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The Community Infrastructure Levy: Confining Discretionary Activity at Local Level?

Tola Amodu *

Abstract: Although the rules/discretion distinction has been visited by legal scholars many times, what remains less well-developed is enquiry into the effects of attempts to constrain discretion by imposing rule-based structures in regimes founded on high levels of discretionary activity. In the land-use planning domain, for reasons of technical complexity and informational asymmetry, discretion is given to local authorities to devise solutions allocating appropriate uses of land. The legal framework contains an array of discretionary powers (ranging from the high-level allocation of land uses, to how planning applications are decided), which include in the latter case peripheral (indeed penumbral) forms of bargaining and negotiation that are integral to the statutory scheme. The Planning Act 2008 includes, however, a shift in the form of the Community Infrastructure Levy (CIL), which attempts to limit an exercise of discretion locally through law. The CIL is a scheme obliging local authorities to impose a ‘tax’ on new planning development to recoup the cost of infrastructure provision rather than negotiating solutions with individual developers on an ad hoc basis. Not only does this represent a departure from a use of discretion to secure equivalent benefits (which have historically been obtained through negotiation), it provides also an illustration of the effects of attempting to constrain one of the many forms of discretionary activity in the context. The provisions, while ostensibly limiting local discretion, point to a temporal shift in its locus. This paper critiques the provisions of the Act as they relate to the CIL and, by referencing previous strategies adopted for a similar purpose, suggests that an imposition of fixed charging structures may have the effect of displacing rather than eliminating discretionary activity in particular negotiation and bargaining.

Key words: Planning Act 2008, discretion, community infrastructure levy, planning law, local government, central/local relations.

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INTRODUCTION

Discretion has been defined as, ‘the means by which law [...] is translated into action’,¹ and it can also be viewed as that penumbra of flexibility that is incorporated into legal or administrative rules.² Using legal rules to confine the discretion public agencies have in their decision-making is often justified on the basis of transparency, fairness and predictability. Rules (imbued with attributes bringing ostensibly order and coherence to complexity) have been seen as deriving greater legitimacy than discretion (although this is not always the case).³ While the rule/discretion debate⁴ has lost much of its resonance generally, it has resurfaced most recently in the contexts of monetary policy and environmental protection.⁵ It was a crucial facet of Government’s stance when it adopted the Community Infrastructure Levy (the CIL), which represents another attempt to limit an exercise of local government power, so often seen within the land-use planning domain.⁶ This paper looks at the possible effects of incorporating more rigid rule-based aspects into that system in the context of the recovery of planning gains through the CIL. The relevance is not limited to land-use planning control, however, and the inferences drawn can be applied in other contexts where Government may have established regimes donating high levels of discretion to other actors and then seeks to reverse that trend.

¹ ‘The Use of Legal discretion: Perspectives from Law and Social Science’, p. 10 in K. Hawkins, (ed.) *The Uses of Discretion* (Oxford: Clarendon Press, 1992).

² See Goodin’s idea of formal discretion, where options are written into a rule. R.E. Goodin, ‘Welfare, Rights and Discretion’ (1986) 6 *OJLS* 3, 232-61.

³ Historically this view can be seen as deriving in part from a scepticism or even fear associated with an excess of power, see T. Lowi, *The End of Liberalism. The Second Republic of the United States* (New York: WW Norton and Co, 1979) who perceives discretion as antithetical to justice and K.C. Davis, *Discretionary Justice. A Preliminary Inquiry* (Baton Rouge, Louisiana: Louisiana State University Press, 1969) who cautions against its excesses. More recently, the exercise of discretion (whether in the form of policy formulation or enforcement) has been seen as the key to effective policies see e.g. the regulation of financial services, food safety and environmental health.

⁴ See e.g. L. Kaplow, ‘Rules versus Standards: an Economic Analysis’ (1992) 42 *Duke Law Journal* 557; J. Braithwaite, ‘Rules and Principles: A Theory of Legal Certainty’ (2002) 27 *Australian Journal of Legal Philosophy* 47; R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) and ‘The Model of Rules’ (1967) 35 *University of Chicago Law Review* 14; T.H.A. Baker and T. Kugler, ‘The Virtues of Uncertainty in Law: An Experimental Approach’ (2004) 89 *Iowa Law Review* 443; R. Korobkin, ‘A Positive Theory of Negotiation’ (2000) 88 *Georgetown Law Journal* 1789; C.S. Diver ‘The Optimal Precision of Administrative Rules’ (1983) 93 *Yale Law Journal* 65; and in the context of regulation, J. Black *Rules and Regulators* (Oxford: Oxford University Press, 1997)

⁵ See D. Mach, ‘Rules without Reasons: The Diminishing Role of Statutory Policy and Equitable Discretion in the Law of NEPA Remedies’ (2011) 35 *HVELR* 205; A.M. Christensen and H.B. Nielsen, ‘Monetary Policy in the Greenspan Era: A Time Series Analysis of Rules vs Discretion’ (2009) 71 *Oxford Bulletin of Economics and Statistics* 1, 69; J.B. Taylor, ‘Legislating a Rule for Monetary Policy.’ (2011) 31 *Cato Journal* 3, 407

⁶ See Department of Communities and Local Government, *Community Infrastructure Levy: An Overview* (May 2011) at para. 4, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6313/1897278.pdf (last accessed May 2012).

Government's attempt to restructure the funding for infrastructure provision illustrates the application of the age old conundrum of the benefits of rules over discretion in effecting policy change. In the Planning Act 2008⁷ can be found, at Part 11, a mechanism for imposing a fixed rate levy on land-use development activity known as the Community Infrastructure Levy (CIL). This empowers local authorities to charge a fee calculated according to a pre-determined schedule on new developments for the purposes of contributing to the financing of local infrastructure projects and thus to indirectly support growth. Government's impact assessment of the CIL, at the time of the enactment of the relevant provisions, estimated a '10 year net additional revenue for infrastructure of £4100m to £6000m'.⁸ Although local authorities are given some discretion to establish a CIL in their area,⁹ the structure introduces a fixed charging system of general application to supplement, if not eliminate the negotiation of those community benefits relating to the provision of infrastructure (known historically as planning gains) which have often been achieved through the instrument of the planning obligation. Introducing a fixed charging system of general application confines the discretion exercised by local authorities in negotiating individual benefits.¹⁰

The Department of Communities and Local Government states that this approach has the benefit of transparency, clarity and certainty over more opaque negotiating practices.¹¹ However, in contexts of technical or policy complexity, given the limited resources available to Government and the nature of the planning system overall (resting as it does on a framework imbued with the donation of discretion, given the need to deliver site-specific provision for local communities, through the participation of all interested parties), it might be asked what effects the introduction of the CIL has on the pervasive character of the planning system overall. The principle of the CIL will be used as a lens to reflect upon the rules/discretion debate.

