A MATERIAL CHANGE OF USE: THE RISE AND RISE OF THE COMMUNITARIAN MODEL

Introduction

Few controversies can have such a profound significance for the planning system than that surrounding the meaning of "development". Each limb of "development" in the Town and Country Planning Act 1990, s.55 has its interpretational complexities.[1] Profound questions continue to surround the meaning of the second limb of Town and Country Planning Act 1990, s.55 that triggers planning powers where there has been a material change of use of land.[2] In particular, difficulty surrounds the meaning of the word "material". The established principle that a material change is simply a question of fact and degree[3] camouflages, and does not resolve, the kernel of the debate because it disguises the range of evidence or material facts that influence the outcome. The dilemma concerns the extent to which a material change of use can be identified by reference to the external consequences of the proposed change rather than the extent or *degree* of the change within the planning unit. Recent case law undoubtedly reveals a judicial willingness to regard off-site harm as a material consideration but it will be argued that the case law reveals a range of issues not all of which should be treated alike. It will be suggested that some presently acknowledged versions of off-site "harm" should be disregarded in establishing whether a material change is use exists.

The task of the courts in establishing the meaning of a "material" change of use is complicated because of the absence of an unambiguous legislatively articulated function for planning law.[4] In essence the choice is between either the communitarian or private property models. The first of these, which

---

[1] This article is primarily concerned with the second limb of s.55. The boundary between developmental and non developmental activity is also problematic in relation to the first limb of this section: see e.g., *Skerritts of Nottingham v. Secretary of State* [2000] JPL 281 QBD and [2000] JPL 1050 CA; *Barvis Ltd v. Secretary of State* (1971) 22 P & CR 710; *Cheshire County Council v. Woodward* [1962] 2 QB 126.

[2] Development means "the carrying out of building operations, engineering operations, mining operations or other operations in, over or under land or *the making of any material change of use* of any buildings or other land (emphasis supplied).

[3] E.g., *Howell v. Sunbury-on-Thames* (1964) 62 LGR 119; *Blackpool BC v. Secretary of State* [1980] JPL 527; *Panayi v. Secretary of State* (1985) 50 P & CR 109.

[4] See e.g., P. Morgan and S. Nott, *Development Control, Law Policy and Practice*, Butterworths, (2nd edit: 1995) pp. 3-5.

includes various versions of utilitarianism, takes a positive approach according to which the general welfare can best be realised where decision makers are entrusted with broad powers to regulate land use largely unfettered by the selfish interests of individual landowners.[5] The second asserts that there is a minimum content to individual liberty beyond majoritarian and, indeed, expert or technocratic preferences. It is a model that regards the planning jurisdiction as a limited body of law committed to the minimum interference with private property rights consistent with achieving its fundamental aims.

Communitarianism

A technocratic version of communitarianism would permit expert decision makers a relatively wide remit to override private preferences for the sake of the general welfare that the expert has identified. In other words it would allow planning authorities to exercise power to achieve general welfare interests provided that, in the absence of their intervention harm would result,[6] or a public benefit not secured. It would accept that competition between actual land uses and/or claims to use land leads to friction unless resolved by the state. This is a version of positive liberty that accepts state action as a concomitant of social living and it further asserts that the state is better equipped to identify the common good than those selfishly interested in advancing their own private goals. The community interest should be identified by trained administrators who can identify the common good from concrete factual settings.[7] According to this model, planning would proceed by scientific means, which would necessarily reject the view that any perception of harm is a material consideration.[8] Unless neighbours could establish objectively that harm had been sustained the development to which they objected would proceed (all other considerations being equal[9]). This model would insist that each 'intrusion' into private choice be explained and justified by an objective evaluation of the overriding general welfare rather

---

5 See e.g., P. MacAuslan, *"The Ideologies of Planning Law"* (1980). The private property ideology can be identified in the writings of John Locke, *Second Treatise of Government*, Blackwell 1956.

6 The concept of harm is a difficult one which is discussed below.

7 This requires us to accept that a common welfare exists and that planning law is not actually about mediating between rival vested interests.

8 As we shall see the law adopts a wider view such that perceptions of harm may now be material considerations: *R v. Tandridge DC ex p Mohammed Al Fayed* [2000] JPL 604; *Newport Borough Council v. Secretary of State for Wales and Browning Ferris Environmental Services Ltd* [1998] JPL 377.

9 For example, the requirements of the development plan: s.54A of the Town and Country Planning Act 1990.

than arbitrary and shifting public sentiment. The recent decision in *Richmond-upon-Thames LBC v. Secretary of State,*[10] discussed below, is located very much within this model.

