with the rights that these controls entail.[77] Yet, the interference must be proportionate. Thus, in *Buckland v Secretary of State for the Environment, Transport and the Regions*,[78] a case concerning article 8, Justice Sullivan expressed the following view:

> Our planning system is based on the premise that land owners "properly expect to be able to use or develop their land as they judge best unless the consequences for the environment or the community would be unacceptable" (see paragraph 36 of PPG1). Or, to use the language of the European Court of Human Rights, planning permission will be granted unless there is a "pressing social need for a refusal."[79]

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[71] *See id.* § 6(2).
[72] *See id.* § 2(1).
[73] The Human Rights Act 1998 has had a significant impact on the law concerned with the enforcement of planning law. *See* South Bucks Dist. Council v. Porter, [2003] UKHL (H.L.) 26, [2003] 2 A.C. 558 (H.L.) (appeal taken from Eng.).
[74] *See id*. art. 1.
[75] [2003] EWHC 1105.
[76] *See id*. ¶¶ 19, 20. For any analysis of how the courts have interpreted the need to show proportionality principle in planning law, see Michael Purdue, *The Human Rights Act 1998, Planning Law and Proportionality*, 6 ENVT. L. REV. 161 (2004).
[77] *See* Buckley v. U.K., 1996-IV Eur. Ct. H.R. 1274; Chapman v. U.K., 2001-I Eur. Ct. H.R. 47.
[78] [2001] EWHC (Admin) 524.

[79] *Id*. (internal citations omitted).

In terms of article 1,[80] a planning control is categorized as a control over the use of property rather than a taking, unless the land is rendered useless because it cannot be used for an alternative purpose.[81] In the latter case, the purchase notice process would normally satisfy article 1 by affording compensation. Although, the Human Rights Act 1998 might require a more liberal interpretation of the meaning of "beneficial use," so far, there has been no case on this issue.

Amendments to legislation that have the effect of taking away property rights, such as changes to the Use Classes Order, might also come within article 1 of the First Protocol. However, the Court of Appeal in *Trailer & Marina (Leven) Ltd. v. Secretary of State for the Environment, Food and Rural Affairs, English Nature*[82] rejected a claim that a change in the law, which had the result of taking away a right to compensation, was in breach of article 1. The Countryside and Rights of Way Act of 2000 made changes to the Wildlife and Countryside Act of 1981 that resulted in the removal of the previous rights to compensation if operations were prohibited by designation of land as a "Site of Special Scientific Interest." The Court held that restrictions on the use of property in the public interest without compensation, which fell short of de facto expropriation, would not normally be in breach of article 1, unless the detrimental effect upon the individual far outweighed the public benefit.

A similar rule would likely hold regarding injurious affection. In theory, the granting of planning permission for a development that seriously affects the use and enjoyment of neighboring land could equally be said to engage both article 8 and article 1.[83] However, in the case of private development, the chances of success are very remote. The injurious affection would have to be very severe to engage either article 8 or article 1. Furthermore, the neighbor in these cases would have private law remedies in nuisance because the grant of planning permission does not give immunity for a nuisance action.

This issue came up in the Court of Appeal decision of *Lough v. First Secretary of State*,[84] where it was argued that the decision of a planning Inspector to grant planning permission for the development of a twenty-story building with twenty-eight dwellings and shops and restaurants in the Bankside area of Southwark would result in the loss of privacy, overlooking, loss of light, loss of a view, and interference with television reception. The Court basically held that the Inspector, in coming to his decision, had fairly balanced the competing interests. The loss of value that would be caused by the development was significant, but that did not constitute a separate or independent basis for alleging a breach of the Convention rights involved.

On the other hand, articles 8 and 1 were successfully used in *Dennis v. Ministry of Defence*[85] to find a claim to damages with respect to aircraft noise caused by RAF harrier jets flying over property. The court held that there had been an interference with Mr. and Mrs. Dennis' human rights under article 8 and article 1 and that an appropriate assessment of damages at common law would provide "just satisfaction" under section 8 of the Human Rights Act 1998. The court, however, refused to grant an injunction to stop the interference on the grounds that

[80] Human Rights Act, 1998, c. 42, sched. 1, pt. 2; Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.
[81] *See* Sporrong v. Sweden (1982) 5 E.H.R.R. 35; Pine Valley Devs. v. Ireland, (1992) 14 E.H.R.R. 319.
[82] [2004] EWHC (QB) 153 (appeal taken from Eng.).
[83] *See* Guerra v. Italy, 1998-I Eur. Ct. H.R. 7; Lopez Ostra v. Spain, Eur. Ct. H.R. (ser. A) No. 302-c (1994).
[84] [2004] EWCA (Civ) 905 (appeal taken from Eng.).
[85] [2003] EWHC (QB) 793.

this was not in the public interest. The court held that, while in this regard the public interest was greater than the individual private interests of Mr. and Mrs. Dennis, it would not be proportionate to pursue or give effect to the public interest without compensation.

Yet, in *Marcic v. Thames Water Utility Ltd.*,[86] the House of Lords rejected a claim that repeated flooding of a home garden with sewage from the public authority's overloaded sewers was in breach of article 8. The House of Lords took the view that the statutory scheme was not incompatible with article 8 because it struck a reasonable balance between the interests of the customers paying sewerage charges and those affected by flooding.[87]

The problem with this approach is that it leaves open the question of whether, even if the statutory scheme itself is compatible with the ECHR, its operation in a particular case may be incompatible. If Mr. Marcic had complained to the Director General under the statutory scheme and then sought judicial review of the failure to take enforcement action, the court would have been faced with that question. Lord Nichols seemed to have some sympathy for this reasoning by stating that he had some concern about the lack of compensation. This suggests that the lack of compensation may mean that "injurious affection" may be actionable under the Human Rights Act 1998 as not being proportionate.

H1 EVLUATION

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

Nevertheless, in the case of the revocation and modification of grants of permission, there are certain anomalies and problems. In particular, attention should be given to the problems involving proof that damage was caused by changes to the Use Classes Order and designations that alter (automatically) permitted development rights (mostly minor additions). It might be necessary to limit the compensation to the cost of works and preparation incurred in reliance directly on the rights. Decreases in the value of the land should remain uncompensated.

In the case of purchase notices, the fact that they are used so little might suggest at first that not much change is needed. On the other hand, the infrequent use of purchase notices by landowners may be caused by difficulties they encounter to prove that the land is not capable of reasonable beneficial use in its existing state. The present interpretation is too narrow and should be extended to cover situations where the adverse planning decisions do not leave any *economically* beneficial use.[88] The area of injurious affection deserves a complete overhaul. The

[86] [2001] 3 All E.R. 698.

[87] *Id*.

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

old provisions in the Land Clauses Consolidation Act 1845 should go. The Lands Compensation Act 1973 should be extended to cover losses caused by both the construction and the use of public works. At the same time, the decision in *Brunt v. Southampton International Airport* could be overturned so that Lord Justice Wade could no longer complain that the result resembled the actions of the promise of the tyrant Temures: not to shed the blood of the garrison of a town if they surrendered and then fulfilled the promise by burning them alive.[89]

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