The Value of the Inquiries System[1]

By Garry Hart, LL.B.

1. Introduction

The object of this paper is to examine the origins and purpose of the inquiries system in land use planning; to trace its rise and fall; to assess its value and to debate whether the rights of the individual and in particular the rights of those having interests in land may be about to be materially damaged.

2. History and evolution of the inquiry system

The Public Inquiry has its origins in the closing days of the Inclosure Acts in the 18th and 19th centuries. In a comparatively short period of time the medieval farming system based on the village community was swept away. Fields were hedged and commons rights extinguished. Between 1845 and 1875, for example, some 600,000 acres were divided between 36,000 people. Inclosure had previously been carried out "by various methods, often by agreement, sometimes with harshness, seldom with any objective appraisal of conflict of interest".[2] In the 18th century the procedure of the Private Bill was adopted. Each village would promote a bill, provided that a sufficient majority of the population agreed. Inclosure Commissioners were appointed to look at the rights and wrongs of each scheme, and it is their "rough and ready"[3] investigations which are the seed from which modern public inquiry procedure has grown. As the Private Act proved to be expensive and repetitive, the Inclosure Act of 1801 enacted an *ad hoc* commission of inquiry to consider disputes arising, for example, over boundaries of parishes and districts, with publicly advertised meetings at which anyone could make representation or complaint on the basis of publicly displayed maps and plans. There was even a provision for appeal against the findings of the Commission but only to Justices of the Peace and not to a department of Government. By the time of the Commons Act 1876 inquiry procedure resembled much more closely that which we know today, with a clear procedural framework including provision for inspection of the site. The Inspector was obliged to hear all persons desirous of being heard on the subject matter of the application, whether considered in relation to the benefit of the neighbourhood or private interests. The Inspector's role was to report in full the objections and suggestions made by those attending the Inquiry, together with his own comments on them, to the Commissioners who would make the decision. Wraith and Lamb highlight a simple parallel between the 18th and 19th centuries and the present day:

"The Inclosure Movement ... arose from the application of scientific and technical knowledge to agriculture, which brought the individual into conflict with authority, and neighbourhood interest into conflict with a wider public interest; ultimately the public interest in agricultural productivity came into conflict with the public interest in keeping enough space for amenity and recreation. Today, in the second industrial revolution, we are experiencing similar pressures and similar conflicts."[4]

They point out that "as life became more complex the state was compelled to intervene increasingly in the affairs of its systems, to hold the balance between the public and private good. The public inquiry was the method by which it sought to achieve this end".[5] They point out that "the public inquiry is a

[1] I wish to acknowledge and thank Mr Jonathan Riley, BA LLM (Cantab) of Herbert Smith for research in connection with this paper.
[2] Wraith and Lamb, *Public Inquiries as an Instrument of Government* (1971), p. 17.
[3] Wraith and Lamb, *Public Inquiries as an Instrument of Government* (1971), p. 17.
[4] Wraith and Lamb, *Public Inquiries as an Instrument of Government* (1971), p. 21.
[5] Wraith and Lamb, *Public Inquiries as an Instrument of Government* (1971), p. 27.

symptom of conflict, widely defined—either between the individual and authority, or between public and private interests, or between one public authority and another. Progress, as represented by scientific agriculture, industry and urbanisation, inevitably gives rise to conflict, which in the eighteenth and nineteenth centuries was made more severe because society was unprepared for the revolutions which were overtaking it. Statutory provision for public inquiries followed rather than anticipated the points of conflict."[6]

The Housing, Town Planning, etc., Act of 1909 was the first Town Planning statute. It contained a section providing for Public Inquiries in Part II, but applied the Public Health Act 1875, which in effect laid down the lines of inquiry into housing and planning matters until superseded by the Local Government Act 1932 and the post-war legislation on housing and Town and Country Planning.

In the first half of the century, local inquiries were deemed to be purely administrative and consequently the appellant was unable to see the report of an inquiry, no reasons were offered for the decision, nor was any extrinsic evidence disclosed which had been taken into account by the decision-maker.[7] This position altered entirely once the requirement was enacted that reports of inquiries be published and the decisions of ministers be supported by reasons, following the Franks Committee's Report on Administrative Tribunals and Inquiries in 1957.[8]

Whilst the right of the appellant to be heard by a person appointed by the Secretary of State provided in the 1909 Act was reaffirmed in the Town and Country Planning Act 1947, the delays involved in appeals have always been regarded as unacceptable. By 1958 the Ministry of Housing and Local Government had taken the view that appeal procedures were likely to be brought into discredit by delays.[9] A major shift began at this stage away from the public hearing of the inquiry in favour of the written representations procedure: "sustained attempts have been made to introduce greater efficiency and speed into the appeal machinery".[10]

3. The present purpose of the inquiry system

The inquiries system occupies an important position nestled between administrative decision-making and the courts. Wade describes it as "the standard device for giving a fair hearing to objectors before the final decision is made on some question of government policy affecting citizens' rights or interests", ensuring that administrative power is fairly and reasonably exercised.[11] As a quasi-judicial arm of Government, it creates high expectations of natural justice and fairness, yet at the same time attracts accusations of bias towards the interests of the bureaucracy from which it emanates. There are around 300 statutory provisions under which a public local inquiry may be held,[12] but planning inquiries predominate, although their decline in the last two or three decades has been quite rapid.[13] Nevertheless, the particular concern of this paper is the function of the inquiry within the land use planning system and the right of an individual to choose it as a method by which planning decisions should be reached.

