Revisiting the rules. The pervasiveness of discretion in the context of planning gains: the case of the Community Infrastructure Levy.

Rules alone, untampered by discretion, cannot cope with the complexities of modern government and of modern justice … let us emphasize both the need for discretion and its danger. Let us not oppose discretionary power; let us oppose unnecessary discretionary power. (Davis, *Discretionary Justice*, 1971, pp. 25–26)

Introduction

The inexorable demand for land and the resulting competition for space and place between different uses has given rise to the creation of legal mechanisms to regulate land-use activity of which town and country planning control (also known as land-use planning) is the exemplar. In land-use planning, designating space and place depends upon Government harnessing the capacities of other actors to secure its objectives. Some will be landowners or developers, without whose co-operation there would be no system. The resulting statutory framework is premised upon an allocation of high levels of discretion to the decision-maker (usually the local authority) to harness the capacities of third parties and so facilitate efficient and effective delivery.[1] It functions to designate (in principle and actuality) particular land uses to specific sites and to ensure that the community is not disadvantaged in the process. This is done by securing those benefits considered necessary to ensure that the locality or its inhabitants are not disadvantaged by the development proposed (commonly known as planning gains).~~,~~ The mechanism for recovering these gains is the subject of this paper. Historically, local authorities used the statutory and discretionary powers given to them to recoup development-associated infrastructure costs and overcome the adverse effects of individual development proposals through the instrument of negotiated planning agreements and obligations. The introduction of a framework for a flat infrastructure charge (known as the community infrastructure levy or CIL) under the Planning Act 2008 was an attempt by Government to constrain the power

[1] Bingham, M., "Policy Utilisation in Planning Control: Planning Appeals in England's 'Plan-Led' System." (2001) *The Town Planning Review*. 72(3):321-340.

authorities have to negotiate bespoke solutions compensating for and mitigating development impacts, particularly those costs local communities bear when development occurs. Authorities are given discretion to adopt the new scheme. In choosing to adopt the CIL regime, authorities apply a flat fee to new developments, calculated according to regulations made under the Act. The CIL, once adopted, fixes the amounts recoverable according to a tariff, thus closing down discretion as to the amounts charged on individual development proposals. This trades recovery on an individuated and negotiated basis for a more general rule-based system. Given the pervasive discretionary context, Government's strategy seems in tension with the structure of the overall town and country planning regime. The Levy, which came into force in April 2010, was intended to replace the use of planning obligations – those instruments of choice negotiated by planning authorities at their discretion, deployed for the similar purposes. [2] To date the uptake has been slow and Government statistics show that 85% of developer contribution value derived from negotiated agreements with 39% of authorities adopting the CIL framework by 2017.[3]

While not extinguishing the route of agreement, Government has sought to encourage and indeed prescribe a use of the CIL through both policy guidance and regulations. Given the pervasive presence of discretion in the planning system, this seems a counterintuitive approach. There were, however good reasons for so doing, not least bringing transparency, clarity and certainty to those gains secured for the community. Introducing the CIL has its critics – developers, landowners and local authorities alike and this has resulted in amendments to the scheme in 2019 recognising the continuing importance of obligations.[4] Using the lens of

[2] Community Infrastructure Regulations 2010 No. 948. See also paragraphs 59 and 60, Department for Communities and Local Government *Community Infrastructure Levy: An Overview.* May 2011 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/6313/1897278.pdf

[3] Ministry of Housing, Communities and Local Government, *The Incidence, Value and Delivery of Planning Obligations and Community Infrastructure Levy in England in 2016-17* March 2018 p.7 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685301/Section_106_and_CIL_research_report.pdf

[4] *A New Approach to Developer Contributions. A Report by the CIL Review Team* (2016), published by the Ministry of Housing Communities and Local Government 7 February 2017 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589637/CIL_REP_ORT_2016.pdf <Jan 2019> Note the subtle shift in emphasis after 2019 by the Ministry of Housing, Communities and Local Government, Guidance *Community Infrastructure Levy* paragraphs 167 – 70 https://www.gov.uk/guidance/community-infrastructure-levy#introduction and paragraph 003 of *Planning Obligations: Use of planning obligations and process for changing obligations.* Published May 2016 and updated September 2019 https://www.gov.uk/guidance/planning-obligations . Both reflect the removal of some of the restrictions by The Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019 SI No. 1103 that had originally further promoted a use of the Levy (contained in the 2010 Community Infrastructure Regulations (see Regulation 122))

Davis's seminal critique of rule and discretion enables a better understanding of what is at stake.[5] Although the debate is well known, it has not lost its resonance in the land-use planning context. Importantly it highlights much that is assumed but not articulated about the CIL and indeed the effects of using rules in discretionary contexts. In short, the idea of a rules/discretion dichotomy, in particular the view that an imposition of rules can eliminate discretionary activity, will be challenged. It will be argued that as an instrument the CIL, amplifies in one way the existence of discretion within the institutional set up of the planning system, (with a relatively low proportion of authorities deciding to adopt the regime), with the failure of Government's aim of foreclosing local authority discretion in the context by disguising its exercise rather than its elimination.

The Community Infrastructure Levy

The CIL (introduced on the 6th April 2010) allows planning authorities to recover on- and off-site infrastructure-related costs of development activity (whether by reason of the additional strains placed upon local communities in bearing the cost of linking to existing facilities, for example roads or drainage, or remedying the adverse impacts that a new development can have) and so ease the burden on the public purse and by doing so address the vexed question of betterment (the recovery of those costs incurred by the community in facilitating private development).[6] It enables, 'local authorities in England and Wales to help deliver infrastructure to support the development of the area', and allows them to 'raise funds from developers undertaking new development projects'.[5] Infrastructure bears a broad meaning that includes the provision of those wider community benefits traditionally defined as planning gains (those benefits not directly associated with the development in question, often off-site recreational, educational or highways, roads or drainage facilities).[7] For many decades, Government has been alive to the risk that, in exercising their discretion in planning delivery, authorities may be swayed by the offer of benefits extraneous to the development or require benefits in

[5] K. C. Davis, *Discretionary Justice. A Preliminary Inquiry.* (Baton Rouge, Louisiana: Louisiana State University Press, 1969).

[6] CIL Guidance, paragraph: 001 Reference ID: 25-001-20140612, Ministry of Housing Communities and Local Government June 2014 https://www.gov.uk/guidance/community-infrastructure-levy <January 2019>

[5] Department for Communities and Local Government (DCLG), Community Infrastructure Levy: An Overview para. 2 p. 4, May 2011 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6313/1897278.pdf <24 April 2016

[7] Section 216 Planning Act 2008

exchange for the right to develop land. The CIL represents a systematic attempt to excise local discretion in the domain, while retaining the prospect of recovering community costs or obtaining benefits from developers.