⁷ 2008 c. 29.

⁸ Present value, (as of 2010) based on the assumption of a 65-78% take up by local authorities. Summary: Analysis and Evidence *Explanatory Memorandum to the Community Infrastructure Regulations 2010*. (2010 No. 948), http://www.legislation.gov.uk/ukxi/2010/948/pdfs/ukxiem_20100948_en.pdf (last accessed 3 June 2014).

⁹ H.L. Deb vol 703 col. 1164 15 July 2008, The Parliamentary Under-Secretary of State, Department for Communities and Local Government (Baroness Andrews). Draft regulations were published for consultation on 30 July 2009 and the power to use the CIL introduced in 2010 (Department of Communities and Local Government, *Community Infrastructure Levy. Detailed Proposals and Draft Regulations for the Introduction of the Community Infrastructure Levy. Consultation* (30 July 2009) and House of Commons Library, C. Barclay, *Financing Infrastructure: Community Infrastructure Levy* SN/SC/3890) (13 August 2009)). The Community Infrastructure Regulations 2010, 2010 No. 948 coming into force on 6 April 2010 would seem to confine the use of section 106 obligations.

¹⁰ See Community Infrastructure Regulations 2010 (2010 No. 948) Part 11.

¹¹ Department of Communities and Local Government, policy *Giving Communities more Power in Planning Local Development* (updated) 23 May 2014, <https://www.gov.uk/government/policies/giving-communities-more-power-in-planning-local-development/supporting-pages/community-infrastructure-levy> (last accessed 3 June 2014).

THE FUNCTION OF LAND-USE PLANNING CONTROL

Land-use planning control provides for a system of allocating development rights that is designed to bring order to communities by designating the most appropriate use of parcels of land in the expectation of aligning both public ideals and private interests and thus securing the efficient redistribution of 'value'. It is but one state response to protecting society from the effects of environmental, economic and technological change. The current system emerged simultaneously with the creation of the welfare state. In one sense, land-use planning control could be viewed as a reflection of modernist ideals, where control is ostensibly state-driven. The ethos of land ownership – the autonomy and right to use land freely and regardless of the wider impacts – however, skewed this aim. State and individuated interests collide with law being used to calibrate both the mechanism of control and to balance private land interests. The pursuit of protection (through the recognition of rights, both public and private and by placing limits upon those rights), is only achievable in contexts that accommodate *all* local needs. This necessitated the donation of high levels of discretion to local authorities. Moreover, different *types* of discretion exist in combination to make for the more responsive control of development activity. It is against this background that the CIL provisions should be assessed.

THE COMMUNITY INFRASTRUCTURE LEVY

The Planning Act 2008 at Part 11 sets out the broad framework for setting up the CIL.¹² Under section 205 of the Act, the Secretary of State with the consent of HM Treasury, can make regulations providing for the imposition of the CIL.¹³ The fact that the Secretary of State requires the consent of HM Treasury to make regulations illustrates the economic importance of the Levy. Section 205(2) states:

(2) In making the regulations the Secretary of State shall aim to ensure that the overall purpose of CIL is to ensure that costs incurred in providing infrastructure to support the development of an area can be funded (wholly or partly) by owners or developers of land.¹⁴

All new commercial and residential developments (other than those considered *de minimis* or related to providing social housing) will contribute to infrastructure

¹² The Planning Act 2008 (Commencement) No.1 and Savings Order 2009 (SI 2009/400), at Art. 3 brought into force sections 206, 211(7) and 224 (1) and (4) relating to the levy itself, the charge, the amount and other provisions relating to it respectively on 6 April 2009.

¹³ These are contained in the Community Infrastructure Levy Regulations 2010, which came into force on 6 April 2010 and its subsequent amendments by the Regulations of 2011, 2012, 2013 and 2014.

¹⁴ This affirms the statements made by the Minister for Local Government during the progress of the Bill through the House of Commons.

financing.¹⁵ Ostensibly the contribution could relate to infrastructure costs that are not specific to the particular development. This is confirmed by the following statement that:

[...] communities should benefit more [...] from the uplifts in land value arising from planning permission to finance the infrastructure needed to support growth.¹⁶

Arguably the result is to both fund local infrastructure provision necessitated by the development activity concerned but to function as a progressive tax on the increased capital value resulting from development.

The emergence of the CIL provisions can be traced from 'Planning Obligations: Delivering a Fundamental Change', published on 19 December 2001, which proposed that local authorities should be empowered to set standardized tariffs for different types of development. The 2008 Act sets out the overall (if skeletal) structure leaving the substantive detail to be established by regulations.¹⁷ It provides for the principle of the CIL.¹⁸ Regulations provide the detail regarding the liability to pay, the charging mechanism and how charging authorities are to set and revise the relevant rates.¹⁹ The objective is to minimize, if not eliminate, those elements of bargaining currently associated with the negotiation of community gains under the provisions of section 106 Town and Country Planning Act 1990 (as amended) through the use of a fixed levy. The sums collected must be applied for the funding of infrastructure works. Infrastructure is defined to include roads and transport facilities, flood defences, open spaces, schools and educational facilities, medical facilities, affordable housing and sporting and recreational facilities.²⁰ Historically, other legal instruments have been the vehicle used to secure this type of provision. Government's emphasis is on the 'greater predictability and transparency' afforded by the use of a fixed rate tariff as opposed to the practice of acquiring planning gains through the system of planning obligations.²¹ The argument of the advantage of transparency and certainty over flexibility resonates throughout the proposal for the imposition of

¹⁵ Under section 216(2) Planning Act 2008, infrastructure is defined to include roads and transport facilities, flood defences, open spaces, schools and educational facilities, medical facilities, affordable housing and sporting and recreational facilities.

¹⁶ HL Debs. vol. 703 col. 1164 (15 July 2008), The Parliamentary Under-Secretary of State, Department for Communities and Local Government (Baroness Andrews).

¹⁷ These were issued in draft on 30 July 2009.

¹⁸ Including at section 206 the identity of those authorities empowered to charge, at section 208, who is liable to pay, the amount (section 211) and the mechanism for collection and enforcement (at sections 217 and 218 respectively).

¹⁹ See The Community Infrastructure Levy Regulations 2010 (No. 948) (as amended by Community Infrastructure Levy (Amendment) Regulations of 2011 (No. 987), 2012 (No. 2975), 2013 (No. 982) and culminating in the Community Infrastructure Levy (Amendment) Regulations 2014 No. 385) and the Department of Communities and Local government *communities Infrastructure Levy Guidance* 2014, http://www.planningportal.gov.uk/uploads/cil/cil_guidance_main.pdf (last accessed 5 June 2014).