The planning system aims to ensure that all relevant interests are taken into account and weighed when making a planning policy or development control decision. The inquiry process is instrumental in this decision-making scheme. In the language of McAuslan's ideology,[14] to varying degrees it facilitates

[6] Wraith and Lamb, *Public Inquiries as an Instrument of Government* (1971), p. 17.
[7] See, for example, *Local Government Board v. Arlidge* [1915] A.C. 120, HL.
[8] CMD 218; Tribunals and Inquiries Act 1958.
[9] Circular 9/58.
[10] *JUSTICE—All Souls Review*, p. 271.
[11] H. W. R. Wade, *Administrative Law* (7th ed.).
[12] Sir Frank Layfield Q.C., "A Retrospect: Planning Inquiries" [1993] J.P.L. Occasional Papers No. 21, p. 89.
[13] *JUSTICE—All Souls Review*, p. 262; Wraith and Lamb, *Public Inquiries as an Instrument of Government* (1971), p. 56.
[14] P. McAuslan, *The Ideologies of Planning Law* (Oxford: Pergamon, 1980).

participation in decision-making, assists the protection of private property rights and advances the public interest in having a transparent, reasoned mechanism for decision-making. The public have their say at an inquiry, the landowner/developer can challenge and test the decisions of the local planning authority orally and by cross examination, and the Secretary of State is able to oversee development control and to reassert central government policy.

4. The statutory and common law basis of the right to be heard

Statute

The statutory basis for the "right to be heard" in the principal areas of land use control is set out in the Appendix to this paper.

In short there is no statutory right to an inquiry but currently the practice is to hold one if requested. The inquiry carries with it the important right to cross examine which is the subject of a separate paper by Lionel Read Q.C.

At Common Law

The courts have also found a rule of the right to be heard in the Common Law. In *Cooper v. Wandsworth Board of Works*[15] Byles J. said:

> "... a long course of decisions beginning with Dr Bentley's case and ending with some very recent cases established that, although there are no positive words in a statute, requiring that the party shall be heard yet the justice of the common law will supply the omission of the legislature."

5. Context and perspective

It is important to keep the role of the planning inquiry in perspective.

Around 480,000 planning applications are received by local planning authorities each year. On average between 85 per cent and 90 per cent of these are successful.

The number of planning appeals made has fallen from a peak of 30,000 in 1990 to less than 15,000 in 1996. The numbers are expected by the Department of the Environment to fall still further as local plan coverage nears completion, as the amount of debate at plan inquiries is thought likely to reduce controversy over planning applications which will in turn reduce the number of appeals made. Of those appeals only between 8 per cent and 10 per cent will be dealt with by inquiry, which means that in total only around 0.3 per cent of planning applications result in an inquiry. This is still well over 1,000 inquiries each year each requiring the attention of an Inspector and significant commitments of time and money by all interested parties.

By contrast appeals determined by hearings have risen from 5 per cent in 1989 to 12 per cent in 1995 and those determined by written representations now constitute some 80 per cent having been only a handful in 1960.[16]

All this work is in addition to the on-going process of local plan adoption and amendment which currently also uses the public local inquiry as a means of balancing interests. There are expected to be over 90 Local Plans publicly examined in 1997.

Further, the Secretary of State may require applications to be referred to him for decisions. The level of call-in currently stands at around 130 each year.

[15] (1863) 14CB (NS) 180.
[16] Grant, *Urban Planning Law* (1982) p. 554.

We must also bear in mind that the occasional notorious long inquiry must be seen in perspective as well. In each of the past five years between 89 per cent and 94 per cent of inquiry appeals were dealt with by inquiries lasting no more than a week and in many cases only one day. However although those are numerically few the major infrastructure projects frequently have a wide significance and potential impact of which the Heathrow T5 Inquiry is a current notorious example.

There are some 4500 enforcement appeals each year. Of the two thousand or so appeals decided some 31 per cent were dealt with following an inquiry.

6. Milestones in the debate

The benefits and dis-benefits of the Inquiry System are no new topics for debate. In my thirty years of life as a practitioner I have heard the frequent siren calls of the administrator, the developer, the politician and community groups each of whom have raised banners emblazoned "cost, efficiency and delay" in different ways, at different times and for different purposes with demands for a change. Over the years there have been many reports, circulars and speeches of which I select as milestones the following:

The Franks Report

In 1958 the Franks Report said this:

> "The intention of the legislature in providing for an inquiry or hearing in certain circumstances appears to have been twofold: to ensure that the interests of the citizen closely affected should be protected by the grant to them of a statutory right to be heard in support of their objections and to ensure that thereby the Minister should be better informed about the facts of the case"; and
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> "Administration must not only be efficient in the sense that the objectives of policy are securely attained without delay but must also satisfy the general body of citizens that it is proceeding with reasonable regard to the public interest which it promotes and the private interest which it disturbs.[17]

The Skeffington Report[18]

This was the high water mark of an assessment of the use and purpose of public participation in the planning system and as the claims for community involvement are reconsidered (as they surely will) the report bears re-reading.