The 2008 Act and associated regulations relevant to the CIL introduce rules of general application to confine much of the discretion given to local authorities in recovering planning gains under s106 of the Town and Country Planning Act 1990 (as amended). The latter Act secured recovery through the instruments of planning agreements and obligations.[8] The notion of the planning agreement has existed since the early twentieth century.[9] The term, 'obligation', although suggesting a rule-like tool, was used in amendments to the 1990 Act to define both negotiated agreements and the unilateral obligation – a modified form of private agreement offered unilaterally by developers for similar purposes..[10] For ease of reference the term obligation will be used to encompass both forms, planning agreements and obligations. The CIL enables local authorities to charge a fee set at a fixed per metre tariff on new development, which is calculated according to a predetermined charging schedule. Where necessary, differential rates can be set according to the type of development. In Government's eyes the Levy is an instrument to be used for the funding of infrastructure projects while planning obligations are confined to 'site-specific impact mitigation' in the quest to confine the negotiated element of planning agreements.[11] Yet many authorities have not followed this route for infrastructure recovery.

Government's impact assessment estimated that over a 10 year period the CIL in its own right would generate economic benefits unlocking growth ranging from £1,400m to £2,800m by

[8] Town and Country Planning Act 1990 (as amended by the Planning and Compensation Act 1991, The Planning Act 2008 and the Growth and Infrastructure Act 2103)
[9] Section 34 Town and Country Planning Act 1932
[10] Inserted into the Town and Country Planning Act 1990 by s12 of the Planning and Compensation Act 1991
[11] LGA Response to call for evidence CIL Review Group January 2016
https://www.local.gov.uk/sites/default/files/documents/LGA%20response%20to%20Call%20for%20Evidence%20%E2%80%93%20Community%20Infrastructure%20Levy%20%28CIL%29.pdf

securing additional revenue for infrastructure of £4,000m to £6,000m over the same period.[12] This can be compared to the £4.9bn generated from planning obligations in 2007-8.[13] The CIL provisions can be traced from the policy document 'Planning Obligations: Delivering a Fundamental Change', published on December 19, 2001, which highlighted concerns regarding the opacity in securing infrastructure delivery through an exercise of discretion, notably planning agreements and obligations.[14] While originally envisaged as a planning gain supplement, the 2008 Act set out the overall (if skeletal) frame for the CIL, leaving the substantive detail to regulations.[15,16] Any sums collected are applied to the funding of infrastructure works, defined to include roads and transport facilities, flood defences, open spaces, schools and educational facilities, medical facilities, sporting and recreational facilities.[17] Part 11 of the Planning Act 2008, authorises the Secretary of State, with the consent of the Treasury, to make Regulations providing for the imposition of the levy to enable developer contributions for infrastructure funding.[18] The delegated legislation, contains sweeping 'Henry VIII' provisions sanctioning the 'tax', which applies to developments granted planning permission other than those considered *de minimis* with exemptions currently also for charities and social housing provision.[19] Governmental policy informs the interpretation of the provisions.[20, 21] Substituting rule for discretion enhances legitimacy by minimizing the risk

[12] It was assumed that (as of 2010) there would be a 65-78% takeup by local authorities giving rise to a "10 year net additional revenue for infrastructure of £4100m to £6000m. Summary: Analysis and Evidence Explanatory Memorandum to the Community Infrastructure Regulations 2010. (2010 No. 948) http://www.legislation.gov.uk/uksi/2010/948/pdfs/uksiem_20100948_en.pdf (last visited 13 June 2016) [10] The incidence, value and delivery of planning obligations in England 2007-08. London: Ministry of Housing, Communities and Local Government. Available at: https://webarchive.nationalarchives.gov.uk/20120919230617/http://www.communities.gov.uk/documents/planningandbuilding/pdf/obligationsupdatestudy.pdf

[13] *The incidence, value and delivery of planning obligations in England 2007-08*. London: Ministry of Communities and Local Government.

[14] See n 13 above

[15] See the Barker Review of Housing Supply, *Delivering Stability: Securing our Future Housing Needs.* (17 March 2004); House of Commons Communities and Local Government Committee Fifth Report *Planning Gain Supplement.* HC 1024-I 7th November 2006.

[16] Community Infrastructure Regulations 2010 No. 948 as amended by regulations of 2011 to 2019

[17] Section 216 Planning Act 2008 and Regulation 63, Community Infrastructure Regulations 2010 (as amended)

[18] Section 205 Planning Act 2008 and Community Infrastructure Levy Regulations 2010 (as amended) SI 2010 No 948

[19] See the House of Commons Library Briefing Note SN/SC/3890 26 February 2014

[20] DCLG, Planning Practice Guidance Community Infrastructure Levy 12 June 2014, paragraph: 095 Reference ID: 25- 095-20140612 http://planningguidance.communities.gov.uk/blog/guidance/community-infrastructurelevy/other- developer-contributions/ <26th April 2016>

[21] Section 205 Planning Act 2008. House of Commons library briefing SN/SC/3890 26 February 2014; HC Deb (10 December 2007), vol. 469, col 32

of, 'injustice' to the public deriving from the exercise of discretion in circumstances which the community are excluded. The CIL further promotes a closer link to local infrastructure provision, through the public participation requirements relating to the setting of the levy tariff. Planning authorities can charge the levy and a statutory liability to pay is placed on the owner, developer and those who have 'assumed liability'.[22] Once adopted, exemptions are set by Government in the Regulations with limited leeway given to authorities to exclude or exempt developments from the charge.[23] Although originally authorities were given significant leeway to adopt the CIL, this freedom has been eroded over time. Government policy has been to confine the use of planning obligations under s106. In an attempt to widen the CIL uptake the latter would be "scaled back", with local authority discretion as to their use being restricted to site-specific gains as opposed to infrastructure provision.[24] The resilience of the practice of using the negotiated obligations has resulted recently in Government acknowledging that agreements remain important to the system overall, and "rowing back" on its policy to restrict their use for infrastructure provision.[25]

The general premise of the CIL was to confine a use of negotiated obligations, historically viewed as notoriously opaque and impermeable to structured forms of oversight. The emphasis is on the 'greater predictability and transparency' afforded when using a fixed rate tariff. As the Minister explained,

> 'The community infrastructure levy is a new levy that local authorities in England and Wales can choose to charge on new developments in their area. The levy is designed to be fairer, faster and more transparent than the previous system of agreeing planning obligations between local councils and developers under section 106 of the Town and Country Planning Act 1990.[26]

Transparency and certainty appear to triumph over flexibility, mirroring commonly used arguments favouring rule over discretion, often distilled to the consequences of excesses in power without concomitant control. The framework minimises as far as possible, local

[22] Ss 206 and 208 Planning Act 2008
[23] Part 6 The Community Infrastructure Regulations 2010 No. 948 Part 6
[24] Regulation 122 The Community Infrastructure Regulations 2010; Regulation 12 The Community Infrastructure (Amendment) Regulations 2011, limiting the use of planning obligations, amending Regulation 122.
[25] See Regulations 122 and 123 of The Community Infrastructure Regulations 2010, n. 24 above, as amended by Regulation 11 The Community Infrastructure (Amendment) Regulations 2019
[26] The Rt. Hon Eric Pickles MP, Minister of State for Housing and Neighbourhood Planning Team, DCLG, November 2012

authority discretion in recouping infrastructure costs. Whilst the authority can decide whether to charge the CIL, the process for charging the levy are mandated by statute and regulation. Marginalising discretion to redistribute development value would be achieved through rule-based elements of compulsion. However, this quest has some surprising effects, which can only be understood from looking at the context within which the CIL is deployed.

