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# The quest for certainty: Introducing zoning into a discretionary system in England and the European experience

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**Abstract**

The critique of planning and new proposals to reform the English planning system and "rethink planning from first principles" have led to the introduction of rules-based principles into what is regarded as the paradigm of a discretionary planning system, culminating in a recent White Paper, which it is claimed will create a faster and better planning system than the existing discretionary approach. But are these proposals based on an oversimplified understanding of the differences between discretionary and regulatory models, neglecting, for example, the negotiation between stakeholders and the flexibility which also exists in regulatory planning systems? Our contribution will review some of the recent changes of the English planning system and reflect on experiences with zoning in European countries to bust the myth that the planning reform claims to address: the possibility to combine faster decision making with better place making and less interference from local planning authorities.

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**Keywords:** Planning systems ▪ legal certainty ▪ flexibility ▪ England ▪ Europe

## Die Suche nach Sicherheit: Die Einführung von regelbasierten Instrumenten in ein diskretionäres Planungssystem in England und europäische Erfahrungen damit

**Zusammenfassung**

Die Kritik an der Raumplanung und jüngste Reformvorschläge für das englische Planungssystem, die darauf abzielen ‚die Planung von Grund auf neu zu überdenken', haben dazu geführt, dass regelbasierte Prinzipien in das Paradigma eines diskretionären Planungssystems eingeführt wurden. Dies gipfelte in einem kürzlich erschienenen *Planning White Paper*, das den Anspruch erhebt, ein besseres und faireres Planungssystem zu schaffen als das aktuelle diskretionäre System mit seinem großen Ermessensspielraum. Es stellt sich die Frage, ob die Vorschläge auf einem zu vereinfachten Verständnis der Unterschiede zwischen diskretionären und regelbasierten Planungssystem beruhen und beispielsweise Verhandlungen zwischen Akteuren und Flexibilität, die auch in Regelungsplanungssystemen besteht, nicht mitberücksichtigt werden. Der Beitrag enthält eine Übersicht zu einigen Neuerungen im englischen Planungssystem und es werden die Erfahrung aus anderen europäischen Ländern mit regelbasierten Planungssystemen reflektiert. Es gilt, die Behauptung zu widerlegen, dass es möglich ist, durch eine schnellere Entscheidungsfindung bessere Stadtentwicklung zu betreiben, aber mit weniger Einflussnahme der lokalen Planungsbehörden.

**Schlüsselwörter:** Planungssysteme ▪ Rechtssicherheit ▪ Flexibilität ▪ England ▪ Europa

## 1 Introduction

For decades, governments of different political persuasions have blamed and subsequently tinkered with the planning system. Planning has been widely regarded as a barrier to reaching the housing numbers necessary to meet demand and those houses that are built are often lacking in high-quality design (Ball 2011; Rydin 2013; Lord/Tewdwr-Jones 2014; Place Alliance 2020). One of the most cited reasons for the failure to deliver more housing is the high degree of uncertainty inherent to the planning system, which is interpreted as planning risk (Gallent/de Magalhaes/Freire Trigo et al. 2019). In contrast to most planning systems that are based on legally binding land use plans, England is the paradigm of a discretionary planning system where the land use plan is only indicative and each planning application is decided on its own merits, with the local development plan playing an important role in decision making but only alongside other 'material considerations'. The uncertainty over the general principle of development at the outset of the process, alongside other factors that influence the viability of development, contributes to the risks for a developer and is thought to slow down housing production (Cheshire 2018; Airey/Doughty 2020).

Various planning reforms have sought to address this issue by introducing rules-based principles, culminating in a Government White Paper entitled "Planning for the Future" that proposed introducing zoning in all but name (MHCLG 2020). The intention was to give greater clarity about the principle of development upfront to both developers and communities and thus remove some of the risks associated with decision making in the later stages of the planning process. Whilst proposals for wholesale reform of English planning along zonal lines are off the table for now due to strong resistance from the Government's own backbenchers, they are representative of a common thread of planning reforms since the 1980s. These reforms have focused on a perceived need to reduce risk for private developers via the use of zoning instruments and together warrant further investigation on the shift towards rules-based instruments in English planning.

This discussion touches upon long-running debates in the literature about certainty versus flexibility in different planning systems (Booth 1995; Tewdwr-Jones 1999; Steele/Ruming 2012). These are usually divided into regulatory or zoning systems where development must be in conformance with the plan, and discretionary systems in which the performance of the plan ranks higher than strict adherence to the plan (Faludi 1987; Janin Rivolin 2008). Whereas in regulatory planning systems there is a continuous tension between the desire for more flexibility whilst maintaining legal certainty, in discretionary systems there is a desire for more certainty whilst maintaining flexibility.

