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europe inside out

In light of the Government's move to a zonal system, **Sebastian Dembski** and **Phil O'Brien** review the experience of three European countries based on a recent report for the Scottish Land Commission

the myth of zoning – the European experience

The planning system is frequently made the culprit of all that goes wrong in English planning, in particular the housing crisis. The current comments/proposals by the government, recently brought to attention by Dominic Cummings' description of it as 'appalling', are just the latest in a series of ill-defined reforms.¹ None has succeeded in delivering more housing than under the previous system. The latest iteration aims to "rethink planning from first principles", as announced by Secretary of State for Housing, Communities & Local Government Robert Jenrick in June this year.² At the heart of the reform is a zonal planning system that provides direct building rights to proposed developments that comply with the zoning code, inspired by the US. The main argument is that such a system is faster *and* better.

The government proposals have been met with instant criticism in the world of planning. The RTPi's Chief Executive, Victoria Hills, responded that "dismantling [the current discretionary planning system] completely in favour of a zoning system will not result in faster permissions or better development" and called local planning zones a "blunt instrument".³ The TCPA's policy director, Hugh Ellis, presented the debate between a zonal system as a "straight trade off between certainty and democracy".⁴

While the Planning White Paper announced in March this year has not been published as of now, it is worthwhile reflecting on the zoning practices in Europe. The Universities of Glasgow and Liverpool recently carried out work for the Scottish Land Commission, studying housing land allocation, assembly and delivery in three European countries: Germany, the Netherlands and Switzerland. One of the problems around the debate in England is a fundamental misunderstanding of how zonal systems such as these elsewhere in Europe work – not only on paper, but also in practice.

Often a distinction is being made between 'conforming' planning systems in which development rights are assigned in binding land use plans in advance according to a long-term spatial strategy, and 'performing' planning systems, in which development rights are evaluated on their merits in line with non-binding policy. The former is often associated with zoning. The UK's discretionary planning system clearly belongs to the latter category of

¹ *The Telegraph*, 23 June 2020. Available at <https://www.telegraph.co.uk/politics/2020/06/22/cummings-pledges-overhaul-britains-appalling-planning-system/> [accessed 6 July 2020]. A critique of these proposed reforms by Olivier Sykes and John Sturzaker is available at <https://news.liverpool.ac.uk/2020/06/25/another-short-sighted-attack-on-planning> [accessed 9 July 2020]

² *Financial Times*, 10 June 2020. Available at <https://www.ft.com/content/284b2533-fcf1-4d1a-9af3-5b0c347ad0f6> [accessed 6 July 2020]

³ RTPi press release, 24 June 2020. Available at <https://www.rtpi.org.uk/press-releases/2020/june/local-planning-zones-are-blunt-instruments-says-rtpi-chief-executive> [accessed 6 July 2020]

⁴ H Ellis: 'In the zone?'. TCPA Blogs, 26 June 2020. Available <https://www.tcpa.org.uk/blog/blog-in-the-zone> [accessed 6 July 2020]

performing planning systems and has long been an exception in Europe.⁵ This dichotomy, however, is too simple and neglects the practice in many European countries, where land use plans are negotiated between stakeholders and can therefore be considered ‘neo-performative’.⁶

Conformative planning systems as imagined by planners familiar with discretionary planning systems probably never existed in their purest form. Germany intended to create such a system in the 1960s, but it remained partial. Detailed land use plans are nowadays almost exclusively drafted in response to proposed development. The same is true for the Netherlands, where a conformative system was practiced, but given that the municipalities were often also the landowners and the majority of housing was delivered by housing associations, conformance was rarely put to the test. Land use planning effectively occurred through land banking.⁷ While in Switzerland municipal zoning plans provide planning permission to landowners directly, the municipality also has had powers to designate sites requiring more detailed land use plans.

Municipalities in these countries make ample use of their planning powers to deliver housing that is affordable and good. The crux is when and under what conditions planning permission is given and on what grounds these can be contested. In all three countries, it is possible that a development is permissible if it conforms to the provisions of the land use plan, which will at the least regulate the use class and building heights. Binding land use plans often cover only a fraction of the built-up area and development projects are “permissible where, in terms of the type and scale of use for building, the coverage type and the plot area to be built on, the building proposal blends with the characteristic features of its immediate environment and the provision of local public infrastructure has been secured”.⁸ Conversely, however, it means that any larger project requires a land use plan. And it is here that the UK and neo-performative planning systems differ. Whereas a UK developer can lodge an appeal and is incentivised to do so in seeking a larger profit, no such opportunity exists in Germany, the Netherlands and Switzerland: the municipality is obliged to permit development that is in line with the existing land use plan or regulations, but it cannot be forced to amend its land use plan to enable a proposed development project. Discretion is thus a relative concept, depending on the specific stage in the planning process analysed.

Municipalities in these countries use these powers to negotiate the parameters of development, including developer contributions. The municipality and the developer will usually team up, and despite potentially diverging interests, work collaboratively. For larger or important sites, most municipalities will require a design competition incorporating municipal as well as developer aspirations. It is common practice that a developer provides local public infrastructure at the specification of the municipality or where the municipality insist on delivering this, pays for it, and returns it into municipal ownership afterwards.