The uptake of the CIL was initially low. By 2012 only six councils had adopted the CIL.[27] Despite adopting strategies to encourage the adoption of the CIL, in the form of advice and "peer support", the aspiration of comprehensive application has remained just that.[28] As the adoption of the levy is subject to a statutory process of scrutiny, planning statistics relating to the uptake of this process are readily available from the Planning Inspectorate's website.[29] It is relatively simple to analyse the historic uptake, using Inspectorate Reports and those policy documents of central and local government in the public domain.[30] By 2013, twenty-seven authorities had received approval for their charging schedule and a further fifty-one were in the process of drafting their charging schedule.[31] Thus approximately 22.3% of planning authorities had either adopted or were in the process of adopting the regime.[32] The strategy of successive government has been to confine the use of those obligations arising through negotiated agreement, through both amending regulations and guidance and so promote the use

[27] Drawn from Planning Inspectorate figures. See also , Lord, Dunning, Dockerill, Burgess, Carro, Crook and Watkins, *The Incidence, Value and Delivery of Planning Obligations and Community Infrastructure Levy in England in 2016-17*. London Ministry of Housing Communities and Local Government March 2018 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685301/Section_ 106_and_CIL_research_report.pdf <July 2019>

[28] Planning Advisory Service National update seminar 2013 CIL uptake and stocktake https://www.local.gov.uk/pas/find-event/pas-past-events/cil-update-and-stocktake-seminars-2013 . Seminars have been ongoing with the most recent on the topic relating to the 2018 consultation Proposed reform to developer contributions (CIL and Section 106) consultation.

[29] https://www.gov.uk/government/statistics/planning-inspectorate-statistics Table 1.3 and Ministry of Housing, Communities and Local Government Guidance, Community Infrastructure Levy (12 June 2014, updated 15 March 2019), https://www.gov.uk/guidance/community-infrastructure-levy#Community-Infrastructure-Levy-rates <accessed 27 June 2019>

[30] The author identified those authorities submitting charging schedules for approval and then cross referenced the information with the public documents of the authorities concerned. See also, the DCLG'S Report of Study *The value, impact and delivery of the community infrastructure levy* (The University of Reading and Three Dragons in association with Smiths Gore and David Lock Associates) February 2017 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589635/CIL_Research_report.pdf

[31] Department for Communities and Local Government *Memorandum – Post Legislative Scrutiny Planning Act 2008* Cm 8716 October 2013; See pp 8-9 House of Commons briefing paper on the CIL

[32] There are approximately 350 authorities with planning functions in England and Wales (excluding county councils but adding the National Parks Authorities). See The LGA Quick Guide to Local Government Dec 2011 http://www.local.gov.uk/c/document_library/get_file?uuid=a5b2c920-8f40-4eae-98528b983724f5bc&groupId=10180 <30 March 2016> and the LGIU Facts and figures https://www.lgiu.org.uk/local-government-facts-and-figures/#how-is-%20local-government-structured <30 March 2018>

of the CIL, improved its uptake.[33] However, negotiated solutions remain continue to be used, and indeed preferred. This has resulted in Government replacing direction, to confine a use of obligations, with reporting on their use, itself an acknowledgement of the instrument's utility.[34] To illustrate, records of the Planning Inspectorate (which has responsibility for appointing inspectors examining authority CIL charging schedule submissions at the inquiry stage for the purposes of making a determination) show that of the 141 submissions made by charging authorities to April 2016, 14 had either been withdrawn or were awaiting approval. By March 2019 the figure had increased to 169 with the majority of submission being made between 2013 and 2016.[35] The median post submission timescale from hearing to approval was less than three months, but the deliberation for some was over six months with one extending to 22 months. This evidences a certain, 'leakiness' in a process asserted to streamline the recouping of infrastructure costs and is suggestive of further elements of discretion creeping into the process. As the CIL Review Team noted, coverage in 2016 remained at under 60%, even taking into account those authorities in the process of setting up the CIL, suggesting again that discretion is being deployed by authorities but in this instance through their choice to avoid the process.[36] ?

The land-use planning system

Planning, it is said seeks to,

> '[s]ecure a proper balance between the competing demands for land, so that all the land of the country is used in the best interests of the whole people'.[37]

It is but one state response to protecting society from the effects of environmental, economic and technological impact. The finite nature of land informs the structure of control. Although ostensibly state-driven, the ethos of land ownership – the autonomy and right to use land freely and regardless of the wider impacts – skews this aim. This together with the asymmetric relation

[33] The Department for Communities and Local Government identified 102 charging authorities with 100 more authorities taking steps towards adoption (the number having doubled between October 2014 to Oct 2015. A. Fairhurst DCLG, "To CIL or not to CIL" January 2016 http://www.slideshare.net/PAS_Team/to-cil-or-not-to-cil <27th April 2016> .

[34] See nn. 24 and 25

[35] Planning Inspectorate statistics, 2019, https://www.gov.uk/government/statistics/planning-inspectoratestatistics <16th September 2019?

[36] A New Approach to Developer Contributions: A Report by the CIL Review Team (submitted October 2016) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589637/CIL_REP ORT_2016.pdf <June 2019>

[37] Rt Hon Lewis Silkin HC Debs (29th January 1947) vol. 432, col. 947

between state and private actors (as the state owns very little land itself, and is highly dependent upon those owning (and indeed using) it to allocate and secure the most collectively appropriate uses), derives from the preference given to private property within the jurisdiction. The controls are used to designate areas for development spatially and specifically by allocating land generally for certain uses and specific parcels for particular uses. The Town and Country Planning Act 1947, provided a comprehensive statutory framework that still informs land-use controls today.[38] The system functions to achieve efficient and effective control in land use and allocation, which is economically, environmentally and aesthetically viable. Planning brings spatial order to communities by designating the most appropriate land use in the expectation of aligning both public ideals and private interests, and so securing an efficient redistribution of 'value'. The particularistic ordering of space and place is dealt with by a statutory system of development control, with the CIL being integral to it. Local authorities, exercise a statutory discretion to allocate appropriate uses according to local demands, with applications being determined by them in accordance with established local plan and central government policy.[39] This, "wise and salutary neglect, cedes … substantial policy making authority" to public decision makers and often receives a bad press (as in the negative connotations evoked by the quote), but there are good reasons for its existence.[40] Giving the planning authority "wriggle room" through an exercise of discretion enables a determination not just of the scope of law's application, but for bespoke decision making in a context specific manner. Discretion mediates central / local and public/private claims. Some critics of the juxtaposing of discretion and rule conclude that the former can impede the legitimacy of a decision leading to capricious decision-making or socially sub-optimal outcomes.[41] However Davis's own take on discretion was nuanced. He excluded "broad policy-making and social justice" from his critique, advocating instead confining certain forms of discretionary action., which illustrates a certain pragmatism in the perceived trade-off between flexibility and certainty in instrument choice, as the headline quote suggests. This is relevant to land-use planning control, a discipline that has the function of accommodating broad policy with individuated justice. Drilling down further we see that Davis did not juxtapose rule

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

[39] See ss 70 and 72 Town and Country Planning Act 1990 (as amended)

[40] J.D. Huber and C.R. Shipan, *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy* (2002) CUP (New York) p. xiii

[41] F.E. Kydland, E.C. Prescott, "Rules rather than discretion: the inconsistency of optimal plans." (1977) *85 J. Polit. Econ.*473–492

and discretion in a stark way but instead pointed to an interaction between the two; an aspect sometimes overlooked.[42] His views resonate in the land-use planning context and the neglect of his analysis in the CIL context is unfortunate.

