

# Symposium on Emerging Problems In the Law of Access Control

## *The Changing Nature of Abutters' Rights*

DANIEL R. MANDELKER, Associate Professor of Law, Indiana University

Four aspects of access control that have emerged as major areas in which legal doctrine and practice are undergoing change are (a) the concept of private rights of access to the public highway, (b) application of the power of judicial review to administrative decisions relating to access control, (c) the structure and content of legal instruments for voluntary transfer of access rights from private to public control, and (d) development of standards and techniques for valuation of access rights when they are publicly acquired.

The papers in this symposium review the current state of legal doctrine and administrative practice regarding these matters, and suggest various points of comparison in the varying methods currently used which appear to be essential to efforts aimed at achieving either improvement or uniformity.

• AMERICANS have been spoiled by luxuries. Not the least of these is the luxury of space. They have been so caught up with the exploitation of a vast continent that they have failed to place proper limits on the space demands of their growing urban agglomerations. Waste is one of the byproducts of this neglect.

Certainly one of the most striking examples of land wastage can be found in the trunk highway choked to the point of uselessness by improper development along its right-of-way and by improper control of points of access. Lewis Mumford has recently written of the fundamental change in land management which was wrought by the capitalist revolution. Medieval concepts of public or feudal management of relatively large areas as an integral unit have given way to the concept of private ownership of individual parcels subject to little in the way of outside restraint—at least in the preplanning days. Surely one consequence of the new emphasis is the so-called easement of access,<sup>1</sup> which guarantees to the abutting owner the relatively untrammelled right of access to the contiguous street, unless he is compensated. The right of access has been one of those factors that has impeded not only the adequate restriction of ribbon development but the proper separation of dependent and nondependent uses along highway rights-of-way.

A society that has not been able to permit itself the luxury of land wastage presents a different approach to the development rights of the highway abutter. England, as a moderately-sized country about as large as the state of Wisconsin, has been faced with an absolute shortage of space, and under this discipline it has had to develop more stringent controls on all forms of land use. An examination of English controls on

<sup>1</sup>The use of property terms to describe what is, after all, a judicially-created concept, is most revealing.

the highway abutter may have something to teach the American highway planner. English policy will be examined in the area of access controls, particularly in connection with filling stations, and in the area of advertisement controls, with passing reference to the English scheme for compensating those who are restricted in the use of their land.

## ACCESS AND TRAFFIC CONSIDERATIONS IN PLANNING CONTROL

### Physical Background

England presents a different physical pattern and with a fundamentally different legal structure. If English city street systems still follow a medieval pattern, the English highway still follows the path of the ancient Saxon. Not without reason did Chesterton write of the "rolling English drunkard" and his "rolling English road." Outside the towns and villages, the road system is intricate and finely woven, the road surfaces a marvel, and the traffic unbelievably dense. English automobile density per mile of road is many times higher than it is in America, even though the incidence of car ownership is lower. Also, the English have as yet done relatively little with the limited access expressway, although they have many miles of excellent divided highways, which they call dual carriageways.

Even imposing on this road pattern a dense settlement structure, with higher and lower order villages at distances from one to three miles from each other, and with regional urban centers liberally sprinkled in between, at least in southern England, the English traffic pattern is far from complete. The English have not been able to permit that strip and ribbon development which defaces the fringes of so many American towns and cities. A rigid separation of town and country has always been one of the earmarks of English planning. To this observation is added the comment that the English simply do not have the drive-in business so common in America. Even permission to build a motel was recently refused in a semi-rural section, on the grounds that this kind of use was not "appropriate" in such an area. Undoubtedly the first application for a drive-in movie will lead to a parliamentary debate and a ministerial regulation, if not to new legislation. Large-scale, space-eating development would be out of place in the intimate English landscape, and even the traditional American cloverleaf will probably be substantially modified before it is adopted. Also, the Englishman still depends primarily on his feet and on public transport to carry him where he wants to go, and he will find his shopping facilities nicely centralized on the nearest High Street, which probably will not be too far away.

### Legal Structure

Effective English planning actually dates from 1947, which marks the passage of the principal post-World War II planning act.<sup>2</sup> In the interwar period, planning was not particularly successful, and this comment holds for the well-advertised Restriction of Ribbon Development Act of 1935.<sup>3</sup> The reason lay in a deficient administrative structure, and in the interwar statutory requirement that full compensation had to be paid at market value for all planning restrictions. Although the English do not have a constitution, and therefore do not have a constitutional just compensation clause, they have always recognized through legislation that the landowner is entitled to compensation for loss of value flowing from planning restrictions. They have not yet worked out a completely successful system to take care of the compensation problem, and though compensation is now payable for planning restrictions it is substantially hedged about and, as a practical matter, is paid at less than market value.