The GLDP Committee of Inquiry 1973[19]

The Inquiry into the Greater London Development Plan (1970–2) involved some 237 working days and 28,000 objections of which 20,000 concerned transport. The problems associated with this Inquiry led to the Town & Country Planning Amendment Act 1974 which replaced the Inquiry as part of the process of adopting structure plans by Examinations in Public (EIPs). Henceforward an objector was not entitled as of right to maintain an objection at an oral hearing. The initiative at an EIP lies with the

[17] Cmd. 218 "Report of the Committee on Administrative Tribunals and Inquiries".
[18] *People and Planning (Report of the Committee on Public Participation in Planning* (HMSO 1969).
[19] *The Report of the Committee of Inquiry into the Greater London Development Plan* (HMSO 1973).

Panel rather than with the participants who attend by invitation and who are not allowed to cross examine one another.

The Dobry Report[20]

In 1979 the Interim Dobry Report (commissioned primarily because of the delays in dealing with appeals)[21] said this:

> "6.2.6 At present the Secretary of State may decide an appeal on the basis of written representations if the parties agree but he must hold an Inquiry if the parties prefer. In fact the written representations method is extensively used and has proved a satisfactory method for handling many cases for both the parties and the Secretary of State.
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> 6.2.7 It has been suggested to me that written representations should in fact become the normal means of dealing with an appeal with Public Inquiries being the exception. I cannot accept this as it seems to me that the right to an inquiry is an important one and cannot entirely be dispensed with in this way. Secondly an appellant in person may get much assistance from the Inspector in points relevant to his case. Indeed the power to hold an inquiry even where written procedure has been adopted by agreement is a most valuable one.
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> 6.2.8 But at the same time there are cases, as for example where the issues are clear cut and well understood, where an inquiry will add little if anything to written statements. It will however take time to arrange and will involve all concerned in delay and expense. I suggest therefore that the Secretary of State should have a discretion as to the holding of a public inquiry. In the vast majority of cases where the parties request it (and in some others too) there should be no question that an inquiry will be held but the existence of a discretion will give the Secretary of State a useful freedom to determine an appeal without Inquiry in cases where an Inquiry appears unlikely to add any useful material to what is already available."

The 1986 Environment Committee Report[22]

In 1986 the Fifth Report from the Environment Committee of the House of Commons looked again at the delay, costs and procedures in the planning system. It recommended detailed rights of third parties to demand a call in, recommended limited funding for third party costs at major public inquiries and as to the inquiry system generally it said this:

> "At present the Department has the ultimate say in how an appeal should be conducted and Appellants have only a limited right to ask for a public local inquiry. For the sake of speeding up the system some witnesses went so far as to suggest that the Inspectorate should be given a new power so that they could specify which appeals procedure should be used. We cannot agree with such a suggestion. While we think that the Department should retain the right to insist that an appeal should be dealt with by public inquiry if the case is very controversial we think that there should be even more freedom than at present for parties to appeal to opt for the procedure of their choice. This need not be a problem for the Department if it has a balanced range of appeals procedures on offer to satisfy the varied requirements of appellants."

[20] George Dobry Q.C.—*Review of the Development Control System—Interim Report* (January 1974).
[21] See Circular 142/73 Streamlining the Planning Machine.
[22] Session 1985–6 "Planning Appeals Call In and Major Public Inquiries" HMSO.

The Government Response[23]

In 1986 the Government responded to the Fifth Report. It confirmed its agreement with the Committee that it would not be appropriate to give third parties a right to appeal to the Secretary of State against the grant of planning permission because "unlike developers, third parties have not had any rights removed by the modern system of development control". It was equally inappropriate they said "to give any rights to third parties to require the Secretary of State to call in certain categories of application" leading to an inquiry. Nor in the case of the major project inquiry did they see any reason to fund third party costs which in their view would add to delay and do nothing to approve efficiency.

Lifting the Burden

In 1985 the Government of the day issued a White Paper "Lifting the Burden".[24] In Chapter 3 under the heading "Planning and Enterprise" a series of de-regulation proposals aimed at simplifying the planning system and reducing the burden of control was set out as a background. The paper contained a re-statement of principles first stated in a Circular issued in 1949, re-stated in a further Circular in 1953 and amplified in Department of the Environment Circular 22/80 "Development Control: Policy and Practice" reaffirming a presumption in favour of development unless the development would cause demonstrable harm to interests of acknowledged importance. In paragraph 3.4 it was stated "it is an established principle of planning law that the developer is entitled to his permission unless there are sound, relevant and clear-cut reasons for a refusal: that is to say permission is not to be refused for arbitrary or irrelevant reasons. Nor is the developer required to prove the case for the development he proposes to carry out; if the planning authority consider it necessary to refuse permission, the onus is on them to demonstrate clearly why the development cannot be permitted and the reason must be precise, specific and relevant to the application".