⁵ U Janin Rivolin: ‘Conforming and performing planning systems in Europe: an unbearable cohabitation’. *Planning, Practice & Research*, 2008, Vol. 23 (2), 167–86

⁶ E Berisha, G Cotella, U Janin Rivolin and A Solly: ‘Spatial governance and planning systems and the public control of spatial development: a European typology’. *European Planning Studies*, 2020, DOI: 10.1080/09654313.2020.1726295

⁷ E Buitelaar: ‘Cracks in the myth: challenges to land policy in the Netherlands’. *Tijdschrift voor economische en sociale geografie*, 2010, Vol. 101 (3), 349-56

⁸ §34 Federal Building Code. Available at <https://germanlawarchive.iuscomp.org/?p=649#34> [accessed 6 July 2020]

This process is as challenging as a planning application in the UK and the process takes at least a year from start to finish, though usually much longer. Like any planning application in the UK, the detailed land use plans will be subject to public scrutiny, with stakeholders, including the general public, bringing forward their legitimate concerns. Legal appeals are usually launched by those affected by the plan, not developers. In Switzerland, land use plans often require approval under the rules of direct democracy, meaning public concerns need to be taken seriously.

Zoning plans such as these are not faster, certainly not for the large-scale schemes that the government has in mind for its zoning plans. They may provide more certainty than an outline planning permission but will equally include detailed provisions. It also enables local authorities to ensure minimum standards in terms of design and materials without risking an appeal from developers. There is also no possibility to use discretion once the plan is approved without amending the plan, meaning there is little flexibility.

As Hugh Ellis remarked, “there is nothing inherently good or bad about zonal planning”, as there is nothing inherently good or bad about discretionary planning.⁹ It appears not unlikely that government’s preference would be for a ‘light touch’ zonal system in which a limited range of land use categories are used to set out permitted uses and characteristics of development. But the outcomes of such a planning system would need to be evaluated in their totality, rather than simply in their effect on increasing completions. A recent Centre for Cities report draws lessons from the Japanese planning system, in which simple zoning rules are held to create planning certainty for developers such that they are able to respond to market signals more effectively.¹⁰ Yet if such a system were to be effective in Britain on these terms, would the sort of built environment that results accord with society’s preferences? Tokyo’s house price growth is impressively restrained as compared to London’s, but its sprawling suburbs and excessive commuting times are less admirable, while its disordered suburban development, ‘with an extreme form of haphazard, unplanned growth’ lies in stark contrast to the prized stability of the British suburb.¹¹ If a societal consensus is to be reached as to the need to build more houses, communities must be brought onside regarding the sort of new development they see in their area. Moreover, the costs of sprawl are no more to be underestimated, simply because they fall on society as a whole rather than on any individual, than are the costs of insufficient housing.

Is there a way to deliver new homes in sufficient numbers within developments that accord to societal preference? Britain has achieved this in the past in the earlier New Towns, while there are lessons to be drawn from our near neighbours, where the Netherlands in particular is able to meet housing need through developments that largely accord to British preference. A key reason underlying this is not that developers are necessarily more free to act as they please in the Netherlands, Germany and Switzerland, but that a great deal of developer risk has been removed from the development process by the reduction in land values that follows from the imposition of high standards of planning and urban design.

⁹ H Ellis: ‘In the zone?’. TCPA Blogs, 26 June 2020. Available <https://www.tcpa.org.uk/blog/blog-in-the-zone> [accessed 6 July 2020]

¹⁰ A. Breach: Planning for the future: how flexible zoning will end the housing crisis. Centre for Cities, 2020. Available at <https://www.centreforcities.org/wp-content/uploads/2020/06/Planning-for-the-future-how-flexible-zoning-will-end-the-housing-crisis-final-online.pdf> [accessed 8 July 2020]

¹¹ A. Sorensen: ‘Building suburbs in Japan: continuous unplanned change on the urban fringe’. *Town Planning Review*, 2001, Vol. 72 (3), 247-73.

Because housebuilders expect to be challenged by local authorities to build to a high standard, they are able to incorporate these anticipated demands into their land valuations, in the same way that British developers do with planning obligations. Where planning is more able to determine the form taken by development, public and private sectors can work more effectively, not less, and windfall land value gains can be redirected more efficiently towards high quality development.

Would a simpler zonal system lower land values, which are a major inhibition to development in the South East of England? Assuming that all areas are of more or less equal accessibility and quality, making more land available for development would introduce competition into the land market and thereby lower prices. But as every housebuilder knows from the experience of encountering local plans where only the least attractive sites are allocated, what land is developable at a profit is determined by the market as well as the plan. Consequently, sufficiently profitable sites around high pressure cities will maintain much of their value under a light touch zonal system, simply because the most important component determining their price – their location and its accessibility – would remain unaltered. It is public investments in infrastructure and services rather than public action to allocate more land for development that would be more effective in increasing the quantity of land available for development. In fact, when rules governing development are set early in the development process, at the point at which the land use plan is drawn up, land values rise accordingly, with two negative effects.¹² First, a major inhibition to development – the tendency of landowners not to sell for fear of losing out on further land value increase as development pressure continues to rise – is exacerbated. Second, the power of the local planning authority to use the award of planning permission as a trump card in negotiations over the provision of public goods, is lost.

A zonal system is likely to provide more legal certainty and has the potential to deliver high-quality schemes, but it is unlikely to be faster unless the government removes any public scrutiny from planning. The point is perhaps not whether a planning system is zonal or discretionary, but whether it avoids making what is a false choice between delivery of new homes by any means possible and matching society's needs and preferences.

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¹² D. Muñoz Gielen and T. Taşan-Kok: 'Flexibility in planning and the consequences for public value-capturing in the UK, Spain and the Netherlands'. *European Planning Studies*, 2010, Vol. 18 (7), 1097-131.