**Developing brownfield land: arguments for a more active local state**

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Abstract: This article summarises the approach taken by English policy-makers in the last 20 years towards brownfield development, which they consider desirable but largely to be delivered by the market, rather than the state. Recent policy developments are outlined, with a clear trend towards liberalisation of the planning system. The article contends that this misses an opportunity: brownfield development in England often relies on local authorities playing an active role, and there is compelling evidence from continental Europe, notably France and Germany, that powers for an active local state are important in realising its potential.

1. **Introduction**

Politicians, planners and citizens all retain, and frequently restate, an interest in promoting brownfield development (which, here, will be considered as “previously developed land”, in line with the National Planning Policy Framework). This fulfils a number of policy goals: development in existing urban areas, on previously developed sites, avoids “blight” from former industrial sites, or indeed decrepit or even derelict residential areas. It reduces the need to take new land to support development, preserving that for the needs of future generations and indeed for other uses, such as agriculture or recreation. By locating development within existing conurbations, it can also promote the sustainability of development, by reducing travel-to-work times, in the case of residential development, the benefits of “synergy” achieved through the co-location of different sorts of commercial use, and through supporting land for employment, support economic development.

This article develops three key claims. First, that while the UK government undoubtedly retains a strong interest in supporting brownfield development, the direction of its policies, which focus on liberalisation of the planning system, are unlikely to achieve that to the maximum, and instead a more active local state is needed. Secondly, a number of recent studies point to successes in achieving brownfield development when local authorities move beyond the role of “regulator”, through the planning system, towards a significantly more pro-active approach, but that equally additional tools from government would assist them in achieving that aim. Thirdly, we can look to continental Europe, specifically Germany and the Netherlands, for examples of such tools to facilitate an active local state.

The article is structured as follows. The next section provides details of the current policy context, while the third section offers some details of emerging government policies at the time of writing (2016). The fourth section summarises recent studies which have offered a critique of existing policy towards brownfield provision, and pointed towards the need for an active local role. The fifth section offers some examples of where local authorities have played such an active role in facilitating brownfield development, while also noting that there are plenty of examples of stalled development, and that often positive case studies rely on the use of public land. The sixth session summarises legal provisions in Germany, noting that such tools could be deployed to assist in the local state in assuming an active role in brownfield land assembly and development, and also points to the existence of such mechanisms in the Netherlands. The conclusion presents the punchline: that an active local state, not just a liberalised planning system, is needed to realise the potential of brownfield development sites.

1. **Current policy context: “brownfield first?” and fingers crossed!**

The English land use planning system, in place since the Town and Country Planning Act of 1947, has been the subject of gradual evolution, rather than revolution. In brief, local authorities prepare a “Local Plan”, which is to guide allocations of land in their areas, setting out both broad policies towards development, and also earmarking particular sites for specific purposes (such as residential development, or as protected green spaces). Above that level, there has always been some national planning policy, simplified by the Conservative-Liberal Democrat Coalition government of 2010-2015 with the launch in 2012 of the “National Planning Policy Framework” (NPPF), and a range of different policies, sometimes with statutory force, above the level of the individual local authority. Governments have also offered “guidance” to the planning process, in a range of guises, and again simplified under the Coalition government. Since 2011, there has been the possibility of plans below the level of the individual local authority, in the form of “Neighbourhood Plans”, though just as Local Plans need to confirm with national and, when it has existed, regional planning requirements, so Neighbourhood Plans need to conform with the existing Local Plan.