The Justice Report on Administrative Law[25]

In 1988, the Report of the Committee of Justice—All Souls Review of Administrative Law in the United Kingdom said this:

> "10.51 Despite the criticisms that can be made of the Public Local Inquiry in the field of land use, the refinements and improvements over the past three decades seem to have made it an effective instrument of administration which has also, by and large, been regarded by the participants as fair and satisfactory even if its formality is inhibiting to non-professionals" and
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> "10.86 As we pointed out at the beginning of this Chapter the Public Inquiry as a piece of constitutional and administrative machinery has been more developed in Britain than elsewhere in the world. Where there have been serious criticisms they have been largely in relation to those inquiries that may properly be considered exceptional. An inquiry has great merit both in informing the decision maker (usually the Government) and meeting the public's desire to participate. It would be disastrous if the benefits of this unique process were to be lost because of irritation and resentment, however well justified, that the expense, complexity and length of inquiries into exceptional projects. There is no simple answer to the problems which these exceptional inquiries pose."

[23] *The Government's Response*, Cmd. 43 HMSO.
[24] Cmd. 9571 HMSO—July 1985.
[25] *Administrative Justice—Some necessary reforms* (Oxford Clarendon Press, 1988).

Section 54A of the Town and Country Planning Act 1990

Section 54A of the Town and Country Planning Act 1990 provides that development control decisions are required to be made in accordance with the provisions in the development plan, unless material considerations indicate otherwise. In effect, this section introduced a presumption in favour of development proposals which are in accordance with the development plan. Equally, an applicant who proposes a development which is clearly in conflict with the development plan should not succeed unless he can clearly demonstrate why the plan should not prevail.[26]

One consequence of this is the stimulation of greater intervention by private interests in the process of adopting structure and local plans, as awareness increases amongst landowners, large industrial enterprises and developers of the need to ensure that strategic policy recognises market needs.[27] Such intervention seeks to safeguard sites for future development, or to avoid devaluation of land by possible uses of neighbouring or nearby sites, outcomes traditionally determined by applications for planning consent.

The introduction of section 54A into the 1990 Act by section 26 of the Planning and Compensation Act 1991 at first caused some measure of uncertainty. Previously, the LPA was required under section 70 merely to "have regard" to the development plan when considering an application for planning permission. This meant that the development plan was merely one of a number of material considerations which should be considered by the LPA in reaching a decision. The new section clearly showed the intention of Parliament to give the development plan added weight in decision-making. This is why developers and landowners considered it to be imperative to be involved in the development plan process itself.

Circular 15/96

This circular offers guidance on the appeals system. It says this:

"Paragraph 2. ". . . the Secretary of State believes that still more can be achieved to speed up the process without impairing either the quality of decision or the parties' ability to present their case fully and fairly".

"Paragraph 5. "Hearings should be used rather than inquiries in all suitable cases. The choice of the hearings procedure will no longer require the agreement of both principal parties and will be determined by the Planning Inspectorate following consultation with them.

"Paragraph 15. "For any appeal under section 78 of the Town and Country Planning Act 1990 the appellant and the local planning authority have a statutory right to appear before and be heard by a person appointed by the Secretary of State."

"Where either of the principal parties exercises their right to be heard they will be asked to state which procedure they regard as suitable giving their reasons. The Planning Inspectorate acting on behalf of the Secretary of State will decide whether a hearing or inquiry is to be held taking into account the circumstances of each appeal including any preferences already expressed by the principal parties. Before choosing their preferred procedures it is important that the parties carefully consider the nature of the appeal and the time and resource implications of each procedural method."

[26] PPG 1, para. 40.

[27] See, for example, S. M. Farthing, "Landowner involvement in local plans: how patterns of involvement both reflect and conceal influence" (1995) 12 *Journal of Property Law* 41–61.

The 1997 DoE Consultation Papers[28]

In January 1997 the Department of the Environment Consultation Paper on Planning Appeals said this:

> "7 The Department considers that a proportion of appeals currently dealt with at inquiry could be handled just as adequately by hearing or written methods whilst some appeals now going to hearings could be determined as fairly by the written method. The relative "success rate" of appeals is similar at around 30% irrespective of method adopted. The Department proposes that in future the choice of method would be decided by the Secretary of State. As now parties would be asked for their preference but they would not in future always secure their choice. This change would require primary legislation."

In January 1997, the Department of the Environment Consultation Paper on Local Plans and UDPs,[29] in discussing a two deposit stage for local plans, said this about the Inquiry:

> "Nevertheless a range of ideas was put forward for changes to the current Public Inquiry process. These included:
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> *Pre-hearings*—the replacement of the right for objections to be heard with a right for objections to be considered. All outstanding objections would initially be considered on the basis of written representations. It would be for the Inspector to decide which issues might need further discussion at the Inquiry.
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> *EIP Type Hearing*—this would replace the current local plan inquiry either as a whole or for the consideration of plan-wide policies and issues with an inquiry process for site specific proposals. Appearances at the hearing would be by invitation only though there might be a right to challenge an Inspector's Decision to consider an objection only on the basis of written representations and not invite attendance at a hearing."