Within the broader communitarian ideology can be located various versions of utilitarianism.[11] In its basic or 'unrestricted' form it requires the administrator to reach a decision from all the available options that will produce the greatest sum of happiness for all. Its emphasis is on process and in its basic form accords with the view that each preference is entitled to enter the utilitarian balance. As between scientifically supported and other objections in the planning process it is neutral since each preference must receive equal weight. This strand of utilitarianism supports the view that a material consideration in planning should include non-scientific objections to unpopular development[12] but rejects the view that the administrator can ascribe different values to these admissible, non-objective, considerations.[13]

The Private Property Model

The project of the private property model seeks to limit potential over-reach of planning controls by reference to a version of negative liberty according to which each individual, in the absence of some overriding public interest, should be free to advance their own happiness. It would reject the communitarian/utilitarian view under which the individual is subordinated since it argues that some values are fundamentally important and should be placed beyond majoritarian controls. It expresses the need each of us has an individual not to suffer any but minimal interference in individual choices. A thriving, vibrant and satisfying society must acknowledge a minimum content of individual liberty. It also challenges the communitarians to justify prioritising the interests of the many to maximise their enjoyment of property over the misery of the few who cannot enjoy theirs. How can you compare (in a case like *Gladden*[14]) the claim of the neighbour to be free of a view of a replica

---

10 [2000] 2 PLR 115, High Court, Christopher Lockhart-Mummery QC sitting as Deputy Judge.

11 There are, alternatively, act or rule versions of utilitarianism. In its unrestricted form act utilitarianism holds that an act is right if it produces a greater amount of happiness than any possible alternative. In its pure form rule utilitarianism holds that an act must conform to a recognised and accepted rule which itself produces more happiness than any alternative: D Miller, *Social Justice*, Clarendon Press 1975, pp. 33 *et seq.*

12 See note 8 above. These issues are developed below.

13 Contrast *Tesco Stores v. Secretary of State* [1995] 2 All ER 636.

14 [1994] JPL 723, discussed below.

aircraft with the claim of the occupier to enjoy the presence of the same object? If all are free and equal why should one view exclude the other? This model would influence the boundaries of "development" by placing a greater emphasis upon the freedom of the individual to make changes in use of land, and would thus insist on a higher development threshold in s.55 than the communitarian or utilitarian approaches.

Off-site Harm in Planning Decisions

The trend in the recent case-law is to allow planning considerations that would be relevant at the merits stage (the decision whether or not to grant planning permission) to influence whether a change of use is a material change of use and so subject to the need to seek planning approval.[15] This can be described as an approach that allows "off-site harm" or the *consequences* of possible development to influence the question whether development has taken place. It will be argued below that this general approach disguises a number of distinct issues, and that a refinement of the present approach is required. This is so because the cases raise different issues one from another and require a more sophisticated conceptualisation if planning law is not to stray beyond its proper purposes. In particular, it will be argued that the notion of a material or planning consideration is so wide, (embracing as it appears to do any thing relevant to the use of land; it need not be confined to questions of amenity or environmental impact[16]) that the unlimited assimilation of such open-ended factors into the question whether development has occurred threatens a radical and probably unacceptable extension of the planning system. If, in principle, a material consideration can mean anything connected with land use there can be few changes in the use of land that planning law cannot regulate.[17] This extreme communitarian stance will subject many activities, including those

---

[15] See e.g. *Panayi v. Secretary of state for the Environment* (1985) 50 P & CR 109; *Lilo Blum v. Secretary of State for the Environment and Richmond upon Thames LBC* [1987] JPL 278; *Forest of Dean District Council v. Secretary of State for the Environment & Howells* [1995] JPL 937*; Thames Heliport v. Tower Hamlets LBC* [1997] JPL 448 and *Richmond-upon-Thames LBC v. Secretary of State*, March 28th 2000, above n.10.

[16] E.g., *Esdell Caravan Parks v. Hemel Hempstead RDC* [1965] 1 QB 895; *Clyde & Co. v. Secretary of State for the Environment* [1977] 1 WLR 926; *Westminster CC v. Great Portland Estates* [1985] 1 AC 661*; Mitchell v. Secretary of State and Kensington and Chelsea Royal Borough* [1994] JPL 363.

[17] This is a concern arising from *Wallington v. Secretary of State for Wales* (1990) 62 P & CR 150 in which a significant increase in the number of dogs kept as pets within a dwelling house was held to be development. See B. Hough, *Planning Law and Domestic Privacy* [1992] Journal of Planning and Environmental Law 906.

within the privacy of the home, to majoritarian rather than private choices.[18] It seems to reject the view that some areas of life are so important that they should be placed beyond arbitrary public sentiment and protected by law unless an overwhelming public interest to the contrary can be identified (unless that public interest is triggered by almost every change in the use of land).

Off-site Harm

The decision of Simon Brown J. in *Lilo Blum v. Secretary of State for the Environment and Richmond upon Thames LBC* [19] presents the first potential difficulty where considerations that would inform the merits question (whether approval be granted) infiltrate the prior question (is there development?) The facts in this case were that an enforcement notice had been served alleging that a material change of use had occurred when livery stables were additionally used as a riding school. At first sight the change did not seem to be a very significant one: the former livery stables had involved the activity of horse riding as well as that of sheltering horses. The subsequent riding school undertook similar activities, but these also involved an increase in the riding. The enforcement notice was broadly upheld by the Inspector on appeal and subsequently by the High Court. Here Simon Brown J., holding that development had occurred, considered that its key constituent was the increase in horse traffic along bridle ways in a conservation area (an issue that the Inspector had also identified as the main issue relevant to the planning merits to be considered on the deemed application for permission). This increased use of the bridle ways was likely to damage them. This revealed the central dilemma: the considerations that would properly impinge on planning merits (whether permission should be granted) also determined whether there was development in the first place; the threshold had all but vanished.