Planning goals (articulated through both legal principle and policy guidance by central and local actors) are often themselves in tension; for example, land prices may not align with the most economically efficient use of the land, particularly where economic costs are made unsustainable by land values. Further, the system attempts to address the 'externalities' or overspill effects of land-use activity, which may be economic, environmental or social in character and negative or positive. Crucially, the effects extend beyond the interests of the individual user or owner of the land, and often impact on society locally, regionally or nationally. The patchwork of controls that exist are deficient to the extent that they do not, and indeed cannot, address all adverse impacts. Over time, discretion has become further embedded in the statutory system. While statute sets down a hierarchy for decision-making ranging from the national, through the regional to the local (the system of actual planning consent), discretion pervades, so that local authorities decide applications, according to national and local needs. This exists to overcome the limited and prescriptive nature of rules, and to address technical and structural complexities inherent to the system.[43] While rules are imbued with attributes bringing ostensibly clarity, certainty, order and coherence, discretion pervades and is indeed a sine qua non to a system resting on land use allocation given the dependency relations in the regime. It is a means to align public interest and private ambition. Fixed rules have rarely, if ever been a viable option given Government's dependency on developers (large or small) to bring forward development.[44] State and individuated interests collide, with law and policy being used to calibrate both the mechanisms of control and the balancing of private land interests. This demands flexibility in approach and is consistent with the thrust of Davis' observation at the very beginning of this paper. Discretion is necessary to achieve efficient

[42] Davis was at pains to emphasise that "principles or other guides [can] keep discretion limited or controlled" in almost the same way as rules so as to minimise the risk of injustice, (p. v preface).

[43] Kadish, Mortimer R. and Sanford H. Kadish (1973) Discretion to Disobey: A study of Lawful Departure from Legal Rules. Stanford: Stanford University Press

[44] There are instances of fixed charging systems being imposed before with little success, e.g. the Development Land Tax, the provisions giving powers to a Central Land Board under the Town and Country Planning Act 1947, and the powers of the Land Commission under the Land Commission Act 1967. This is explained in depth by V.H. Blundell, Labour's Flawed Land Acts, 1947-1976.August 1993 http://www.labourland.org/downloads/papers/Vic_Blundell_DLT.pd <March 2019>

solutions. Without its existence the system's broader goals could be frustrated. This is apparent from the structuring of the recovery of planning gains.

Value capture in land-use planning and the CIL.

It is axiomatic that granting planning permission has effects on land values – land benefiting from permission will see an increase in its value while adjoining land may, in the extreme, be blighted. Consequently, Government makes policy choices regarding the correlative impact of costs and benefits distribution in value terms. The principle of 'value capture' – monetizing and extracting from developers that benefit attributable to public actions facilitating development (known as 'betterment') looms large in land-use control.[45] Betterment has both a compensatory aspect anticipating that development activity has the potential to affect land values, and restraining "windfall" surpluses to developers resulting from a use of existing infrastructure, without which the development would not have been possible.[46] Discretion is critical to the statutory system which only obliquely addresses betterment concerns by donating to local authorities a discretion to recover planning gains. Yet, in the pursuit of doing so, the instrument of the CIL seeks in many respects to foreclose this aspect by making the parameters for recovery more prescriptive, especially when deciding the chargeable amounts.[47] In theory, if not in practice some alignment in the processes adopted to capture value and determine planning permission is needed to avoid conflict and confusion. The vexed question of betterment and its apportionment has been a continuing concern since the advent of the planning system in 1947. The cost, both direct and indirect, of developer activity not only feeds into the rationale for land-use planning controls but the debate surrounding the recovery of what have come to be termed planning gains. This is crucial to the justification for the CIL.

Reference to the history of the practices for planning gain recovery are informative to understanding the role of persistent and pervasive role of discretion in the context. Historically the techniques used for the purpose were often characterised by an exercise of 'soft power', so often overlooked in regulatory regimes.[48] Informal and locally negotiated practices facilitated

[45] This was referred to by Lloyd George referred to in 1909, who was concerned that, "the growth in value, more especially of urban sites is due to no expenditure of capital on the part of the ground owner, but entirely owing to the energy and enterprise of the community" HC Deb. (29th April 1909) vol IV col 532.

[46] See *Land* Cmnd 5730 at para. 21

[47] Jowell *Law and Bureaucracy* at pp. 156 and 152

[48] Olejarski, Amanda M. Lanham, *Administrative Discretion in Action: A Narrative of Eminent Domain*.

development without initially any statutory basis. In doing so, planning authorities exercised discretion as to the recovery of gains. They had a choice in how to decide what was appropriate in the given circumstances and the processes deployed with landowner and developer agreement for achieving the proper planning of an area in the absence of direct statutory authority. Indeed, as an adjunct to the statutory town planning scheme the practices to be adopted by local authorities evolved on an ad hoc basis. The institutionalizing of this strategy was achieved initially through a use of planning agreements, reflecting local practices and co-opted for public purpose through statutory recognition in the Town and Country Planning Act 1932, which in turn enshrined in law the basis for exercising discretion in the context.[49] While giving greater flexibility to recover betterment, their use was highly dependent upon planning authorities' proper exercise of discretion and forms of private ordering.[50] Agreements were used to redistribute the burden of externalities created by development. They were deployed to overcome some of the basic deficiencies associated with development proposals, such as to improve drainage or sewerage provision, or to provide public recreation facilities including open space or other amenities and to secure public works and enable the payment of capital sums of money, classic aims shared too by the modern CIL provisions.[51] By 1990, the planning agreement was 're-branded' the planning obligation, enabling developers to unilaterally offer undertakings for similar purposes.[52] Part of the justification for so doing was to widen the ambit of the instrument and to 'reflect the political objective of permitting greater use of private capital for what are described as 'off site infrastructure costs', which formerly were borne by the public sector alone.[53] Central government, through a use of planning policy guidance as opposed to strict law exercised further control over practices that were seen as inherently problematic because of the opacity associated with local decision-making. This gave rise to a suspicion of unconscionable dealing that tainted the planning system overall.