²⁰ Planning Act 2008, section 216(2).

²¹ Ibid.

standard charges. It repeats the commonly used arguments concerning the consequences of the existence of excesses in power without concomitant control, as will be seen.

Those authorities empowered to charge are specified in section 206 of the Planning Act 2008, and include local planning authorities and the Mayor of London.²² By section 208, those liable to pay include the owner, developer and those having ‘assumed liability’ to pay in accordance with the regulations. Further, section 211 covers in outline the amount payable. This is to be determined according to a published charging schedule, setting the rate and the actual and anticipated costs of infrastructure within the area. The framework for collection and enforcement of the CIL appears at sections 217 and 218 respectively. As framework legislation, much of the detail is contained in regulations. The substantive detail regarding liability for payment, the mechanism for how charging authorities are to set and revise the relevant rates and the extent of liability is found in the Community Infrastructure Levy Regulations 2010 (as amended).²³ Part 2 of the Regulations (Regs. 4-10) defines the key terms with Part 3 detailing the charging schedule and its content, with Parts 4 and 5 covering liability and the chargeable amount respectively. Part 6 covers exemptions and relief (notably for charities and social housing), while Part 7 (at Regulation 59), makes it mandatory for charging authorities to apply the CIL to fund infrastructure to support development in its area.

The CIL’s rationale centres upon improving infrastructure planning and delivery, while confining local authority discretion to negotiate gains with individual developers under section 106 Town and Country Planning Act 1990 (as amended) by making the process fairer and more transparent.²⁴ Each new development has some form of cost to its local community, whether in terms of increasing traffic flows or generating a greater demand on local resources. One way of financing the burden has been through locally negotiated arrangements known as planning agreements. These are legally binding agreements which local authority and developer are authorized to enter into by statute. Government’s strategy is to confine as far as possible their use and thus those elements of individuated negotiation and bargaining between developers and local authorities.

The objective of enhancing transparency, predictability and accountability, by minimizing elements of negotiation and bargaining inherent in the system is a key aim of successive governments. Promoting a standard charge has the effect of legitimating and normalizing developer contributions by making them more transparent and equitable.²⁵ It enhances ostensibly the capacity for governmental

²² Also the Broads Authority and the Council of the Isles of Scilly.

²³ See n.19 above.

²⁴ See n.6 above.

²⁵ See Department for Communities and Local Government *The Community Infrastructure Levy* August 2008,

<http://www.communities.gov.uk/documents/planningandbuilding/pdf/communityinfrastructurelevy.pdf> (last

control while reducing local authority discretion over how they secure community benefits. Government's perspective seems to be that promoting a standard charge will create a closer nexus to community infrastructure provision generally (as opposed to on an individual basis)²⁶ which would be also more visible, whilst spreading the burden more evenly throughout the whole developer community.²⁷ The logic is that by introducing a fixed charge, the capacity for central control increases and the autonomy of local authorities to obtain wide-ranging benefits (including those extraneous to or having little connection with the particular development) through an exercise of discretion will diminish accordingly. However, the character of the modern planning system is one imbued with forms of discretion that often shape the system itself.

THE PLANNING SYSTEM: A PARADIGM OF DISCRETIONARY ACTION

The present land-use planning system has its origins in the post-war revival of central intervention coinciding with the creation of a generalized system of welfare. The framework of the Town and Country Planning Act 1947 Act remains the foundation for the modern land-use planning system.²⁸ The system, much of which remains today, set down the basis of a strategy for development (or forward) planning on national, regional and local scales and a method for controlling individual and particularistic land-use activity, that of development control. Successive governments have used the planning system as a vehicle for maintaining economic efficiency and land value through the designation of land-uses.²⁹ These goals (articulated through both legal principle and policy practice by central and local actors) are then made specific to particular sites through the process of development planning and control culminating in the granting (or otherwise) of planning permission. The framework inscribes a strategy for development planning that sets the broad goals which are then applied regionally or locally in relation to specific development activity. Modern land-use planning control centres upon the determination of planning applications in accordance with development plan policy. Thus the zoning of development activity becomes a key issue. Local authorities, in determining planning applications, exercise

accessed 20 August 2010). Research had shown that the burden of contributions fell largely on the big developer. The CIL would extend to small and large developments. See A. D.H. Crook, J.M. Henneberry, S. Rowley, R. S Smith and C. A. Watkins *Valuing Planning Obligations in England: Update Study for 2005-06* (London: Department for Communities and Local Government, 5 August 2008).

²⁶ We can identify however a more *general* as opposed to a specific link to infrastructure provision in relation to the development and the area concerned. Historically the financing of infrastructure provision was tied to specific developments by an imposition of planning conditions (where there was a direct link to the development proposed – to do otherwise would be unlawful *see Hall v. Shoreham UDC* (1964) 1 All ER 1) or through planning agreements, where more generalized benefits accrued to the area or community.

²⁷ See n. 25 above.

²⁸ c. 51 10 and 11 Geo 6. See S.A. de Smith (1948) 11(1) *MLR* 72-85.

²⁹ Concise accounts of the development and rationale of the modern planning system can be found in J. B. Cullingworth and V. Nadin *Town and Country Planning in Britain* (London: Routledge, 2006).

statutory discretion to allocate appropriate uses according to local demands. These powers are subject to remote oversight by central government.

Embedded within the system is a considerable degree of flexibility that rests upon co-operation and collaboration between public and private actors given Government's dependency upon the private landowner to bring land forward for development. Further, in addition to statutory discretion more diffuse forms of 'parasitic' or 'penumbral' discretion exist that depend upon a use of negotiation to ameliorate any adverse effects. Hence the actualization of Government's attempts to construct a coherent framework for regulating land-use development after 1947 rests upon consensus as a key facet of land-use control. This measure of flexibility has benefited both public and private actors and for the latter mitigated the impacts that direction can have on business efficiency.³⁰ It is particularly apparent when considering the redistribution of development value, (i.e. that value deriving from development activity) an issue the CIL attempts to deal with. Yet the 1947 Act provided also for the historic basis of a form of development charge. The reason why it sought to do so related to the problem of 'betterment'.

THE PROBLEM OF BETTERMENT

The central concern of the apportionment of development value as between the individual and the state has been all pervasive since the advent of the modern planning system. Integral to this is the question of how to recover those public 'costs' incurred (such as highways and other infrastructure burdens), in facilitating private development. This is known as 'betterment'. Betterment is premised upon the idea that development value created by the community should be returned to it. The question of recovery is vital to understanding the character of the system overall and the CIL.