But that did not conclude the issue because the concern with maintaining the state of the paths arguably poses questions about overlapping or parallel jurisdictions of the planning and highway authorities respectively. This is considered further below.

But this does not conclude the matter because there are different kinds of off-site harm. The redress of some of these harms does seems compelling. This is

[18] *Ibid*.
[19] [1987] JPL 278.

so, for example, in *Richmond-upon-Thames LBC v. Secretary of State* which is a further example of the communitarian model albeit that, in addressing "off-site harm", it raises different issues from those in *Lilo Blum*. Here the question was whether the conversion of a dwelling house containing seven self-contained flats to one large family house would constitute a material change of use notwithstanding the almost complete absence of external alteration and a reduction in the "nuisance" effects associated with multiple occupancy (such as the number of visitors to the building). The local planning authority wished to resist the change because it conflicted with the established policy objective of avoiding any reduction in the stock of low cost small accommodation.

In following *Panayi v. Secretary of State*[20] Christopher Lockhart-Mummery QC determined that the reduction in accommodation would entail a material change of use requiring planning permission. This was so because if a change of use gave rise to planning considerations, such as the loss of a particular type of residential accommodation, that would be a relevant factor to be taken into account in considering whether the change of use is a material change of use. His lordship also stated that it was "common ground" between the parties that the loss of residential accommodation would be a material factor at the merits stage under Town and Country Planning Act 1990, s.70 (2). This confirms the importance of merits issues in establishing whether development has occurred.

His lordship also emphasised that if the opposite conclusion were reached, the important social and economic policy of increasing the number of low cost properties available would be "profoundly" affected if developers could amalgamate these small units into larger ones without acquiring planning consent. Thus development occurred because of the public interest in preserving the flats; the materiality of the change was not concerned with the *degree* of change of the building but its *importance* in terms of the public interest. But it is to be emphasised that the harmful consequences that the decision sought to avoid were consequences for public policy in the potential reduction in small residential units. *Richmond* is thus an exemplar *par excellence* of the communitarian interpretation of the development concept.

Yet other issues arise where there is a conflict between persons seeking to exercise their own liberty. Here the "consequences" test is used as a means of choosing between these rival land uses. In *Wallington v. Secretary of State for*

[20] (1985) 50 P & CR 109.

Wales[21] the keeping of a large number of dogs was held to be a material change of use of land falling outside the saving for uses incidental to the enjoyment of a dwelling house as such.[22] The probable *sub silentio* reasoning was that the dogs caused off-site harm to a nearby property, although the *ex facie* reasons were alternatively that a material change of use occurred by virtue of the displacement of conventional dwelling house activities, and thus furnished evidence of the *degree* of change; alternatively that such an eccentric hobby fell outside the exemption as it was not incidental to the enjoyment of the dwellinghouse as such. Similarly, in *Croydon LBC v. Gladden*[23] the basis for the decision must have been that the placing of a replica aircraft in the garden of a small suburban property would cause detriment in the neighbourhood. The only purpose in which an unconventional land use such as this might be thought to merit planning control is that it is perceived as harmful to others. The issue that needs to be resolved is the sense in which this so? What kind of harm is this? This issue becomes even more acute when it is recalled that the reasoning in *Gladden* was that the introduction of other large objects onto the land (in contrast to the replica Spitfire) would not raise a planning question. This is an issue to which we shall return.

Measuring the Importance of Change: the Problem of 'Harm'

It has been shown that whether development has occurred is often determined by reference to the likelihood that it might cause harmful consequences for others beyond the boundaries of the planning unit. The resolution of border-line cases by reference to off-site consequences, or off site 'harm', if now judicially accepted in principle, poses a number of complex issues. The first of these touches on the meaning of harm. This is particularly so in relation to some cases of unconventional land use, but it is not confined to these cases. What is cognisable as 'harm' in the planning context? Does legally cognisable harm mean that which can be scientifically or empirically shown to exist or is the perception of harm sufficient? Does harm occur where it frustrates aims perceived as important to an individual's chosen way of life? Or does it require

21 (1990) 62 P & CR 150.

22 Town and Country Planning Act 1990, s.55 (2)(d).

23 [1994] JPL 723.

injury or potential threat to an entitlement or interest?[24] What degree of harm justifies interference in private choice? Is proof of any harm sufficient?

The Meaning of 'Harm'

The concept of harm is a notoriously difficult one not least because an activity that may harm one individual may profit another. Further, an affliction normally understood as harmful may, in individual cases, produce benefits.[25] Harm may also have different meanings for different social groups.[26] And the law does not treat equally claims to be free from harm.[27]

Two alternative conceptions of harm must be considered. According to the first, (model 1) harm cannot be understood independently of some consensus about how individuals in society ought to live and the kind of satisfaction they are entitled to enjoy. The second (model 2) adopts a more subjective approach and argues that harm occurs wherever there is an *actual or threatened* interference with an activity considered to be important by an individual to his or her way of life.

