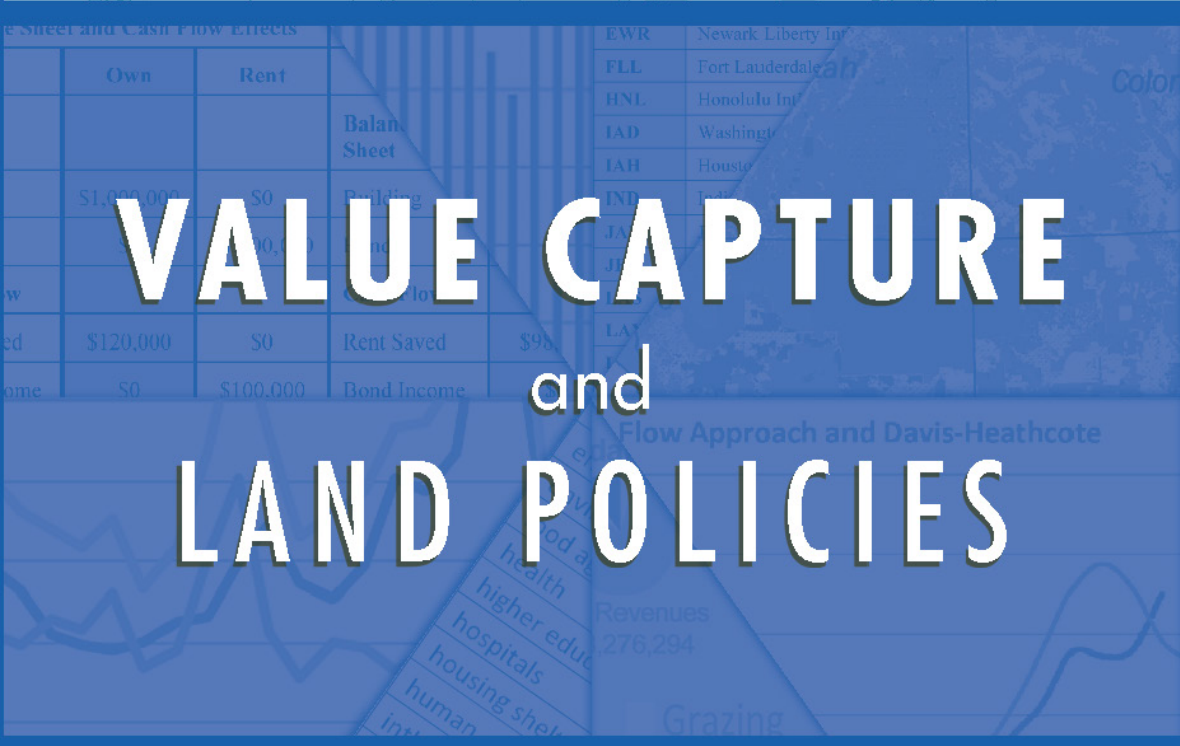
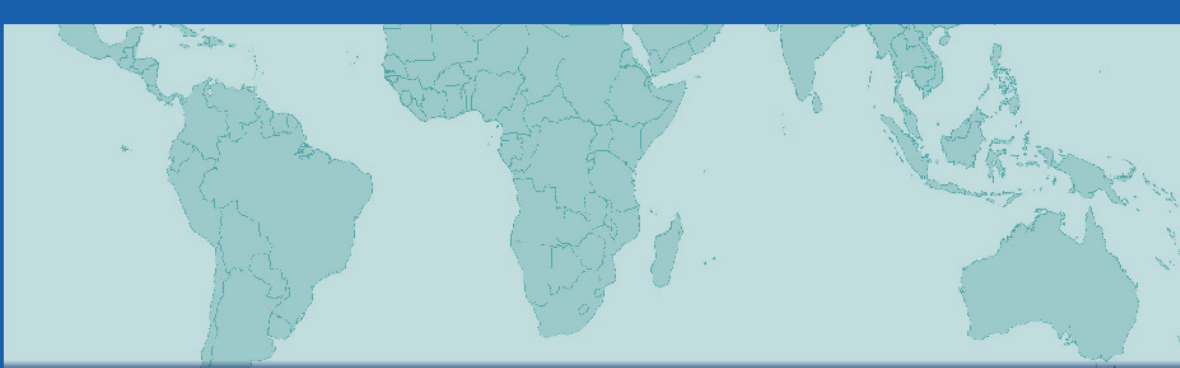
Proceedings of the 2011 Land Policy Conference

# VALUE CAPTURE and LAND POLICIES





Edited by Gregory K. Ingram and Yu-Hung Hong

# Value Capture and Land Policies

Edited by

*Gregory K. Ingram and Yu-Hung Hong*

LINCOLN INSTITUTE
OF LAND POLICY
CAMBRIDGE, MASSACHUSETTS

*Library of Congress Cataloging-in-Publication Data*

Value capture and land policies /
edited by Gregory K. Ingram and Yu-Hung Hong.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-55844-227-6
1. Public lands—Valuation. 2. Real estate development—
Finance. 3. Land use, Urban. 4. Public investments.
I. Ingram, Gregory K. II. Hong, Yu-Hung.
HD216.V33 2012
333.10973—dc23 2012008363

*Designed by Vern Associates*

Composed in Sabon by Achorn International in Bolton, Massachusetts.
Printed and bound by Puritan Press Inc., in Hollis, New Hampshire.
♻ The paper is Rolland Enviro100, an acid-free, 100 percent PCW recycled sheet.

MANUFACTURED IN THE UNITED STATES OF AMERICA

# CONTENTS

*List of Illustrations* *ix*
*Preface* *xiii*

**Introduction** *1*

1. ***Land Value Capture: Types and Outcomes*** *3*
Gregory K. Ingram and Yu-Hung Hong

**Conceptual Frameworks and Historical Experiences of Land Value Capture** *19*

2. ***Land Value Capture and Justice*** *21*
Susan S. Fainstein

3. ***Takings and Givings: The Analytics of Land Value Capture and Its Symmetries with Takings Compensation*** *41*
Perry Shapiro

COMMENTARY *69*
Henry E. Smith

4. ***The Unearned Increment: Property and the Capture of Betterment Value in Britain and France*** *74*
Philip A. Booth

COMMENTARY *94*
Louis G. H. Albrechts

5. ***Special Assessments in California: 35 Years of Expansion and Restriction*** *97*
Dean J. Misczynski

COMMENTARY *116*
Carol E. Heim

**Land Value Capture Instruments** 121

6. ***Collecting Land Value Through Public Land Leasing*** 123
John E. Anderson

COMMENTARY 145
Guanzhong James Wen

7. ***A Better Way to Grow?: Town Planning Schemes as a Hybrid Land Readjustment Process in Ahmedabad, India*** 149
Bishwapriya Sanyal and Chandan Deuskar

