

**REVISITING THE IDEOLOGIES OF PLANNING LAW:
PRIVATE PROPERTY, PUBLIC INTEREST AND PUBLIC
PARTICIPATION IN THE LEGAL FRAMEWORK OF
ENGLAND AND WALES**

1. Introduction

Two of the key challenges facing the United Kingdom in the late 1970s were energy scarcity and unemployment¹. The challenges faced today are not dissimilar. Climate change is an overarching imperative and a pivotal driver for the development of alternative sources of energy, energy efficiency and the reduction of carbon emissions. The current financial crisis has inevitably been accompanied by a surge in the rate of unemployment and efforts to move towards recovery are underpinned by the facilitation of development. On the face of it, we are in a similar place. However, much has changed in the past three decades in the planning law arena. There have been key external developments (both international and national) such as the adoption of the Aarhus Convention² and the Human Rights Act³. Significantly, for the purposes of this examination, the public participation ideology, nascent in the late 1970s, has become increasingly embedded in legislation as well as finding recognition in the courts. Much has changed in the legal framework of planning in England and Wales and there have been numerous changes in policy with accompanying legislative instruments. This article revisits the three legal ideologies proposed by Professor Patrick McAuslan over thirty years ago in an attempt to establish where the balance lies between them in one aspect of modern day planning law. The development of the public participation ideology is charted and an analysis of the law governing key areas of development control is undertaken in order to draw conclusions as to how the competing ideologies interact today and which of the ideologies (if any) is dominant.

2. The Ideologies of Planning Law

In his seminal 1980 publication ‘The Ideologies of Planning Law’, Professor McAuslan advanced the theses that land use planning law lacked objectivity and neutrality and that the law itself was a major contributory factor behind the disarray of planning. He further argued that this lack of objectivity and neutrality existed because the law is based upon three competing ideologies.⁴ McAuslan proposed these to be; first the traditional common law view that the role of the law is to protect private property; second that the law exists to serve the public interest; and third that the law serves the cause of public participation.⁵ He then proceeded to examine the law in three areas of the planning system of the time, exploring the role of each of the ideologies in; public participation and debate, public development and initiatives and public regulation of private development and activities.

2.1 The Traditional Common Law Approach

The first of McAuslan’s ideologies will be familiar to all legal scholars. It is an approach to the law which flows from the close relationship between private property ownership and the law. Historically the two have always been closely intertwined and the idea that the role of law exists to uphold the constitution and property can be traced back to Locke in the seventeenth century.⁶ Until relatively recent times, politics and law-making have remained the exclusive

¹ McAuslan, P. (1980), *The Ideologies of Planning Law*, Pergamon Press, Oxford, p xi

² Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998 (in force 30 Oct. 2001).

³ Human Rights Act, 1998 (in force 2 Oct. 2000).

⁴ No. 1 at p. 2.

⁵ Ibid.

⁶ Locke, J. (1953), ‘An Essay Concerning the True Original Extent and End of Civil Government’ Everyman’s Library, London (First published in 1690 anonymously in ‘Two Treatises of Government’ Awnsham Churchill, London).

preserve of property owners. The judiciary and lawyers themselves are more often than not owners of property and steeped in a legal tradition that long predates the advent of legislation and judicial intervention to protect the public good.

When faced with legislation enacted to improve the living conditions of the urban working classes and giving government powers to control the use of property, it is not surprising that land owners turned to the courts to protect their interests, nor that the courts were sympathetic to their cause.⁷ It is in the principles developed by the courts in the late nineteenth and early twentieth centuries to protect landowners that the common law or private property ideology can be recognised⁸.

2.2 The Public Interest Ideology

Alongside the traditional common law approach another ideology has gained influence during the last century. The public interest ideology can itself be traced back in time to the writings of Bentham in the late eighteenth century.⁹ This view of the law sees its role as one of providing legitimacy for action taken in the public interest.¹⁰ Whereas the private property perspective can be recognised in the arguments of lawyers and decisions of the courts, the public interest ideology is evident in the actions and decisions of the public administrator. In order to serve the public interest the law gives wide powers to administrators, which often give rise to conflict with the traditional rights of private property ownership.

In more recent times, the courts, themselves, have come to recognise the legitimacy of administrative action in the public interest. With the advent of the twentieth century, lawyers and judges began to become familiar with the role of morality in law espoused by Bentham and this acceptance of the public interest ideology can be recognised in the case law of the higher courts in the early 1900s¹¹. Planning law is characterised by legislation that is motivated by the public interest ideology but yet often attempts to recognise the interests of private land owners. Planning disputes in the courts have seen a vacillation between the traditional common law approach and the recognition of the legitimacy of the actions of public officials in the interest of the public who act in good faith and are ultimately accountable to Parliament.¹²

2.3 Public Participation

The third ideology identified by McAuslan rests in the proposition that, inherent in the law, should be mechanisms for the public to be consulted and involved in decision making processes. Although, as he notes,¹³ this ideology also has philosophical roots in the writing of J.S.Mill,¹⁴ it has only become a recognisable force with its own constituency relatively recently. At the time of writing in 1978, McAuslan saw this ideology as of equal importance to the two outlined above, but as the least developed in terms of both policy and law.¹⁵ As will be

⁷ No. 1 at p. 3.

⁸ For example, nuisance law and the law of easements.

⁹ Bentham, J. (1907), *Principles of Morals and Legislation*, Clarendon Press, Oxford (First printed 1780, first published 1789, reprint of 1823 edition).

¹⁰ No. 1 at p. 4.

¹¹ *Board of Education v Rice* [1911] AC 179; *Local Government Board v Arlidge* [1915] AC 120.

¹² No. 1 at p. 4 and p. 5.

¹³ No. 1 at p. 5.

¹⁴ Mill, J.,S. (1975), *Three Essays: On Liberty; Representative Government; The Subjection of Women*, Oxford University Press, Oxford (First published in 1861).

¹⁵ No. 1 at p. 5.

illustrated below, this third ideology has grown in substance in these respects in the past thirty years or so.

The basic premise of the principle of public participation in the context of planning law is that the public should have rights of participation in decisions on land use planning, not because of any property interests but in the interests of democracy and justice.¹⁶ This notion naturally brings the ideology of public participation into conflict with the private property/common law approach. It also does not sit comfortably with the public interest ideology. Public administrators acting in the public interest in accordance with the law can tend to do so in a paternalistic way without necessarily allowing meaningful public participation in their decision making.