Judicial cognisance of harm in the planning context has recently altered significantly. There is an emerging orthodoxy that harm means "genuinely perceived" rather than "actual" (or even "significant") harm, and that the decision-maker has a duty to take into account the perception of harm (or individual preference) as a material consideration.[28] Accordingly, the recent case-law ostensibly appears to accept model 2 discussed above. In fact, it is even wider than this because proof of "*actual or threatened*" interference is unnecessary: an unsupported affirmation that harm may result is treated as a

---

[24] By 'interest' it is meant a right or expectation for which the law or administration devises means of protection independently of an extension to the planning system.

[25] A philosopher who suffered blindness in old age refused to concede that harm had befallen him. Whilst normally sighted, he argued that he had dissipated his energies; once blind he would concentrate more fruitfully on his philosophy: a story told of the philosopher Brentano cited in D. Z. Phillips and H. O. Mounce, *On Morality's Having a Point,* Philosophy, xl (1965) p. 316.

[26] For a valuable general discussion of risk and harm see N. Stanley, *Public Concern: the Decision-Makers' Dilemma* [1998] JPL 919 to which the present author is much indebted.

[27] Hence the *dictum* that "..what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey..", Thesiger LJ delivering the judgment of the CA in *Sturges v. Bridgman* (1879) 11 Ch.D. 852 at p. 865.

[28] Although the weight to be attached to that factor is for the decision maker, acting reasonably, to determine. See e.g., on this issue and that of the subjective meaning of harm, *R v. Tandridge DC ex p Mohammed Al Fayed* [2000] JPL 604; *Newport Borough Council v. Secretary of State for Wales and Browning Ferris Environmental Services Ltd* [1998] JPL 377 CA; *Gateshead MBC v. Secretary of State* [1994] 1 All ER 397.

material consideration; scientific evidence of this is not necessarily required. This means, of course, that perceived harm, often amounting to little more than disapproval, is given a *de jure* recognition. In cases of a conflict between the claim of an individual to change, in a minor way, the use of his land and the objections of neighbours who see themselves as harmed by the proposed activity it culminates in an extreme communitarian position akin to that which R. Dworkin describes as "neutral utilitarianism".[29] This theory asserts that the existence of 'more or more intense desire' justifies the denial of the fulfilment of an individual's desires. The law thus avoids confronting the disapproving neighbours' needs[30] and instead focuses on weighing "desire".

A contrast with the technocratic version of communitarianism is also suggested by the emerging orthodoxy. Technocratic communitarianism would permit the decision maker to recognise and be influenced only by harm in the first sense identified above; in other words, the accountable decision maker is entitled to make judgments about the kind of satisfaction individuals are entitled to enjoy and to assess scientifically whether those expectations will be frustrated. The broader neutral or unrestricted utilitarian stance reduces the influence of experts; scientifically justified notions of harm are placed on the same level as irrational perceptions of harm.

The current approach can readily be seen to have the potential for significantly expanding the reach of planning law. Landowners who make some minor change in the use of land may find themselves subject to planning jurisdiction because of a neighbour's perception that he or she has suffered harm. Development for the purposes of s.55 can thus be triggered where such "harm" occurs, yet this perception may amount to little more than disapproval. The existence of more or more intense desire may thus outweigh the choice made by an adjacent landowner. The potential for difficulties in this respect can be seen in *Newport Borough Council v. Secretary of State for Wales and Browning Ferris Environmental Services Ltd* [31] where it was held to be lawful to refuse planning permission for a waste treatment plant in the face of local objections founded (erroneously) on anxieties concerning public safety. As is well know the Court of Appeal decided that such anxieties were a material consideration and that it was an error of law to hold that the genuine fears on the part of the

---

[29] R Dworkin, *Rights as Trumps*, in J Waldron, *Theories of Rights*, Oxford University Press, 1984.

[30] "Need" describes and gives priority to those desires or preferences which, if not satisfied, result in harm or the denial of some interest: B. Barry, *Political Argument*, 1965, re-issued 1990, p.lxviii.

[31] [1998] JPL 377.

public, unless objectively justified, could never amount to a valid ground for refusal.[32] This means, of course, that mere perceptions of possible harm can be overriding in the planning process. [33]

The emphasis upon an unrestricted utilitarian calculus may also jeopardise certain unconventional land uses. This concern arises from the *reasoning* in *Croydon LBC v. Gladden.*[34] This ventured the possibility that it might be acceptable in planning terms to place a pirate's ship, a wendy house or an unconventional statue in the rear garden of a dwelling house, but not another unconventional large object (such as in this case, the replica aircraft).[35] Since the replica aircraft (development) and the unconventional statue (non development) are each inert, in the sense that they emit no noise, smoke or odour, the basis for the distinction must be that one is more likely to incur the disapproval of neighbours than the other. It may be questioned whether planning law should articulate in these terms a preference between one large object and another. Decisions such as this suggest that even where alternative land uses do not result in nuisance some are more equal than others.

From the private, albeit selfish, perspective of the landowner the possibilities of unrestricted utilitarianism threaten an imposition of majoritarian preferences in private matters of taste.