The nexus between planning control and land values has never been straightforward and some would suggest that the ease with which capturing development value, planning control and land ownership have been decoupled suggests that they are not necessarily kin.³¹ Yet this 'kinship' has remained (albeit unhappily), in the eyes of central government at least.³² Development plan policy

³⁰ See, Australian Government Productivity Commission Report *Business Regulation Benchmarking: Role of Local Government as Regulator* 18 July 2012 Ch. 12 'Planning, Zoning and Development Assessment' <http://www.pc.gov.au/projects/study/regulationbenchmarking/localgov/repor>, (last accessed 30 July 2012).

³¹ See S. Ashworth and J. Demetrius, 'The Path to the Community Infrastructure Levy: Past, Present, Future' (2008) 13 *Journal of Planning and Environment Law*, Supp (Delivery or Democracy?), 13-39.

³² Lloyd George's Budget debate of 1909 referred to the dilemma that, 'instead of reaping the benefit of common endeavour of its citizens, the community has always to pay a heavy penalty to its ground landlords for putting up the value of their land'. HC Debs. vol IV col 532, (29 April 1909). It was a fundamental concern of the Barlow Commission in 1939, (*Royal Commission on the Distribution of the Industrial Population*, Cmd. 6153, (January 1940)). Its practical implications were considered by the Uthwatt Committee in the 1940s (the Ministry of Works and Planning, *Compensation and Betterment* (Final Report) Cmd. 6386 (September 1942) HMSO) and have remained a feature of modern land-use

influences land values by denoting acceptable uses.³³ Planning controls refine questions of social costs, working against expectations that the market alone will efficiently allocate land to its most productive use. Concerns of betterment can be distilled to those of subsidizing economic growth; namely how far both the state and individuals should subsidize or be subsidized regarding the costs of facilitating development activity. For the former, the issue of recovering the cost of undertaking public works becomes a fundamental consideration.

Historically, recovery was dealt with through forms of development charge³⁴ and also through the use of what might be termed 'parasitic' discretionary powers. As noted above, the statutory framework leaves much to negotiation and bargaining between local authority and putative developer.³⁵ Planning through negotiation and agreement gave greater flexibility to the system, when addressing the recovery of betterment. This was secured through the instrument of the planning agreement. Its use emerged before the creation of a comprehensive system and derived from the doctrinal areas of contract and property law (effectively the hybridization of the law on restrictive covenants and contracts) but was given statutory recognition after 1932.³⁶ The resulting instrument was the forerunner to modern day planning agreements and obligations.³⁷ These forms have been used to redistribute the burden of externalities created by development and address the vexed issue of planning gains. With the CIL attention is turned to the recovery of the costs of facilitating private development in a more directive manner. The CIL framework duplicates many of the functions of agreements and obligations by displacing those costs generated by development activities, onto the developer community in a direct way. Its adoption attempts to marginalize the more flexible and local system of redistribution of development value for recovering planning gains in favour of a centrally controlled mechanism.

PLANNING AGREEMENTS AND THE RECOVERY OF PLANNING GAINS

Government attempts to resolve the betterment problem with the CIL in a way that has been tried in the past – by imposing a general fixed rate charge to supplement, if not replace, the use of more individuated negotiated forms to

development control. H.L.I. Neuburger and B.M. Nichol, note this much later in *The Recent Course of Land and Property Prices and the Factors underlying it*. DoE Research Report 4 (1976), p. 42 para. 82.

³³ P. Hall, *Land Values: the Report of the Proceedings of a Colloquium held in London on 13th and 14th March 1965 under the auspices of the Acton Society Trust*. (1965) p.x.

³⁴ As with the Town and Country Planning Act 1947, requiring that a development charge be paid on the grant of planning permission to the state.

³⁵ P. McAuslan, *Land, Law and Planning: cases, materials and text*. (London: Weidenfeld and Nicolson, 1975) indicates, '[...]a system of land-use planning that tries to live with and leave as untouched as possible a free market for land is almost inevitably forced into accepting only a residual role for positive planning conducted on terms largely dictated by private enterprise; compulsory purchase for planning purposes is the exception rather the rule [...]', p. 603.

³⁶ See the Town and Country Planning Act 1932, section 11.

³⁷ For the purpose of this paper the terms will be used interchangeably.

recoup the infrastructure costs associated with development activity.³⁸ Aligning local activity with central preferences is no easy task. A use of statute to impose a fixed rate levy limits local authority powers to negotiate solutions (which hitherto were exemplified by the instrument of the planning obligation). The confining of local discretion through subjection to central control has been rehearsed previously in the context of the recovery of planning gains. The concerns regarding the recovery of betterment sketched above underpin the planning gains debate.

Back in 1981, the Property Advisory Group in its Report *Planning Gain* defined the concept as negotiations entered into:

[...] with a would-be developer for planning permission in respect of land not owned by the local authority, [that] tries to incorporate [...] some element of public benefit or advantage which the developer, left to his own devices, would not have volunteered, but which he is expected to provide, or in some cases is offering to provide, at his own expense as part of his scheme.³⁹

Although understandings of planning gain vary, two of the most prominent are those given by Jowell and Loughlin.⁴⁰ Each link the notion of ‘gain’ to benefits accruing to both the community and the developer. The result, although ostensibly commercially disadvantageous to the latter, represents the cost to the developer incurred in obtaining planning permission to develop land. Through the shifting dependency ratios existing between the planning authority and the developer or landowner, the long term ‘goal’ (in the sense of an expectation of a grant of planning permission) results in an equilibrium or a ‘win-win’ situation for both parties. Gains are derived from a process of bargaining and negotiation overcoming the inherent defect in the modern planning system regarding securing betterment. This suggests a need for interaction between the parties that may not be achievable through an application of a rigid rule-based or indeed a fixed charging structure. We might infer that obtaining betterment by dictation alone may not suffice. Yet this is what the CIL provisions effectively seek to do.

The local and lateral dealings in the form of the planning agreement were used to secure planning gains including the broader forms of public benefit (as in the dedication of land for the creation of highways) and the payment of money by

³⁸ Reference can be made to the provisions relating to interim development and the development charge under the TCPA, 1947.

³⁹ Department of the Environment, Property Advisory Group, *Planning Gain* (1981) HMSO.