3. The Balance in Planning Law of the 1970's

Of the three areas of planning law surveyed by McAuslan, public participation was considered both at local and central levels. At a local level he concluded that the dominant ideology of the time was public interest. Any deviance towards public involvement, he argued, was motivated by the ideology of private property and public participation did not then have a significant position.¹⁷ Similarly in looking at public participation at a central level, he concluded that the mechanisms in place at the time were not motivated by the ideology of public participation, but dominated by the ideology of public interest. Any innovations in public debate he suggested were 'designed to control and not advance public participation – to steer it into acceptable channels'.¹⁸ At a central level also, he argued that any headway made in public participation was through the service of the private property ideology. His overarching conclusion at the time of writing was that law, which might appear to be designed to increase public participation, was, in fact, grounded in the ideology of public interest. Where public participation provisions did appear these, he argued, were catering to the interests of private property rather than the public at large.¹⁹

In reaching a judgement as to where the balance between the competing ideologies lay in the area of public development, McAuslan looked at compulsory purchase and compensation, clearance area policy and practice and community land. These are areas of planning law firmly underpinned by the fundamental ideology of society and as such, on the face of it, are most closely aligned to the public interest ideology. In the sphere of compulsory purchase and compensation, the principle statute of the time was the Compulsory Purchase Act, 1965, which, on examination, largely replicated the Land Clauses Consolidation Act, 1845. As such, the statutory provisions were, in fact, rooted in the interests of private property and, in particular, ensuring that private landowners were sufficiently compensated. This was also reflected in the decisions of the courts after the 1965 Act came into force.²⁰ Although both public and private interest ideologies are recognisable in the Act, McAuslan notes that the procedural and administrative provisions of the Act, whilst having as their goal the protection of private property, were placed 'firmly within the context of getting on with public development'.²¹ There were no explicit provisions for public participation within the 1965 Act, but one of its aims was to lessen public opposition to development by increasing the size

¹⁶ Ibid.

¹⁷ No. 1 at p. 38

¹⁸ No. 1 at p. 73

¹⁹ Ibid.

²⁰ For example, *Birmingham Corporation v West Midland Baptist (Trust) Association (Incorporated)* [1969] 3 All E.R. 172.

²¹ No. 1 at p. 116.

and opportunities for compensation²². The fact that public opposition to developments continued, reinforced McAuslan's conclusion that public participators formed a separate constituency of interest, which was the basis of an ideology of its own right²³.

The two other areas of public development under consideration by McAuslan are of less relevance today, relating to clearance areas and the ill-fated Community Land Act, 1975. A common theme was unveiled in which the two dominant ideologies were those of public interest and private interest. Despite the fact that all these measures were *prima facie* in the public interest, there was an inherent nod to the power of private property interests and an alliance between the two competing interests in order to preserve the status quo²⁴. What is apparent in all the areas under examination is that, at the time of writing, public participation was barely recognisable as a force. Neither public officials nor the courts favoured arguments from the public or challenges to public action²⁵.

The final area of law under examination by McAuslan spans development control and the control of housing conditions. In development control, more than any other area of planning law, the role of lawyers and the courts has been at its most significant²⁶. This, in itself, can be seen as a triumph of the ideology of private property²⁷. McAuslan considered two specific areas of development control; planning conditions and material considerations. After examining a number of cases relating to planning conditions, he concluded that the courts were firmly aligned to the private property ideology, albeit with different parameters for rural and urban planning. In turning his attention to material considerations in planning, McAuslan recognised an 'oscillation between private property and public interest' in the cases under consideration, but, on balance, he concluded that the courts favoured private property interests, reflecting their grounding in the private property ideology²⁸. No doubt as a consequence of the limited degree of public participation in development control at the time, there was little consideration given to the influence of this ideology in the equation. In contrast, when looking at the control of housing conditions, the public participation ideology was clearly recognisable at this time. However, the picture presented is one of the two dominant ideologies of private and public interests, whilst remaining in competition, supporting one another, particularly against the ideology of public participation²⁹. This alliance, it is argued, stems from the notion that it is ultimately in the public interest to preserve the institution of private property and the market mechanisms within which these interests operate³⁰.

What emerges from the examination of all three of these areas of planning law is the suggestion that the adjustment to reach a balance or *status quo* is the product of what lies beneath any notion of the ideologies of law; this being the ideology of society. At the core of the ideology of society, according to McAuslan, is 'the maintenance and preservation of the system of private property'³¹. If it is accepted that private property interests provide the basis

²² Ibid.

²³ No. 1 at p. 117

²⁴ No. 1 at p. 141.

²⁵ No. 1 at p. 101.

²⁶ No. 1 at p. 147.

²⁷ Ibid.

²⁸ No. 1 at p. 180.

²⁹ No. 1 at p. 209.

³⁰ No. 1 at p. 210.

³¹ No. 1 at p. 145.

of both societal and legal ideologies, then public participation will naturally be marginalised and the balance will always skew towards the private property ideology³².

4. The Current Context

The scale of change across a range of factors that impact upon the legal ideologies underpinning planning law over the past three decades or more has been vast. Not only have there been significant changes in the legal framework of planning, but we have also seen the introduction of extrinsic legal instruments, which may have altered the balance between the ideologies identified by McAuslan in the late 1970s. In particular, legislation providing for freedom of information³³ and public participation³⁴ and an increasingly rights based rhetoric leading up to the introduction of the Human Rights Act of 1998. Alongside developments in the law, the Thatcherite era saw a major change in the political approach to town planning. Since the time of McAuslan's writing, there have been moves to both centralise and decentralise the planning regime as well as numerous changes in the administration of planning. Planning guidance has become increasingly influential and burgeoned and then recently become more contained.

These developments warrant a fresh look at the balance between the three originally identified ideologies. In the preface to his work, McAuslan distinguished the term ideology from philosophy and asserted that the former term embraces 'values, attitudes, assumptions, "hidden inarticulate premises"³⁵, which can be recognised in a range of written sources. In addition to the ideologies that shape the law, there are those that mould politics and society. Indeed, McAuslan recognised that the ideology of society was fundamental to the balance between public and private interest and public participation³⁶. The respective force of these ideologies is based upon power and at the same time influenced by financial and environmental factors. Acknowledged by McAuslan, and acceded here, is the inherently subjective nature of identifying and evaluating competing ideologies from written work given that one's own ideologies will have an inevitable tendency to intervene³⁷. Nonetheless, an attempt will be made to draw conclusions as to where the balance lies today between the three ideologies in the system of development control in England and Wales. Restricting the examination to development control keeps it manageable and it is in this area, in particular, where a shift in balance might be expected.