Thus the dilemma for the judiciary in cases raising such divergent issues like *Lilo Blum, Richmond, Wallington* and *Gladden* is to provide a more

---

[32] There is, however, a conflict as to whether such perceptions of harm, without more, justify a refusal of planning permission. Compare, for example, *Newport Borough Council v. Secretary of State for Wales and Browning Ferris Environmental Services Ltd* [1998] JPL 377 CA; *Gateshead MBC v. Secretary of State* [1994] 1 All ER 397.

[33] In cases where off-site consequences will be examined to decide whether a material change of use has occurred it means that the jurisdiction of the planning authority depends on the reaction (or lack of reaction) of neighbours!

[34] [1994] JPL 723. The court in this case considered whether a private residential occupier would have the freedom to place a replica Spitfire aircraft in either the front or rear garden of their suburban residential property. The court held that such an use was not incidental to the enjoyment of a dwelling house as such (the exemption in s.55 (2) (d) of the 1990 Act) but their lordships gave different reasons for this. According to Dillon LJ the exemption only benefited objectively reasonable land uses. Stuart-Smith LJ offered the more liberal view that even unconventional or unusual or large objects could, as a matter of fact and degree, benefit from the exemption, but held that the aircraft did not do so because it would be placed on the land to "tease" the local authority and not for *bona fide* enjoyment purposes. Hobhouse LJ agreed with both judgments. *Emin v. Secretary of State* [1989] JPL 909 seems consistent with the liberal approach preferred by Stuart-Smith LJ.

[35] *per* Stuart Smith LJ at p. 733. Presumably the replica lacked an engine. Had it been otherwise, and the complaints had been founded on noise nuisance, the case would have been a more straightforward one, since even proponents of the private property model would accept that no-one would be at liberty to inflict such harm on neighbours.

convincing justification and explanation of the role of the state in restricting private choice than an unqualified resort to off-site harm. It suggests a need for a more sharply focused principle than one which uncritically accepts any version of "off-site harm" as a planning consideration, especially where this amounts to perceived rather than actual harm. And it may be appropriate that, in the planning context, harm should not be identified independently of an understanding of entitlements. At this point it is necessary to consider how any debate concerning entitlements may be influenced by the bringing into force of the Human Rights Act 1998.

Human Rights [36]

The enactment, in the Human Rights Act 1998, of "convention rights" has received into English law most of the substantive provisions of the European Convention on Human Rights. Convention guarantees are, of course, binding against public authorities such as planning authorities, unless the statute itself requires a result contrary to a convention right.[37]

Art. 8 of the European Convention on Human Rights guarantees respect for private and family life.[38] "Private life means the sphere of each individual life into which non-one can intrude without having been asked. Freedom of private life is the recognition to everyone's benefit, of a zone of activity which is one's own, and whose entry one is free to prohibit to anyone." [39] The article embraces a right to free enjoyment of the "home", the meaning of which appears to be widely defined.[40]

---

[36] For a general discussion see, e.g., Upton, *The European Convention on Human Rights and Environmental Law*, [1998] JPL 315; Corner, *Planning, Environment and the ECHR* [1998] JPL 301; Hart, *The Impact of the Human Rights Act 1998 on Planning and Environmental Law* [2000] JPL 117.

[37] Human Rights Act 1998, s.6

[38] The basic right in Article 8 (1) is that "Everyone has the right to respect for his private and family life, his home and his correspondence." The right is qualified by article 8 (2) which states in effect that interference with this right is lawful if it is in accordance with the law and necessary in a democratic society in the interests of (*inter alia*) the economic well-being of the country and the protection of the rights and freedoms of others. Art 1 of Protocol 1 should also be noted. It confers an entitlement to the peaceful enjoyment of possessions. Interference with the basic right is permitted "in the public interest and subject to conditions provided for by the law".

[39] From *Les Libertés Publiques*, vol. 2, Jean Rivero, Presse Universitaire de France, 1989 p. 76.

[40] Including, for example, a businessman's office: *Niemietz v. Germany* 16 EHRR 97; and a gypsy caravan: *Buckley v. UK* [1996] JPL 1018. A minority group can also claim the right to respect for its particular life-style as "private life", "family life" or "home": Application Nos. 9278 and 9415/81 *v. Norway* (1984) 6 EHRR 357

The existence of planning controls is recognised as necessary in a democratic society and thus capable of being exercised in a manner consistent with Convention guarantees.[41] However, as we shall see below, the Convention seems to insist on a greater emphasis than domestic law on the claims of the individual user of land. This probably follows *a fortiori* in the context of activities within the curtilage of dwelling house.

In essence Art 8 (1) and (2) requires the state to have regard "..to the fair balance that has to be struck between the general interest of the community and the interest of individuals, the search for which balance is inherent in the whole Convention".[42] This can be seen in a case in which national authorities planned the partial flooding of a valley for hydro-electric purposes within an area inhabited by a nomadic minority group.[43] The Commission acknowledged that the scheme would interfere with the life style of the group, and hence their private lives, but the interference was justified under Art 8 (2) because the national authorities had given careful consideration to the interest of the Lapps as well as to the national economic interest. The weight attached to the Lapps' concerns and the careful balancing exercise by the national authorities ensured that a breach of Art. 8 did not occur.