COMMENTARY 183
Bipasha Baruah

8. ***Are Property-Related Taxes Effective Value Capture Instruments?*** 187
Lawrence C. Walters

COMMENTARY 215
Jay K. Rosengard

9. ***Community Benefits Agreements in a Value Capture Context*** 217
Laura Wolf-Powers

COMMENTARY 229
Julian A. Gross

**Specific Applications** 233

10. ***Science Parks and Land Value Capture*** 235
Michael I. Luger and Justyna Dabrowska

COMMENTARY 259
Weiping Wu

11. ***The Affordability Challenge: Inclusionary Housing and Community Land Trusts in a Federal System*** 261
Richard P. Voith and Susan M. Wachter

COMMENTARY 282
Rachel G. Bratt

12. *Transit Value Capture: New Town Codevelopment Models and Land Market Updates in Tokyo and Hong Kong* 285
Jin Murakami

COMMENTARY 321
Zhirong Jerry Zhao

13. *Airport Improvement Fees, Benefit Spillovers, and Land Value Capture Mechanisms* 323
Anming Zhang

COMMENTARY 349
Jeffrey P. Cohen

**Potential Extensions** 351

14. *Assessing the Nonprofit Property Tax Exemption: Should Nonprofit Entities Be Taxed for Using Local Public Goods?* 353
Joseph J. Cordes

COMMENTARY 402
Woods Bowman

15. *Experimenting with Land Value Capture on Western State Trust Land* 405
Susan Culp and Dan Hunting

COMMENTARY 433
Amy W. Ando

*Contributors* 435
*Index* 439
*About the Lincoln Institute of Land Policy* 466

# 4

# *The Unearned Increment: Property and the Capture of Betterment Value in Britain and France*

Philip A. Booth

On the face of it, the idea of land value capture is straightforward. Land increases in value, quite possibly as a result of intervention by public powers, and an argument can be made for diverting at least part of that increase to serve the common good rather than a private interest. All that then need concern us is the mechanics of the process of capture. Yet even at that level, problems begin to emerge. The mechanics of capture have proved troublesome, and ensuring that value is indeed directed to serve the public interest has often been elusive. Closer inspection shows that the technical problems are themselves the products of more fundamental confusion about the nature and purpose of land value capture. At least one approach to solving this conundrum is to recognize that attitudes toward land value capture are intimately linked to the ways in which the concept of "property in land" itself is understood. This in turn requires us to consider how property has been constructed in law and the philosophical and constitutional underpinnings of such constructions. It follows that the ways in which land value capture is understood reflect the different legal traditions and constitutional arrangements of various countries.

The purpose of this chapter is, therefore, to explore how the nature of property in land as articulated by law has affected the process of land value capture. It does so through an exploration of the tortured history of land value capture in the United Kingdom, where attempts to capture land value within the context of statutory town planning are more than a century old. It then contrasts the British

case with that of France, where the issue has been far less prominent in public discourse and different methods have been employed. It concludes with some general reflections on the nature of land value capture and the prospects for the future. The approach adopted is of necessity historical, because without the historical background, both the immediate question of land value capture and the property context within which approaches to capture take place are inexplicable.

## *Britain: Land, Property, and the Unearned Increment*

Toward the end of the nineteenth century, there was a growing concern that landowners seemed to be profiting inordinately from the land they owned (Offer 1981). This concern for what came to be termed the "unearned increment" found expression in a variety of forms. It had to do with the way that lessees might invest in property only to see the financial fruits of their efforts revert to the landowner when the lease expired. It also had to do with the premium that landowners charged to renew a lease. And it had to do with the way in which land often appeared to increase in value without any input from the landowners themselves. When the first town planning legislation in Britain received royal assent in 1909, an essential part of its provisions was the taxing of betterment value (the increase in land value occasioned by the prospect of development) that was the direct result of allocating land for housing in a planning scheme prepared under the act (Booth and Huxley 2012; Cox 1984). It was to be the start of attempts over 70 years to tackle what proved to be an extraordinarily intractable problem.

To understand why the question of the unearned increment should have generated such enormous concern among political classes, specifically within the Liberal Party, requires us to go back to consider the nature of property in land and attitudes toward it. The striking thing about property relations in England (and to some considerable extent in other parts of the United Kingdom) is that they derive from a feudal system of very considerable antiquity whose vestiges are still evident in the early twenty-first century. The principle of feudal tenure was that there was only one absolute landowner in the person of the sovereign. The sovereign granted land to his nobles, who could use it for the time being in return for services rendered, and in turn the nobles granted others the right to work the land. Several people might have an interest in a particular parcel of land, but none could claim an absolute right to use or dispose of it. Tenure—the very word reflects the contingent nature of ownership in the medieval world—was therefore essentially precarious and dependent on the will of a feudal superior (Booth 2002; Gray and Symes 1981). In all probability, a "pure" feudal system, predicated on the concept of land in return for service, died out very early, if it ever existed in quite the simplistic form described. Acquiring land became the occasion for acquiring status, rather than a result of same. Rights to land might be inherited, albeit within strict parameters; service was commuted into money payments. By the end of the Middle Ages, a market in land had developed in which

the concept of sovereign power was actually quite distant from the realities of the use and exchange of property rights (Hicks 1995). Yet at the same time, the principle of multiple concurrent interests, including a right to future occupation, was deeply ingrained in legal and popular thinking about property in land.

In this precarious property rights regime, lawyers were at pains to establish what "rights to tenure" actually meant. The doctrine of estates was developed, which was the way in which lawyers came to articulate the possibility of multiple interests in a single plot of land. In cases of dispute, the law of equity sought to evaluate whose interest carried the greater right to occupation (Pettit 2006). Another development was the introduction of the leasehold as a form of tenure that was fixed to a term of years rather than related to the lifetime of the tenant, which allowed greater control by the landlord and still offered benefits to the lessee. Originally used for agricultural tenancies, leasehold became a potent means of enabling urban development from the sixteenth century onward. If it represented a more "modern" approach to property than the feudal tenancies, it nevertheless perpetuated the idea of shared interest in a single plot, in which there would be mutual benefit to both lessor and lessee.

Because property in land was inextricably linked to status and because of the precarious nature of ownership, landowners were at pains both to acquire land and to secure their succession. The strictly settled estate was a potent means to that end, with estates in land settled not on heirs, but on grandchildren, with immediate heirs being granted a life interest only. This, coupled with rigorous primogeniture, led to an increasing concentration of land in relatively few hands.