⁴⁰ J. Jowell, ‘Bargaining in Development Control’ (1977) *JPL* 414 at p.418, defined the notion as, ‘the achievement of a benefit to the community that was not part of the initial application (and was therefore negotiated) and that was not of itself normally commercially advantageous to the developer.’ M. Loughlin, ‘Planning Gain: Law, Policy and Practice.’ (1981) *OJLS* 61 goes further to suggest that the gain itself may be commercially disadvantageous to the developer. See also Loughlin, ‘Planning Gain: Another Viewpoint’ (1982) *JPL* 352–358.

developers to cover infrastructure costs.⁴¹ Using agreements defeated the limitations of the planning system (especially regarding the powers to impose conditions on the grant of planning permission) often by incorporating further elements of flexibility into the regime and so enhancing its efficiency.⁴² The practice, sanctioned by statute⁴³ has been moulded by successive governments in the quest for securing planning gains.⁴⁴ It represents a form of ‘second order’ discretionary action embedded within the planning regime (itself characterized by high levels of discretion) which has, been moulded by local practices.

To illustrate how the scope of these practices was manipulated to enhance the objectives of speed and transparency in the planning system, we can look at the provisions within the Planning and Compensation Act 1991. Under section 12 of that Act the locally negotiated planning agreements (renamed planning obligations) had their scope extended to include unilateral developer undertakings to provide planning gains (often infrastructure provision⁴⁵).⁴⁶ It was thought that undertakings would both minimize the risk of authorities’ seeking, ‘excessive planning gain’ and overcome potential delays in the applications process arising from the negotiation of agreements.⁴⁷ The provisions, whilst more prescriptive in terms of defining when obligations could lawfully be used, sought to confine, but not eliminate, the penumbral or parasitic discretion associated with local negotiating practices.⁴⁸

The rationale for the CIL is close to, if not analogous, to commonly expressed justifications for seeking planning agreements and obligations. *R v.*

⁴¹ See Memo 70/D of the Ministry of Health, Town Planning – Development during the preparation of Preliminary Statement. Orders under section 45 of the Housing etc. Act 1919, para 11 – August 1922.

⁴² See *Hall v Shoreham UDC* (1964) 1 All ER 1.

⁴³ See Town and Country Planning Act 1932 c.48, s 34; Town and Country Planning Act 1947(10 & 11 Geo. VI c. 51), s 25; Town and Country Planning Act 1962 c.38, s 37; Town and Country Planning Act 1971 c.78, s 52; Town and Country Planning Act 1990 c.8, s 106.

⁴⁴ Governmental Circulars 22/83 Town and Country Planning Act 1971. *Planning Gain. Obligations and benefits which extend beyond the development for which planning permission has been sought.* (25 August 1983) and 16/91 *Planning and Compensation Act 1991: Planning Obligations.* (8 October 1991) both give tacit if not explicit support for this objective.

⁴⁵ ODPM Circular 05/2005 encouraged planning authorities to use formulae and standard charges as part of the framework for negotiating agreements.

⁴⁶ The section clarified the ambit of the instrument by providing that any person interested in land may by agreement or otherwise enter into an obligation (known as a, ‘planning obligation’).

- (a) restricting the development or use of land in any specified way;
- (b) requiring specified operations or activities to be carried out in, on under or over the land;
- (c) requiring the land to be used in any specified way;
- (d) requiring a sum or sums to be paid to the authority on a specified date or dates or periodically.

⁴⁷ HC Debs. vol 187 col. 819, (12 March 1991), Sir George Young. Previously the Inspectorate had no *locus* to require planning authorities to enter into agreements. With the amended provisions, developers could now unilaterally offer obligations without the participation of the authority to overcome development objections. This is particularly useful in appeal situations.

⁴⁸ The amendments were said to, ‘considerably widen [...] the express ambit of planning obligations’ and to, ‘reflect the political objective of permitting greater use of private capital for what are described as ‘off site infrastructure costs’, which formerly were borne by the public sector alone’. See ODPM Circular 05/2005 *Planning Obligations* 18 July 2005; H. Campbell, H. Ellis, C. Gladwell, J. Henneberry, J. Poxon and S. Rowley, *Planning Obligations and the Mediation of Development.* Monograph, Department of Town and Regional Planning, University of Sheffield RICS Foundation Research Paper 5(13), 2001.

*South Northamptonshire DC and others ex p. Crest Homes plc*⁴⁹ illustrates the point. *Crest* highlights the use of fixed rate charging scheme which appears, at first glance, very similar to the CIL. In that case the planning authority negotiated with interested landowners and developers the fixing of a scheme of tariffs through planning agreements. These required the fixing of contributions towards the essential infrastructure and services at 20% and 17.5% of the enhanced value of the land proposed for residential and commercial development respectively. On hearing a challenge to the local authority's *vires* to enter into such an arrangement, the court held that the Council's policy of requiring developers to contribute to the cost of relevant infrastructure provision was neither unlawful nor constituted an illegitimate levy.

The *Crest* scenario differs from the CIL to the extent that it enables the planning authority to decide whether a levy is appropriate and rather than placing further control in Government's hands, leaves it ultimately to the courts to determine the limits of discretionary action. Both strategies seek to achieve the same objective – that of securing funding for infrastructure provision and to compensate for external impacts in the broadest sense. The CIL however provides for a confining of local power through prescriptive and rule-based standardization.

CONTROLLING PLANNING GAINS – SETTING THE LIMITS OF DISCRETION WHERE MULTIPLE FORMS EXIST

Overall land-use planning control remains both geographically and institutionally distant from central governmental influence. Government is rarely party to local development control processes but seeks to steer remotely the activities of others, whether local planning authorities or developers by exercising central default powers (most often in the context of challenges to local decisions by way of appeal). Although the development control framework is mandated by a system of national laws and guidance, central government clearly depends upon local actors to deliver effective outcomes. Hence government can be viewed as a key player but not the sole one. It may be responsible for the promulgation of rules but is not their sole interpreter. This may explain why multiple and different forms of discretion are exercised locally within the domain. The donation of high levels of discretion to local actors arises because of the presence of local variability coupled with economic and environmental complexity. Margins of flexibility

⁴⁹ *R v South Northamptonshire District Council and Others, ex p. Crest Homes plc* (1993) QBD 68. Further more recent planning decisions accept the principle if not the detail of planning authorities seeking tariffs to fund infrastructure costs *see e.g.* appeal against non-determination by Dartford BC *Ref:DA/07/00977/OUT* referred to in [2009] 8 *JPEL* 1118. Further H.J.W. Bullock, 'The Economic Realities of Taxing Development' [2009] 10 *JPEL*, 1283-1293 at p. 1290 notes the capacity of local authorities to codify and 'develop quite sophisticated tariff and formulaic charges by way of Supplementary Planning Guidance and SPDs'.