This paper suggests that recent reforms to the English planning system are based on a misunderstanding of the relationship between zoning and certainty. Zoning-style reforms for England have erroneously equated the use of zoning as a planning instrument with the provision of certainty to developers, wrongly citing Dutch and German planning in support of this proposition. Comparing the English proposals with the planning systems of three European countries (Germany, Switzerland and the Netherlands) shows that the planning practices of the latter are, in contradiction of the terminology typically applied, far more discretionary than those applied in England, strengthening the public sector in guiding development. Recent and proposed planning reforms in England tend to provide more certainty for developers but undermine the power of local planning authorities and citizens and do very little to improve the standards of place making.

The paper is organised as follows. First, we discuss the key debate on flexibility and certainty within different planning systems. Next, we introduce the English planning system, the proposed reforms in the White Paper and other rules-based planning instruments. We then review how the planning systems of three European countries (Germany, Switzerland and the Netherlands) address the need for certainty, before discussing the potential implications of the English reforms and potential lessons for England.

## 2 Certainty in rule-based and discretionary planning systems

The dichotomy or tension between certainty and flexibility in land use planning has long been discussed in planning research (Faludi 1987; Booth 1995; Moroni 2007; Steele/Ruming 2012). This dichotomy is often connected to the different types of planning systems: rule-based, regulatory, zoning or conformative planning systems are credited with a high degree of certainty, whereas discretionary or performative planning systems are credited with a high degree of flexibility (Janin Rivolin 2008; Muñoz Gielen/Taşan-Kok 2010; Steele/Ruming 2012). The respective terminologies are used somewhat interchangeably. The key difference in such typologies is whether development rights are granted at the moment that a plan is approved, as is the case in rules-based systems, or following the approval of a proposal, as is the case in discretionary systems (Faludi 1987: 185).

First and foremost, it needs to be clarified that this debate is primarily concerned with legal certainty, notwithstanding the rich literature on uncertainty or risk that planning and law need to address (e.g. Gunder 2008; Rauws/De Roo

**Table 1** Primary differences between rules-based and discretionary planning

| Characteristic | Rules-based planning | Discretionary planning |
|---|---|---|
| Specificity of the plan | Legally binding | Indicative |
| Basis for decision making | Land use plan | Land use plan and 'other material considerations' |
| Legal right to develop granted via | Land use plan | Discretion of local planning authority |
| Stimulus for urban change | Plan-led | Development-led |
| Authorisation to develop | Building permit | Planning permission |

Source: O'Brien (2021: 28)

2016; Moroni/Buitelaar/Sorel et al. 2020). Legal certainty consists of procedural and material certainty, with the former referring to the rights to engage in planning processes and the latter to the norms that prescribe what development is permitted within which environmental limits (Buitelaar/Sorel 2010; Van den Hoek/Spit/Hartmann 2020; Feiertag/Schoppengerd 2023). Flexibility has been frequently presented as the opposite to certainty, but in practice the relationship between the two is much more complex. In particular very rigid material planning rules may provide false certainty as these are more likely to be changed (Van den Hoek/Spit/Hartmann 2020). Popelier (2008) reminds us that the demand for more legal certainty may come along with more uncertainty as the legal system in itself is dynamic.

An account that draws from portrayals found in the literature (see in particular Faludi 1987; Muñoz Gielen/Taşan-Kok 2010) is as follows (see also Table 1). In discretionary systems the land use plan guides development proposals by use of binding written policies and indicative maps, with the concept for each individual development being propagated in the form of a proposal (in the UK planning lexicon this is termed a 'planning proposal' and is formally lodged with the relevant planning authority in the form of a 'planning application') that is judged on its merits and with reference to the plan. Because each planning application is judged on a case-by-case basis against a purely indicative map and written policies that may be open to interpretation, there is the potential for negotiations between developer and planning authority to shape the conditions that bind each individual development. By contrast, in rules-based systems both written policies and maps are legally binding on both the planning authority and the developer, such that all rules determining what may or may not be developed on which site are determined upon the publication of the land use plan. There is, in theory, no room for case-by-case judgement of proposals on their own merits because development rights are specified in, and are conferred by, the plan or the law. It can be surmised that developers' intentions are the primary driver underlying the nature of urban development in discretionary systems, which are therefore development-led; whereas planners' intentions are the primary driver underlying the nature of urban development in rules-based systems, which are therefore perceived as plan-led.

