Does the Planning System Need a "Tea Party"?

Dr Wendy Le-Las

Emily Shirley*

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Introduction

"Power to the People" is the public image of the Localism Act 2011. Is it true? Close analysis of trends in local government and their effects on the planning system over the last 20 years reveal some disturbing trends. It is not "exactly what it says on the tin" as Andrew Stunnell, the Under Secretary of State, insisted during the Committee stage of the Localism Bill.

The ideologies of Planning Law

In the interest of clarifying a confusing picture, it is proposed to utilise Patrick McAuslan's categories for differentiating between the dominant ideologies in environmental legislation:[1] prior to 1850 was the era of the "private interest"; the advent and eventual supremacy of the modern administrative state was 1940–1980s, the ideology of the "public interest". The rise in environmental consciousness and the granting of rights for the public to participate in planning decisions is termed "public participation". The existence of procedures has not meant a commensurate shift in power: McAuslan points out that close reading of legislation reveals that the bias in favour of the developer remains.[2] This view was corroborated in detail in 1997.[3] However, with skilful advocacy it was still possible to stop a damaging proposal.

This paper sets out to show how it has become virtually impossible to make any impact on such a scheme now; why local authorities moved from repositories of the "public interest" to partnership with the "private interest"; that "localism" is a smokescreen to distract from the "public interest" becoming indistinguishable from the "private interest"; and the real function of public participation is to legitimate land use decisions.

The realpolitik of Local Government Law 1980–2011

Although the role of the state had been reduced since the 1950s, the advent of the Thatcherite Government made "Business" and money-making respectable. Industry was not associated with "dark satanic mills" and "being in trade" was no longer to be regarded as infra-dig. Private enterprise was shiny, new, and apparently garnished with "green" trimmings. This was the era when efficiency, as defined by the private sector, was introduced into local government: running a borough or a biscuit factory was considered the same. The cult of management had arrived.

* Dr Wendy Le-Las MRTPI, Honorary Research Fellow, Durrell Institute for Conservation and Ecology, University of Kent and Emily E. Shirley LLB, Member of Inner Temple.

[1] Patrick McAuslan, *The Ideologies of Planning Law* (Pergamon, 1980).

[2] Patrick McAuslan, *The Ideologies of Planning Law* (Pergamon, 1980) p.11.

[3] W. G. Le-Las, *Understanding the Development Jigsaw: a User's Guide to Procedures* (Buccaneer Books, 1997) pp. 208–210. This was written for third parties and details the procedural problems they face.

The new Labour administration in 1997 wanted to tighten up the delivery of services by local government through the introduction of targets.[4] In the 1999 Local Government Act the concept of "Best Value" impacted adversely on third parties participating in the planning system.[5] In particular, it exacerbated an existing problem, namely officers threatening Members that should an application be refused, the developer would go to appeal and costs would be awarded against the Local Planning Authority ("LPA"). New councillors are taught the basics of planning law and policy, but lack the confidence to challenge their officers if misleading information is given. This threat is particularly effective in times when money is scarce. Given that the only way that an LPA can finance infrastructure is by permitting development, the piper calls the tune.

The first aim of the 2000 Local Government Act ("LGA") was to streamline the internal operation of local government. The committee system was abolished for everything except development control. The overwhelming majority of LPAs voted for cabinet government rather than an elected mayor.[6] This sat well with the traditional party affiliations.[7] The 2000 LGA concentrated the power in the hands of the cabinet consisting of the Leader of the Council and "portfolio holders" who represent the various departments of the LPA. They liaise directly with the department. Initially Chief Executives panicked that their influence would be much diminished[8] but, in practice, they joined the "politically relevant" sector[9] of the LPA i.e. the Cabinet, where the power lies.

The days of professionally qualified chief officers has gone: administrators run merged departments, sometimes spread over neighbouring boroughs and many staff are part time. A conscientious councillor may never identify the source of a problem. Development schemes are formulated between portfolio holders and managers. These are rubberstamped by the Planning committee before going out to public consultation but return straight to the Cabinet for decision: there is no vehicle for public questioning of this decision. A Cabinet's activities are overseen by the Overview and Scrutiny Committee: it can call the Cabinet to account, but, crucially, there are no powers to make them change course.[10] The 2000 LGA did create a National Standards Board and require LPAs to have standards committees and codes of conduct. Officers were to be included but it never happened despite their growing power. Meanwhile "Backbench" councillors are left to liaise with their wards and raise any pressing issues with the portfolio holders. Those considered "troublesome" are simply left out of any working parties, e.g. the development plan sub-committee.[11] Thus the power of the LPA has been concentrated into the hands of the Cabinet.[12]