<sup>2</sup>Town and Country Planning Act, 1947, 10 & 11 Geo. 6, c. 51.

<sup>3</sup>25 & 26 Geo. 5, c. 47.

The 1947 planning act has substituted a flexible and more effective administrative mechanism for the unwieldy interwar planning schemes. In the process, the planning provisions of the 1935 Restriction of Ribbon Development Act have been repealed, and roadside planning has been brought into the larger planning process. This is a distinct advantage. If one turns to the control of roadside development, the first comment to be made on administrative apparatus is that the English do not have the multi-pronged American techniques which combine official maps, subdivision ordinances, zoning ordinances, and master plans to achieve what is hoped to be a unified approach. Instead, land use intentions are shown in one comprehensive document, the development plan, which embodies all of the familiar American techniques, but which at the same time does not bind the local authority.<sup>4</sup>

Unlike a zoning ordinance, which can be said to confer a right to build in conformance with the designated land use, the development plan is only persuasive evidence of the appropriate use of a parcel of land. Indeed, the plan itself will only show land uses in the most general way, and there is nothing in England resembling the intricate details of a typical American zoning ordinance. However, any developer who wants to make anything but a very minor change in the use or development of his land must apply to the planning authority for what is called planning permission. It is at this point that the English planner has a decisive role in the protection of highway and roadside frontages. There is no real court review of the planning decision as such. The local planner may be reversed in an administrative appeal to the Ministry of Housing which supervises the administration of the planning acts. Otherwise the planning decision will stand whatever the outcome insofar as compensation is involved.

#### Highway Considerations in Planning Cases

The dominant idea behind the control of highway development is the restriction of ribbon development and new points of access.<sup>5</sup> This is true not only of such highway-dependent uses as filling stations but of residential uses as well. In appeal after appeal in residential cases, the effect of the new development on highway use was a prime consideration. Should access be allowed to the highway at this point? If so, should it be direct or should a service road be provided? Is this road the right place for new residential development? What is the accident record in the vicinity? Is the site on a bend or a curve? (It usually is.) What kind of traffic does the road carry? That the English have been successful in preventing new ribbon development along their highways should be obvious to any sensitive observer from behind the wheel.

What should be stressed is that highway considerations such as these enter routinely into the consideration of any planning application. This is partly a result of administrative practice rather than official command, although consultation with the highway department is required in the case of any application involving highway access.<sup>6</sup> In the case of development affecting trunk roads, the application to develop land must be referred to the Ministry of Transport, and he may give a direction that will bind the planning authority in its disposition of the case.<sup>7</sup> Perhaps the most significant aspect of this procedure is that the planning authority need not refer to the Ministry of Transport or to the highway department any planning application which it is prepared to

<sup>4</sup>For example, the English are just now developing explicit off-street parking requirements outside the general planning structure.

<sup>5</sup>Ministry of Town and Country Planning, Circular 88 (1950) Appendix, para. 1: "The presumption in dealing with ... land [along main traffic routes] will normally be against permitting development of the land" unless other than direct access can be provided.

<sup>6</sup>General Development Order, Stat. Instr., 1950, No. 728, Art. 9(1)(c), adopted under authority of 1947 Act, § 14(3)(c).

<sup>7</sup>General Development Order, Art. 7, adopted under authority of 1947 Act, § 14(3)(a). See also the new directive governing expressways, which severely restricts frontage development except for special services on sites to be provided. These restrictions are made applicable to connecting roads "at or near motorway [expressway] junctions." Ministry of Housing and Local Government, Circular 25 (1958), Appendix B.

refuse. Also, the English do not indulge in the assumption that new development cannot be prohibited along established roads,<sup>8</sup> an enforced attitude that often limits planners, at least in any state.

### Filling Station Controls

Attention to highway consequences is most marked in the area of filling station controls. Filling stations are probably the only major "drive-in" use on the English highway. Official policy took explicit notice of its problems and imposed regulations that are sharply restrictive. The Ministry of Housing and the Ministry of Transport have collaborated on an explicit filling station directive<sup>9</sup> which should be read by all American planners interested in highway development. When allowances are made for English scale, this document will be seen to be quite remarkable. For example, the filling station policy circular makes it clear that on "fast open stretches of road" all filling stations are open to objection, and should not be allowed "unless there is a very good reason," such as a genuine need.