To this evolving pattern of property in land, in which the original justification for tenure had been lost but its consequences had not, must be added an emerging philosophy of ownership that was born of a rejection of the absolute power of the sovereign in the revolutions of the seventeenth century. It was John Locke, above all, who proposed a theory of property based on natural rights. He contrasted the fertile but "uncultivated waste of America" (Locke 1946, 20) with the well-cultivated Devonshire in England to demonstrate that it was human activity that had created the wealth of the latter. The "natural law" that gave people this right to property also ensured that property ownership would be limited by need. For Locke, therefore, property was not a creation of governments, but something that was God given (Gordon 1996). As Gordon observes, there is a paradox in this view of absolute property rights flourishing in a country in which few absolute rights could, in fact, be demonstrated. But if Locke's philosophy in no way encouraged the concentration of land ownership, the effect of it was nevertheless to sanctify the preexisting arrangements and underwrite the symbolic value of land ownership in the eighteenth century.

If the freehold ownership of land became increasingly concentrated, the use of leasehold tenure was the means by which the property system retained its flexibility. Issuing leases was itself a way in which the value of land might be increased and the associated risk of development shared. For builder-lessees involved in urban development, leases minimized the outlay of capital on land, while at the

same time the landlord could maintain strict control of the development taking place. And for eventual occupiers, even the fact of owning a lease gave some advantage in a world in which status was conferred by land ownership.

This lengthy preamble is necessary to understand the nature of the revulsion against landed property and the desire to return profit to the state that took place during the nineteenth century. With the wealth of the nation increasingly deriving from industrial production rather than agriculture, attitudes toward land began to change. John Stuart Mill, drawing on the work of David Ricardo, viewed with disdain the contrast between the productive industrialist, whose wealth was indeed created by the sweat of his brow, and the idle landowner, whose land increased in value regardless of any input that he might make (Schapiro 1943). It was Mill who first proposed the idea of taxing what came to be referred to as the "unearned increment" (Mill 1965). That idea was then taken up by others, notably Henry George, whose thinking on land nationalization was to become influential in Britain.

Mill argued that it was entirely appropriate for the state to take all or part of the increase in rental value, because that value was being created by the state as a whole. But he also argued that, apart from a tax on increased value, a land tax should not be regarded as a tax at all, but as a rent "reserved from the beginning by the State, which has never belonged to or formed part of the income of the landlords" (Mill 1965, 821).

These proposals for value capture by the state found their first expression at the beginning of the twentieth century with the Housing and Town Planning Act of 1909, introduced by the Liberal government that had come to power in 1906. Although this act must be understood as primarily a housing, not a town, planning measure, its town planning provisions included the collection of what by then was being called "betterment value." This concept was based on Mill's idea that if, through land allocations made in a town planning scheme for unbuilt land, landowners saw the value of their landholdings rise, the increase in value should be transferred to the state. Originally proposed at 100 percent, this betterment tax was reduced to 50 percent as a result of vociferous opposition in Parliament. It was not a perpetual tax. It was, moreover, set alongside a right to compensation for landowners whose property has been excluded from development by a planning scheme.

These provisions were fraught with complications. The act did not specify when the betterment should be collected, nor did it provide any mechanism for the valuation of development land (Booth and Huxley 2012). And, as Reade (1987) has argued, it was essentially illogical both to collect a betterment tax and to pay compensation for betterment value forgone: that is, if the state was to take 50 percent of the development value from landowners intending to develop, why should it return 100 percent of the development value to landowners who were prevented from developing by virtue of a planning scheme? Nevertheless, the approach adopted in 1909 was to become the pattern for the twentieth century.

## *Betterment and Public Ownership*

The experience of collecting a betterment tax in the first half of the twentieth century was disappointing. By the 1940s, therefore, a radical reappraisal was necessary. This took the form of the report of a government committee set up to examine the matter in 1941 (U.K. Expert Committee on Compensation and Betterment 1942). Chaired by Augustus Uthwatt, the committee produced what remains the most acute analysis of the problems of taxing betterment value. This report points out both the difficulties of determining betterment value and the stranglehold that the payment of compensation exerted on the ability to plan for future development.

The Uthwatt committee's proposal was that there should be a prohibition on the development of undeveloped land and that as a consequence, "the right to develop land will be treated as having been vested in the State" (U.K. Expert Committee on Compensation and Betterment 1942, para. 58). This would result in two clearly defined interests: the owner's interest in the land in its present state and the state's interest in its future development. It then followed that if development was to be allowed, in general the state would buy out the owner's interest and lease the land to the eventual developer. For land that was already developed, the committee proposed universal control of all development through the issuing of permits as a prelude to state acquisition of land for the urban restructuring that war damage and the continuing problems of unfit housing had made necessary.

The singularity of the Uthwatt committee's proposals requires reflection. First, the ease with which the committee was able to distinguish between parallel interests in land that could be separated between two different "owners" was a direct consequence of the construction of property rights in the English common law system (Booth 2002). Second, the committee was concerned not with capturing value by direct taxation, but rather with ensuring that the state would be able to control future urban development by nationalizing land. The state would thus acquire, indirectly and directly, a property interest. Finally, the committee recognized the problem of "floating values": that is, the potential value of land was a function of development pressures and competition with sites available for development elsewhere. This allowed the committee to argue that the right to compensation would be determined by the value of land needed for development in the country as a whole, not expressed as a hoped-for value that might not be realized.

Although these proposals are seen as the immediate precursor of the Town and Country Planning Act of 1947, which put in place statutory town planning in Britain in more or less the same form as it currently exists, in fact the 1947 act departed quite substantially from the Uthwatt report. Although it did indeed nationalize the future rights to development, what it did not do was pave the way to national ownership of development land. Compensation would be paid only to those who had suffered hardship as a result of the passing of the act, and a

£300 million fund was created for that purpose. Betterment was to be taxed at 100 percent through what was termed the development charge. There was, too, an improved regime for the compulsory purchase of land needed for urban development. The whole process was to be managed centrally through the Central Land Board.

The problems of the 1947 provisions have been well examined elsewhere (Cox 1984; Cullingworth 1980). First, the Labour government of the day rightly feared that the 100 percent tax would be a deterrent to land sales, but it also believed that compulsory purchase powers would ensure that land would nevertheless be made available to meet the needs of the construction industry, operating at a reduced capacity in the difficult economic climate of the late 1940s. In practice, while the development charge did deter landowners from selling, the Central Land Board was reluctant to buy land sufficient to meet the capacity of the construction industry. Moreover, it proved very difficult to stop potential developers from paying a premium over the existing use value to secure sites, with landowners prepared to forgo their long-term rights to compensation in favor of an immediate gain. Second, payment of compensation in cases of hardship was protracted and proved highly unpopular because of its perceived inadequacy. Finally, the whole question of valuation proved to be much more intractable than it had at first appeared (Cox 1984; Cullingworth 1980).