Secondly, the LGA 2000 s.2 gave LPAs the power of "wellbeing" in terms of the economic, social and environmental wellbeing of the area. This has enabled Chief Executives to take up positions on local bodies which would be improper for Members. For example the Chief Executive of Canterbury City Council created a lobbying body called Canterbury 4 Business and sits on the boards of no less than five other committees and institutions within the district with an interest in planning. When this was queried[13] the reply from the legal department cited the power of wellbeing.[14] The independence essential for forming a dispassionate view on a planning application is now considered old fashioned. Cabinets and Partnerships have made refusal virtually impossible for any application of public importance. Should an LPA have the temerity to refuse an application, even complex cases are handled by written representations because of pressure on the Planning Inspectorate to speed up the system.

[4] *Municipal Journal* March 26, 1999. Also the 1998 White Paper, *Modern Local Government: In Touch with the People*.
[5] W .G. Le-Las, "Planning & Best Value" (January 2000) *Local Council Review* Vol.51 No.6, pp.18, 19.
[6] *Municipal Journal*, May 28, 1999.
[7] *Municipal Journal*, August 25, 1999.
[8] See *Municipal Journal*, January 2000.
[9] D. Easton, *A Systems analysis of Political Life* (London: John Wiley & Sons, 1965) pp.385, 401.
[10] See, e.g. *www.canterbury.gov.uk* [Accessed December 14, 2011]. Constitution p.166.
[11] See, e.g. *www.canterbury.gov.uk* [Accessed December 14, 2011]. Constitution p.166.
[12] Otherwise known as the Executive.
[13] Letter from Dr W. G. Le-Las to Mark Ellender, Canterbury City Council dated February 14, 2011.
[14] Letter from Mark Ellender, Canterbury City Council in reply to Dr W. G. Le-Las dated February 18, 2011.

The LGA 2000 also empowered LPAs to set up Local Strategic Partnerships ("LSPs") to bring together all sections of the community to improve quality of life. LSPs were empowered to produce Community Strategies, the land use planning aspects of which were to form an integral part of the Local Development Framework set out in the 2004 Planning and Compulsory Purchase Act. In practice the local business sector wielded a dominant influence over the development plan: the terms "Sustainable" and "Community" are myths applied to the Strategy.

Furthermore LSPs became involved in creating Local Investment Plans ("LIPs"). These were designed to facilitate Community Strategies. The LIPs prioritised development aims for specific areas and were used to secure government funding for implementation. LIPS are not part of the LDF process or subject to Strategic Environmental Assessment.[15] Of more concern because of their greater size, are the new Local Enterprise Partnerships ("LEPs").[16] LPAs and businesses were invited to form their own economic development groupings to replace the Regional Development Agencies.[17] Indeed LEPs will now be administering infrastructure funding both from central government[18] and the European Union.[19]

The ability to acquire funding and sign contracts provides key parties on the LSP or LEP, usually those supporting business interests, with far more power and ability to influence what happens than non-executive Members of the LPA. There are manifest dangers in this:

- Certain individuals within partnerships cannot be held to account for a specific decision taken.
- Individual decisions or policies may not get proper scrutiny by a committee of elected Members.
- Elected Members become powerless to challenge a decision or policy because of its being tied up with government funding streams.

Thus calling an individual to account over the finances of some important land-use planning project has gone. The gravity of this situation has been compounded by changes to the development plan system in 2004.[20] Development Plan Documents ("DPDs") have Public Examinations which are inquisitorial rather than adversarial in form.[21] The agenda for a Public Examination is set by the Inspector on the basis of written responses and weeks spent in discussion with the LPA. The job of the Inspector is to decide whether the DPD is "sound", i.e. is it feasible? Clearly a scheme, within a development plan, which has money attached, has greater credibility with an Inspector than one without.

Attendance at hearings is by invitation only but this has not proved difficult for those who can demonstrate their contribution to a debate. More of a problem is challenging the agenda if the Inspector does not want to explore the matter; there is no way to force the issue. It could be argued that the soundness test for DPDs is the planning equivalent of *Wednesbury* unreasonableness: as long as the DPDs is rational it will get approved regardless of whether it is plausible or in the long term environmental interest.[22] The 2008 Planning Act introduced a fast track system for major infrastructure proposals which hitherto had been debated in large public inquiries. Here again the public examination system is to be used and public participation kept to a minimum.