Perhaps the guiding thought behind the filling station directive is that the number of stations must be limited quantitatively. This has always been a thorny subject in American land-use regulation, and certainly zoning limitations which take account of need pose difficult problems. Indeed, the English regulations make it clear that need should be considered only if the planning considerations are persuasive but not determinative.<sup>11</sup> In this case, the lack of need can be considered and might indicate a rejection.

However, the official language does not tell all the story. Again, the dominant idea behind filling station placement is that filling stations should not run riot, and should not be placed so as to interfere with the use of the highway for highway purposes. In one small county in East Anglia, which has an excellent planning department, the possible sites for filling stations had been carefully explored and had been mapped in advance. This county is yet to be overturned in a case in which it has refused a filling station application on the ground that it is out of harmony with the county's plan.<sup>12</sup>

The English regulations also make sense in terms of the placement of new stations. The directive encourages placement of stations on both sides of the road at the same point.<sup>13</sup> It also advises that new stations be placed away from intersections, not at intersections.<sup>14</sup> Nor is the stringency of these directives defeated in practice. The planning authorities have been more than strict in enforcing them, and they have been upheld by the planning ministry. In one recent year, out of 427 appeals from refusals in filling station cases, only 53 were allowed, a loss ratio much higher than in other planning appeals.<sup>15</sup>

### ADVERTISEMENT CONTROL

Advertising control occupies a special place in English planning. It dates from the time, early in the 1900's, when some enterprising Americans erected a mammoth sign on the white cliffs of Dover, facing and visible from France. It advertised a breakfast cereal. In any event, the statute now explicitly authorizes advertisement controls, and provides that they may be exercised only in the interests of "public safety and

<sup>8</sup>Circular 88 (1950), Appendix, para. 3: The general principles which govern roadside development should not be departed from simply because the "land alongside a trunk or classified road is in multiple ownership."

<sup>9</sup>Ministry of Housing and Local Government Circular 25 (1958), Appendix A.

<sup>10</sup>Id., para. 2.

<sup>11</sup>Id., para. 9.

<sup>12</sup>The filling station circular was preceded by an intensive study of filling stations which resulted in the Waleran Report. Ministry of Transport, Petrol Stations: Report of the Technical Committee (1949). This County has used the Waleran Report in planning its filling station sites, although the Ministry circular is not as restrictive as some of the Waleran recommendations.

<sup>13</sup>Circular 25 (1958), Appendix A, para. 7.

<sup>14</sup>Ibid.

<sup>15</sup>Report of the Ministry of Housing and Local Government, 1959, Cmnd. 1027, at 194 (1960).

amenity."<sup>16</sup> This last word reflects a dominant strain in English planning. Although it has never really been defined, it clearly encompasses what would be called aesthetic control, and for this reason the English planner has broad powers in the regulation of advertising signs. The relationship to safety on the highways is also explicit.

Ministry regulations have been issued.<sup>17</sup> They enact the procedures for regulation and also specify several classes of advertisements for which planning consent is not required. Advertisements on business premises are an exempted class under certain limitations, and their control has proved troublesome. But the point is, once again, that the planner relies not on specific ordinances governing location, size, and height. Instead, he works directly from a statutory delegation that permits the wide exercise of an informed judgment. A fairly large sign is proposed for the front of a country inn. Do they need it? If they do, how big should it be? Should it be lighted? If it isn't lighted, what should it say? And what kind of lettering should they use? And what colors? In one case, in which a sign was proposed for seafront development, the planning officer redesigned and relettered the sign and the planning authority then approved it.

Perhaps Americans would balk at stringent controls on this order. Again, a crowded island demands policing. And the word "police" is more than adequate, too. In one rural area, the planning officer reported that they had had no difficulty with signs for years, ever since they had tramped the area, noted all the offending signs, and secured the voluntary cooperation of their owners in tearing them down.<sup>18</sup> This is not to say that English advertising controls have been an unqualified success, for the townscape retains a cluttered look that some might find charming and others might find just messy. However, outside the town or village, there are few billboards along the highway. In rural areas, furthermore, which have high landscape value, the planner may designate areas of special control and if the ministry approves his choice he can be even tougher than he usually is.