A change of government in 1951 led rapidly to the abolition of the development charge. More significant, however, was the fact that the Conservative government did not revisit the fundamental principle of nationalizing future development rights that lay at the heart of the 1947 act. All development, as originally defined by that act, needed the consent of government, and in general there was no right to develop without such consent. More surprising still, while a free market in land transactions between private owners was restored by the abolition of the development charge, with the seller retaining the full profit made as a result of development potential, until the end of the 1950s land acquired by the state for purposes in the public interest was bought at existing use value. This anomalous dual market in land was eventually abandoned by a change to the law in 1959.

A Labour government was returned to power in 1964, once again expressing its commitment to resolving the land problem. This time the emphasis was placed not on the taxing of betterment value, but on the public acquisition of land for future development. This would be done, as in 1947, through a central body, the Land Commission, which was finally appointed in 1967 after a good deal of agonizing over appropriate means and procedures. The intention was that the commission would ultimately buy all land needed for future development, but in the immediate term its role would be to help facilitate development that was required in the public interest. In this interim period, a betterment levy, set at 40 percent, would operate on other, entirely private, transactions, and the commission would buy land at 60 percent of its developed value. This meant that, effectively, the betterment value of all land transactions was taxed at 40 percent, regardless of

whether they were public or private, and that there remained some incentive for landowners to sell. How this might have worked in practice is very hard to say. The commission never got to exercise its ultimate powers because a change of government again intervened, and the commission was abolished. In hindsight, the prevailing view is that the Land Commission was a dismal failure. In three years, it purchased no more than 2,260 acres and was involved in conflicts with both landowners and local authorities (Cullingworth 1980). Reade (1987) takes a more sanguine view and argues that if the commission had been better funded and firmly integrated into a system of land use planning, it could have been a powerful instrument in the state control of future development.

It was not until the Labour Party was returned to power in 1974 that a third and final attempt to deal with land value capture in this form was enacted. As with the Land Commission, there was a long-term goal, to ensure the public control of all land needed for development, with a short-term measure, which would allow the collection of betterment through a development land tax and the purchase of land for projects that would be profitable for local authorities. This version of land value capture was to be handled on the local level, instead of by a central agency. The Community Land Scheme, as it was called, survived for less than four years. Yet another change in government led to the rapid abolition of the scheme (although not, curiously, of the development land charge, which survived until 1985).

Here, one part of this narrative of the legal framework for land value capture in Britain comes to rest. There have been no further attempts to tax betterment value directly in the ways previously described. But if direct taxation of betterment has gone, a second, powerful mechanism has emerged to enable the state to share in the profits made on the development of land that relies on quite different legal foundations.

## *Agreements, Obligations, and the Community Infrastructure Levy*

One of the particularities of the British Constitution is the extent to which local government has traditionally operated in a world apart from central government. This has been expressed in various ways, perhaps notably in the reference to the idea that local government in Britain represents a "residual domain" of powers that localities have jealously protected and central government has found it expedient to leave to a lower tier of government to administer (Lagroye and Wright 1979). Indeed, local government in its modern form was established only rather grudgingly by central government in response to the demands of the growing provincial cities that wished to take charge of their own affairs and in recognition of the impossibility of controlling local affairs from Westminster. More recent commentators have developed a typology of local government systems in Europe

that distinguishes between a "northern" grouping, in which there is a wide range of responsibilities and discretion to act, but poor access to central decision making, and a "southern" grouping, characterized by few responsibilities and discretionary powers, but where access to central decision making is obtained through national politicians present locally (John 2001; Newman and Thornley 1996; Page and Goldsmith 1987). Britain manifestly falls into the first category, and if those characterizations of British local government are only partial truths, they nevertheless have shaped the way in which local government behaves.

To that can be added another characteristic of the British Constitution. One strand of legal thinking has held that in Britain, unlike in France, there was, in the words of the great legal theorist Albert Venn Dicey, no administrative law (Harlow and Rawlings 2009) and that every servant of the state was answerable before the law in the same way as any other citizen. Such a view became untenable in the twentieth century, but the idea that local authorities were no different from other corporate bodies in the private sector meant that their behavior could also correspond to corporate behavior. This becomes clear in the way in which contract has become a major means of controlling the relationship between local authorities and developers.

The possibility of using contracts in the context of planning legislation has existed from the beginning of statutory town planning in Britain. The Housing, Town Planning, etc., Act of 1909 allowed local authorities to purchase land within the area covered by a "planning scheme" both compulsorily and by agreement. However, the early legislation, intended to promote development, proved in practice to hold up development during the protracted process of preparing the scheme. By 1914 a contractual agreement was proposed to effectively indemnify developers against the potential effects of a future approved scheme in order to allow development to proceed (Acland 1914). During the interwar period, the power to acquire land by agreement was extended, and from 1932 on, local authorities were specifically authorized to restrict the use of land by in effect imposing a restrictive covenant on it, just as contracts between private parties could.

In the course of time, the use of contractual agreement came to be understood as a powerful vehicle for expediting development under the best possible conditions rather than simply restricting it. Expediting development did not just mean imposing restrictive covenants; rather it meant using contracts to secure the necessary conditions for development to take place. That might entail, for example, extending a sewer system or improving feeder roads, projects that were not specifically seen as part of a program of publicly funded work.

The power to enter into agreements under the 1947 Town and Country Planning Act was not used often, because local authorities had to seek the consent of the minister responsible for planning. But 20 years later, the potential of using such agreements was formally recognized in a management report on the development control process (U.K. Ministry of Housing and Local Government 1967). This report led to a change in the law such that planning agreements no

longer required ministerial consent. Since 1968, therefore, such agreements have been widely used and almost at once became the subject of protracted and often not very fruitful debate.

To begin with, the Ministry of Housing and Local Government viewed these agreements as entirely pragmatic: they were "useful tools" that appeared to be "readily understood by developers" (U.K. Ministry of Housing and Local Government 1967, 22). They could be used to get developers to contribute to infrastructure, without which urban development could not go ahead, and in that way they represented a mutual advantage to developer and local authority alike. By the late 1970s, however, it was clear that agreements were increasingly linked to "planning gain," an essentially nebulous concept that sought to express the advantage to the wider community that might be possible on the back of, or sometimes as a result of, development. Disquiet about the use of agreements in the 1970s led to investigations by the Conservative government that came to power in 1979. In a report on the development industry published in 1980, the Property Advisory Group, an expert consultative body within the government's Department of the Environment, claimed that evidence brought to it suggested that "in areas where there is a demand for development, local authorities are in a strong negotiating position, and are often tempted, when public expenditure is constrained, to extract benefits from developers in return for planning permission, in circumstances of doubtful legality" (Property Advisory Group 1980, para. 5.11). The evidence, with its surprising implication of illegal behavior, was not included in the report.