From 2000, in its Planning Policy Guidance note 3, the government adopted an explicit commitment to a “Brownfield First” policy, whereby “the presumption [for local authorities] will be that previously-developed sites (or buildings for re-use or conversion) should be developed before greenfield sites”.[[1]](#endnote-1) It also contained a target (initially announced in 1998) that 60% of additional housing should be provided on previously-developed land and in converted buildings. This continued in various incarnations of the guidance until the publication of the draft NPPF in 2011, when the government dispensed with the term “brownfield” and indeed “previously developed land”, points challenged at the time by the Select Committee report on the draft document.[[2]](#endnote-2) In response to criticism, the government, in the final version of the NPPF, reintroduced the term “brownfield”, encouraged its development “provided it is not of high environmental value”, and also suggested local planning authorities might wish to set a target for the proportion of development to be on brownfield land.[[3]](#endnote-3) More broadly, local authorities now have a clear obligation to identify sufficient land for development to meet “objectively assessed needs”, unless the costs of doing so would significantly outweigh the benefits, and if they fail to have in place an approved plan (which meets this test), a “presumption in favour of sustainable development” kicks in, for which applicants simply need conform to the policies set out in the NPPF.[[4]](#endnote-4) In practice, local planning authorities might wish to get a local plan in place precisely to steer development towards brownfield sites in need of regeneration, rather than less complicated, but potentially more lucrative, greenfield sites that would otherwise be promoted for development.

In terms of funding for development, there is no general expectation that developers of brownfield land would receive public funding, though there are occasional, often small, pots of money that might be used towards it (such as funding for land remediation, or for local authorities to introduce liberalised planning regimes); these were supplemented by some government schemes to support builders’ finance and infrastructure.[[5]](#endnote-5) There is also a clear steer in the NPPF that locally-imposed requirements for affordable housing, and potentially other non-site specific infrastructure, charged through the “Section 106 process”, should be scaled back if development would otherwise be “unviable”.[[6]](#endnote-6)

As such, then, policy context throughout the 2000s to date has been to favour the development of brownfield land through planning policy, but without necessarily providing significant state funding or policy tools to ensure that it can happen.

1. **The changing policy context: deregulation as solution**

From 2010 onwards, and with growing pace (notably following the change of government from a Conservative-Liberal Democrat coalition to a Conservative majority administration), there has been an increased push to liberalise the planning process in relation to brownfield sites.

In June 2014, the government announced a target of getting “Local Development Orders” in place to cover 90% of brownfield land suitable for development.[[7]](#endnote-7) Local Development Orders effectively grant planning permission for development, thus establishing the principle that a site is suitable for development of that form, and reduce uncertainty for applicants, although they might still need to apply for detailed consent. It also proposed punitive sanctions for local authorities which failed to comply, “designating” them and reducing their ability to shape development in their areas, although at the time of writing (August 2016) no response to the consultation has been published. The government has also significantly extended the scope of “permitted development rights”, such that conversion of office buildings (and certain other, less significant types of building) could be converted to residential use without the need for planning permission, and just with the approval of certain technical details, in a temporary change made permanent in 2016.[[8]](#endnote-8)

In the Housing and Planning Act (2016), the government introduced a number of further, liberalising measures. The act introduces a new concept of “Permission in Principle” in clause 150 of the Act for housing-led development. Under this, certain land may gain “permission in principle” for development, akin to a Local Development Order, by virtue of being included in a qualifying planning document (such as a new local plan, or a “brownfield register”), and indeed such permission may be granted by the local planning authority or, in some circumstances, the Secretary of State. In order to receive full permission, a “Technical Details Consent” will also be needed, but the government hopes that, by establishing the principle of use, risk to developers and up-front costs will be reduced – a benefit particularly to be felt by smaller builders, who will also be able to apply for a “permission in principle” directly.[[9]](#endnote-9) Moreover, the Secretary of State can, under clause 151 of the act, require the keeping of certain register of land. The government has been clear that a “brownfield register” is what it has in mind; currently, 73 councils are piloting this register of brownfield sites available for housing locally.[[10]](#endnote-10) Taken together, the Town and Country Planning Association argued that these changes “amount to the introduction of a new form of local planning but without public debate or consensus that this is the best approach to delivering the homes and communities that are needed in England”.[[11]](#endnote-11) However, it would be fair to state that while the Housing and Planning Act provides the broad legal framework, the scope of these changes will depend significantly upon the content of regulations, and indeed the approach of the government to planning documents in the future (for instance, whether these will be approved if they explicitly withhold permission in principle from many or all sites).