The dichotomy between planning systems in relation to development outlined above, while useful as a starting point for comparative planning analysis, is somewhat simplistic, with many nominally plan-led systems across Europe displaying varying degrees of development-led characteristics (Janin Rivolin 2008; Muñoz Gielen/Taşan-Kok 2010; Buitelaar/Galle/Sorel 2011; Berisha/Cotella/Janin Rivolin et al. 2021). The contrasting depictions of conformative (rules-based) planning systems, in which development must conform to the plan, and performative (discretionary) planning systems, where individual developments are said to collectively perform the planning authority's strategy (Janin Rivolin 2008), have been usefully adapted to describe how development-led practices can operate within plan-led systems (Buitelaar/Galle/Sorel 2011). The category of 'neo-performative' planning systems has been added to the conformative/performative dichotomy to describe those systems that make planning decisions on a discretionary basis, with the binding land use plan only changed following an agreement with a developer (Berisha/Cotella/Janin Rivolin et al. 2021). Indeed, land use plans themselves are often far more dynamic than they have been depicted in some of the literature and have substantial built-in flexibility, for instance in terms of the land uses that are allowed within categories (see for example in the case of Germany Hirt 2007). It is also somewhat ironical that the English government emphasises the extent to which the English system is already plan-led (MHCLG 2020), whereas many European countries have adopted a development-led philosophy, without abandoning binding land use plans (Janssen-Jansen/Woltjer 2010; Muñoz Gielen/Taşan-Kok 2010).

If development-led urban change can occur in nominally rules-based and therefore plan-led systems, while politicians in charge of development-led systems seek the apparently greater certainty offered by plan-led systems, is the issue primarily that all systems strive for a balance of certainty and flexibility? Buitelaar/Galle/Sorel (2011) suggest that, where a pragmatic planning culture prevails, the practice of planning may tend towards flexibility and adaptation to change, irrespective of the formal set of planning rules

in place. In the Dutch case plans are used to facilitate development rather than to direct it, representing a divergence between the formal legislative determination of how planning *should* work and the informal practice of how planning *does* work (Buitelaar/Sorel 2010). The notion that planning systems that use a formally adopted zonal plan to establish precisely what can be developed are by their nature plan-led is based on a reading of law and policy and is in fact subverted by an analysis of planning practice.

The comparison concerning the search for a balance between certainty and flexibility in planning systems points to the additional question of for whom certainty is sought in different cases. Proposals to reform English planning along more plan-led lines are firmly aimed at providing greater certainty to developers and less flexibility to planners. But developers and planners face, and must try to resolve, very different sorts of uncertainties. While developers operate within an unpredictable economic environment and an imperfect land market, planners must coordinate urban change under conditions of severe uncertainty (Moroni/Chiffi 2022), most notably an accelerating climate crisis. It seems that many planning systems are searching for the holy grail of delivering both certainty and flexibility, which Steele/Ruming (2012: 156) argue has resulted in "schizoid planning systems". It may be that the real challenge of planning reform is to accept that, just as in the practice of planning itself, a balance between sometimes competing agendas must be reckoned with.

## 3 The English planning system

The English planning system is the odd one out in a European context and characterised by its discretionary nature in which the development plan and the policies in it are only indicative and development proposals are determined on their own merits (Davies 1998). The current system dates back to the 1947 Town and Country Planning Act, which established the system of development control that has remained fundamentally unchanged since (Davies 1998; Booth 2003; Allmendinger 2016). Every local planning authority must have an up-to-date Local Plan which sets out generic and place-based policies alongside an indicative map. However, planning permission is given on a case-by-case basis with other 'material considerations', or matters that must be considered in development control, being taken into account, thus land use planning and development control are two separate processes (Tewdwr-Jones 1999). A planning decision of the Local Planning Authority can be appealed, with a relatively high chance of success: about a third of planning decisions are overturned by the Planning Inspectorate (MHCLG 2020: 12). Although the core of the planning system has remained essentially unchanged since 1947, several commentators have observed a marketisation of the system starting with the Thatcher governments of the 1980s but pursued under subsequent governments of different political persuasions, as property-led regeneration and special purpose zoning tools have been introduced at the fringes of the system (cf. Lord/Tewdwr-Jones 2014; Parker/Street/Wargent 2018; Ferm/Raco 2020; Bradley 2022).