The Property Advisory Group followed its general investigation of the development industry with a specific exploration of planning gain a year later (Property Advisory Group 1981). Leaving aside some important fallacies in the group's arguments, there was a twofold problem with this report. The first issue was that the group, while rejecting out of hand the concept of planning gain, nevertheless felt compelled to concede that planning agreements might still have some utility in allowing development to proceed. The second issue was that contracts in principle were freely entered into, and therefore could not be subject to the same kind of external limitations as the instruments contained within the planning acts themselves. If planning agreements were eliminated altogether, local authorities would lose an important development tool. If the power to enter into agreements was left in force, central government would have to resign itself at best to marginal control in the way those agreements were used. It is notable that the government of the day took a somewhat more liberal view than the Property Advisory Group (Booth 2003).

The disquiet was in no way resolved by the Property Advisory Group's report and subsequent government advice. It was still unclear what planning gain actually meant. Were agreements simply a convenient way of oiling the wheels of the development process, and the gain therefore limited to achieving a satisfactory outcome on a given site? Or were they, as Desmond Heap (1980) argued, an unintended tax on development that would return value to the community

as a whole? More seriously, there was real worry that negotiating planning gain through the use of agreements would distort the planning process, because local authorities' objectivity might be colored by the gains that could be achieved by permitting development (Healey, Purdue, and Ennis 1995).

Agreements continued to be used. In a climate of declining local authority revenues, agreements that made it possible for a local authority to provide infrastructure and services as a result of permitting development became ever more attractive. Developers did not by and large refuse to sign agreements, because they saw their willingness to do so as the price they had to pay for gaining planning permission. They were clearly able to do so financially. And then, in the late 1980s, government policy changed dramatically from the almost entirely negative stance taken earlier in the decade. The Conservative government became aware that planning agreements could be used to secure affordable housing on the back of private residential development. In this way, central government could meet a growing shortfall that was itself the result of government housing policy to restrict local authorities' role as a social housing provider. Government policy was amended to that effect in 1992 (Monk, Short, and Whitehead 2005).

To the specific use of planning agreements to boost affordable housing was added another legislative change. In the Planning and Compensation Act of 1991, a new instrument was introduced: the planning obligation. In fact, planning obligations were little different in legal terms from planning agreements. Both resulted in a contract between the developer and the local authority in which, as part of the planning consent, the developer would undertake specified further work. But there was one important change: developers were now allowed to propose a planning obligation unilaterally, and the obligation would become a material consideration in the determination of planning applications. Thus, in principle, a developer could exert leverage on a local authority to grant planning permission by offering an attractive package of additional work in the form of a planning obligation.[1] Generated by a desire on the part of central government to expedite the development necessary for the economy, this policy appeared to be a very substantial shift in opinion from the attitudes of a decade earlier. A test case in which developers had proposed a whole range of benefits in relation to a superstore by way of an obligation seemed to confirm critics' worst fears. The judges ruled that legally, the benefits could be considered "material" to the application, but that it was not for them to rule on the weight to be given to these benefits in the decision taken (Booth 2003).

---

1. The criteria for determining planning applications in the Town and Country Planning Act of 1990 are given in section 70, which requires local planning authorities to "have regard to the development plan . . . and to any other material considerations." This wording confirms the absence of rights to development (as, for example, by reference to an approved development plan) and in effect sanctions discretionary decision making by local planning authorities (Booth 2003).

The introduction of planning obligations and their use to achieve affordable housing, if anything, made matters worse. Case law in the 1990s was not very helpful in shedding light on the situation, although it is notable that in one case, a judge specifically rejected the idea that a move to impact fees on the American model would be preferable, because judges would be called to adjudicate on the merits of planning decisions and on the "rational nexus" between the impact of the development and the fee charged (Booth 2002).

In the past 10 years, there have been three attempts to reform this system of agreements. The utility of planning obligations to secure development under the best possible conditions and to offset the external costs generated by development has been emphasized repeatedly (Barker 2004; U.K. Department of Environment Transport and the Regions 2001; Urban Task Force 1999). Significantly, the reform proposals all recognized either tacitly or directly that agreements amount to a tax on development. The government's own review encouraged greater transparency in the process of negotiating obligations and greater certainty for developers by setting tariffs (U.K. Department of Environment Transport and the Regions 2001). The most recent attempt was enacted in 2008 as the Community Infrastructure Levy (CIL), although it has yet to be implemented, in the absence of secondary legislation. It is geared specifically to meeting infrastructure needs as a function of local development values. CIL is not mandatory, but local authorities who choose to fund infrastructure in this way must publish a scale of charges that is in accordance with a national scale and reflects local conditions. Planning obligations remain, but the government announced that it intends that they should be limited to the immediate impact of the development of a site on its surroundings. What will happen in practice is not yet clear.

This levy has shifted the emphasis from a tax on land to a tax on the profits of development. However, where the burden of taxes of this kind falls has always been much debated. Recent work on the use of obligations for affordable housing demonstrates that at least part of the effect is to lower land prices, although it is also evident that the burden is partly shared with the developer, whose profits are reduced, so much is clear from development value appraisal (Crosby, McAllister, and Wyatt 2010). Planning obligations, and by extension CIL, are simply alternative means of instituting a betterment tax. As Crosby and his colleagues argue, however, variations between sites make it unlikely that area development appraisals can be used as the basis for uniform CIL rates within a given local authority.

Quite apart from the particular difficulties of determining what value might be captured through the mechanism of either contractual agreements or the proposed levy, others have criticized the regressive nature of a betterment tax collected in this way. Campbell et al. (2000), for example, have shown that planning obligations are used most often in areas of highest development pressure, which in turn tend to be the most favored parts of the country. Areas that have the greatest needs tend to be those that attract the least in the way of planning gains.

The attempts by central government to capture land value have thus moved from direct taxation of betterment value to the negotiated settlement of con-

tributions to the costs of infrastructure provision. That CIL is indeed a tax on betterment value can no longer be doubted. What is perhaps less evident is that the particular approaches adopted in Britain are not simply the result of political orientation. Indeed, there is considerable agreement between the major political parties that some kind of contribution to the common good needs to come from the profits of development (see, e.g., Cox 1984). At least part of the reason why contractual agreement has replaced direct taxation is to be seen in the fundamental characteristics of a legal framework, a system of property in land, and constitutional arrangements for internal government. This becomes much clearer if Britain is contrasted with its closest neighbor in continental Europe, France.

## *France: A Sacred and Inviolable Right*

If property rights in Britain still bear vestigial witness to their feudal origins, the conceptualization of property in land in France is a direct product of the development and application of Lockean and Rousseauesque philosophy after the French Revolution. A century earlier, Locke had insisted on the right to own land as a result of the honest toil of those who worked it (and thereby entirely rejected the hereditary and feudal principle). This philosophy found fertile soil in mid-eighteenth-century France, which was becoming increasingly dissatisfied with its monarchical regime. In the second half of the century, these ideas were developed by Jean-Jacques Rousseau, who saw land ownership as a natural right of free men. In 1789 land ownership became the "inviolable and sacred right" of citizens under the Declaration of the Rights of Man, and it has remained a key provision of the French Constitution ever since. It does not matter greatly that this right was, as Joseph Comby has argued (Comby 1989), always a fiction because of the state's power to intervene. The concept of absolute land ownership still occupies a powerful place in French thinking and has molded a relationship between citizen and state that is quite different from that in Britain.