The Housing and Planning Act also introduced into legislation a new type of sub-market housing, “starter homes”, which are aimed at first-time buyers, under the age of 40, with a price set at a 20% discount upon the market level. This discount is secured for five years, after which time it will be retained by the purchaser. Local authorities would have a duty to provide this type of housing on appropriate sites, effectively overriding existing local plans. Starter homes are also included within the definition of affordable housing under proposed amendments to the NPPF, and would be exempt from the Community Infrastructure Levy (CIL).[[12]](#endnote-12) The government has also set aside £1.2 billion as part of a “Starter Homes: unlocking the land fund”, to assist with the development of starter homes on brownfield sites.[[13]](#endnote-13) The upshot if this change is that, in most areas, those seeking to develop brownfield sites will be able to provide starter homes, rather than other, more costly (to the developer) forms of affordable housing, and may also receive additional government funding to do so.

Alongside this, the government is introducing a new “delivery test” on local authorities – not only should they allocate sufficient land for housing in their local plans, but they will also need to act “where there is a significant shortfall between the homes provided for in Local Plans and the number being built”, for instance by allocating additional sites for development.[[14]](#endnote-14) The relevant consultation notes that developers also have a role in ensuring sites are built out in a timely fashion, but does not offer any specifics on how this might be required.

1. **Notes of scepticism: is a more active local state needed?**

The foregoing discussion of government policy might be summarised thus: brownfield development will make an important contribution to meeting housing need. To that end, sufficient land needs to be allocated in local plans (and if it is not delivered, more land should be allocated); the burden of planning regulation should be reduced, with principles for the use of land becoming clearer earlier (ideally at the plan-making stage), and then with only technical detail to be approved later. The costs associated with development should also be reduced, with some central government funding available to assist with the development of “starter homes” on these sites. So, the government’s analysis goes: when more land is made available, costs of development are reduced, and greater certainty is provided to developers, the market will then deliver.

Unfortunately, the view might be taken that this is something of an act of faith, especially in an era of far greater uncertainty caused by the UK’s vote to leave the European Union. A number of studies have suggested that a more active state role is needed, both in the assembly of land and then in its development, in order for the potential of brownfield sites to be realised.

To give just three examples:

* A study by Shelter and KPMG contended that the current English land use planning system is “largely reactive, rather than proactive”, and that there should be a system of “New Homes Zones”. These would take the form of a public private partnership which would be responsible for assembling the land, capturing a share of the uplift in value for infrastructure, finding an appropriate “promoter” to lead the development, and then “parcel” serviced plots for development within a defined timeframe.[[15]](#endnote-15)
* The Lyons Review noted that “there are limits on the scope for local authorities to play an active ‘place shaping’ role and to actively promote the creation of new homes”.[[16]](#endnote-16) It proposed that local authorities should gain new powers over land assembly and delivery in identified “Housing Growth Areas, with the possibility of “New Homes Corporations” as local vehicles to assemble land and deliver housing. There should also be reform to rules around compulsory purchase to facilitate smoother land assembly.[[17]](#endnote-17)
* The London Housing Commission had as a key recommendation that the “London Land Commission should be given permanent status and resources to identify all brownfield land opportunities in London, public and private”.[[18]](#endnote-18) Particular support should be offered to public landowners to bring forward their land for development, and some sites should be offered to small and medium sized builders.

All three of these reports also suggested that there should be some ability for local authorities to levy a charge, based upon the value of council tax, where a development was expected, should have proceeded but did not do so.

Of course, such a “hands on” role for the state is by no means alien to the UK – the principles identified in these studies are rather similar to those upon which New Towns Development Corporations operated, and developed 32 new towns, for 2.5 million people, in the post-war era, although they were more driven by central government than the proposals in these reports had perhaps intended.[[19]](#endnote-19) It was also striking that, in a recent comment piece, the former Downing Street housing policy advisor, Alex Morton, praised moves towards “direct commissioning [of housing], so that councils could control the land market themselves and, without taking on the balance sheet risk directly, allocate land to developers in return for agreement to build at a set rate”, but acknowledged these had not advanced as fast as he would have wished. Morton argues that “the key to fixing these issues [of insufficient delivery and inelastic housing supply] is to ensure that councils control the local land market, remove the risk from those building homes (sharing it between landowners, developers and councils, not taking it onto Government)”. [[20]](#endnote-20) Although the rest of his piece has a different tone, it is striking that the punchline, in favour of a more active local state, appears to bear a striking similarity to the other studies cited.