The 1997 House of Lords Debate[30]

In June 1997, in a debate in the House of Lords Baroness Hayman said this:

> "My Lords the Noble Earl Lord Kinnoull has given us the opportunity for a short but trenchant debate on the Planning Inquiries System in this country. He asks the straightforward question:
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> "Whether the rules of Public Planning Inquiries should be reviewed to balance the democratic rights of objectors against the inordinate length of certain inquiries."
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> I am tempted to give a trenchant answer in reply simply "yes" to the Noble Earl but such a brief reply would be more than even the Noble Lord Lord Lucas was looking for from me. It would not give me the opportunity to respond to some of the important issues that have been raised this evening. I shall try to deal with the main themes and write to the Noble Lords who have taken part in the debate on specific issues if I am unable to cover them.
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> It is very much an issue of getting the balance right as the Noble Earl points out in his question. The Noble Lord, Lord Chorley, pointed out that "we were not Napoleonic yet". I endorse the view that we should not be Napoleonic in the future either. There are serious democratic issues about the rights of objectors to be heard properly and fairly and we should not be willing to sacrific those rights and the Government believe that more must be done. They want to ensure that delivery of sound planning decisions much more swiftly than hitherto. At the same time we must protect the ability of interested parties to put their views fully and fairly. We are determined

[28] DoE "Planning Appeals"—January 1997 Consultation Paper.
[29] DoE "Speeding Up Delivery of Local Plans and UDPs"—January 1997 Consultation Paper.
[30] Hansard 19 June 1997—Planning Inquiries.

to make the planning system as efficient and effective as possible. We recognise the problems—delay, uncertainty, blight and costs. Therefore we are looking at the operation of the planning system at every level, at how the national policy is formulated, at regional and local level as well."

1997 R.T.P.I. National Conference Edinburgh

At the 1997 Conference the Minister for London and Construction, Nick Raynsford, said:

"We have decided not to pursue changes which would reduce the rights of people to be involved in the preparation of development plans. The consultation paper floated the idea of limiting the right to be heard at a public local inquiry. Not surprisingly in my view, this did not receive universal support. As most objections are now dealt with by written representations this change would not achieve a substantial saving."

And speaking of ways to simplify and speed up the planning process for major infrastructure projects of national importance he said:

"We must improve upon current practice while continuing to allow individuals to express their views and to have them taken fully into account. We need to see whether there are ways of processing such projects more quickly. We are looking at a number of alternatives including the possibility of further refinements to inquiry practice and procedure."

The Nolan Report

Every now and again a non specialist body can illuminate a specialist subject. The Third Report of the Committee on Public Life in its section on the planning system said this:

"2.7.6 A shift in public opinion has also contributed to a decline in confidence in the system. Since its inception in 1947, the planning system has carried a general presumption *in favour* of development. This is natural enough. The owner of a property has a right to exploit it which should be restricted only where necessary in the public interest. In 1947, moreover, the need for post-war reconstruction was clear. Development enjoyed broad public support.

2.7.7 The climate of popular opinion has now changed. "Development" is now a term which has a perjorative ring, and the planning system is seen by many people as a way of preventing major changes to cherished townscapes and landscapes. If the system does not achieve this (and it is a role which it was not originally designed to perform), then the result can be public disillusionment."[31]

The Nolan Report highlighted a series of quotations contained in the representations and material it had received:

"The problem is that there is a fundamental misunderstanding by many people about the planning arrangements. People are not given planning permission as a privilege. They are refused planning permission with regret. It should be seen that way round."[32]

"The Government recognises and upholds the rights of property and the privileges of ownership. Owners of land and property properly expect to use and develop their land as they judge best and as the consequences for the environment or the community would be

[31] Third Report of the Committee on Standards in Public Life, *Standards in Public Life: Standards of Conduct in Local Government in England, Scotland and Wales* (CN 370251) page 71, para. 277.

[32] Rt. Hon. John Gummer M.P. Secretary of State for the Environment, *Standards in Public Life*, p. 17.

unacceptable." To which one might add: "The Government therefore sees control of the right to develop land as a significant power which should be exercised in such a way that individual property owners are allowed to enhance and improve their use of land and buildings.[33] This is subject to the proviso that, unless material considerations indicate otherwise, an application for planning permission or an appeal should be determined according to relevant development plan policies."[34]

"In Victorian Times politicians wanted to be known by the development they promoted . . . and by the self-sufficiency of their local community. Modern politicians want to be known by the development they prevent and the amount of other people's money they pull in by way of grant, and that is a fundamental difference in approach."[35]

7. Summary

In summary we can see that over the last 50 years:

the inquiry started life as a means of collecting information for the administrative decision maker in the context of a forum which enabled those affected by the decision to feel that justice had been done to their point of view and in defence of their interest. That forum had the characteristics of openness, fairness and impartiality;

a series of reports have echoed each other down the years investigating the issues of cost, delay and efficiency in the land use planning system;

the number of inquiries into planning appeals (once the principal method of procedure) has substantially diminished;

the right to appear as an objector to a policy contained in a draft Structure Plan does not exist; but there is a right to appear at an inquiry to promote an objection to a Local Plan. That right has been under threat but the threat has recently been removed;

the importance of the standing of the land interest has been consistently restated but the presumption in favour of development has been replaced by a presumption in favour of development in accordance with the plan; it is debateable whether after 50 years of the modern system of planning control the primacy of the land interest is now in decline;

for the first time it is now suggested that a right to a hearing in the context of a planning appeal may be forfeit. Henceforth the Secretary of State, it is proposed, will choose the method of appeal for the appellant. The right to be heard is to be reduced to a right to be read.

8. The success or failure of the inquiries system

The inquiries system cannot be evaluated satisfactorily from a single viewpoint. Its benefits and disadvantages to a number of distinct interest groups must be assessed. Broadly speaking, these can be divided into the interests of landowners, the public interest represented by the government of the day and third parties. These three classifications equate roughly with McAuslan's three goals of planning law, namely the protection of property, advancing the public interest and facilitating participation.