Where interference in private life by the state does occur it must be 'necessary'; and this connotes a 'pressing social need' for the interference in question. As *Howard v. UK*[44] reveals, an urgent need to regenerate land can justify compulsory purchase, although a critical reason for the lawfulness of the state action in this case was that the inspector had recognised and given full weight to the interests of the elderly residents whose land was affected.

Each state has a "margin of appreciation" in determining whether a pressing social need exists. The purpose of the margin of appreciation is to allow national decision makers, subject to review by the Strasbourg Court, some scope to identify relevant social conditions within their own state, that the

---

41 See e.g., *Masefield v. UK* (1987) 9 EHRR 136.

42 *Cossey v. UK* (1990) 13 EHRR 622; see also *Lopez Ostra v. Spain* (1994) 20 EHRR 277 .

43 Application Nos. 9278 and 9415/81 *v. Norway* (1984) 6 EHRR 357.

44 (1988) 52 DR 198. This admissibility decision was primarily concerned with the issue of effective redress under art 13, although a complaint under Art 8 had been declared unsuccessful at an earlier stage.

court would be less well-equipped to recognise. [45] In the planning context, it is acknowledged that a wide margin of appreciation is applied.[46]

The doctrine of proportionality restricts the margin of appreciation so that scale of actual interference must be judged against the importance of the legitimate aim pursued.[47] A complete ban on the enjoyment of an activity will require more serious reasons to justify it than a less intrusive interference. But state action taken to further important social policy attracts both a wide margin of appreciation and imposes a correspondingly low burden of proportionality.[48]

It is recognised that proportionate action may be taken by state authorities to preserve a landscape of particular aesthetic or natural value even if this does amount to a ban on the exercise of private legal rights. For example the "general interest" justified an interference with the right to peaceful enjoyment of a possession, such as a war time bunker converted into a seasonal dwelling house, because the restrictions were "desirable and necessary" to prevent harm in an area of outstanding natural beauty.[49]

Complainants who suffer grave inconvenience[50] short of personal injury have not been held to have suffered a violation of their Art 8 right where the state was pursuing a legitimate and important aim (urban regeneration) because the state action, within the permitted margin of appreciation, "fairly" balanced their interests with those of the community.[51] This is important because it signals that even serious harm will not render unlawful state action that pursues a legitimate purpose. *A fortiori* mere perceptions of harm would not appear to

---

45 *Dudgeon v. UK* (1981) 4 EHRR 149.

46 See e.g., *ISKCON v. UK* (1994) 22 EHRR 7 CD 133.

47 *Handyside v. UK* (1976)1 EHRR 737.

48 See *Mellacher v. Austria* (1990) 12 EHRR 391, where the state, in reforming the rental housing market did not violate art 1. of Protocol 1 when it introduced statutory powers resulting in the reduction in a freely negotiated rent to a mere 17.6 % of its value.

49 Application No. 11185/84 *Herrick v. UK* (1986) 8 EHRR 66. This complaint also raised issues under both Art 1 of protocol 1 as well as Art 8. As far as the latter was concerned the enforcement action was for a legitimate aim, proportionate, and intended to protect the rights of others. The Commission observed that a more stringent test for assessing the legitimacy of the aim to be pursued applied under Art 8 than under art 1 of protocol 1, although the proportionality test was substantially similar. Similarly, in Application No. 11469/85 *Mansfield v. UK* (1987) 9 EHRR 136. On the importance of landscape, such as the Green Belt, see *Buckley v. UK* [1996] JPL 1018.

50 Evidence established that for a period of around three years residents of a London neighbourhood were unable to open their windows or dry washing out of doors because of dust pollution caused by road building.

51 *Khatun v. UK* (1996) 26 EHRR CD 212

weigh heavily in the balance and thus would be most unlikely to outweigh state action that pursued a legitimate aim.[52]

In sum, the Art 8 cases reveal that public authorities act consistently with the Convention when individual interests are given careful consideration and only overridden where a clear countervailing public interest can be identified, such as the need to protect the general economic interest or the rights of others. Even then the authority must strike a fair balance between the competing interests. As Corner concludes[53] the application of the Convention will require a greater emphasis on the individual interest than has been traditional in domestic planning and this may signal a re-appraisal of the communitarian model to reflect that emphasis.

Suggested Reform

If it is now an emerging principle that off-site harm is capable of establishing a material change of use it should perhaps be recognised that the various kinds of off-site harm raise different issues and the principles under which such harm influences the decision-making process ought to be refined to reflect this. The following argues that cases should be distinguished according to the categories suggested below:

Category 1 "ulterior purpose"

The first category is concerned with cases in which the local authority identifies certain off-site harm as relevant to planning but this harm might alternatively be addressed under another "parallel" statutory scheme. *Blum* arguably represented such a case because the decision to employ development control to preserve the condition of the public paths by minimising the opportunity of the public to exercise their rights over them caused two principle concerns. First it sought to divert the public (or interested horse-riders) from the enjoyment of a vested public right; and second it arrogated to the planning authority a decision over highway management that might alternatively lie with the highway authority. Other management techniques,

---

[52] This raises the possibility that the grant of planning permission for the waste treatment plant in *Newport Borough Council v. Secretary of State for Wales and Browning Ferris Environmental Services Ltd* [1998] JPL 377 could not have been impugned by neighbours as a violation of Art 8 on the grounds of unsubstantiated health concerns.