### COMPENSATION AND PLANNING

Compensation for planning restrictions remains a difficult subject bristling with technicalities, described elsewhere.<sup>19</sup> They have devised a method paying compensation which at the same time permits the landowner to retain title and occupation of his property.<sup>20</sup> This refers to the compensation provisions of the 1954 planning act.<sup>21</sup>

The key to a claim for compensation under this act is a planning refusal which prevents one from carrying out "new development" on his own land.<sup>22</sup> Attempts at exceptions to this general rule are worked out on a common sense rule of thumb which bears a pragmatic resemblance to the American police power-eminent domain dichotomy. However, a refusal of permission to erect an advertising sign is simply not compensable. The reason appears to be the abiding English interest in aesthetics (amenity), and that an advertising sign is not a substantial structure requiring a heavy capital investment in its development. American laws are tending in the same direction, as some important recent cases attest.<sup>23</sup>

<sup>16</sup>1947 Act, § 31(1).

<sup>17</sup>Stat. Instr., 1960, No. 695.

<sup>18</sup>This area was in East Sussex, but the author was also privileged to observe the excellent program of enforcement that has been carried out in Worcestershire.

<sup>19</sup>Notes from the English: Compensation in Town and Country Planning, 49 Calif. L. Rev. 699 (1961).

<sup>20</sup>American statutes that provide for the acquisition of "development rights" in land are attempting a similar solution. As applied in rural areas, the idea is that a farmer in an area zoned restrictively for agriculture uses will keep title to his land and then sell the right to develop it for urban uses to the county or municipality.

<sup>21</sup>Town and Country Planning Act, 1954, 2 & 3 Eliz. 2, c. 72.

<sup>22</sup>Id. at §16.

<sup>23</sup>For example, Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957) (upholds amortization of nonconforming billboards).

When limitations on access to highways are considered, the picture is more complicated. Planning conditions relating to "the location or design of any means of access" are not compensable.<sup>24</sup> (American subdivision ordinances have largely accomplished the same result.) Ordinarily, a planning refusal that has the effect of prohibiting access will prohibit the building of a new structure, so that compensation for the denial of access is seldom independently considered. However, an independent denial of access, without more, would be compensable under the provisions of the 1954 status.<sup>25</sup>

However, although the denial of access is compensable under the 1954 Act, the payment of compensation is considerably hedged about. A claim must have been made under the 1947 law, and because development possibilities could not always be estimated at that time, a claim might not have been filed. Even more important, the compensation payable will not begin to reflect the loss of value flowing from the refusal to permit development. The reason is that compensation is pegged back to 1947 values and does not reflect the substantial inflation in land value that has occurred since. In spite of these seeming deficiencies, however, the English may have worked an intermediate solution to the compensation problem which Americans might well adapt. Instead of forcing a mutually exclusive choice in which the restriction is either wholly compensable (eminent domain) or wholly free from compensation (police power) the English system recognizes a need for partial compensation, no little part of which is the landowner's right to remain in possession of his property and to continue uninterrupted the existing use of his land.

#### CONCLUSION

There is not an absolute shortage of space in this country, but there is a relative shortage of the right kind of space in the right places. As the increasing outward expansion of cities forces consideration of location and distance factors in relation to transportation and travel, America will probably move toward the English restrictions on roadside highway development. A case in point is the new state of Hawaii, which like England must handle a relatively dense population on a small island with limited building space, and which has recently adopted restrictive State legislation to deal with this problem.<sup>26</sup>

The American constitutional system is flexible enough to permit highway access and roadside development controls of an appropriate stringency. One may, indeed, seek a legislative solution on an intermediate plane which seeks to work out a better accommodation of the public and the private interest than the courts have achieved under an either-or police power approach. In this light it is encouraging to see a recent New York case upholding the constitutionality of billboard restrictions along the New York Thruway. As the opinion in the intermediate court pointed out, the highway created the opportunity for exploitation by billboard, which the state in turn has the right to regulate.<sup>27</sup> If Americans can recapture a sense of the public interest in the regulation of the highway abutter, they will have gone a long way toward a solution of the access problem.

<sup>24</sup>1954 Act, § 20(2)(e).

<sup>25</sup>The refusal of new "development" is compensable under the 1954 provisions. The definitions of the 1947 law are applicable to the 1954 Act. See § 69 (2). Development is defined by the 1947 Act to include "engineering operations," § 12(2), which are in turn defined to include "the formation or laying out of means of access to highways." § 119(1).

<sup>26</sup>Hawaii Acts, 1961, No. 187.

<sup>27</sup>New York State Thruway Authority v. Ashley Motor Court, Inc., 12 App. Div.2d 223, 210 N. Y. S. 2d 193, affd, 10 N. Y. 2d 151, 176 N. E.2d 566 (1961).