There have already been tentative steps in this direction: for instance, the government is, at the time of writing (2016), considering reforms to compulsory purchase rules and specifically the assessment of compensation (so that the market value in the absence of the scheme leading to compulsory purchase is what compensation is based upon).[[21]](#endnote-21)

1. **Brownfield development in England – the active local state**

Already, it is not hard to find evidence of brownfield land development where the state, particularly the local state, has played a proactive role in bringing the sites forward for development. This section will briefly mention three illustrative cases where this is the case, but also comment on some the constraints they highlight.

In Birmingham, the City Council’s housing arm developed a partnership with the developer Keepmoat to regenerate housing in the Newtown area of the city, and also provide public spaces. This required the use of compulsory purchase orders where necessary, as well as the provision of infrastructure including a public square and the redevelopment of three schools.[[22]](#endnote-22) The City Council also published a “housing prospectus” in 2015, listing larger development opportunities for the public and private sector.[[23]](#endnote-23)

In Oxford, the City Council has established a joint venture with Nuffield College (a major landowner in the city), to bring forward the development of the Oxpens site in the city centre. This combined land purchased from a government agency (London and Continental Railways) with land already in City Council ownership. The new joint venture will seek a private sector partner following a competitive process, and will then deliver a mixed-use, joint venture, in line with the local authority’s “Area Action Plan” (a planning document). Profits would be shared between all parties (Council, Nuffield College and private sector partner).[[24]](#endnote-24) The advantages of such a scheme are several: it consolidates the ownership of several sites to maximise development potential; it shares risk (and in particular reduces the risk to which the local authority is exposed), but crucially it also gives the local authority far greater control over the nature, and timing, of development that would have been achieved simply by selling its own brownfield land, with the central government agency doing the same for its own landholding.

On a far larger scale, the Olympic Park in London is also an important example of a strong local state in action, to facilitate brownfield regeneration on an impressive scale. Initially land required for the Olympics was acquired by the London Development Agency (London’s Regional Development Agency), and Transport for London, but responsibility passed to the Olympic Delivery Authority in 2006. This oversaw the successful and timely construction of the sporting venues, within budget, as well as the conversion of athletes’ accommodation to residential use thereafter.[[25]](#endnote-25)

There are numerous other examples: Barking Riverside, the Argent development at King’s Cross, and East Manchester, amongst many others. However, it is striking that in all the cases mentioned, although some compulsory purchase of private land might be needed, public land was an essential component, giving public authorities a stake in the scheme, but also in control. McAllister *et al* found that there were some 1,411 “stalled” development schemes in England in June 2012, totalling some 75,534 units.[[26]](#endnote-26) Although the single biggest reason for this “stalling” was found to relate to conditions in the housing market and the reaction of landowners, the business model of land owners and house builders, ownership conflicts an problems of land title.[[27]](#endnote-27) These are precisely the sort of issues which can be addressed by an “active local state” – and indeed are so addressed in much of continental Europe.

1. **Continental Europe – where the state picks up a shovel, or steels itself for a fight**

Beyond the United Kingdom, there are significant examples where the local authorities are empowered to play a far more active role in realising development, upon both brownfield and greenfield sites. In their discussion of continental European planning systems, Monk *et al* noted that local powers of “land assembly and land readjustment (including compulsory purchase) are powerful tools to enable larger development”, and indeed that these were prevalent in much of continental Europe.[[28]](#endnote-28)

There are significant lessons that can be learned from Germany in this regard:

First, it is actually quite common, through the planning process, for local authorities to become directly involved in land readjustment, resolving issues of ownership in brownfield development, potentially reallocating land to resolve an *impasse*, to mutual benefit, and then sharing out the proceeds at the end (under paragraph 45-84 of the Federal Building Law).[[29]](#endnote-29) The legal thresholds for this process are set lower than those for compulsory purchase.

Secondly, there is not only the possibility (under paragraph 11 of the Federal Building Law) to reach an agreement, akin to an English “Section 106” agreement, to meet certain costs or provide certain infrastructure, but there is also a possibility, under paragraph 12, to provide a particular timescale for the construction of development, without which the permission will lapse.