[53] *Planning, Environment and the ECHR* [1998] JPL 301, 312.

such as maintenance and repair, were undoubtedly alternatives to the chosen indirect method of *exclusion* that the highway authority may have considered as alternatives. The intervention of planning denied that authority, and the public, this possibility.

In some, but not all, cases of this kind the exercise of planning powers may be lawful as falling within statutory authority,[54] but even where this is so the existence of possible action under the alternative jurisdiction might be regarded as a relevant consideration that the planning authority could only decline to follow on rational grounds. Where the off site harm identified is harm that properly falls within the jurisdiction of a body other than the local planning authority, [55] it is not normally relevant to planning.

Category 2- Parallel Jurisdiction

In cases in which there is a legitimate 'parallel' jurisdiction the issues will be different from those in category 1. For example, if the local planning authority had to determine whether a change of use was material and called in aid the possibility of off-site harm, such as noise, the existence of the noise abatement remedies would be a relevant planning consideration.[56] The availability of a satisfactory remedy outside planning influences the merits issue so as to allow a local planning authority to permit development, thereby acknowledging the role of environmental health officials. This limits the role of planning as a preventative system, although the extent to which this is so is unclear.[57]

It is, however, possible to argue that the possible existence of a parallel jurisdiction should also be relevant to the manner in which off-site harm is now considered at the threshold stage. In essence the argument is that if adverse

---

[54] Town and Country Planning Act 1990, s.335 which allows planning authorities to exercise planning powers notwithstanding the existence of a "parallel" and specific power provided that the latter was enacted and in force at the passing of the 1947 Act.

[55] For example, where the enactment was not in force at the passing of the 1947 Act. (But see on this point *Westminster Bank v. Beverely BC* [1971] AC 509)

[56] E.g., controls under part III of the Environmental Protection Act 1990 which might involve consultation between planning and environmental health officers. *Gateshead Metropolitan Borough Council v. Secretary of State for the Environment & Northumbria Water Group plc* [1995] JPL 432 decided that the parallel regime is a material consideration in deciding whether to grant or refuse planning permission. See also PPG 23.

[57] Development might be refused where harm might otherwise result notwithstanding integrated pollution control, but here again the *Newport* case raises questions about the meaning of harm: see Professor M Purdue, *The Relationship between Development Control and Specialist Pollution Controls etc.*, [1999] JPL 585.

planning consequences can determine whether there has been a material change of use, removal of those adverse consequences by other, possibly statutory, means *ipso facto* undermines the case that a material change of use has occurred. For example, in a case involving noise (depending on the severity of the harm) if a material change of use would only arise under the *consequences* test the existence of noise pollution controls might permit the local planning authority to consider whether the *prima facie* development had not actually occurred because the harm could be addressed by other means.

Further, the emphasis on proportionality in human rights law would suggest that, in some cases, an activity should not be restrained where the state could achieve its legitimate aim of protecting the interests of others by allowing the activity to proceed subject to the use of other remedies to remove any harmful consequences. The effectiveness of the alternative remedy would thus be a relevant consideration.

Category 3 - harm and entitlement

In category 3 no question of ulterior purpose or parallel jurisdiction arises. It describes other cases in which the planning authority wishes to intervene in order to address identified off-site harm not falling within categories 1, 2 or 4. In particular, it is concerned with those cases that the state needs to resolve a conflict between individuals seeking to exercise their own liberty as, for example, in *Gladden*, and *Wallington*.[58] It raises again the question of the meaning of 'harm'.

As we have seen, unsubstantiated objections to a possible development on the grounds it might cause harm are currently admissible as "material considerations". *Newport* reveals that these views are not only taken into account and weighed as relevant but they can also be overriding. This, as it has been argued, is consistent with a utilitarian stance that allows a public representative to decide a planning issue so as to advance the sum of communal happiness. All preferences count and count equally. The merits of this inclusive approach to materiality are that a decision that is adverse to the objectors' wishes is made more acceptable if they are aware that their views

[58] Also *Forest of Dean District Council v. Secretary of State for the Environment & Howells* [1995] JPL 937.

have been taken into account. It also encourages the widest participation in the planning process since anyone who perceives themselves affected must be heard. As the *Newport* case demonstrates, this approach also dilutes the influence of scientific evidence in planning, and thereby acknowledges possible public disquiet about scientific reassurances. Thus there are strong arguments that views of neighbours or objectors should be planning considerations.[59] The difficulty is to determine the influence these should have in the planning process, especially where other countervailing considerations are also relevant. This returns us to the vexed issues of preferences and 'harm'.

It can be argued that the present adoption of unrestricted utilitarianism is open to objection because the satisfaction of some wants may be judged to be without any value; they may actually be harmful and thus ought to be left out of consideration in choosing between possible options. The frustration of certain preferences can thus be recognised as a benefit. It could be argued, for example, that a desire shared by the majority of the community that the minority suffer a disadvantage or receive less because of their colour would not be acceptable. Similarly, the strong desire of a village community that a new neighbour send their child to the village school threatened with closure rather than to a distant private school could also not be supported without undermining notions of liberty. The claims of the community do not become persuasive simply because they perceive themselves to be harmed by the choice of school.