Lexington Books. 2013; C.S. Diver "A Theory of Regulatory Enforcement" (1980) 28 *Public Policy* 257; Hawkins, (ed.)*The Uses of Discretion.* OUP Oxford (1992), 2002; R. Kagan, *Regulatory Justice: Implementing a Wage Price Freeze* Russell Sage Foundation NY(1978); Lipsky, M. *Street-level Bureaucracy. Dilemmas of the individual in public services.* Russell Sage Foundation, New York. 1980

[49] 1932 c. 48

[50] Section 34 Town and Country Planning Act 1932. Agreements were effectively, the product of a hybridisation of the law on restrictive covenants and contracts. See Claydon and Smith, "Negotiating Planning Gains through the British Development Control System" (1997) 34(12) *Urban Studies* 2003-22

[51] See ODPM Circular 05/2005 *Planning Obligations* 18 July 2005

[52] Section 106 Town and Country Planning Act 1990 (as amended) by s12 Planning and Compensation Act 1991

[53] Campbell, Ellis, Henneberry, Poxon, Rowley and Gladwell , Planning Obligations and the Mediation of Development (RICS Foundation, 2001) . They identify that the facet of flexible negotiation can render the planning system, "iniquitous" at p. 35

An absence of coherence in deploying negotiated obligations rendered the whole scheme illogical, for some and, worse still fuelled, "pathological outcomes", including suspicions of the 'buying' of planning permissions when negotiating transactions beyond the public gaze.[54] This resulted in a proposal to eliminate discretion through the instrument of the CIL, where Government took steps to regulate and shape the practice to secure planning gains, by, in Davis words,"confin[ing], …structur[ing[and …check[ing] discretion".[55] Paradoxically, this approach falls down when the mechanism for setting the rate is considered.

Setting the CIL

The process of setting and implementing the CIL is part of a suite of mechanisms aimed at securing sustainable and viable development underpinned by the local development framework, with the core strategic policies of the Local Plan and Local Strategic Partnerships at its heart. Section 211 Planning Act 2008 sets out the procedure for adopting the charge. Where an authority proposes to charge the CIL, it must issue a document setting out the rates by which the Levy is chargeable. The substantive detail is contained in the 2010 Regulations. Although the Regulations have been amended significantly over time, the key provisions remain relatively constant.[56] The format and content of the charge setting schedules, together with how the charge is set is subject to a consultation and publication process similar to the public participation rules in the planning system as a whole, which are known to be problematic. The role of landowners and developers in the formulation of local plan policy to the detriment of public participation has been well-documented. These power dynamics, design, cultural and institutional factors as well as the construction and production of knowledge contribute to attenuate public participation, and in doing so support the type of discretionary action that the CIL is supposed to overcome.[57] In the case of the CIL, the draft charge setting schedule is

[54] Note in particular the Poulson scandal of 1950's and 60's. The Nolan Committee Report on Standards in Public Life in its Third Report, *Standards of conduct of local government in England, Scotland and Wales* (July 1997)

[55] Davis, "Confining and Structuring Discretion: Discretionary Justice"(1971) 23(1) Journal of Legal Education 56-62

[56] Community Infrastructure Levy Regulations 2010 (SI No 948) as amended by Regulations in 2011 (2011/987), (2012/2975), 2013 (2013/982), 2014 (2014/385) and 2015 (2015/836); Community Infrastructure Levy
Consultation on detailed proposals and draft regulations for reform. A consultation response of the RTPI to the CLG consultation Dec 2011, http://www.rtpi.org.uk/media/5495/RTPI-CIL-reform-response-final.pdf (accessed 2 August 2017

[57] Mark S. Reed, Steven Vella, Edward Challies, Joris de Vente, Lynne Frewer, Daniela Hohenwallner-Ries, Tobias Huber, Rosmarie K. Neumann, Elizabeth A. Oughton, Julian Sidoli del Ceno, Hedwig van Delden, "A

made subject to a public examination made by an independent examiner. The aim is to give transparency to the setting of the Levy by imposing a procedure akin to adopting the local development plan. In both cases, while formally enabling public participation, the processes in the wider planning system have long been criticised, with decisions being reached by a largely consensual and behind the scenes approach.[58] Government has emphasised the balance to be struck between obtaining additional investment (with rates reflecting actual and anticipated infrastructure costs) and securing project viability.[59] In short,

> "…[the] CIL should emerge from a process of collective bargaining between planners, the development industry and the gamut of public, private and quasi public-private agencies which could be considered "infrastructure providers".[60]

Section 213 of the 2008 Act requires the schedule fixing the CIL rates (known as the charging schedule) to be approved by the authority only after a process of scrutiny by an examiner appointed by it. By Part 3 of the Regulations, before the draft is submitted for examination, it must be publicised (via website and press notice), made available for inspection and interested parties consulted.[61] Infrastructure assessments feeding into this process will have already been undertaken at the local plan formulation stage. Having already assessed infrastructure needs during the local plan process, in setting the levy rates the planning authority has a statutory duty to strike a balance between the desirability of funding for the actual and proposed infrastructure costs of development in its area (taking into account all other sources of funding for the same purpose) and the potential effects of imposing the CIL on the economic viability of the area as a whole.[62] This exercise is itself a value laden process refining the question of

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theory of participation: what makes stakeholder and public engagement in environmental management work?" (2017) 26 (1) *Restoration Ecology* S7-S17, Emphasised by Pacione M., "The power of public participation in local planning in Scotland: the case of conflict over residential development in the metropolitan green belt." (2014) 79 *GeoJournal* pp. 31-57 at p. 31;

[58] Mark Sackett RTPI West Midlands CPD. https://www.slideshare.net/midlandsarchitecture/mark-sackett-cilpresentation

[59] Ministry of Housing, Communities and Local Government Guidance, Community Infrastructure Levy (12 June 2014, updated 15 March 2019), https://www.gov.uk/guidance/community-infrastructure-Levy-rates (accessed 27 June 2019)

[60] UCL/Deloitte research quoted by, A. Lord, 'The Community Infrastructure Levy: An Information Economics Approach to Understanding Infrastructure Provision under England's Reformed Spatial Planning System.' [2009] 10(3) *Planning Theory and Practice*, 333-349 at p.335

[61] The Community Infrastructure Regulations 2010 No 948(as amended). Further amendments to the consultation provisions are proposed by the Community Infrastructure Levy (Amendment) (England) (No 2) Regulations No1103 for September 2019, having been laid before Parliament on 4 June 2019.

[62] Regulation 14, Community Infrastructure Levy Regulation (2010) as amended by Regulation 5 of The

general infrastructure needs assessed in the plan process with questions of economic viability that are critical to particular developer interests. Hence the level of developer interest at the charge setting stage, which from an authority perspective may determine whether indeed projects come to fruition and by doing so generate prosperity.

The CIL schedule~~,~~ is formulated from an evidence base, with a preliminary draft being prepared and published for consultation. After consultation, the published draft is subjected to further scrutiny and a period for further representations set, before the draft is examined in public by an independent examiner who makes recommendations to the authority. The process of using public hearings in the planning system generally is acknowledged as problematic. Members of the public are reluctant to participate and sense that they are put at a disadvantage by reason of their lack of expertise.[63] The same might be said of smaller developers.[64] Further rights of appeal are provided on questions of fact regarding the application of the calculation of the CIL in any given case.[65]

Although planning authorities must consult local communities and stakeholders on the charging schedule setting CIL rates, these interactions are contentious, given the conflicting ambitions of those implicated within the system. Oppositional voices can be, "scripted out" with the regime becoming a new site for conflict,

"[in] a deeply politicised process, full of tensions derived from within the profession and, more profoundly, from beyond".[66]

Commentators note that, "Few would argue that since its introduction in 2010 CIL is far from the fairer, faster and more transparent system of securing developer contributions it was intended to be."[67]

Community Infrastructure Levy (Amendment) Regulations 2014 and now amended by the Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019. Further guidance can be found at https://www.gov.uk/guidance/community-infrastructure-levy <14 September 2019>

[63] Conrad E. et al. "Hearing but Not Listening? A Participatory Assessment of Public Participation in Planning." (2001) 29(5) *Environment and Planning C: Government and Policy*, 761–782

[64] Walker, "Small is Beautiful. Delivering more homes through small sites." LGIU December 2016 https://www.fmb.org.uk/media/41167/fmb-and-lgiu-report-small-is-beautiful.pdf

[65] Sections 212-215 Planning Act 2008 and Part 3 Community Infrastructure Levy Regulations 2010 (SI 2010/ 948).