5. Public Participation

Much of the analysis will focus upon the development of public participation in the law and policy relating to development control. First, it is helpful to understand and chart the development of this more recent legal ideology. Public participation is a shorthand term that embraces a range of ways in which citizens can be involved in decision making. In 1969, Arnstein recognised that participatory processes allow for different levels of influence and proposed a 'ladder of citizen participation'. At the top of the ladder is 'public participation in the final decision' and at the bottom 'public right to know', with participation increasing with

³² Ibid.

³³ Freedom of Information Act, 2000, Environmental Information Regulations, 2004 (2004 No. 3391)

³⁴ No. 2.

³⁵ No. 1 at p. xii.

³⁶ No. 1 at p. 2.

³⁷ No. 1 at p. xii.

movement up the ladder³⁸. Since then, authors have applied their own categorisations to participatory activities. Black, for example, identifies a range of participation from ‘thin’, taking in transparent procedures and traditional consultation exercises, to ‘thick’, encompassing deliberation and consensus-based decisions and solutions³⁹. McCracken and Jones place participatory activities into three categories; ‘proactive’ (for example, environmental impact assessment), ‘active’ (for example, the keeping of registers and responding to requests for information) and ‘passive’ (for example, data monitoring and publication via the internet)⁴⁰. Holder, on the other hand, proposes two theories of participation based upon ‘information’ and ‘culture’⁴¹. The former correlates with ‘thin’ participation and has a limited effect upon decisions, whereas the latter sees public opinion as forming part of the decision-making procedure and is akin to ‘broad’ participation. Direct involvement in decision making, law making and litigation, the ‘culture theory’, ‘broad’ and ‘proactive’ forms of participation can be placed at the top of Arnstein’s participation ladder, whereas the ‘thin’, ‘information theory’ and ‘passive’ forms rest at the bottom. It is clear that the greatest areas of conflict between the public participation ideology and the ideologies of public interest and private property will arise with the types of participation towards the top of the ladder. Private property interests will not wish to see affected members of the public involved in decisions relating to their property and nor will public administrators wish to devolve their decision making powers to the uninformed public.

In identifying the public participation ideology, McAuslan sees its value in terms of contribution to democracy and justice. This third constituency is, if you like, what remains after the interests of private property ownership and public officialdom are accounted for and it is seen as equitable that the remaining part of society should have a part to play in decision making. However, there are also practical arguments for involving the public in law making in general and in planning decisions in particular. Decision making by planners and technocrats may overlook important local knowledge⁴² and local input can be vital in solving complex problems relating to a proposed development⁴³. Both developers and the public can learn about the controversial issues involved and differences of opinion can be settled at an early stage in the process, meaning that the development process is conducted in a way that is sensitive to the local community and less likely to meet with opposition⁴⁴.

5.1 The Entrenchment of Public Participation in Law and Policy

Despite McAuslan’s conclusion that public participation in planning was dominated by the two other ideologies of private and public interest and his observation that the public participation

³⁸ Arnstein, S.R. (1969), ‘A Ladder of Citizen Participation’, *Journal of the American Planning Association*, Volume 35 (No. 4), pp 216-224.

³⁹ Black, J. (2000). ‘Proceduralizing Regulation: Part 1’, *Oxford Journal of Legal Studies*, Volume 20, pp 597-614.

⁴⁰ McCracken, R., Jones, G. (2003) ‘The Aarhus Convention’, *Journal of Planning and Environment Law*, July 2003, pp 802-811.

⁴¹ Holder, J. (2006), *Environmental Assessment: The Regulation of Decision Making*, Oxford University Press, Oxford.

⁴² Owens, S., & Cowell, R. (2011), *Land and Limits: Interpreting Sustainability in the Planning Process*, 2nd Edition, Routledge, London, Steele, J. (2001) ‘Participation and deliberation in environmental law; exploring a problem-solving approach’, *Oxford Journal of Legal Studies*, Volume 21 (3) 415 at p. 437.

⁴³ Dryzek, J.S. (1997), *The Politics of the Earth: Environmental Discourses*, Oxford University Press, Oxford.

⁴⁴ Thompson, J., (2004) ‘Involving people, changing lives: community participation in the development process’, *Journal of Planning Law*, Supp (Occasional Papers No. 32) Volume 58 at p. 64.

ideology was nascent at the time of his writing, mechanisms for public participation did then exist and, in many respects, planning law was well developed in this sense in comparison, for example, with other areas of environmental protection. Registers of planning applications had been kept since 1948 and these were the oldest record containing information on the environment open to the public. Limited provisions also existed for notification and consultation with interested parties in the context of development control, and there were opportunities for the public to be involved in development planning⁴⁵. Public participation had certainly entered the language of planning as long ago as the late 1960s when the ‘Skeffington Report’ ‘People and Planning’⁴⁶ was published. However, over the past three decades or so, requirements for public participation across all areas of government activity have seen a significant increase and the notion of involving the general public in decision making has become entrenched in many areas of law and policy, not least in environmental decision-making.

This movement has to a large degree been led by Europe both by the European Union (EU) and the United Nations Economic Committee for Europe (UNECE). Freedom of information in environmental decision-making, an essential pre requisite and cornerstone of public participation, has been a feature of EU Law since a 1990 Directive⁴⁷ and since this time, there has been a series of EU Directives containing provisions for procedures informing or enabling the public⁴⁸. Furthermore, public participation is a recurrent theme in EU policy making and this can be noted in the Environmental Action Programmes as well as the EU Governance White Paper⁴⁹. One of the most significant recent developments in the field of public participation is the UNECE ‘Aarhus Convention’⁵⁰. The Convention implements principle 10 of the Rio Declaration on the Environment and Development and is commonly described as comprising three pillars; public access to environmental information, public participation in environmental decision-making and public access to justice in environmental matters. Both the European Union and the UK have implemented the Convention and it is clearly the case that planning law in England and Wales falls within its ambit⁵¹.

At a national level, aside from legislation implementing EU provisions, the public participation requirements of the town and country planning legal framework have been enhanced over recent years and provisions in the Planning and Compulsory Purchase Act, 2004, the Planning Act, 2008 and the Localism Act, 2010 have all had a significant impact upon public participation in planning matters. Alongside the introduction of legislative provisions for participation, government policy and guidance have echoed the call for public involvement in planning decisions⁵² and, as shall be seen, the courts have also turned their attention to the question of adherence with public participation requirements. In assessing the

⁴⁵ Town and Country Planning Act, 196.

⁴⁶ HMSO, 1969.

⁴⁷ Dir 90/313/EEC on Freedom of Access to Information on the Environment [1990] OJL158/58 (subsequently repealed by Dir 2003/05) implemented by Environmental Information Regulations, 1992 (SI 1992/3240) (UK).