This suggests that the decision maker should be concerned with a just distribution of satisfaction that would acknowledge the right of individuals to be treated equally. An individual should be able to pursue liberty unless harm is thereby caused to others. If decision makers were concerned with just distribution it would suggest the application of a version of harm similar to that propounded as model 1 above. In other words, harm should not be understood independently of some consensus about the kinds of satisfaction individuals are entitled to enjoy. This may demand that each person's ranking of the importance of having their respective wants satisfied is not necessarily adopted by the political decision maker.[60] Subjective perceptions of harm are thus

---

[59] The need to advertise applications for planning permission under the Town and Country Planning Act 1990, s.71 (as amended) and Town and Country Planning (General Development Procedure) Order 1995/419 recognises the importance of local views as part of the planning process.

[60] See B. Barry, *Political Argument*, 1965, re-issued 1990, esp. pp. 38 *et seq.*

capable of being differentiated in law from, say, empirically verifiable harm or simply undeserving claims.

The need for such a reform is arguably made necessary by the incorporation into English law of Convention Rights. Unlike the utilitarian calculus in which more or more intense desire prevails, the emphasis for the Convention is the "fairness" of the balance. It suggests that whilst each objector is entitled to be heard on what is necessary to satisfy their own conditions for happiness, even if shared with the majority of others, their claims do not necessarily correspond with either a just distribution of satisfaction or one which meets the demands of an alternative public interest that an expert might identify.

If this is accepted, the present concept of materiality (in so far as it applies to development in s.55) should be reformed. The disapproval of others, unsupported by empirically identifable harm, ought not to establish the jurisdiction of the planning authority over the proposed use of land by another individual. On the other hand, it has been argued that to deny such objectors a voice in the planning process would undermine confidence in the planning system, discourage participation in the planning process and under-value public opinion. The solution to this is therefore to distinguish between considerations that are "material" for the purposes of s.55 (development) from those relevant to s.70 (planning merits). Only harm that is empirically identifiable could be relevant to the question of whether development has occurred. Where planning merits are at issue (i.e. once development had been established) public concern manifested in perceptions of harm should be admissible to the decision-making process as a material consideration, but they should not be decisive since expert decision makers should be entitled to make judgments about the worth of particular preferences.

This proposal offers a restricted view of the utilitarian model because it demands in certain cases that protection be accorded to the minority or the individual even if there is a plausible claim that a greater number will somehow benefit if the individual's desire is frustrated. It raises a somewhat more robust threshold against state interference in private life via the concept of development, so as to provide the greater emphasis upon individual interests that the European Convention on Human Rights seems to require. The emphasis upon identifying a "pressing social need" and the doctrine of proportionality in human rights jurisprudence would appear to demand that a

clearer public interest be identified for the use of planning, in particular in some cases concerning the home. The action taken to further the legitimate aim of protecting the rights of others must also be proportionate and achieve a fair balance between the community interest and the protection of the fundamental rights of the individual.[61]

Category 4- Harm to Public Policy

In the fourth category of off-site harm the local planning authority is concerned with an activity that conflicts with its previously established formal development plan policies. There is a stronger case for the intervention of the state where it does so to defend policies that are the result of a process of consultation and debate within the community; the purpose of these policies is precisely to identify "pressing social needs". This is arguably the basis upon which decisions such as *Richmond* are founded. In other words, the conclusions of a democratically elected and accountable body enshrined in its planning policies are perhaps more genuinely seen as an expression of the general welfare than *ad hoc* interventions that favour one individual or group at the expense of others. Provided the action taken to implement them is proportionate the local planning authority would seem to act lawfully. Public participation in development plan policies rescues this version of communitarianism from authoritarianism since it is not the planning expert alone who decides which individuals should endure a loss of freedom.

Conclusion

The recent evolution of the concept of development is firmly rooted in a communitarian conception of planning law. It has, however, been argued that the uncritical broadening of the legal concept of material harm, and its use in determining whether development has occurred, has resulted in a system that legitimates considerable intrusion into private life. The particular problem is that the adverse reaction of neighbours can both establish that a change of use is a material change *and* provide an overriding case for enforcement action.

---

61 *ISKCON v. UK*, supra, at p. 144.

These principles of domestic law seem inadequate to meet the demands of the European Convention on Human Rights which requires that a fair balance be achieved between the interest of the community and that of the individual. Although the state has a relatively wide margin of appreciation there remains the "pressing need" to justify interference in Convention Rights. It has been argued that this need is unlikely to be established where the only argument for interference (ie a finding that development occurred) is the disapproval of others articulated through empirically unsubstantiated conceptions of harm.

Accordingly the categories suggested above urge a more structured approach to the relevance of off-site consequences. In particular, it has been argued that the concept of materiality ought to be reformed in a way that recognises that only empirically identifiable harm and not mere disapproval satisfies the concept of development for the purpose of s.55 of the Town and Country Planning Act 1990. The views of members of the public on planning matters should, however, remain relevant considerations at the merits stage, but it has been doubted whether these views should be overriding.