[66] Allmendinger P, Haughton G, , "Spatial planning, devolution, and new planning spaces" *Environment and Planning C: Government and Policy* (2010) 28 803–818, p. 816

[67] Grekos and Nation, *The Planner* "The bitter CIL that we struggle to swallow" 24/05/2017

One problem is that developers and their advisers assume a prominent role in the setting of both CIL rates and when infrastructure needs are assessed during the adoption of local plans process. Research to date has shown that larger developers are well-versed in navigating procedures to the best effect and work closely with authorities, in ways reminiscent of the negotiation of planning agreements and obligations.[68] At each stage this can be to the detriment of true public participation.[69] Despite the legal requirements, wider stakeholder participation in the planning process generally is often perfunctory with a propensity for, "more opportunity for economically motivated special interests to dominate the decision process" and the charge setting process for the CIL is no different.[70]

The CIL and the 'demise' of discretion

Introducing the CIL into a discretionary framework is not without its problems. The CIL, ostensibly a more directive form of charge, seeks to minimise, as far as possible an exercise of discretion. It duplicates many of the functions of agreements and obligations by displacing those costs generated by new development onto the developer community in a direct way. The purposes themselves are very similar, but the mechanics are different. It deploys an ostensibly centrally controlled mechanism to redistribute development value for recovering planning gains.

Government's thinking maps directly on to K. C. Davis' critique of discretionary action. His concern is of injustice as the "intuitive" response a decision-maker may have that can impact upon rational and – most importantly – just decision-making. Many "administrative decisions", are imbued with an exercise of discretion impacting upon the delivery of justice in the widest sense.[71] In the planning system discretion enables the striking of an appropriate balance

[68] See paras 47 and 63, Department for Communities and Local Government The value, impact and delivery of the Community Infrastructure Levy. Report of Study. The University of Reading and Three Dragons in association with Smiths Gore and David Lock Associates, February 2017 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589635/CIL_Rese arch_report.pdf (accessed December 2018)

[69] R. Altermann 'Levying the Land: Land-based instruments for public revenue and their applicability to developing countries.' Paper prepared for the UN Habitat Governing Council Meeting Nairobi, Kenya, April 1517 2013

[70] Irvin, R. and Stansbury, J. (2004) 'Citizen participation in decision Making: is it worth the effort? (2004) 64 *Public Administration Review* 55-65 at p. 62

[71] Davis n.5 pp. 12-13

between individual and collective interests whilst ensuring that, as far as possible the claims of all interested parties are heard. Given the particularity of planning decisions, discretion facilitates proper consideration of the individuated case. Tension arises however in the application of generalised policies to the particular case, which in turn leads to a perceived injustice in this context extending to the "collective anxiety" experienced by communities when their concerns often appear to be ignored. Not all discretionary activity leads to tyrannical or arbitrary behaviour on the part of administrators.[72] Indeed, discretion is necessary to accommodate the complexity inherent to land-use allocation and control, thus ensuring that cases are indeed considered on their individual merits, whilst also balancing the requirements of general fairness.

Davis recognises the trade-off that exists between dispensing justice and delivering administrative efficiency, a sentiment telling with regard to how we understand the multifunctionality of law. As he observed, 'discretion is our principal source of creativeness in government and in law'.[73] It is the *injustice* deriving from discretionary action that should be confined by the imposition of rules, (particularly in applying formulated policy at individual levels), rather than an exercise of discretion itself. The ambition of *confining discretion* relates by setting defined limits for its exercise, and its *structuring* demand transparency and procedural fairness in the broadest sense to achieve the just decision. However, as Davis was at pains to point out, discretion *can* provide justice, it is just that 'what we need to do is … not to minimize discretion or maximize its control but to eliminate unnecessary discretion and to find the optimum degree of control'.[74] It is this quest for optimality that has been overlooked when inserting the CIL into the land-use planning framework. Further forensic analysis of the provisions emphasises a common misreading of Davis as supporting a binary interpretation (juxtaposing rule and discretion) where the CIL promotes, perhaps paradoxically, discretionary activity at different stages of decision-making – that of setting the charge, whether intended or not, and indeed whether to adopt the system at all. In this situation rule and discretion are linked. In land-use planning, discretion is integral to decision-making and built into the regime. The use of a fixed charge to fund outcomes equivalent to negotiated agreements and obligations for the recovery of infrastructure costs, appeals to the ideal of rules to achieve the transparency wanting historically in a recovery of planning gains. However, in the given context, as with

[72] Ibid. pp. 25-6
[73] Ibid. p.25
[74] Ibid. p.20 and p. 217

others (in particular the criminal law) the substitution of rule for discretionary action may be more mythical than real and those (whether policy makers or academics) asserting the flaws in a use of discretion in the recovery of infrastructure costs may have overlooked the fundamental character of the planning system as a whole, and the operation of the CIL regime that replicates in its levels of generality at the charge setting stage, the troubling opacity of the negotiated agreement and planning obligation. The task of finding the optimality of control (and this rather begs the question of optimality for who) requires more than a superimposition of rule-based forms, where discretion seems to be a pervasive ingredient of the system. Indeed, the effects of ascribing rules to achieve the goals of transparency and further legitimacy in a highly discretionary regime may well result in other counterproductive effects that present opportunities for disguising, rather than eliminating, discretionary action – and the CIL is illustrative of this point. The charge setting process is, as has been noted, subject to external examination and the levy set must balance infrastructure funding with the potential effects on economic viability throughout the given area. Landowners and developers are not homogeneous groupings and it is rational for competition to exist within and between these groupings in the quest for the right to develop land and thus profitability. Critical junctures exist at the stage of the formulation of the evidence base (and even before when setting its parameters) for the setting of the Levy, and again at the examination in public. Given that collaboration is emphasised as essential to formulating the charge, rule-based structures can be diluted, for example at the consultation stages.[75] In establishing the evidence base, interaction with developers is inevitable.