⁴⁸ Dir 2003/04 on Public Access to Environmental Information and Repealing Council Dir 90/313/EC [2003] OJL41/26, Dir 2003/35 Providing for Public Participation in Respect of the Drawing up of Certain Plans and Programmes Relating to the Environment and Amending with Regard to Public Participation and Access to Justice, Council Dirs. [2003] OJL156/17.

⁴⁹ European Governance – A White Paper, COM (2001) 428 25 July, 2001, 8.

⁵⁰ No. 2.

⁵¹ Purdue, M. (2005), ‘An Overview of the Law on Public Participation in Planning Law and Whether it Complies with the Aarhus Convention’, *Environmental Law and Management*, Volume 17, pp 107-114.

⁵² White Paper, Modern Local Government: In Touch with the People, 1998, Community Involvement in Planning: The Government’s Objectives, ODPM, 2004, PPS1: Delivering Sustainable Development, White Paper, Communities in Control: Real People, Real Power, 2008 and National Planning Policy Framework.

position of the public participation ideology in current day planning law, the main area under examination will be development control. This is the realm in which development of the ideology is most recognisable and consequently where there is most likely to be a recognisable shift in the dominance of the respective ideologies.

6. Development Control

There are multiple layers of public participation requirements in the process of application for planning permission for a proposed development. The Town and Country Planning Act, 1990 requires an applicant, in the first instance, to give notice to owners, leaseholders and agricultural tenants⁵³ and the Local Planning Authority (LPA) is required to take into account any representations from these parties⁵⁴. The courts have taken a firm stance on the need to comply with notice provisions as can be seen from the case of *R (On the Application of Pridmore and Others) v Salisbury DC*⁵⁵. Distinguishing the facts before him from those of the Court of Appeal decision in *Main v Swansea City Council*⁵⁶, Newman J quashed the grant of planning permission by the LPA. Notice had not been given to another landowner and a false certificate had been submitted by the applicant. Mr. Justice Newman was of the view that preserving the permission, under the Court's discretionary power not to quash, would come close to undermining the mandatory scheme of the legislation.

The system of planning registers alluded to above allows for public inspection of all applications for planning permission and all the information relating to such applications is now available for public scrutiny through the web-based government planning portal⁵⁷. In terms of publicity, whereas requirements were limited under the Town and Country Planning Act of 1971 to two classes of application (those regarded as nuisances and those affecting a conservation area or listed building), there is now a broad duty upon LPAs to publicise all applications⁵⁸. There are different publicity requirements dependent upon the category of development⁵⁹ and special requirements for applications concerning conservation areas and listed buildings⁶⁰. 'Paragraph 2' applications require the highest level of publicity. These are for developments, which require an environmental statement, are contrary to the development plan or affect a public right of way. For such applications both a site notice and a notification in the local press are required. For 'major developments' either a site notice or neighbourhood notification is required along with notice in a local newspaper. For all other developments, the LPA has the choice between site notice or neighbourhood notification. However, accompanying guidance advises that this last category of application may warrant newspaper publicity for certain kinds of development⁶¹.

The accompanying guidance also gives general encouragement to LPAs to go beyond the legal minimum in ensuring that the public are made aware of applications for planning

⁵³ Town and Country Planning Act, 1990, s65 (5), Town and Country Planning (General Development Procedure) Order 1995 TCPA, arts 6 and 20.

⁵⁴ Town and country Planning General Regulations, 1992, Reg 19 (2).

⁵⁵ [2004] EWHC 2511 (Admin).

⁵⁶ (1984) 49 P & CR 26; The identity of the landowner in this case was unknown.

⁵⁷ <http://www.planningportal.gov.uk>.

⁵⁸ Town and Country Planning Act 1990, s 65, inserted by the Planning and Compensation Act 1991

⁵⁹ Town and Country Planning (Development Management Procedure) (England) Order, 2010, Art 13 (5)

⁶⁰ Planning (Listed Buildings and Conservation Areas) Act 1990, ss 73 (1) and 66 (1).

⁶¹ Circular 15/92.

permission. However, the courts have been reluctant to interfere with the judgment of the LPA on mechanisms for publicity. In the case of *R (On the Application of Seamus Gavin) v London Borough of Haringey*⁶², Richards J was of the opinion that the LPA did not even have to consider which method would best give notice of the application to interested parties⁶³. In refusing an application to quash the planning permission, the court found that, although discretion to choose between site displays and neighbour notice was conferred⁶⁴, there is no obligation upon the LPA to assess each individual case and determine which is the best method of publicity. Furthermore, the LPA was within its rights to adopt one method as general practice as long as the policy was not so rigidly applied as to fetter its discretion and it was prepared to consider reasons for departure from policy in any given case.

In the case of neighbour notifications, the Order requires that the owners and occupiers of any land adjoining that to which the application relates be notified. The LPA can extend neighbour notification more widely and clearly has the discretion to do so. This raises the question as to how this discretion should be exercised and the degree to which LPAs' decisions in this regard are open to challenge. The *Gavin* case above would seem to suggest that such a decision can only be challenged on the grounds of irrationality. The restriction to notification of owners and occupiers of adjacent land can raise particular issues in terms of high visibility large structures such as wind turbines and the question as to the breadth of population materially affected by such a development and the legality of restriction of notification to immediate neighbours is one yet to be fully tested in the courts⁶⁵.

Publicity requirements fall in the category of provision of information and sit low on the ladder of participation. Publicising applications for planning permission will only allow for meaningful participation if the public are given the opportunity to make representations. Current town and country planning legislation allows for written representations to be made to the Planning Committee⁶⁶. At the end of the publication period there are three weeks in which such submissions can be made. Any concerns raised during this period are presented to the Development and Control Committee and are material considerations that must be taken into account in the decision-making process⁶⁷. The law stops short of providing a right for the public to be heard, although there is a public right to attend planning committee meetings⁶⁸. There are no legal rights for the applicant, objecting parties or members of the public to address the planning committee meeting, although it is common practice for committees to allow objectors to speak. The Government has encouraged local authorities to allow parties to address planning committees⁶⁹, however, practice across local authorities varies, with some not giving the opportunity for interested parties to be heard, whilst amongst those who do there is no common procedure⁷⁰. The minimum period of three days for committee reports to be available for public inspection prior to the meeting, also restricts the ability of interested parties to prepare cogent oral submissions. Most significantly, any opportunity for an oral hearing will only arise where determination is made by a planning committee, whereas the

⁶² [2003] EWHC 2591 (Admin).