(discretion) are arguably key to maintaining the stability of the system overall. With the CIL, a fixed charging structure is pitted against the more varied responsive forms found in the planning system. The CIL constricts the flexibility local planning authorities have in negotiating planning gains and its efficacy depends upon aligning local interests to central demands. It seems to work on the premise there is only one form of discretion and that this can be constrained relatively easily. However, the manipulation of discretionary powers used for different purposes (including the use of discretion in innovative situations) can frustrate both central policy and local effectiveness of the regime overall.

Scholars have long been familiar with the continuing debate surrounding the role of discretion in delivering effective policy outcomes, which are both legitimate and at same time to be made subject to appropriate forms of oversight. Discretion may be ‘a central and inevitable part of the legal order’,⁵⁰ and its exercise cannot be eradicated easily. The institutionalization of discretionary activity can exist both individually and organizationally and in circumstances that are not expressly mandated by law. Hence its exercise may occur when an official is given a choice between certain courses of action, to meet often contingent collective organizational demands. In the land-use planning system the competing worldviews of central and local actors can give rise to levels of contestability. A local planning authority may decide that its aims are most effectively secured by negotiating with prospective developers rather than applying a fixed levy, or in the extreme refusing an application of planning permission (and so risking an appeal) where it perceives the costs imposed upon the community outweigh the potential benefits to be accrued.

Policy-making itself has been viewed by some as the archetype of discretionary activity, which serves to translate often highly technical abstract goals and ideals into effective outcomes.⁵¹ To this extent the existence of discretion may serve a dual purpose; to both legitimize and simplify policy action and to constrain arbitrary activity. The polycentricity of the land-use planning domain coupled with the presence of unstable dependency relations makes discretionary activity a necessary facet of the system.

In technologically complex situations discretion becomes a pervasive form.⁵² The contestability of meaning (and the inherent problems of language⁵³) poses another challenge to the constraint of discretion in such complex and largely unstable situations.⁵⁴ Further, the circulation of multiple interpretations makes it probable that however carefully drafted the legislation, legal ambiguity will remain.

⁵⁰ Hawkins n.1 *supra*, p. 10.

⁵¹ See D. Galligan *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986), at p.110 and Hawkins (1992) above at p.28.

⁵² J.F. Di Mento, *Environmental Law and American Business: Dilemmas of Compliance* (NY: Plenum, 1986) at p.25.

⁵³ As to which, in a regulatory context see F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision Making in Law and in Life*. (Oxford: Clarendon Press 1991); C. S. Diver, n. 4 above.

⁵⁴ J. Braithwaite, n.4 at p. 75.

The open texture of language renders many interpretations possible, not all of which will converge with Government's expectations.

The effects of contestability and inconsistency within legal systems should not be underestimated.⁵⁵ The indeterminacy of law and the 'impossibility of objectivity' may render meaning 'context bound' in a context that is 'boundless'.⁵⁶ This could be perceived as an illustration of the ambiguity of law. Multiple interpretations can be given to ostensibly clear legal rules. Scholars note that inter-organizational pressures can shape local policies to the detriment of central direction as Grattet and Jenness observed in the context of policing hate crime.⁵⁷ The same can be observed in the land-use planning control domain where forms of ambiguity can provide organizations and professional actors with opportunities to propose novel interpretations in the face of even the most concrete provisions.⁵⁸ In hotly contested policy spaces these opportunities may increase regardless of whether the legal frameworks incorporate high levels of official discretion. This is in addition to the instrumental aims, capacities and limitations of those concerned to shape their operating environment. Each can give rise to a 'surplus of meaning' resulting in further ambiguity. On this interpretation legal processes can be viewed as being socially constructed by groups having disparate interests and expectations. The process does not end but rather begins with legislative enactment. Possible consequences of this can be a resistance to institutional change⁵⁹ or the subversion of the rule-meaning.

The manifestation of many forms of discretion within the land-use planning system might suggest that discretionary elements (exemplified by negotiating/bargaining) may remain, reappearing elsewhere. This leads to a paradox for the application of rule-oriented direction such as the CIL. The confining of discretion in negotiating infrastructure provision may result in it 'leaching' elsewhere to contexts where central control may be even more limited. Thus it becomes impossible for central government to legislate for every eventuality.⁶⁰ Previous attempts to confine discretion through a use of central dictation illustrate this well.

⁵⁵ K. Kress, 'Legal Indeterminacy' (1989) 77 *California Law Review* 2, 283-338 at p. 283; C.M. Yablon 'The Indeterminacy of the Law: Critical legal Studies and the Problem of Legal Explanation' (1985) 6 *Cardozo Law Review* 917; J.W. Singer 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 *Y.L.J.* 1.

⁵⁶ See G.E. Frug, 'Ideology of Bureaucracy in American Law' (1984) 97 *Harv L Rev* 1276 at 1380 commenting on Culler's formulation of the 'unmasterability' of context, J. Culler *On Deconstruction: Theory and Criticism after Structuralism* (London: Routledge, 1983) at p. 123.

⁵⁷ R. Grattet and V. Jenness, 'The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity and a Surplus of Law in Policing Hate Crime' (2005) 39 *Law and Society Review* 4, 893.

⁵⁸ L.B. Edelman, 'Legal Ambiguity and Symbolic Structures: Organizational Mediation of Law' (1992) 97 *American Journal of Sociology* 1531.

⁵⁹ P.J. DiMaggio and W.W. Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48 *American Sociological Review* 147.

⁶⁰ Using the analogy of E. Bardach's and R.A. Kagan's observation in *Going by the Book: the Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982), where they observe the difficulties in drafting rules with sufficient precision to cover every eventuality.

Attempts made by successive governments' to limit the exercise of local authority discretion in the negotiation of planning gains have not been wholly effective. The policy debates of the 1970s and 1980s, show this well.⁶¹ A number of tactics have been used to structure the recovery of planning gains, many of which are indicative of an organic evolution characterized by high levels of innovation. A patchwork of oversight forms ranging from a use of policy guidance to an exercise of judicial power has emerged.

Discretion is not without its problems. It can obscure high levels of informality and may diminish the legitimacy of the system overall, rendering procedural and substantive equality less likely.⁶² The stated aim of advancing the CIL is to make the system 'fairer, faster and more transparent'.⁶³ Similar concerns were used to justify the creation of a comprehensive planning system in 1947.⁶⁴ By the late 1960s government was again concerned with the impact of delay within the system.⁶⁵ Crucially expressions of the adverse effects that opaque dealings could have in the planning domain became apparent from the late 1970s. These included the risk of the abuse in an exercise of local authority powers leading to unethical dealing whereby *in extremis* planning permission could be bought or sold. This aspect becomes explicit during the late 1970s culminating in the Department of the Environment's Property Advisory Group report in Planning Gain of 1981 and the promulgation of central planning guidance thereafter.⁶⁶ However, it is naïve to think that the imposition of a rule-based system will inevitably eliminate this aspect.