The adoption process itself embeds significant discretionary elements. Evidence suggests larger developers and landowners are more conversant with the process, unlike smaller entities.[76]

[75] Regulations 16 and 17 Community Infrastructure Levy Regulations 2010 (as amended). The statutory guidance Community Infrastructure Levy indicates that, "the consultation period must be at least four weeks long. It is good practice to allow at least six weeks, and longer if the issues under consideration are particularly complex." paragraph: 032 Reference ID: 25-032-20140612 (12 June 2016) http://planningguidance.communities.gov.uk/blog/guidance/community-infrastructure-levy/ <26 April 2016> [72] See paras 46 ff., Department of Communities and Local Government, *The Value, Impact and Delivery of the Community Infrastructure Levy. Report of Study*. University of Reading and Three Dragons in association with Smiths Gore and David Lock Associates February 2017. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589635/CIL_Rese arch_report.pdf <January 2019>

[76] See paras 46 ff., The Value, Impact and Delivery of the Community Infrastructure Levy. Report of Study. University of Reading and Three Dragons in association with Smiths gore and David Lock Associates February 2017.DCLG.

Viability, critical to any assessment – as it is with local plan formulation, and local authority dependency in the given context results in a greater exercise of discretion than may otherwise be assumed, and the promotion of public participation can mask pathological behaviours including its denial in a given context.[77] In a recourse to rule, optimal outcomes become lost in the process, with the worthy objectives of clarity and certainty becoming subverted by, both the overarching structure of the system, its pervasive character and the structuring of the charge setting process itself. There is little reason to see that the examination in public of the charging schedule should be any different, a factor alluded to in the report by the CIL Team in 2016.[78] The subversion of rule, is one of the counterproductive aspects of the CIL. Looking closely at the operation of the provisions and their place in the wider framework of land-use control suggests this. The strategy of successive governments display elements of compulsion to increase the uptake of the CIL. Guidance issued by the Department for Communities and Local Government both when the broad framework for the Levy was introduced and subsequently, highlight that a key objectives is to minimize, if not foreclose, those discretionary elements associated with the negotiation of planning agreements and obligations.[79] The need to wean authorities from obligations and agreement evidenced by the slow uptake of the CIL, where the instrument of choice appears to be negotiated agreement, despite exhortations in both policy and law, highlights the overlap between a use of both instruments for similar ends, with negotiated agreements being the preferred instrument of choice generating in monetary terms the majority of development value.[80]

A fixed charge increases the capacity for central control while reducing the autonomy of local authorities to obtain wide-ranging benefits in a flexible manner. Promoting a standard charge has the effect of legitimating and normalising developer contributions and in doing so makes the process more transparent and ostensibly more equitable. The guiding rationale is to

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589635/CIL_Rese arch_report.pdf <January 2019>

[77] Aitken, "A three dimensional view of public participation in Scottish land use planning." (2010) 9(3) *Planning Theory* 248-264

[78] A New Approach to Developer Contributions: A Report by the CIL Review Team (submitted October 2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589637/CIL_REPORT_2016.pdf <June 2019>

[79] See n. 57

[80] See Lord, Dunning, Dockerill, Burgess, Carro, Crook and Watkins, *The Incidence, Value and Delivery of Planning Obligations and Community Infrastructure Levy in England in 2016-17*. London Ministry of Housing Communities and Local Government March 2018 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685301/Section_106_and_CIL_research_report.pdf <July 2019

minimise the suspicion of unequal treatment by reducing the scope for discretion and also to prevent corruption, by seemingly allowing the buying of planning permissions.[81] Government also seems of the view that a standard charge will create a closer nexus to infrastructure provision more generally (as opposed to on an ad hoc basis). The effect should be to spread the cost of infrastructure provision more evenly throughout the whole developer community thus reducing those risks associated with negotiating deals beyond the public gaze. This seems not to have happened, with larger developers bearing a disproportionate burden of the contributions. The aversion of this sector in the developer community to the CIL, and the preference for negotiated and relational interaction (often because they are used to dealing with the authority in question) may perpetuate the preference of some authorities to avoid the Levy.[82,]

Rather than enabling local authorities to negotiate effective, bespoke, locally devised solutions, these elements were supposed to be confined by central government direction. The substitution of rule can have unintended consequences. Discretion, however, is not eradicated easily, and an underlying choice exists for authorities in deciding whether to adopt the CIL or not. This institutionalizing of discretionary action exists both individually and organizationally, often in circumstances not mandated by law. The competing world views of central and local actors can give rise to levels of contestability. A local planning authority may decide that its aims are most effectively secured by activities promoting discretionary forms, especially in times of austerity when authorities are reliant upon the private developer to enhance economic development prospects. This can extend to enabling landowners and developers to 'steer' the process, as in instances where redevelopment of areas cannot happen without the 'consent' and involvement of the developer community. The resulting presence of discretion exists beyond, and potentially in opposition to, the stated legal provisions. The binary of rule and discretion becomes evident when considered through the lens adopted by sociologists and neo-institutional scholars on law's ambiguity where multiple interpretations can be given to ostensibly clear legal rules during the course of their translation at local levels. The currency

[81] See Department for Communities and Local Government, *The Community Infrastructure Levy* August 2008 http://webarchive.nationalarchives.gov.uk/20120919132719/http://www.communities.gov.uk/archived/publications/ planningandbuilding/communityinfrastructurelevy2 <18 May 2016>.

[82] See A. D. H. Crook, J. M. Henneberry, S. Rowley, R. S Smith and C. A. Watkins, *Valuing Planning Obligations in England: Update Study for 2005-06* London: Department for Communities and Local Government, (5 August 2008).

of multiple interpretations highlights that the most carefully drafted the legislation~~,~~ can be ambiguous. Legal processes become socially constructed by groups having disparate interests and expectations. The open texture of language renders many interpretations possible, not all of which will converge with Government expectations. Each can give rise to a 'surplus of meaning', resulting in further ambiguity.[83] Thus multiple interpretations can be given to ostensibly clear legal rules. The process does not end with legislative enactment, but rather begins there. These effects should not be underestimated.[84,] Law's indeterminacy and its relativity overall amplify the importance of context in ascribing its meaning as sociologists point out.[85] Local preferences can influence heavily implementation, despite the precision and clarity of the provisions themselves. Similarly, inter-organisational pressures can shape local policies to the detriment of central direction.[86] Forms of ambiguity provide organisations and professional actors in particular with opportunities to propose new interpretations of even the most concrete provisions and the opportunities may increase regardless of the form of the legal framework.[87] Implementing the CIL is informed by the pervasiveness of discretion within the planning system. This shapes not just how the instrument is deployed but whether it is used at all. The general structure of the planning system presents opportunities to resist the confining of discretion in the CIL process. As noted above, although rigorous, the provisions leave open the possibility of replicating the flaws found with the instruments of the planning obligation. Public trust is thus enhanced through the prospect of public participation and the transparency of the process linked to the fixing of the charge, as a charging schedule must be considered in the public domain through the process of public examination. However, the limitations of the public hearing are well documented, with hearings serving multiple functions, depending upon the power of the contributor, their capacity to be heard and their nexus to the ultimate decision-maker.[88] It may be overly optimistic to attribute a single and defined purpose for the law.

[83] P. Ricoeur *Interpretation Theory: Discourse and the Surplus of Meaning.* (1976) Fort Worth: Texas Christian University Press, 1976.