[33] PPG 1 (Revised), para. 36.
[34] PPG 1 (Revised), para. 40; TCPA 1990, s.54A.
[35] Dr Ian Roxburgh, Director of Planning and Environment, George Wimpey Plc, *Standards in Public Life*, p. 17.

From the point of view of the private land interest

Appeals

Since 1947 a landowner's right to deal with his property as he wishes has been severely circumscribed. In return he received the grant of a right of appeal to the Secretary of State against a refusal of permission. This has been described as a "fundamental right".[36] Similarly a right to a hearing can be regarded as no less a right.

In fact an appellant chooses (very carefully) the method by which his appeal is to be heard. Conscious of delay and cost and the possibility of telling interventions by third parties he will only choose an inquiry if he believes his cause is well served by doing so. The facts bear this out. That is why written representations is the chosen procedure in so many cases. The time devoted to the inquiry is not a principal factor of delay and the facts bear this out as well.

The appellant is very well aware that hearings as distinct from inquiries are fundamentally unsuited to cases which generate substantial third party representations or where complicated matters of policy are involved or where it is desirable to cross examine evidence.

For as long as the importance of the property interest remains, and PPG 1 has on its face and very recently reasserted its importance, then it should remain the choice of the landowner to opt for an inquiry (let alone a hearing) on appeal if he so desires. The owner's rights should not be further restricted by removing this right from him. And this is so in connection with all the various rights to hearing in addition to the appeal against the refusal of the grant of planning permission to which I referred in section 4 and in the Appendix.

From the landowner's point of view once he chooses an appeal by way of inquiry he desires the rapid appointment of an inspector and an equally swift inquiry date. He should expect the Inquiry Procedure Rules to be enforced and he should have no objection to an effective sanction for breach.[37] He desires a speedy Inspector's Report and decision and in the case of a call-in he desires a much swifter decision than he seems to get at the current time. But he does not wish to sacrifice fairness or quality of decision making for speed.

If on the other hand the importance of the private land interest in the context of planning is on the decline then other questions arise. In the future, once the right to a hearing has been abandoned, could it be argued that by reason of cost and delay and in the interests of administrative efficiency the right of appeal should go as well?

Local Plans

With the advent of Section 54A of the Town and Country Planning Act 1990 and the increased significance of development plans in development and decision-making, landowners and developers are increasingly anxious to safeguard their interests by influencing the local plan at the public local inquiry held before it is adopted. Here the inquiry allows them to have their say on detailed, site specific policies, affording them the opportunity to lay firm foundations in the plan for later development. The submission of more objections, both oral and written, obviously results in more material for the Inspector to consider, lengthening both the inquiry and the subsequent reporting period.[38] Increased public participation in the plan-making process "has undoubtedly strung out, delayed and impeded the process materially."[39]

[36] Grant, *Urban Planning Law* (1982).
[37] See for example "Inquiry Procedure—Another Dose of Reform" [1996] J.P.L. 99.
[38] Planning Inspectorate Executive Agency, *Agency Report and Accounts for the year ended 31st March 1993.*
[39] Sir Desmond Heap, "A Retrospect: High Peaks and Watersheds in the Continuing Saga of Land Planning Control" (1993) J.P.L. Occasional Papers No. 21, p. 104 at 108.

With this increased emphasis on the plan, local planning authorities not surprisingly have a vested interest in ensuring that the plan covers as much policy ground as they desire. In turn, landowners and community interests will challenge those policies where they perceive them to be against their interests. Section 54A therefore changes the culture of local plan inquiries, inducing interested parties to concentrate their resources on the local plan preparation process rather than focusing on the development control system as previously.

In this context it would be quite wrong to curtail the right to be heard at a Local Plan Inquiry (particularly since the Consultation Paper reveals that the Inquiry itself is not the prime source of delay) and I am pleased to see that Mr Raynsford has now ruled this out.

From the point of view of the public interest

> "It is important in a true democracy for people to sense that they can influence affairs and participate in government in matters affecting their environment and their property. It induces better administration and decision-making because the decisions are subject to external testing. The length of time of inquiries is a price that may have to be paid for that."[40]
>
> Participation by the public in planning matters gives legitimacy and acceptability to the eventual policy or decision. It may also reduce public bewilderment in the face of change and minimise alienation between planners, developers and the public.[41] PPG 1 (Revised) states that one of the objectives of the plan-led system is to secure public involvement in shaping local planning policies:
>
> "it is important that anyone with an interest in the future pattern of development in the plan area should participate in its preparation and help to influence its emerging policies. Anyone has the right to object to plan proposals prior to their adoption or approval."[42]
>
> The proper extent of participation by the public is difficult to determine. Too little, and the decision loses its legitimacy; too much, and the system grinds to a halt, choked by delays and soaring costs. Participation can be on any of a number of levels, from complete non-participation, through tokenist measures verging on mere placation, to degrees of actual citizen control.[43] Whilst some may aspire to the top rung of the ladder of participation, it must be accepted that the financial and time costs of securing that much participation are probably unacceptable. However, this does not mean that Government should not strive to augment the opportunities for realistic, meaningful participation wherever possible. Participation can only be meaningful when there is, and is seen to be, a real possibility for community action to affect a decision.
>
> The simple question to be asked here is whether the inquiries system delivers an optimal participatory mechanism. From the position of government, local and central, is there too great an amount of participation in the inquiries system, or too little?
>
> The last Conservative government pursued a policy of privatisation and deregulation which had significant consequences for the political structure of the nation; at the same time there took place an erosion of the power of local government, indicating a centralisation of authority.[44] Planning control on the other hand has been increasingly decentralised.[45] The new Labour government is implicitly more in favour of increased participation through its proposed