⁶¹ As to which, see the articles published during the late 1970s in the *JPL* including M. Grant, 'Planning by Agreement' (1975) 501; M. Aves, 'Enforcing Section 52 Agreements' (1976) 216; J. Jowell, n.40; M. Grant 'Developer Contributions and Planning Gains: Ethics and Legalities' (1978) 8; M. Loughlin, 'Bargaining as a Tool of Development Control: A Case of all Gain and no Loss' (1978) 290; the *JPL* Occasional Paper, 'Development Control — Thirty Years On' (1978); J. Jowell, 'The Limits of Law in Urban Planning' (1977) *CLP* 63; M. Loughlin, n. 40 above. A number of important studies undertaken include DoE Research Report, The Use of Planning Agreements – Grimley J.R. Eve incorporating Vigers in association with Thames Polytechnic and Allsop Wilkinson (February 1992) HMSO; 16/91 *Planning and Compensation Act 1991: Planning Obligations*. (8 October 1991) HMSO; P. Healey, M. Purdue, F. Ennis, 'Gains from Planning?: Dealing with the Impacts of Development'. (York: Joseph Rowntree Foundation, 1993); Campbell, et al., n.48.

⁶² For a fuller discussion see Hawkins n.1 above Introduction.

⁶³ Department of Communities and Local Government, Supporting Detail: Community Infrastructure Levy, <https://www.gov.uk/government/policies/giving-communities-more-power-in-planning-local-development/supporting-pages/community-infrastructure-levy> (last accessed June 2014).

⁶⁴ Uthwatt Report Cmd. 6386 (1942) notes at para. 11, '[these] [...] problems lie purely in the economic sphere, but the economic and physical aspects are closely related and, in so far as the various requirements of economic reconstruction will involve the use of land, it is part of our duty to ensure that our recommendations provide a suitable basis for whatever policy may be adopted so that it may be freed from any elements which might "hamper, prejudice or delay" its effective execution'. Similar concerns were expressed in Progress Report of the Minister of Local Government and Planning on the Work of the Ministry of Town and Country Planning – Town and Country Planning 1943-51, Ministry of Town and Country Planning Cmd. 8204 (April 1951).

⁶⁵ This was one justification for the Town and Country Planning Act 1968

⁶⁶ n. 39 above, Department of the Environment Circular 22/83 Town and Country Planning Act 1971. *Planning Gain*. (25 August 1983) HMSO, and Department of the Environment Circulars 16/91, *Planning and Compensation Act 1991: Planning Obligations* (8 October 1991) HMSO and 1/97 *Planning Obligations* (28 January 1997) HMSO.

Provisions having an effect similar to the CIL have been tried before. While the 1947 Act had provided for the effective nationalization of development value, it also included a development charge. The 1947 Act made developers liable to pay a development charge when planning permission was granted.⁶⁷ This was calculated at 100 % of the increase in land value resulting from the grant of planning permission payable by owners carrying out development. Land 'ripe for development' before the passing of the Act was exempted from the charge. The intent was to remove the speculation in development activity and stabilize land values so that land would be transferred at a value equivalent to its existing use. A notional compensation fund, financed out of the charge, was created for owners suffering a downturn in land values as a result of the legislation.⁶⁸ The charging structure militated against development as owners proved reluctant to bring land forward for development because of the obligation to pay the charge to a Central Land Board.⁶⁹ This forced local authorities to negotiate solutions locally using planning agreements to secure planning gains. The agreements were often used in connection with compulsory purchase schemes, thus overcoming the liability to pay a development charge.

The Land Commission Act 1967 imposed a betterment levy of 40% of the net development value, chargeable upon the disposal of land or its release for development purposes.⁷⁰ By virtue of Part III of the Act, the Land Commission became the vehicle for the collection of the sums recoverable. The end result was the 'banking' of land, delays in development and significant shortfalls in anticipated revenue.⁷¹ The subsequent enactments of the Community Land Act 1975 and the Development Land Tax Act 1976 were further largely unsuccessful attempts made to recover betterment.⁷² In each case there appears to have been no significant decline in the negotiation of planning gains. Attempts at the capture development values through the imposition of forms of taxation either

⁶⁷ s 70(2) of the town and Country Planning act 1947 provided for a Central Land Board to 'have regard to' the increment in value accruing to the land by virtue of the grant of planning permission and to have regard to the general principles prescribed in regulations made by the Treasury.

⁶⁸ Under Part VI of the Act £300m was allocated for the payment of compensation to landowners for loss of development value (payable in Treasury stock) by 1 July 1953. Additionally compensation was payable for certain war damaged land. The provisions were repealed by the Planning Act 1954.

⁶⁹ As noted in *Land* Cmnd 5730, at para 9, the effect of 'nationalizing' development value was to remove developer incentives to bring land forward for development. Instead, land was withheld from the system in the expectation that the legislation would be repealed.

⁷⁰ Land Commission Act 1967c.1, s. 29 and Sched. 4. The 'trigger' date being 6 April 1967.

⁷¹ A clear analogy exists with the emergence of the current provisions in Government's response to the Sheaf Committee's Report of the Working Party on Local Authority/Private Enterprise Partnership Schemes (HMSO 1972), to consult on legislation requiring developers to contribute to the cost of infrastructure provision.

⁷² T. Westlake, in 'Community Infrastructure Levy: Can it Feed the Infrastructure Cuckoo?' [2009] 6 *JPEL* 687-695 at p. 687 notes this as the largely successful 'fourth attempt in the past 40 years by the Government effectively to tax the increase in land value' deriving from the grant of planning permission, generating £50m during the last year. M. Grant (1992) n.61 at p.76 notes that, 'by 1982 net assessments to DLT totalled only £77m'. The Community Land Act was abolished in 1980 and the Development Land Tax by the Finance Act 1985 section 93.

created administrative ‘headaches’ centrally, resistance from the regulated community or more often a combination of the two. Each illustrates two things: the difficulty of imposing directive systems of control on local actors in situations (where Government is highly dependent upon other state and non-state actors) and the amorphous nature of discretionary activity. Attempts at rule-standardization would seem to produce further discretionary forms of action because of the complexity and uncertainty inherent in the regime.

Delivering an effective system of land-use control is the fundamental question that the planning regime seeks to address. History suggests that for recovering betterment more responsive solutions tend to deliver results. Here the principal actors – developers and planning authority are able to generate efficient solutions themselves, tailored to local requirements. It is known that in situations of complexity, forms of self-organization can be a useful element in solving public policy problems.⁷³ It is the very fact that room is given for the parties to work through and negotiate the basis of their interdependence that leads to potentially more efficient and effective solutions. Arguably the multi-faceted nature of land-use planning (concerning as it does community input in an environmental and technological as well as the economic context) requires levels of flexibility and expertise militating against rule-based decision-making. By contrast, the CIL provides for a more standardized and highly specific framework that gives a greater opportunity for an exercise of central oversight confining the ability of both planning authority and developer to negotiate bespoke solutions to development problems.