⁶³ Para 27.

⁶⁴ Art 8 (4)(a).

⁶⁵ Siraj, N. (2012), 'Planning law and the turbine: the proliferation of onshore wind turbines: Part 1: the publicity requirements', *Journal of Planning and Environment Law*, Volume 6 pp. 666 – 670.

⁶⁶ Town and Country Planning Act, 1990, s71 (1).

⁶⁷ General Development and Planning Order, Art 19.

⁶⁸ Local Government Act 1972 as amended by the Local Government (Access to Information) Act 1985, s 100 (A-K).

⁶⁹ Planning Green Paper 'Delivering Fundamental Change', 2002 para. 5.59.

⁷⁰ Manns & Wood (2002) 'Public Speaking at the Development Control Committee', *Journal of Planning Law*, 382.

great majority of applications are delegated to officers for decision, which is made purely on the basis of written representations⁷¹.

The advent of the Human Rights Act has brought no change to the position on the right to oral representation in planning. The higher courts have held that Article 6 of the European Convention on Human rights does not require there to be an oral hearing before a decision is made by the LPA on grant of planning permission. However, in the case of *R (On the Application of Adlard and Others) v Secretary of State for the Environment, Transport and the Regions*⁷², Simon Brown LJ, in the leading judgment, did acknowledge that, in exceptional circumstances, denying an objector sufficient hearing may bring the courts to conclude that the LPA had acted unfairly or unreasonably. The view that an oral hearing is not required to comply with Article 6 was confirmed in the House of Lords in *Begum (FC) v London Borough of Tower Hamlets*⁷³, where Lord Hoffmann made clear that an oral hearing would not be necessary, even if a planning committee were required to make findings of fact.

There are further opportunities for representations to be made by the public at the point of appeal. Applicants for planning permission have the right to appeal against both the decision and any conditions imposed⁷⁴. Appellants have the right to a hearing, which can take the form of either a formal public inquiry or an informal hearing. In practice, however, most appeals are dealt with by way of written representations, by agreement between the appellant and the LPA. Should a hearing proceed, those who have responded to the publicising of the application have the right to make submissions, present evidence and cross examine⁷⁵. Although there is no right for the general public to participate in appeals, inspectors do have the discretion to allow other parties to appear and will generally facilitate this. As with appearance before the planning committee, there is a potential problem here with inconsistency in practice across local authorities. There is no corresponding right of appeal for objectors to the grant of planning permission or attendant conditions.

The question of third party rights of appeal in planning matters has long been a thorny one. There have been calls over many years for a change in the law in order to allow, at the very least, a qualified right of appeal for objectors⁷⁶. However, the government has systematically rejected any change in the law to allow third party rights of appeal⁷⁷. One of the main justifications for maintaining the status quo is based upon the premise that democratically elected councillors represent their communities in planning matters⁷⁸. This argument, however, neglects the inequity raised by a situation where the decision of a democratically accountable body to refuse permission can be overturned on appeal, whereas the decision to grant permission cannot⁷⁹. Also, as previously noted, an increasing number of applications are determined by officers rather than by planning committee, thus, to a degree, removing the democratically accountable element of the decision. The lack of a third party right of appeal

⁷¹ Best Value Performance Indicators set a target of only 10% of applications to be decided by committees (BVP 2007/8).

⁷² [2002] JPL 1379.

⁷³ [2003] UKHL 5.

⁷⁴ Town and Country Planning Act, 1990, s78.

⁷⁵ Town and Country Planning (Determination by Inspectors) (Inquiries) Rules 2000, Regulations 11 and 166 (5).

⁷⁶ For example, Third party rights of appeal in planning 2002 - Green Balance et al, London, Liberal Democrat Manifesto, 2010.

⁷⁷ Third Party Rights in Planning Green Paper 02/38, 2002.

⁷⁸ Ibid. para. 6.20

⁷⁹ No 51 at p. 110.

has been tested in the courts under Article 6 of the Human Rights Act - the right to a fair hearing. However, the House of Lords, in the *Alconbury*⁸⁰ cases, ruled that the right to a fair hearing had not been denied to the claimants, because of the nature of the process and because the Inspector was required to justify his/her decisions. It is easy to see the hand of private interest here. It is commonly recognised that the main reason behind the resistance by government to a third party right of appeal lies in the extra time and cost this would impose on the system of development control⁸¹ and in parallel to this, the extra burdens that might ensue for developers.

6.1 Planning Policy

Planning policy as always played a significant role in underpinning the planning system of England and Wales. Over recent years the number of individual Planning Policy Statements (PPS) has increased at a rapid pace, with no less than 25 in place before the recent assimilation into one single policy document. There are repeated references to public participation in the separate statements, but of particular significance are the principles on participation to be found in PPS1, which advocates that the public be given an important role in the planning system⁸², through early involvement in proposed developments and effective participation once planning permission applications have been submitted⁸³. PPS12 on Local Spatial Planning gives guidance on 'Statements of Community Involvement'. It is notable here that the statement also requires statements to reflect both early and lasting community involvement throughout the whole planning process⁸⁴. The policy on renewable energy (PPS22) also emphasises the importance of public participation in development procedures. Principle 1 (vii) states that the public should be engaged, in particular by developers, before applications for planning permission are submitted⁸⁵. In parallel to the PPS22, government policy on renewable energy also notes the importance of the public's role in planning law procedures to ensure the goals of new renewable energy infrastructures⁸⁶. The government's 2009 strategy draws on the Killian Pretty Review, which recognised the importance of local community involvement before a planning application is made⁸⁷ and to facilitate this, the strategy recommends that developers and LPA agree on a 'Planning Performance Review' including measures to ensure a deliberative and effective dialogue is established between all relevant parties, before an application is made⁸⁸.

⁸⁰ *R v Secretary of State for the Environment Transport and the Regions ex parte Alconbury Developments* [2001] UKHL 23.

⁸¹ *Ibid.*

⁸² Office of the Deputy Prime Minister, Planning Policy Statement 1: Delivering Sustainable Development, 31 January 2005, para. 40.

⁸³ *Ibid* para. 43.

⁸⁴ Communities and Local Government, Planning Policy Statement 12: Local Spatial Planning, 4 June 2008, para. 4.20-1.

⁸⁵ Office of the Deputy Prime Minister, Planning Policy Statement 22: Renewable Energy, 10 August 2004 and Office of the Deputy Prime Minister, Planning for Renewable Energy: A Companion Guide to PPS22, 16 December 2004 para. 4.24. See further, Higgs, G. *et al* (2008) 'Using IT approaches to promote public participation in renewable energy planning: prospects and challenges' 25 (4) *Land Use Policy*, Volume 25 (4) 596 at p. 599.