The philosophies of Locke and Rousseau became institutionalized in the French legal system after the Revolution. Property relations in Britain were formalized through the slow evolution of common law, itself a product of medieval reform. A unified system of courts, imposed by Henry II in the twelfth century, became the basis for a common legal framework that was pragmatic and focused on the search for remedy. Continental Europe enjoyed no such unity in its legal systems. Unlike the unified practice-based, pragmatic English system, Continental law was essentially a university discipline that focused on legal theory and principles rather than remedy (Van Caenegem 1988).

Roman law played a significant part in the Continental system. The rediscovery of the Roman emperor Justinian's Code in the eleventh century was central to the establishment of the first European university at Bologna and later the university in Paris. The eighteenth-century view of property as a natural right accorded well with Roman notions of property. The Romans conceptualized property

ownership as *dominium*, the right to enjoy land in both its present and future states, a right that extended both above and below the surface of the earth. In principle at least, this right was not subdivisible in the way that property interest was in feudal England. In particular, proponents of Roman law would have found it impossible to accept the idea that a future right to occupation could be a current interest (Halpérin 1995; Parisi 2002).

In France, where the right to own property was inviolable and sacred, land was inherited equally by all members of a family. The often rigorous primogeniture that obtained in Britain was specifically excluded in France. No doubt part of the reason for this was to prevent the development of landed elites who might challenge the power of the state. Yet the citizen's absolute right to property was a fiction, as evidenced by the fact that Roman law also offered a vision of state authority that encompassed and surpassed the absolute right to individual land ownership. This was the concept of *imperium*, the state's right to govern. All citizens were subject to that greater power, which could be exercised only in the interest of the state as a whole (Gaudemet 1995).

This understanding of dominium and imperium had a double impact on property and ultimately on the capture of land value. First, it led to a structure of land ownership in France that was (and still is) radically different from that in Britain. In particular, land ownership in both urban and rural areas was far more fragmented in France. Although occasionally individual entrepreneurs managed to accumulate large landholdings, there was nothing akin to the aristocratic estates (and their bourgeois emulators) that were found in Britain (Olsen 1982; Sutcliffe 1970). Fragmentation of ownership, which inhibited both urban development and the development of efficient agriculture, was the norm.

The second effect was on the conceptualization of government and its relationship to the citizen. The constitutional crisis in France after the Revolution, caused by the beheading of the king, was resolved by the creation of the state as a legal entity through the written constitution (in which the American experience was of profound significance). The structure of local administration that was put in place rapidly after the Revolution was seen as an integral part of the state, which would in turn ensure that the unity of the state was maintained. This puts a very different complexion on the concept of local administration in France than in Britain. It also set government at all levels apart from the individual citizen, and, much earlier than in Britain, it led to the development of a separate body of administrative law that recognized the division of citizen and state, while at the same time allowing for considerable legal redress against the abuse of power. Local government in France was not expected to behave, in the Diceyan mold, like an individual.

The legal construction of property in land and the constitutional characteristics of government in France resulted in a different attitude toward land values than existed in Britain. There was, first of all, much less concern in France about the unearned increment and the need to tax betterment values. Landowning also did not have the same consequences for status and power as it did in Britain. Prop-

erty was a constitutional right, but not the ultimate definer of status. The bigger issue was how to reassemble land in order to promote urban development.

The exercise of imperium in France is evident in the much more interventionist approach that French authorities took toward urban development in the nineteenth and twentieth centuries. Nowhere is this more obvious than in the transformation of Paris undertaken by Baron George-Eugène Haussmann under orders from Napoleon III from 1852 to 1870. For Haussmann, the question was one of reconfiguring the city through expropriation and was not primarily about returning a profit to the state. That said, there was, from the beginning of the nineteenth century, legislation that allowed public authorities to expropriate land, but also required them to return that land to the original owner and then to recoup the betterment value occasioned by any improvements on it (Faure 2004). In 1850 the power to expropriate was strengthened by allowing public authorities to take sufficient land to ensure high-quality development and then simply to resell any surplus at market rates. In practice, however, the power to recoup the betterment value proved difficult, and the courts, no doubt for constitutional reasons, remained "resolutely opposed" to it (Sutcliffe 1970, 75). Although Paris was indeed reconfigured in the second half of the nineteenth century and property was quite substantially reorganized, the massive investment was not repaid through a return to the state of betterment value.

This pattern persisted into the twentieth century. The Haussmannian approach to urban redevelopment continued at least until the outbreak of World War I. The state continued to play a major role in urban development and aspired to control both the value and the development of land through expropriation and zoning plans. After World War II, state interventionism in France was even more marked than in Britain. The urgent need to rehouse a population that was either homeless or living in poor conditions resulted in very large-scale housing development led by the state. Beginning in 1958, the *zone à urbaniser en priorité* (priority development zone; ZUP) was the preferred instrument for promoting housing, which among other things allowed for expropriation and control of land values. To this was added the *zone d'aménagement différé* (deferred development zone; ZAD), which covered land earmarked for long-term development and in which a right of preemption by the state allowed for both incremental public acquisition of land at existing use value and control over land speculation. The ZUP has been replaced by the *zone d'aménagement concerté* (coordinated development zone; ZAC), which can be used for any form of development or redevelopment, and the right of preemption has been extended in local authority areas with a development plan in force (Jacquot and Priet 2008).

Such an armory of legislative powers could have led eventually to a collectivization of development land by stealth, but a proposed tax on land that was not developed in accordance with public policy was never implemented (Comby and Renard 1996). During the 1990s, there was a gradual liberalization of public policy that saw an emphasis on public-private partnership rather than on state intervention. To that was added a shift away from recovering betterment values

through public ownership and reducing speculation through the right of preemption, and a shift toward raising money from private sector developers to fund infrastructure. The ZAC is one mechanism that has allowed public authorities to recover the costs of road construction and the provision of public space as part of the development process. It is not, however, a contractual agreement of the kind used in Britain. Rather, it is a regulatory document that sets out in detail the form of the proposed development and specifies how the development will be supported by services and infrastructure. It might, however, give rise to a contract between the local authority and the developer about the exact manner in which site development will take place. Crucially, it also sets out how infrastructure will be provided and financed. Preparing a ZAC may become the occasion of extensive negotiation between developers and local authorities (Jacquot and Priet 2008).