Before World War II, the approach to planning in England was not dissimilar to that taken elsewhere in Europe. What Booth (2007: 137) refers to as the "immature system" in operation across the UK between 1909 and 1947 was based on zonal planning, as it had earlier developed in Germany. The system nevertheless contained scope for discretion where no planning scheme (the term then used for zoning plans) was in place, which was frequently the case as few local authorities adopted plans during this period (Crow 1996; Booth 2003). From the 1947 Act onwards zonal planning was side-lined, however, as the current discretionary system was put in place. The context for this change of path was in part the faults common to many zonal planning systems, in that plans were unable to incentivise development, coordination of different plans was difficult, and few plans were prepared due to heavy administrative costs, as well as its being a reaction to the growth of suburban sprawl. It has also been contended that discretionary planning was in fact only a continuation of the existing use of case-by-case decision making in the absence of a zonal plan, on the basis that almost all new development would be undertaken by the newly established New Towns Corporations (Hall/Tewdwr-Jones 2011).

The changing economic and political context, wherein public sector development was curtailed following its immediate post-war heyday, soon elevated the role of the private sector in residential development and, correspondingly, of the planning system. By the 1980s the New Town Corporations had been wound up, the rate of housebuilding by local authorities was in decline, and England was heavily dependent upon the private housebuilding industry – and therefore the planning system – for its rate of housing supply and for the design and layout of its new housing. While other planning systems had grappled with such an arrangement since their inception and had cause to design legal tools to maintain public control over the layout and design of new housing, in the English planning system it had been assumed that a high-quality urban environment with a sufficient supply of new housing would be provided by the public sector. Consequently, such legal tools and planning practices that might support housing supply and urban design outcomes are lacking.

Against a background in which the private sector is depended on to deliver the great majority of new housing

and where housing supply has been regarded as insufficient to meet demand, the efficiency of the planning system to allocate land for housing has been questioned by governments of different political persuasions. In the 2000s, the Labour Government commissioned the Barker reviews of housing supply and land use planning in response to criticisms of planning as constraining housebuilding (Barker 2008) and were accused of bypassing 'nimby' local authorities by using regional planning authorities to set housing targets (Goodchild 2010). Following its election in 2010, the Conservative-Liberal Democrat coalition government pursued a dual agenda of localism and liberalisation. The 2011 Localism Act removed the regional planning tier, devolving responsibility for calculating housing need to local authorities, while the new 2012 National Planning Policy Framework (CLG 2012) sought to distil policy down to a single short document in an effort to drastically liberalise planning legislation. Most recently, a government White Paper declared the planning system unfit for the twenty-first century and recommended to do away with detailed land use regulations, such as use classes, and introduce a simplified zonal land use planning system (MHCLG 2020).

At the same time, there are also concerns about the quality of the built environment that the planning system seems to produce. A Housing Design Audit found that most new housing design is of average quality at best (Place Alliance 2020). Also on a smaller scale, there are significant concerns about the design quality of conversions of former retail units to residential use, which are threatening to blight the high street and the wellbeing of residents (Clifford/Madeddu 2022). The problem was recognised by the Government, which established the Building Better, Building Beautiful Commission to "tackle the challenge of poor-quality design and build of homes and places" (BBBBC 2020: 140).

A prevalent critique of the English planning system associated with its apparent failure to deliver the quantities of new housing demanded by the UK government is that it offers insufficient legal certainty to landowners and developers, embodied in what UK residential developers know as 'planning risk' or the risk of being unable to obtain permission to develop (Gallent/de Magalhaes/Freire Trigo et al. 2019). It is from this position that zonal-oriented reforms are proposed, switching from the present development-led state towards a plan-led state (Breach 2019; Airey/Doughty 2020; MHCLG 2020). The philosophical impetus that underlies this suggestion is the critique of central planning found in Friedrich von Hayek's writings and which proposes the use of predictable rules in place of discretionary decision making (see for example Lai 1999). It is questionable, however, whether rules-based planning systems elsewhere in Europe, cited in the White Paper as offering greater certainty than the discretionary English system (MHCLG 2020), do so in practice.

Much of the critique of the planning system is directly associated with the proliferation of influential think tanks over the last decades (Haughton/Allmendinger 2016), which, if anything, has only increased under the current Conservative government (Foye 2022). Centre-right and libertarian think tanks have been hugely influential in shaping the debate about planning and their influence has increased. The Policy Exchange and Centre for Cities have been particularly influential (Foye 2022). Whilst ideologically distinct, they both lay the blame for the housing crisis with the planning system for not delivering enough, and government policy such as the focus on beauty can be directly linked to reports from either think tank (Foye 2022).

## 4 Responses to the 'Failure' of Discretionary Planning

The Government's own analysis in the White Paper acknowledged that England's planning system is an international exception and that the case-by-case decision on development proposals significantly increases planning risk due to its unpredictable nature (MHCLG 2020). It argues that planning systems which "give greater certainty that development is permitted in principle upfront" would work better (MHCLG 2020: 26). The key question is whether the proposal for a zonal system as well as earlier rules-based reforms are likely to emulate existing rules-based planning systems or are just another step through which the planning system has become "systemically more permissive" (Lord/Tewdwr-Jones 2014: 347). In the following, the proposals of the White Paper and the earlier rules-based planning instruments will be outlined.