⁸⁶ Secretary of State for Energy and Climate Change, The UK Renewable Energy Strategy, July 2009 Cm 7686 (209) para. 4.9.

⁸⁷ The Killian Pretty review 'Planning applications: A further and more responsive system' November 2008, recommendation 4 at 10.

⁸⁸ 86 at para 4.27.

As can be seen in some of the examples cited above, public participation recommendations have become firmly embedded in both planning policy and broader government policy. Furthermore, there is a strong emphasis upon engaging the public at an early stage of the development, thus facilitating the possibility of meaningful input into the decision making process. This kind of involvement moves up the ladder of public participation towards public involvement in the final decision and 'culture theory' models of participation⁸⁹. The publications referred to here are policy and strategy documents, which provide guidance and direction rather than having legal status. However, the former PPSs played a significant role in the determination of planning permissions, being a material consideration in the decision making process. This said, in most cases, there will be a large number of, often competing, considerations to be taken into account in any given decision. As mentioned previously, the PPSs have now been replaced by a single policy document, the National Planning Policy Framework (NPPF)⁹⁰. This much reduces the quantity of guidance at the hands of the decision maker and aims to simplify and consolidate government planning policy. The most prominent position of public participation guidance is in the section on local plans. Paragraph 155 states that 'early and meaningful engagement and collaboration..... is essential' and that 'A wide section of the community should be proactively engaged' and in Paragraph 157, the NPPF sees it crucial that local plans should 'be based on co-operation with..... public, voluntary and private sector organisations'. The new policy document does not, however, echo this advice for public participation in development control decisions, where no mention is made of engaging the public at any stage of the procedure. As with the predecessor PPSs, the NPPF will be one of a number of material considerations to be taken into account in the grant of planning permission and accompanying conditions.

6.2 Environmental Impact Assessment

A significant development over recent years has been the introduction, by the EU, of provisions on environmental impact assessment (EIA). Where developments are likely to have a significant impact upon the environment, particular procedures are required, which include the submission of an environmental statement along with the application for planning permission. The introduction of EIA provided a prime opportunity for the EU and its member states to enhance public participation requirements for developments that have an impact upon the environment. This is particularly the case, given that the EU saw the EIA Directive⁹¹ as satisfying Article 6 of the Aarhus Convention⁹², the most specific article on public participation, which relates to proposed activities that may have a significant effect on the environment. Article 6 (7) of the Convention requires that the public be allowed 'to submit, in writing or, as appropriate, at a public hearing or inquiry.... any comments, information, analyses or opinions that it considers relevant to the proposed activity'. Article 6 (4) and (5) require member states to provide for early public participation when options are still open and effective public participation can take place and for the developers to be encouraged to enter into discussions before applying for a permit. These latter two articles were not reflected in the 1985 Directive and an amending provision was required and was

⁸⁹ No. 41.

⁹⁰ National Planning Policy Framework, Department for Communities and Local Government, March 2012.

⁹¹ Directive 85/337/EEC, Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJL 175 , 05/07/1985 P. 0040 - 0048

⁹² No. 2.

enacted in a 2003 Directive⁹³. This directs member states to allow the public concerned effective opportunities to participate and express comments and opinions when all options are open to the decision-making body. It is notable that the Aarhus Convention does not provide for a positive obligation for the public to be heard, public hearings or inquiries only being 'as appropriate'. Correspondingly, neither the 1985 Directive nor the 2003 Directive grant such a right and the implementing regulations in the UK, as reflected in the enhanced publicity requirements referred to above, merely require that extra measures to publicise the environmental statement and other documentation are adopted at the point of submission of a planning application. Furthermore, although the 2003 Directive reflects the Aarhus requirement for early and effective public participation, there is no legal obligation in the implementing legislation or other UK planning provisions for any advance publicity or provision of information on the options before the application is lodged.

With one notable exception, the courts have been reluctant to interfere with decisions challenged on the basis that EIA public participation procedures have not been complied with. In the case of *R v Swale Borough Council and Medway Ports Authority, ex parte RSPB*⁹⁴, no public consultation had taken place, but, nonetheless, the court was prepared to uphold the decision to grant planning permission on the basis of the detrimental financial impact upon the developer should the decision be quashed. Similarly, McCulloch J, in the case of *Twyford Parish Council v Secretary of State for the Environment*⁹⁵ (88), upheld the decision to grant permission on the basis of the public interest in completion of the development on time, which, in the court's view, would not have happened if extensive public participation had been required. The short-lived high water mark in the courts' acceptance of the importance of proper public involvement in EIA decisions came with the case of *Berkeley v Secretary of State for the Environment and Another* (89). In this case, no environmental statement had been submitted with the planning application and the House of Lords saw this as sufficient reason to quash the decision, despite the argument put forward by the defence that there had been substantial compliance with EIA procedures. In the view of Lord Hoffman, in the *Berkeley* case, the lack of a non-technical summary in an environmental statement meant that the public had been excluded from any involvement in EIA decision-making. Lord Hoffman also stressed the imperative of public involvement in EIA procedure, no matter how flawed their views may be. In his words;

'The directly enforceable right of the citizen.... is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues⁹⁶.

⁹³ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25.6.2003, p. 17–25.

⁹⁴ (1991) 3 JEL 135.

⁹⁵ [1992] 1 CMLR 276.

⁹⁶ *Ibid* 430.

What appeared to be a culture shift in the way the courts treat public participation⁹⁷ was not to be maintained. The decision in *Berkeley* was, no doubt, influenced by the fact that these were EU provisions and at the time the case came before the House of Lords, it had been accepted that the key articles of the EIA Directive have direct effect and confer a right on individuals, which can be pursued before their national courts⁹⁸. The prediction that, even if there were to be substantial compliance with the terms of the Directive, there would be a very narrow limit on the UK courts' discretion not to quash a decision and that this might transfer to public participation provisions in the UK town and country planning regime was not to come to be⁹⁹. There was a caveat in the judgment of Lord Hoffman, where he stated that planning permission need not be quashed when there were minor technical omissions from procedures. Little guidance was given as to what situations this might apply to¹⁰⁰ and subsequent cases have capitalised upon the flexibility offered by Lord Hoffman's statement¹⁰¹. In *R (Jones) v Mansfield DC*¹⁰², for example, the procedural requirements of EIA were held not to be required because of the quantity of environmental information already available. Carnwarth LJ, in the *Jones* case, was of the view that facilitation of decision-making could be at risk if the formal EIA procedures on public participation were followed¹⁰³. A recurring theme emerges from cases decided before *Berkeley* and subsequent cases¹⁰⁴, which continued to diminish the significance of the House of Lords' decision. This is the tension between a speedy and 'efficient' decision making process for planning matters and the involvement of the public in decisions that impact upon both themselves and their environment.