Two other mechanisms for recovering value from development to fund infrastructure were introduced in 1967. One was the permissive power given to local authorities to raise a *taxe locale d'équipement* (local infrastructure tax; TLE) based on the overall value of the real estate (estimated according to standard rates, not the actual value at sale) to be developed within a local plan; the tax would range from 1 to 5 percent (Comby 1996; Jacquot and Priet 2008). To this has been added the option to create a *programme d'aménagement d'ensemble* (development program; PAE) designed to fund the actual cost of infrastructure within a given area.

The evidence suggests that the French experience in land value capture has been scarcely more satisfactory than the British, and, at least superficially, it appears to have moved in the same direction. What started as a legal framework that sought to return to the state the value that the state itself had created, has become a mechanism for financing infrastructure. In addition, the move away from top-down state intervention toward private sector finance in the achievement of public policy objectives has led to a form of contractualization of public policy. Again, superficially, there appears to be a convergence of French and British practice. We might conclude that it makes little difference what the legal and constitutional arrangements are; all attempts to capture land value within capitalist democracies seem to trend in the same direction. However, a deeper comparative analysis is required.

## *Capturing Land Value: Some Reflections*

This chapter began with the proposition that different legal constructions of property in land would lead to different approaches to the collection of betterment value. The evidence presented for Britain and France, however, seems to suggest a convergence in terms of the legal instruments used to return betterment value to the state. Britain has moved away from trying to tax betterment created by the opportunities for development that the planning system offered landowners and toward collecting contributions from developers for providing infrastructure. In France, although the will to collect betterment was never expressed as forcefully

as in Britain, the desire for the state to take directive action in urban development has been a recurrent theme since at least the nineteenth century. In the end, however, France has also resorted to collecting contributions from developers to meet infrastructure needs. CIL in Britain and the TLE in France look, on the surface, remarkably similar.

Such a conclusion needs considerable qualification. This is partly because the two legal instruments have been arrived at by different routes. In addition, the apparent similarities of CIL and the TLE conceal a considerable difference in the relationships they embody. CIL is at the tail end of a movement designed to bring order to a system of contractual agreements in which developers and public authorities, in principle at least, are equal partners. It is an addition to, not a replacement for, the older regime of planning obligations, and the provision of affordable housing will continue to be made by way of planning obligations and not through CIL payments. The contract remains at the heart of the relationship between the public and private sectors in Britain.

In France the move to an infrastructure tax was the logical consequence of the imperium of the state. It is not that contracts do not play an important role in French local government. Indeed, the contractualization of policy in France since the 1990s has been the subject of much comment (Gaudin 2004). Rather, the relationships embodied by contracts are very different from those expressed in planning agreements and obligations in Britain. For one thing, much of the contractualization has been between different levels of public administration, and not between the public and private sectors. In addition, when contracts with the private sector have been used to extract betterment value, they have always been within the very clear context of the state initiating development through the various mechanisms available to it. The ZAC is a prime example of a zoning plan used to facilitate development perceived to be in the public interest. Private sector agreement to finance infrastructure from the proceeds of development has become the ticket to participation in urban projects.

Both France and Britain have had to face three essentially intractable problems. The first has to do with the valuation of land. The general premise that if the state creates value by declaring land developable, the state should be a beneficiary of that value, is unimpeachable. Knowing exactly what that value might be or when return of it to the state might take place is quite another matter. This is not just a question of the difficulties planners face in assessing the capacity to make obligations (in Britain) or the level of contribution to infrastructure (in France). How to arrive at land values is a fundamental issue that appears to confound everyone from real estate experts to government officials.

The move to residual valuation put a different complexion on Mill's formulation of the problem, but as Crosby and his colleagues (2010) have demonstrated, even residual valuation has its considerable weaknesses. In its simplified form, residual valuation uses the fixed costs of development to produce a residual value representing the value of the land. It is based on the assumption that the cost of development is a single lump sum spread equally across the time needed to develop.

It also assumes that the value of the land is an outcome of the development process, when in reality the market value is established at the outset. Neither assumption works in very many instances. Using more sophisticated discounted cash flow techniques may model the development process more accurately, but it also results in greater uncertainty. Although it is possible to establish a database of market values and average prices paid for land in a given area, the actual costs of development may vary considerably for any two sites, and the specific market value may differ widely because of local conditions. Arriving at the market value of land would appear to be an inherently uncertain process, and it could be argued that capturing betterment value may be seen either as an opportunistic desire by the state to cash in on privately created profit or as a disincentive to development.

The second major problem in land value capture is linked specifically to the use of contracts to secure the financing of infrastructure that will support new development. In Britain investigators have agonized over what might legitimately be required of developers and whether planning agreements and obligations have hindered development. Should, for example, the developer of a housing area contribute to, or provide for, the schooling and recreational needs of eventual residents in addition to improving road access? Even if contracts are appropriate to secure improvements to infrastructure—as indeed they may be in particular circumstances—there is another awkward problem in that developers may be more willing to pay for such planning gains in areas of development pressure than in areas where profits are more uncertain, but where infrastructure needs may be greater. Thus, the effect of using contracts is inherently regressive.

The third major problem is defining exactly what the desire to capture betterment value means. Is it a fundamental belief that value should be captured in the public interest and then applied for the public good? That was clearly Mill's position and informs some of the attempts in Britain to tax betterment. Or is it simply a question of making developers pay for infrastructure needed to support their projects and to offset the impact the projects will have on their environment? That is the logic of CIL in Britain and the TLE in France. There is an inherent tension between those two questions in both France and Britain. The difference is in the approaches the two have taken to resolve that tension, which can indeed be ascribed to different constitutional and legal traditions.

In France, capturing land value appears to be a consequence of the desire to control urban development. That France has tried to cash in on urban development both currently and historically is proof that the exercise of imperium can be costly. In Britain, by contrast, government, under pressure to act from increasingly persuasive philosophical debate and popular sentiment, insinuated itself into a system of property that made such infiltration possible. While that system made radical intervention possible in a way that appeared relatively harmless, it created a fundamental ambivalence on the part of both central government and local authorities. On one hand, local involvement in land development was a form of imperium exercised for the public good. On the other hand, both local

and central governments have become direct beneficiaries of an interest (in the technical sense) in property in land.

In the end, France and Britain face the same dilemmas in capturing land value. At least part of the resolution of these dilemmas must be defining the purpose of collecting betterment value. Is it a question of requiring developers to offset the external impacts of their projects, notably in terms of the extra demands made on local infrastructure? Or is the collection of betterment value more generally a hypothecated tax intended to fund infrastructure within a given locality? Or yet again, is the betterment tax to be levied in the general interest and for the public good on philosophical grounds—that is, that property in land is in some way not wholly a private interest? The answer to these questions is important in the search for solutions.