Back in 1973 Jowell sought to distinguish the ‘functional’ from the ‘strategic’ limits of the law in controlling largely discretionary activities.⁷⁴ Law could not, on this reading, resolve all problems or indeed control satisfactorily all forms of discretionary action. Processes subjecting official decision to predetermined rules and authoritative general directions containing specific and concrete guides for decision could be costly ultimately in terms of their effects.⁷⁵ In the quest for consistency and uniformity in decision-making, standardization may overreach the functional limitations of law.⁷⁶ Although the basis for this assertion was not made specific, it could be argued that the argument stems not from an existence of one

⁷³ R. Maynz, ‘Governing Failures and the Problem of Governability: some Comments on a Theoretical Paradigm.’ in J. Kooiman (ed.), *Modern Governance: New Government-Society Interactions* (NY: Sage, 1993), p. 9-20; B. Jessop, ‘The Rise of Governance and the Risks of Failure: The Case of Economic Development’ (2002) 50 *International Social Science Journal* 155, 29.

⁷⁴ J. Jowell, in ‘The Legal Control of Administrative Discretion’ (1973) 18 *Public Law* 178 at p. 179 noted that, ‘Law has both strategic costs and benefits, and these should be recognised and balanced against each other in the light of the situation that it is purported to control before any conclusion as to the *inherent* desirability of the legal control of discretion can be reached’.

⁷⁵ Ibid. at p.183 cited as ‘legalisation’. And referencing P. Nonet’s *Administrative Justice* (New York: Russell Sage Foundation, 1969) at p.246 ‘with legalisation, policies are transformed into rules that bind the decider’.

⁷⁶ Jowell n. 74 above perceived that, ‘legal techniques are not able to control decisions about certain kinds of problem’ and this may be one example.

form of discretion but its multiple guises within a particular context. It is apposite to consideration of the CIL.

Discretionary activity including bargaining is integral to many regimes in the public policy domain. Empirical studies are an important source from which to gauge the salience of law and its meaning to those affected by it. Illustrations can be found in the context of food control, pollution control.⁷⁷ In the absence of synchronic ‘fit’ between the perceptions and actions of those subject to legal controls and the relevant legal provisions, it becomes virtually impossible for law to be used to prescribe and confine the activities of those within the domain to a degree sufficient to eliminate discretion without its manifestation elsewhere in the system or different forms emerging.

CONCLUSION

Adopting a development levy seeks to impose greater transparency on the negotiation of development gains locally that have historically operated outside the parameters of a plan-led system. Clarity and certainty are substitutes for opaque negotiations. Oversight is tightened through closer and extensive monitoring of local activity (often as with the 2008 Act by prescribing procedures for the examination and approval of the scheme). In the past, recourse to locally negotiated solutions mirrored the discretionary character of the planning system overall. Agreements absorbed the deficits of systems of land taxation in the past. Their use after 1947 facilitated the broad alignment of developer and planning authority expectations and helped to ensure the operation of the system overall.

The CIL may provide Government with the prospect of resolving the conundrum of planning gains by expressly providing for the circumstances in which a levy becomes payable but there is no guarantee that the provisions themselves will eliminate the possibility of counterproductive effects. The level of intervention seems to be inconsistent with the characteristics of the institutional structure of the planning system as a whole, which is heavily reliant upon an exercise of discretionary powers. Imposed control systems tend to be highly problematic as regulatory forms as the well-documented history of command and control regulation and its substitution with more compliance-oriented forms indicates. The current approach would seem to defer a preference for forms of control responsive to market demands in favour of externally imposed structured solutions. Arguably this is at odds with the logic of the planning system, in particular its flexibility in general and misreads the nature of relations between the local planning authority and developer in particular. At a more abstract level the proposals sit unhappily with theories identifying the limitations and marginality of

⁷⁷ B. Hutter *Compliance: Regulation and Environment* (Oxford: Clarendon Press, 1997).

legal control forms in state regulation.⁷⁸ At issue fundamentally is the quest to make the system more clear, consistent and transparent, without hampering unduly the development process. Perhaps these goals are fundamentally incommensurable. It might be suggested that as an alternative the appeals system and enhanced structures of public engagement have the merit of making negotiations less opaque. A trade-off exists with regard to time and expense, however, with developments progressing more slowly and in some cases not at all. Planning guidance has proved effective in the past but rests upon the fostering of trust and dependency of planning authorities. Overcoming process and participation deficits may not necessarily result in better outcomes and this is something that should be recognized with the CIL. Further, the imposition of rule-based forms cannot totally eliminate discretionary action. Domains containing high levels of uncertainty and complexity (not limited to the land-use planning regime) tend to produce norms reliant upon levels of discretion irrespective of the legal framework. Hence rule-based regimes may 'morph' to suit the participants themselves.

The prospect of resistance to the changes at local levels cannot be discounted. Knowledge of both the broad context within which laws apply and the functional capacities, interests and resources of the community subjected to them are both critical to success. Yet the collective memory of Government appears to have suffered a degree of amnesia regarding the outcomes of previous attempts to invoke fixed charging structures.

Back in 1981 it was suggested that the imposition of a compulsory infrastructure charge might undercut the flexible and discretionary elements of the modern planning system.⁷⁹ Not only do the current provisions appear to be at odds with the history of the mechanisms used to recover planning gains but they are also in tension with the known theoretical implications when confining discretionary action. At this stage it is only possible to hypothesize the possible effects of the CIL. Clearly there is much at stake. In many ways the Planning Act, 2008 as it relates to the CIL establishes a framework but ignores many of the substantive problems integral to the juxtaposition of rules with discretionary action. However this does not end with the rules/discretion debate but begins by looking at the multiple manifestations of discretionary activity existing within any given domain.

⁷⁸ C. Scott, 'Regulation in the Age of Governance: The Rise of the Post-Regulatory State' J. Jordana and D. Levi-Faur (eds) *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Cheltenham: Edward Elgar, 2004) in defining the post-regulatory state notes the importance of variety in control mechanisms as between controller and controllees where (a) the capacity to exert control through a use of law is limited; (b) legal control forms are marginal to overall ordering processes and that state law is only likely to be effective when linked to other ordering processes. All of these facets are identifiable in the planning system.

⁷⁹ Loughlin, 1981 n. 40 at p.96.