[40] *Hansard*, H.L., 19 June 1997 col. 1404, 1414.
[41] Skeffington Report, paras 8–9.
[42] PPG 1 (Revised), para. 41.
[43] S. R. Arnstein, "A Ladder of Citizen Participation" (1969) 35 *Journal of the American Institute of Planners* p. 216–224.
[44] D. Oliver, *Government in the United Kingdom: the search for accountability, effectiveness and citizenship* (1991), Chap. 5.
[45] Witness the emphasis now placed on the Development Plan as the primary policy instrument in deciding planning applications.

programme of decentralised government, giving more power to Scotland, Wales and the regions to govern themselves. The intention is to decentralise planning policy to the regional level. Regional chambers are viewed as a better means of co-ordinating land use, transport and other planning issues at the regional level.[46] This indicates increasing recognition in today's politics of the benefits to be achieved from allowing geographical and social groups to have a greater say in how their lives are run.

Discontent with the participatory mechanics of planning remains. Public concern over the environmental effects of major developments has led to a string of high-profile protests, the latest being the tunnelling which aims to undermine, figuratively if not literally, the expansion of Manchester airport. It is arguable that such demonstrations indicate widespread dissatisfaction with formal mechanisms for taking third party interests into account when making planning decisions.

A further argument for increasing participation in planning generally is the United Kingdom's commitment to the principles of sustainable development, which requires increased public involvement in decision-making.[47]

Government, like landowners and developers, require certainty in decision-making. They have repeatedly investigated ways in which the system can be made faster and more efficient without reducing fairness or taking away from applicants and objectors the right to "a fair crack of the whip".[48] Like third parties, government is often constrained severely by budgetary limits and is therefore keen to reduce as far as possible the time and money expended on the inquiry system without affecting the fairness of the procedure.

The clear picture that emerges from the recent consultation papers on planning appeals and local plans is that the DoE is keen to restrict participatory rights in order to save time and money at the Planning Inspectorate.

Local authorities can commit a substantial proportion of their resources to planning inquiries when they object to proposals in neighbouring areas. The group of 10 local authorities opposing Heathrow Terminal 5 are reported to have spent £3.6 m to date, of which £1 m has been paid by Surrey County Council. Whilst this pales into (relative) insignificance besides BAA's £30 m budget for the Inquiry, it is still a huge drain on the other responsibilities which these authorities bear.[49]

But in the planning balance the cost of the inquiry is a small price to pay for having the opportunity to present a case personally and to see the individual charged with responsibility of decision-making discharge those responsibilities openly, fairly and impartially.

From the point of view of the third party participant

The inquiry system aims to impose a flexible but sufficiently definite procedural framework upon decision-making to ensure a fair hearing for participation by objectors at inquiries is permitted, even encouraged, is the key to administrative procedural justice being done and being seen to be done.

Besides statutory parties entitled to full participation in the inquiry and other persons entitled to appear[50] under the Inquiries Procedure Rules, the established practice is that all persons with a genuine

[46] *Hansard*, H.L., 19 June 1997, col. 1416.
[47] *Our Common Future*, pp. 63–65.
[48] Lord Russell of Killowen in *Fairmount Investments v. Secretary of State for the Government*.
[49] *Hansard*, H.L., 19 June 1997, col. 1404.
[50] Town and Country Planning (Inquiries Procedure) Rules 1992 (S.I. 1993 No. 2038), r.11; Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) Rules 1992 (S.I. 1992 No. 2039), r.11.

interest in the application are allowed to appear and take part in the inquiry provided they have something relevant to say. The Planning Inspectorate guidance on good practice at inquiries states that "participation by interested persons or groups is encouraged. Inspectors will normally exercise their discretion in favour of hearing persons who wish to be heard, but cannot appear as of right, having regard to fairness, expedition, relevance, avoiding unnecessary repetition and the general need to control the proceedings."[51]

This is in line with PPG 1, which accepts that the protection of individual interests is an important aspect of the public interest as a whole:

> "The basic question is not whether owners and occupiers of neighbouring properties would experience financial or other loss from a particular development, but whether the proposal would unacceptably affect amenities and the existing use of land and buildings which ought to be protected in the public interest."[52]

Public participation at local plan inquiries is also consistent with PPG 1, as one of the objectives of the plan-led system is "securing public involvement in shaping local planning policies."[53]

By importing features of the judicial process into administrative decision-making, the inquiry system strengthens the position of a third party or objector. Disclosure of the opposition case is essential to allow proper objections to be formulated. Cross-examination gives objectors the opportunity dramatically to expose the weakness of the opposition's case. The publication of inspectors' reports and the giving of reasons by the Secretary of State both expose the internal workings of the decision-making machine, possibly enabling objectors to mount further challenges on the grounds of bias, unreasonableness or other procedural irregularities.