Nevertheless, if the questions are the same, the solutions will no doubt reflect the two countries' different legislative and constitutional frameworks. A general tax on betterment values is easier to imagine as the British did in 1947 than as the French have done, and such a tax potentially offers the greatest likelihood of equitable outcomes. A tax according to fixed criteria to fund infrastructure accords well with the codified regulatory regime of France. Negotiated agreements become possible within the particular constitutional construct of local government in Britain. They offer important flexibility in the development process and have proved relatively easy to use. By the same token, they are the most regressive and untransparent of the mechanisms discussed. The conclusion, therefore, must be not that some countries have legislative frameworks that allow the capture of land value more effectively than others, but that different systems generate different solutions to this intractable problem, and those solutions are themselves problematic in different ways.

## REFERENCES

Acland, A. H. D. 1914. *The land: Report of the Land Enquiry Committee*. Vol. 2, *Urban*. London: Hodder and Stoughton.

Barker, K. 2004. *Review of housing supply; Delivering stability: Securing our future needs*. London: HMSO.

Booth, P. 2002. Nationalising development rights: The feudal origins of the British planning system. *Environment and Planning B: Planning and Design* 29(1):129–139.

———. 2003. *Planning by consent: The origins and nature of British development control*. London: Routledge.

Booth, P., and M. Huxley. 2012. 1909 and all that: Reflections on the Housing, Town Planning etc. Act 1909. *Planning Perspectives* 27(2):261–277.

Campbell, H., H. Ellis, C. Gladwell, and J. Henneberry. 2000. Planning obligations, planning practice, and land-use outcomes. *Environment and Planning B: Planning and Design* 27(5):759–775.

Comby, J. 1989. L'impossible propriété absolue [The impossibility of absolute ownership]. In *Un droit inviolable et sacré: la propriété* [Land ownership: A sacred and inviolable right], ed. Association des Etudes foncières, 9–20. Paris: ADEF.

Comby, J., and V. Renard. 1996. *Les politiques foncières* [Land policy]. Paris: Presses universitaires de France.
Cox, A. 1984. *Adversary politics and land.* Cambridge, U.K.: Cambridge University Press.
Crosby, N., P. McAllister, and P. Wyatt. 2010. Fit for planning? An evaluation of the application of development viability appraisal models in the UK planning system. Working Paper 10/10. Reading, U.K.: School of Real Estate and Planning, Henley Business School, University of Reading.
Cullingworth, J. B. 1980. *Environmental planning 1939–1969*. Vol. IV, *Land values, compensation and betterment.* London: HMSO.
Faure, A. 2004. Spéculation et société: Les grands travaux à Paris au XIXe siècle [Speculation and society: The large-scale urban development of Paris in the nineteenth century]. *Histoire, économie et société* 23(3):433–448.
Gaudemet, J. 1995. Dominium-imperium: Les deux pouvoirs dans la Rome ancienne [Dominium-imperium: The dual powers in ancient Rome]. *Droits: Revue juridique française* 22:3–17.
Gaudin, J.-P. 2004. La contractualisation des rapports entre l'Etat et les collectivités locales [The contractualization of relationships between the state and local authorities]. In *Annuaire des collectivités locales*, ed. H. Wollman and G. Marcou, 215–234. Paris: Centre national de la recherche scientifique.
Gordon, R. W. 1996. Paradoxical property. In *Early modern conceptions of property*, ed. J. Brewer and S. Staves, 95–110. London: Routledge.
Gray, K. J., and P. D. Symes. 1981. *Real property and real people: Principles of land law.* London: Butterworth.
Halpérin, J.-L. 1995. Propriété et souveraineté de 1789 à 1804 [Property and sovereignty from 1789 to 1804]. *Droits: Revue juridique française* 22:67–79.
Harlow, C., and R. Rawlings. 2009. *Law and administration*. 3rd ed. Cambridge, U.K.: Cambridge University Press.
Healey, P., M. Purdue, and F. Ennis. 1995. *Negotiating development: Rationales and practice for development obligations and planning gain.* London: E & FN Spon.
Heap, D. 1980. Planning bargaining—the pros and cons: Or how much can we stand? *Journal of Environment and Planning Law*:632–637.
Hicks, M. 1995. *Bastard feudalism.* London: Longman.
Jacquot, H., and F. Priet. 2008. *Droit de l'urbanisme* [City planning law]. Paris: Dalloz.
John, P. 2001. *Local governance in Western Europe.* London: Sage.
Lagroye, J., and V. Wright. 1979. Introduction to *Local government in Britain and France*, 1–9. London: George Allen & Unwin.
Locke, J. 1946. *Second treatise on civil government*. Ed. J. W. Gough. Oxford, U.K.: Basil Blackwell.
Mill, J. S. 1965. *Principles of political economy*. Book 5, *On the influence of government*. In *Collected Works*, vol. 3, ed. J. M. Robson. London: Routledge & Kegan Paul.
Monk, S., C. Short, and C. Whitehead. 2005. Planning obligations and affordable housing. In *Planning, public policy and property markets*, ed. D. Adams, C. Watkins, and M. White, 185–208. Oxford, U.K.: Blackwell.
Newman, P., and A. Thornley. 1996. *Urban planning in Europe: International competition, national systems and planning projects.* London: Routledge.
Offer, A. 1981. *Property and politics 1870–1914: Landownership, law and urban development in England.* London: Cambridge University Press.

Olsen, D. J. 1982. *Town planning in London: The eighteenth and nineteenth centuries*. 2nd ed. New Haven, CT: Yale University Press.
Page, E., and M. Goldsmith. 1987. Centre and locality: Explaining cross-national variation. In *Central and local government relations: A comparative analysis of Western European unitary states*, ed. E. Page and M. Goldsmith, 156–168. London: Sage.
Parisi, F. 2002. Entropy in property. *American Journal of Comparative Law* 50(3):595–632.
Pettit, P. H. 2006. *Equity and the law of trusts*. 10th ed. Oxford, U.K.: Oxford University Press.
Property Advisory Group. 1980. *Structure and activity of the development industry*. London: HMSO.
———. 1981. *Planning gain*. London: HMSO.
Reade, E. 1987. *British town and country planning*. Milton Keynes, U.K.: Open University Press.
Schapiro, J. S. 1943. John Stuart Mill, pioneer of democratic liberalism in England. *Journal of the History of Ideas* 4(2):127–160.
Sutcliffe, A. 1970. *The autumn of central Paris*. London: Edward Arnold.
U.K. Department of Environment Transport and the Regions. 2001. *Planning obligations: Delivering a fundamental change*. London.
U.K. Expert Committee on Compensation and Betterment. 1942. *Final report*. Cmd. 6386 (Uthwatt Report). London: HMSO.
U.K. Ministry of Housing and Local Government. 1967. *Management study on development control*. London: HMSO.
Urban Task Force. 1999. *Final report: Towards an urban renaissance*. London: E & FN Spon.
Van Caenegem, R. 1988. *The birth of English common law*. 2nd ed. Cambridge, U.K.: Cambridge University Press.