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

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

[86] P. J. DiMaggio and W. W. Powell, 'The iron cage revisited: institutional isomorphism and collective rationality in organizational fields' (1983) 48 *American Sociological Review* 147

[87] L.B. Edelman, 'Legal Ambiguity and Symbolic Structures: organizational mediation of law' (1992) 97 *American Journal of Sociology* 1531

[88] Aitken, 'Wind power and community benefits: challenges and opportunities.' 38 *Energy Policy*, pp. 6066-6075

Hearings, as Jowell noted, can serve as both an instrument of persuasion for decisions already taken as well as a technique for decision-making.[89] Additionally each stage of the process allows for leeway and the opportunity for authorities to decide how best to collaborate with developers often to the detriment of public participation. Both the open texture of language and the form and context of the process (not least the dependency levels present in the system) create opportunities for an exercise of discretion in soliciting and exchanging information, as between planning authority and the landowner or developer that can subvert the stated provisions.[90]

Although the aim of the CIL is to expedite the securing of infrastructure provision while giving greater transparency (or 'openness' in Davis' language), it was initially premised upon a measure of voluntarism. Planning authorities could *choose* whether to impose a levy or use the negotiated route for recovering infrastructure costs – that of the planning agreement or obligation. Subsequently, after attempting to confine the local authority discretion deployed in negotiated agreements, and so promote the CIL, in 2015 Government sought to 'scale back' the use of planning obligations for infrastructure purposes through both planning guidance and legal provision.[91] However, new regulations introduced by the Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019 give greater flexibility to authorities to use both methods – again a sign of how problematic it is to attempt to confine discretionary behaviour in the domain.

Conclusion

Contrary to Davis assertion, the presence of discretion in town and country planning has served to legitimate and simplify the process of capturing value from development activity, to accommodate the highly unstable dependency relations as between local authorities and landowners and developers, affected by changing policy priorities. As has been observed, stakeholder and community engagement, '[reflects] the practice of 'planning through dialogue'

[89] Jowell, "The Limits of the Public Hearing as a Tool of Urban Planning." (1969) 21(2) *Administrative Law Review* 123-152, in the context of US urban planning.

[90] Hawkins n. 50 identifies, "Discretion suffuses the interpretation of rules, as well as their application", p.35. [87] See paras 84-91 Department of Communities and Local Government, *Community Infrastructure Levy Guidance* December 2012 and Regulations 122 and 123 of the Community Infrastructure Levy Regulations (as amended), now modified in September 2019

[91] Regulation 123 inserted into The Community Infrastructure Levy Regulations 2010.

which has become central to the planning system.[92] This is echoed in ~~by~~ the highly discretionary nature of the processes involved in planning generally. Through this the defects of the law and informational asymmetries can be overcome and welfare maximised.[93] Law and economics theorists would suggest that a use of discretion facilitates the negotiating outcomes of the parties – in contrast to the more directive nature of the CIL.[94] However, paradoxically the latter also presupposes that authorities will use their discretion to commit to the system. The quest to impose greater transparency in negotiating development gains through the introduction of the CIL highlights how context dependent strategies seeking to eliminate an exercise of local discretion can be. The imposition of rule as the assurance of clarity and certainty, although notionally a substitute for discretion can result in the subversion of the implementation of rule-based strategies. The CIL provides Government, in principle, with a resolution to the conundrum of securing planning gains by expressly providing for the circumstances in which a levy becomes payable – but there is no guarantee that the provisions themselves will eliminate the exercise of discretion at local levels. However, the character of central intervention under the 2008 Act seems to be inconsistent with the institutional structure of the planning system as a whole (itself heavily reliant upon an exercise of discretionary powers). This approach seems to eschew forms of control responsive to market demands in favour of externally imposed structured solutions. Arguably this is at odds with the logic of the planning system. It serves to misread the nature of relations between the local planning authority and developer, and goes some way to explaining the limited uptake of the CIL by local authorities. At a more abstract level the proposals sit unhappily with theories identifying the limitations and indeed marginality of some legal forms of state regulation.[95] While negotiated agreements align more neatly with spontaneous legal ordering, the directive form of the CIL is less well aligned to the planning system overall.[96] At issue, fundamentally, is the

[92] Baker, Hincks and Sherriff, "Getting involved in plan making: participation and stakeholder involvement in local and regional spatial strategies in England." (2010) 28 *Environment and Planning C: Government and Policy* pp. 574-594, referring at p.574 to Murray "Building consensus in contested spaces and places? The regional development strategy for Northern Ireland", in *Conceptions of Space and Place in Strategic Spatial Planning* (eds Davoudi, S, Strange, I), (Routledge, New York) pp 125–146. (2009).

[93] See, Coase's observations regarding the benefits of negotiating to achieve optimality in Coase, R.H, "The problem of social cost." (1960) 3 *Journal of Law and Economics*, 1–44

[94] E. Bertrand, "The three roles of the 'Coase theorem' in Coase's works" (2010) 17(4) *Euro. J. History of Economic Thought* 975–1000 referring to Coase, R.H.,"The Federal Communications Commission." (1959) 2 *Journal of Law and Economics*. 1–40

[95] C. Scott, 'Regulation in the Age of Governance: The Rise of the Post-Regulatory State' J. Jordana and D. LeviFaur (eds). *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance*. (Cheltenham: Edward Elgar, 2004).

[96] R. Sugden, *The Economics of Rights, Cooperation, and Welfare*. B. Blackwell New York and Oxford, 1986.

quest to make the system more clear, consistent and transparent without unduly hampering the development process, while achieving the same aims of planning agreements and obligations, instruments historically that have been viewed in an adverse light.

The adverse effects that opaque dealing can have on regimes such as the planning system in terms of its wider legitimacy should not be underestimated. For this reason, rule-based regimes have an obvious place in curtailing the deficits that an exercise of discretionary activity can cause. However, it may be naïve to think that the imposition of rule-based regimes in any given context will inevitably eliminate discretion. Aspects of discretion may still remain but appear elsewhere in the system. In the context of the case study there remain plenty of opportunities for discretionary action in the form of negotiation and bargaining to re-emerge at the stages of the setting, consulting on and determining the charging schedule. This is unsurprising given the structure of the modern land-use planning system, which is premised upon a high level of discretionary activity. Imposing rule-based regimes (as has been seen in the previous attempts to set development charges) can result in deviation and even resistance to institutional change or the subversion of the rule-meaning.[97] This may be one explanation why, in other domains, there has been a shift from rules to more open-textured regulatory forms such as 'principles-based' regulation.[98]

[97] This was the case when a development charge was imposed under the Land Commission Act 1967, the Community Land Act 1975 and the Development Land Tax Act 1976. The result was a withholding of land by developers, resulting in a failing system. A brief overview can be found in the House of Commons, Housing Communities and Local Government Committee 10th Report HC 766 10th September 2018 https://publications.parliament.uk/pa/cm201719/cmselect/cmcomloc/766/766.pdf <1September 2019>More generally, see P. J. DiMaggio and W. W. Powell, 'The iron cage revisited: institutional isomorphism and collective rationality in organizational fields' (1983) 48 American Sociological Review 147

[98] As with the regulation of the energy markets. For an exposition of its application in financial markets, see J. Black "Principles Based Regulation" (2007) 1(3) *Law and Financial Markets Review* 191