On the other hand there is, of course, a danger of making the inquiry too judicial and too intimidatory. This has sometimes led to the suggestion that an inquisitorial rather than adversarial system would be a better model for the inquiry. But on balance with Inspectors now encouraged to be more interventionist I do not sense any great wish to change the format of the inquiry. The procedures leading up to the inquiry are another matter.

Lacking the resources of developers and public bodies, individual objectors and interest groups may be deterred by the cost of attending inquiries, particularly lengthy ones. Over the last couple of years, for example, the National Trust has spent over £100,000 on each of two inquiries and in excess of five figures on several others.[54]

Although it has been rejected in the past, there will be repeated demands for community and other groups to be funded to appear at inquiries accepting perhaps the condition that their actions are better co-ordinated.[55]

If the primacy of the private land interest is truly in decline a demand for third party rights of participation to be extended to allow a third party to appeal against a grant of planning permission will be repeated. Some Australian States allow for this.[56] But to introduce such a right would allow objectors to development to clog up the planning system with appeals leading to inquiries. Those aggrieved by a grant of planning permission may complain to the local ombudsman if they have ground to allege

[51] Circular 15/96, Annex 5, "Good Practice at Planning Inquiries", para. 34.
[52] PPG 1 (Revised) para. 64. See also para. 58.
[53] PPG 1 (Revised) para. 7.
[54] *Hansard*, H.L., 19 June 1997, col. 1406.
[55] *Hansard*, H.L., 19 June 1997, col. 1411.
[56] *JUSTICE—All Souls Review*, p. 299, para. 10.62.

maladministration. Judicial review can also be sought, subject to the objector showing he has sufficient interest. It should be remembered that the revocation of planning permission entails compensation. On balance, the objector already has remedies enough.

9. Conclusions

An appeal to the Secretary of State against the adverse decision of a planning authority is regarded by all concerned as a fundamental right. The Town and Country Planning Association once expressed the right as:

> "the ultimate safeguard against unfair or unreasonable decisions by local authorities, a mechanism whereby the public can obtain an independent and impartial hearing beyond the realms of local politics and influences."[57]

The inquiry is an essential part of that safeguarding process and has proved a robust model for fact finding and natural justice.

The most frequent criticism of the inquiry system (and the alleged root of the majority of all other evils within it) is delay but participants do not wish to sacrifice fairness or quality of decisions simply for the sake of speed.

In fact the inquiry is now chosen in only a very small number of cases and the evidence is, that in the majority of cases it is not the inquiry itself which is the cause of delay.

Whatever alterations to the procedures leading up to and following the inquiry that may be proposed (and there remains much scope for improvement here), my principal contention is that to remove the choice of the appellate procedure from the appellant is seriously flawed, removes a fundamental right, which in turn prejudices third parties, and is on the slippery slope to undermining confidence in the system itself. The unrelenting march to administrative efficiency means that in this respect, the administrators may be poised to take one step too far.

Appendix 1

Sources of the Statutory right to be heard

Appeal against refusal of planning permission

Section 79(2) of the Town and Country Planning Act 1990 (the Act of 1990) provides that before determining an appeal under section 78 the Secretary of State shall, if either the Appellant or the Local Planning Authority so wish, give each of them an opportunity of appearing before and being heard by a person appointed by the Secretary of State for that purpose.

In practice the procedure currently adopted in relation to the duty to "hear" is that of the public local inquiry when so requested I know of no request being rejected.

Appeal against refusal of Listed Building Consent

Section 22(2) of the Planning (Listed Buildings and Conservation Areas) Act 1990 uses language the same as section 79(2) of the Act of 1990. In practice the hearing is normally undertaken through the medium of a public local inquiry.

Call-in of Application for Planning Permission

Section 77(5) of the Act of 1990 states that before determining an application on call-in the Secretary of State shall, if either the applicant or the Local Planning Authority wish, give each of them an

[57] Quoted in the 5th Report of the Environment Committee 1985–6.

opportunity of appearing before and being heard by, a person appointed by the Secretary of State for the purpose. In practice a public local inquiry is held.

Objections to Local Plan

Section 42(1) of the Act of 1990 provides that where any objections are made in accordance with the regulations to proposals for a local plan or any alteration or replacement thereof the local planning authority shall cause a local inquiry or other hearing to be held for the purpose of considering the objections.

In practice a hearing will be employed as an alternative to an inquiry only "in exceptional circumstances to consider objections concerning matters of national security."[58]

The call-in of Local Plans

Section 45(3)(b) of the Act of 1990 provides that the Secretary of State shall give any objector to a proposal an opportunity of appearing before and being heard by a person appointed by him for the purpose (unless such a hearing has already been given to this person by a local planning authority). In practice this involves an inquiry rather than a hearing.

Appeal against Enforcement Notices

Section 175(3) of the Act of 1990 employs the same language as section 79(2). In practice an inquiry is held if requested and certainly where facts are in dispute.

Revocation Orders

Section 94(3)(4) of the Act of 1990 provides that a person upon whom a revocation notice is served has an opportunity of appearing before, and being heard by, a person appointed by the Secretary of State for the purpose. In practice this involves an inquiry.

[58] PPG 12, Annex A, para. 40.