Thirdly, there is a possibility, under paragraphs 165-171, for the local authority to introduce “Urban Development Measures” (*Städtebauliche Entwicklungsmaßnahmen*) to a particular site. Under this system, the local authority acquires the site at existing use value, assembles the land, and then sells it after development (or creation of building plots). The proceeds are shared amongst the original owners, but it may retain the costs of the development and associated infrastructure (effectively capturing the uplift in land value). This is only permissible if proposals for the site cannot be realised in another way (for instance, through less coercive tools, and if the local authority has finance in place), and it can be resisted by landowners if they instead show they will bring development forward in accordance with the plan themselves. Although these measures are useful as a means of encouraging recalcitrant landowners to get sites developed, they have also been used quite extensively since their introduction in 1971: for instance, around 6,000 units in the Frankfurt district of Riedberg were delivered using this measure, and they have also been used in a number of former military and transportation sites in Munich.[[30]](#endnote-30)

Fourth, there is the possibility to issue a “requirement to build” (*Baugebot*), under paragraph 176, where there is a zonal plan in place, or in an area of a city centre already dense with buildings. This can only be done if building is financially viable for the owner, and in practice serves as a useful threat for local authorities in order to accelerate building, and to dampen speculation with plots of developable land.

Of course, Germany sees significant state involvement beyond land assembly and local pressure to build, particularly within the urban context: for instance, a significant role is played by housing companies partially or wholly owned by local authorities in housing development, and the state is a significant provider of development finance, either in the form of grants or loans, in order to support affordable housing construction, as well as being a significant funder of infrastructure.[[31]](#endnote-31)

In Holland, as in the United Kingdom, containment of urban sprawl, under a “compact city policy”, and thus the re-use of previously developed land, has been a key objective of government policy.[[32]](#endnote-32) Historically, local authorities were key drivers of development (notably as part of the VINEX programme of 90 urban extensions, but also on brownfield sites), acquiring land and providing appropriate infrastructure, parcelling it up, and then selling it on for development, although more recently this model has been undermined by developers directly purchasing land.[[33]](#endnote-33) The Netherlands also has experience of joint ventures between public and private sectors to deliver brownfield regeneration.[[34]](#endnote-34) The strong planning position of local authorities is of critical importance in this context – binding planning rules provide a strong incentive for private landowners to co-operate with the local authority – again putting the local state in a strong position to drive brownfield development.

1. **Conclusion**

Today’s English policy-makers are far from unique, both spatially and temporally, in their desire to see brownfield development realised. However, this article has attempted to demonstrate that the reliance upon the market to deliver such development is both rather unusual and unlikely to be as successful as they might wish.

Specifically, the current government’s prescription is to encourage sufficient land allocation for development by local authorities; and reduce as far as possible the costs of that land being developed, by offering planning certainty (through “permission in principle” being applied to the site, or at least a strong national policy steer that development will be accepted), and reducing regulatory and “planning” costs, such as contributions to affordable housing and infrastructure. However, this does not extend towards a strategy for local authority involvement in the land market, and then in realising development. Several recent studies and commentaries, from across the political spectrum, have argued that this reliance upon the market and lack of empowerment of local authorities poses a major obstacle to the country realising its potential for housing development. The article has pointed to a number of schemes in England where local authorities have indeed played an active role in development, but these have tended to involve a high proportion of public land, solving some of the complications that exist with privately owned sites.

The foregoing section showed that, compared with both Germany and the Netherlands, this reliance upon the market to drive land assembly and development of brownfield sites, without any “backstop” powers for local authorities, is striking – both those countries have long-standing provisions for such active local powers, and see them used to good effect.

It is not the purpose of this article to make predictions: it might be that the government’s recipe of increasing planning liberalisation coupled with ever greater requirements on local authorities to allocate land for development prove a great success and a step-change in the extent of brownfield development. But important recent studies, experience in the UK hitherto, and lessons in continental Europe should give policy-makers pause for thought, and specifically consider whether a stronger, more active role for the local state, in land assembly and in development, would lead to more extensive brownfield development. Given the economic uncertainty caused by “Brexit”, and its likely impact upon the development market, such consideration would indeed be timely.

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