6.3 Major Infrastructure Projects

The conflict referred to above between speed and public participation is particularly evident in the context of major infrastructure projects. Governments have long held a desire to smooth the process for all development projects and for large projects in particular. As long ago as 1950, only a few years after the passage of the 1947 Town and Country Planning Act, Churchill's government saw the planning system as 'much too cumbersome, too rigid and too slow' and pledged to drastically change it. Arguably, there has been little change of substance over the intervening years¹⁰⁵ and today's government still view the system they inherited as less than ideal for promoting growth and as a burden in cost terms¹⁰⁶. In truth, it is not at all clear that the determining of planning applications plays a significant part in time delays in the development process. Certainly it seems that gaining the necessary consent for

⁹⁷ Upton, W. (2001) 'Case Law Analysis - The EIA Process and the Directly Enforceable Rights of Citizens', *Journal of Environmental Law*, Volume 13 (1) at p. 89.

⁹⁸ *R v North Yorkshire County Council, ex parte Brown* [2000] 1 AC 397.

⁹⁹ No. 97.

¹⁰⁰ *Ibid.*

¹⁰¹ Leitch, V. (2010) 'Securing planning permission for onshore wind farms: the imperativeness of public participation', *Environmental Law Review*, Volume 12 (3), p. 182 – 199.

¹⁰² [2003] EWCA Civ 1408.

¹⁰³ *Ibid.* at 58.

¹⁰⁴ For example, *R (Wembley Field Ltd) v Bret LBC* [2006] Env LR 34, *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2004] UKPC, *Younger Homes (Northern) v First Secretary of State* [2005] Env LR 12 and *R (Richardson) v North Yorkshire County Council* [2004] 2 All ER 31.

¹⁰⁵ Booth, P. (2009) 'Managing land-use change', *Land Use Policy*, Volume 26 at p. 154.

¹⁰⁶ Brearley, S. (2012) 'What's wrong with planning - and is it about to be fixed? A crie de coeur', *Journal of Planning and Environment Law*, Volume 5 at p. 534, *The Plan for Growth*, HM Treasury/Department for Business, Innovation and Skills, HM Treasury, Mar 2011.

development is no slower in the UK than in other jurisdictions¹⁰⁷. In one of two recently commissioned investigations into the planning system and competitiveness, which presaged the controversial changes introduced in 2008, the difficulty in distinguishing between the time that is necessary to make complex decisions and unnecessary delay was acknowledged¹⁰⁸.

Proposals to facilitate the progress of major infrastructure projects through the planning system have been mooted for some years. In 2001, the then government, in expressing its concern about the efficiency and effectiveness of the land use system, made particular note of the delay over major decisions, which, it believed, hindered economic growth¹⁰⁹. The government published a series of consultation papers, including one on procedures for large scale projects, such as airports and power stations. Much of the impetus for change to procedures for major projects stemmed from experiences where extended public inquiries had caused significant delay to infrastructure projects. Perhaps the most influential of these was the Heathrow Terminal 5 project, the delays to which were broadly thought to be as a result of community participation. This is probably a misconceived view, much of the delay being attributable to the developer (BA took over a year to present the initial case) and the government¹¹⁰. As Lord Falconer commented in the House of Commons 'Much of the hearing on Terminal 5 was about international airport policy'¹¹¹. Under the proposals put forward in 2001, Parliament would debate the merits of the case and the detailed design would be the subject of a public inquiry, which would not be able to overturn the decision of Parliament. In terms of public participation, the government saw this as being carried out at a very early stage and there would be no effective voice in the actual determination. Whilst early involvement of the public is a positive step towards meaningful participation in decision-making, in order to achieve this result it must be coupled with both continuing and later consultation and decisions should take into account the outcomes of the whole spectrum of public participation¹¹².

The 2001 government proposals, in the end, did not come to fruition, but in 2005 new Major Infrastructure Inquiries Procedure Rules were introduced with the intention of speeding up the process, 'whilst continuing to ensure that adequate opportunity is given for people to have a say, to test evidence and make a sound decision'¹¹³. Only a few years later proposals were underway for a radical change to the procedure for determining major infrastructure applications. The Planning Act, 2008 introduced a fast track system for such proposals, with minimal opportunity for public participation. The provisions in the Act relating to major infrastructure projects were influenced both by general political frustration and two reports commissioned to explore the impact of the planning process on competitiveness both of which recommended the speeding up of the way major infrastructure was provided¹¹⁴.

¹⁰⁷ No. 105 at p. 156.

¹⁰⁸ Barker Review of Land Use Planning, December, 2006.

¹⁰⁹ DTLR (2001) Planning: Delivering a Fundamental Change.

¹¹⁰ Razaque, J. & Stookes, P. (2002) 'Community participation: UK planning reforms and international obligations', *Journal of Planning and Environment Law*, at p. 792. There were also significant changes made to surface access arrangements and no less than 18 separate further planning applications made by the developer after the inquiry began.

¹¹¹ House of Commons, 20 November 2001.

¹¹² No. 110 at p. 791.

¹¹³ ODPM Circular 07/2005 para 4.

¹¹⁴ No. 108 (Barker Review) and the Eddington Review of Transport Policy (TSO 2006). The conclusions of both reports on the timescale of projects were based on debatable evidence. See, Ellis, H. (2008) 'Planning and the people problem (1)', *Journal of Planning and Environment Law*, at p. 78.

Despite the reassurance by Hazel Blears MP at the second reading of the Planning Bill that 'At every stage it will reinforce the democratic principle that everyone should have a fair say on the future of their neighbourhood'¹¹⁵, public participation and accountability in the new system are both weak and opportunities for this to happen are significantly diminished. The new system is underpinned by a series of National Policy Statements (NPS) on the key areas of infrastructure provision. The content of these can be location specific, but the consultation requirements are such as the Secretary of State 'thinks appropriate' and he/she must simply have regard to the responses¹¹⁶. There is no provision for an oral hearing or for members of the public to make oral representations, even when the particular location for a project is identified in the Statement. This is particularly significant, given the weight that is accorded to the NPS. Whilst development plans in the local planning regime are a key component of the decision making process, they are balanced against other material considerations, including representations of the public. Whereas, in effect, an application for development consent for a major infrastructure project must be determined in accordance with the NPS, subject only to four specific exceptions¹¹⁷. There is, however, an obligation for the developer to consult with the public before bringing forward an application¹¹⁸. Such early public engagement reflects the principles of the Aarhus Convention and has the potential to move participation up the ladder, however, it is only a requirement to consult and there must be doubts as to impartiality here as well as to whether there will be a meaningful response from the developer¹¹⁹.