[15] Letter to Mrs Emily Shirley from Roger Smithson, CLG dated March 16, 2011.
[16] "Local Growth: Realising Every Place's Potential" October 2010, CM 7961.
[17] Department of Business Innovation and Skills, June 29, 2011.
[18] Planning, *Journal of the Royal Town Planning Institute*, October 7, 2011.
[19] *Yorkshire Post*, December 8, 2011.
[20] The Planning and Compulsory Purchase Act 2004.
[21] These were brought in the wake of the 237 days of the Greater London Development Plan Inquiry in 1969–1971, the first and last Structure Plan inquiry. EIPs were used for Structure and Regional Plans because it was thought that they were far too remote for public participation. Local Plans had had inquiries into objections which gave the public a statutory right to be heard, although written objections were encouraged.
[22] In addition, there are LPAs which have opted for a detailed Core Strategy followed by Supplementary Planning Documents which have no public hearing. Should the Master Plan not conform to the Core Strategy, there is no safety net.

There has always been provision for a Minister to call-in a significant application for his own determination. All governments have sought to keep down the numbers much to the chagrin of those concerned with public participation.[23] However, the DCLG Direction of 2008[24] has succeeded in halving the already meagre numbers of applications being called-in, from circa 100 to only 50 out of half a million applications per year. Calls-ins are vitally important as a safeguard for local communities faced with the combination of a supine LPA and a powerful developer: the community is totally impotent even with the support of a government agency such as English Heritage or Natural England because they lack the funds to risk judicial review.

The first decade of this century has seen a radical departure from the traditional structure of local government. Gone are the days when a concerned member of the public could ask their Member to query some matter with a planning officer. Cabinet government, served by managers was decoupled from both the general public and the professionals. The business community, supposed source of economic growth/human happiness, has become a Cabinet's best buddy. The "Public Interest" went into partnership with the "Private Interest" against "Public Participation".

The divorce of local government from local democracy

Then came the seismic shift introduced by the 2011 Localism Act. An LPA has the power to do anything that an individual may do: the power to do it *anywhere in the United Kingdom*, or *elsewhere*; the power to do it for, or *otherwise than for the benefit of the authority, its area or persons resident or present in its area*.[25] Commercial activities may be undertaken via companies. It is possible that such a company could be involved in a land-use scheme at the far end of the United Kingdom or even abroad. Ratepayers will not have the protection of shareholders. The express intention of the Act is to prevent the battles with the courts over whether the activity of a given LPA is within its statutory remit or related to the interests of the local population.[26]

The Standards' Boards for England and Wales are to be abolished, as is the need for standards committees within LPAs.[27] Only toothless codes of conduct remain. There is the option of returning to governance by committee[28] but it is likely that power, once experienced, will prove too attractive to relinquish. That a future Secretary of State may rein in or indeed encourage local government in its adventures is small consolation.[29] Recourse to the ballot box is no match for the powers conferred by this Act

In McAuslan's terminology the "public interest" has been subsumed into the "private interest". What of "public participation"? Oh, yes, the children can spend their pocket money on neighbourhood plans[30] and their "prefects" can speak and vote on local issues,[31] whilst the grown-ups concentrate on exploiting their new freedoms. All this is a far cry from the late 1960s when the reform of local government was being contemplated by Rt Hon Lord Redcliffe Maud:

> "In a period of great change, when huge unrepresentative organisations seem to control the lives of individuals and restrict personal freedom, people might be tempted to give up as a bad job the effort to master these impersonal forces. If they yielded, the loss would be irreparable. In this situation, local self-government should be a crucial influence. It should represent the citizen and be the means whereby he brings his views to bear on those public problems that touch most nearly his personal

[23] HMSO, *Planning, Call-in and Major Public Inquiries: the Government's Response to the Fifth Report from the Environment Committee Session 1985–86*, Cm 43.
[24] DCLG, The Town and Country Planning (Consultation) (England) Direction 02/2009.
[25] Localism Act 2011 s.4.
[26] *Brent LBC v Risk Management Partners Ltd* [2009] EWCA Civ 490.
[27] Localism Act 2011 s.26 and Sch.4.
[28] Localism Act 2011 Sch.2 Ch.3.
[29] Localism Act 2011 s.5.
[30] Neighbourhood plans have to conform to development plans. Localism Act 2011Sch.9 Pt 2 38B(3).
[31] Localism Act 2011 s.27.

> and domestic life. If local self government withers the roots of democracy grow dry. If it is genuinely alive, it nourishes the reality of democratic freedom".[32]

In fact, the 2011 Act is designed to liberate local government from the shackles of both central government and local democracy. "Localism" it is not. Why is time and money still spent by all parties going through the rituals of public participation? Unpalatable though it may be, its real function is to legitimate decisions not transform them. Perhaps we need a Tea Party movement led by local communities and environmental NGOs? The slogan "No Taxation without Representation" could find new resonance in 2012.

[32] Command Paper 4039, *Local Government Reform—Summary* (1969).