Decisions on major infrastructure projects under the 2008 Act were to be taken by a new independent body, the Infrastructure Planning Commission (IPC). The powers of the IPC were wide ranging, including the creation or extinguishing of rights and compulsory purchase of land¹²⁰. Whereas the predecessor large public inquiries for major projects allowed for full participation of the public, the IPC's examination (with some very limited exceptions) took the form of written representations only. The basis of any claim to a right to be heard for the public comes from a provision requiring an 'open-floor' hearing. However, this kind of forum simply allows members of the public to make statements and there is no opportunity in the system for cross-examination. It was the government's view that the opportunity to question engenders 'an unconstructive culture of opposition among parties'. The life of the IPC was short lived. The Conservative Party Manifesto stated its intention to dismantle the Commission and in due course, the Localism Act, 2010 abolished the IPC from the date of its coming into force and transferred its assets and functions to the Secretary of State¹²¹. In practice now the decisions on major infrastructure projects will be delegated to the Planning Inspectorate (PIN), under the same procedures provided for by the 2008 Act. Another provision of the 2010 Act ensures that NPSs can be voted on in Parliament¹²².

On the face of it, large scale public inquiries did provide the opportunity for meaningful public participation in the spirit of the Aarhus Convention. However, the balance has now swung in favour of speed and the much needed development of the UK economy. This shift away from public participation may appear to be dominated by the private interest of

¹¹⁵ HC Deb December 10, 2007 c.25.

¹¹⁶ Planning Act, 2008.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ No. 104 (Ellis) at p. 81.

¹²⁰ Planning Act, 2008.

¹²¹ Localism Act, 2010.

¹²² Localism Act, 2010.

developers, but, in fact it is heavily entwined with the ideology of public interest. The location of the decision-making function, in practical terms, with PIN means that public officials are making decisions on infrastructure projects, supposedly in the public interest. The argument that the view of the public is accounted for by decisions taken by democratically elected bodies was entirely void during the brief period of the IPC's life. To a degree, this has been rectified with the Secretary of State taking on the functions of the IPC, which has effectively meant a return to the former system by which the Secretary of State made the final decision upon receipt of a report from the planning inspector. The Secretary of State is accountable to Parliament and thus to the public, although the degree to which this system truly reflects democratic accountability or public involvement in decision making on such important matters is debatable.

7. Conclusions

The provisions in planning legislation for notice and publicity might seem to reflect an enhanced position for the ideology of public participation. Certainly the publicity requirements are more comprehensive than they were in 1980. Notice requirements are, however, a part of the planning regime originally designed to protect the interests of private property owners and the firm stance of the courts in upholding such requirements can thus be seen as a reflection of the traditional private property interest dominance. The enhanced publicity requirements might be viewed as signifying a move towards both public interest and public participation. However, there remains a good deal of discretion in the hands of the Local Planning Authority to choose their method of publicity and to determine the range of neighbour notifications, which restricts the effectiveness of these measures in terms of public participation. It seems that, in fact, this is an area where the public interest ideology is dominant, with control lying firmly in the hands of the public body.

Notice and publicity requirements have little contribution to meaningful public participation if they are not accompanied by the right to make representations. This is seriously undermined, in the first instance, by the discretion on publicity operated by LPAs mentioned above. However, the most significant limitation lies in the lack of any right to an oral hearing. Most decisions are taken by officers based entirely on written representations and where the public are allowed to participate in person, there is no established procedure and inconsistent practice across LPAs. There has always, of course, been the right for applicants to be heard on appeal and this forms another facet of the development of a regime with mechanisms inherent to protect the interests of private property. The right to be heard by other parties at appeal is restricted to those who have made representations, limited, as noted above, by the LPA's discretion on publicity requirements. The absence of any third party right of appeal against a planning decision underlines the continued dominance of private property interests at the direct expense of public participation.

On the face of it, it would seem that in policy and guidance terms, public participation has a high status. The public participation rhetoric has become well rehearsed and embedded in guidance documents over the past three decades or so. However, this has been diluted more recently in the condensed version of planning guidance now to be found in the National Planning Policy Framework. Planning guidance remains just one of many material considerations to be taken into account in the making of a planning determination and, as was noted by McAuslan it provides little by way of legal requirement¹²³. Government guidance

¹²³ No. 1 at p. 38.

remains part of the balancing act undertaken by the LPA, which can be paid lip service to and manipulated to pursue either the public interest agenda or the interests of private property.

The development of environmental impact assessment procedures brought the opportunity for the European Union and its member states to fully integrate public participation into at least part of the planning process. However, despite the fact that the EU saw its EIA provisions as compliant with the newly introduced Aarhus Convention, it is submitted that they do not reflect the spirit of the Convention. In particular, the lack of requirements for advance publicity and the absence of any right to be heard leave the EU Directive and its implementing legislation in England and Wales lacking in terms of the goal of meaningful public participation that underpins the Convention. Looking at the case law to date on EIA, with one notable exception, the courts have taken the traditional private property interest line.

The conflict between the public participation ideology and the private interest ideology is very evident in the cases relating to EIA and a consistent theme is the supposed incompatibility between public participation and speedy decisions and swift development.

The issue of public participation holding up development is most prominent in high profile major infrastructure projects. It is in this area that we see a significant shift towards the private interest ideology in 2008 with the introduction of the Planning Act and its fast track process for the approval of major infrastructure projects and the loss of the opportunity for the public to participate in large scale public inquiries. This was the high water mark for the triumph of private interest over public participation. However, the effective shift of decision making to the Planning Inspectorate, introduces an element of public interest into the equation. What is patently clear is that in this area of development control the public participation ideology is extremely weak.

What difference then between 1980 and today? Opportunities were certainly lost in the introduction of EIA and the courts have failed to take up the gauntlet of public participation post *Berkeley*. Furthermore, the doors to public participation in major infrastructure project developments appear to be firmly closed. Despite the increase in profile and entrenchment of public participation in policy and law, in practical terms it remains subservient to the private and public interest ideologies. The *status quo* prevails with the public interest allowed to operate in some limited areas, but always under the terms of private interest. It seems that despite all that has happened in this area of law, little has changed in the balance between these three legal ideologies and McAuslan's overarching conclusions, at least in respect of the law and guidance on development control, remain good today.