### 4.1 Planning for the Future

The Planning White Paper (MHCLG 2020) aimed to introduce a zoning system in all but name that grants direct development rights prior to any application and would have fundamentally altered the nature of the English planning system. It was not the first proposal to introduce rules-based principles into the English system, but certainly one of the most prominent and perhaps radical over the past decade or so. Although it makes a brief reference to the planning systems in Japan, the Netherlands and Germany, referring to the "greater certainty that development is permitted in principle upfront" (MHCLG 2020: 26) and showing that the planning systems of these countries are poorly understood, there is no clear attempt to emulate these systems. The reform equally aimed to accelerate and streamline planning

by creating more certainty and design quality. It proposed that development plans would "zone" land into three different types: "growth areas" for substantial development, where the principle of development cannot be questioned; "renewal areas" for most of the existing built-up area as well as small sites in the fringe of existing settlements, where there is a presumption in favour of sustainable development; and "protected areas" for all areas where development would be restricted because of ecological, environmental or heritage concerns and where the existing system of stringent development control would remain in place. Growth and renewal areas would set out the rules in terms of permitted land uses, building heights, density, etc. To avoid the pitfall of inflexibility that is attributed to zoning systems, the Government envisaged that it would still be possible for proposals to be put forward that deviate from the rules, controlled by a residual discretionary development management system. Whilst the Government's own analysis focuses on both quantity and quality of housing delivery, zoning is presented primarily as an instrument to deliver growth through the award of automatic planning permission, thereby reducing risk for developers.

At the same time as the publication of the White Paper, a separate consultation was launched on proposed adjustments to the determination of how many additional housing units must be planned for in local authority areas. The 2012 National Planning Policy Framework (NPPF), published two years after the Coalition government took over from New Labour, required local planning authorities to meet objectively assessed needs by documenting a five-year housing land supply that was deliverable (Bradley 2021). While a central-government-determined standardised calculation for this was introduced in 2018, it is presently interpreted by planning authorities in the light of localised physical and planning constraints such as flood plains and protected natural areas. The recent consultation proposed to revise the standard calculation by introducing the zero-sum premise that allocated need across England must equal no more or less than 300,000 new units per year, with the great majority of these allocated to the highest growth areas. While this consultation exercise took place outside of the White Paper, it is mentioned in the latter that housing numbers would be calculated by Central Government and would be binding upon local authorities. The broad-brush zonal approach proposed in the White Paper is therefore tied to a demanding central-government-determined housing target, thereby seeking to ensure that a zonal planning system is used to substantially raise the quantity of new housing developed.

The White Paper faced severe backlash from the Government's own backbenches, particularly from Members of Parliament with constituencies in the 'Home Counties' around London where most of the development would take place (Walker 2020), and the idea of zoning was eventually dropped. The Chesham and Amersham by-election proved the death knell of the planning reform, when the governing Conservative party clearly lost one of the safest seats in the country to the Liberal Democrats in June 2021 with the planning reforms being cited as one of the main reasons for the defeat (Whiteley 2021). After a Cabinet reshuffle in September, when the Secretary of State, Robert Jenrick, was replaced by Michael Gove, the planning reform was put under review and the proposals for a zoning system in all but name were dropped. Following a year in which the government was in turmoil, the current Levelling Up and Regeneration Bill is a much more toned reform of the system, focusing on the introduction of a non-negotiable infrastructure levy on development, national development management policies and design codes.

## 4.2 Simplified Planning Zones

The earliest manifestation of rules-based principles within an English planning instrument is the Simplified Planning Zone (SPZ). The Simplified Planning Zone employed the same deregulatory rationale underlying the generic notion of the special economic zone, where rules on taxation and trade are different from those that pertain in the rest of the national territory. The incoming Thatcher government of 1979 quickly applied this logic in creating "Enterprise Zones" and "Free Ports" to encourage economic growth by creating taxation incentives and reducing planning constraints. Simplified Planning Zones were squarely focused on the notion that planning was the source of uncertainty and delay that inhibited development activity, and sought to bypass the discretionary planning system by combining plan with permission. Allmendinger (1997) notes that they have come to symbolise the peak of deregulatory planning intention evident in UK planning reforms since the 1980s and that, by combining plan with permission, they, at the time of publication, represented the starkest move away from discretionary planning that had been put into action. In the light of the shelving of the recent White Paper this remains true today. Since their introduction in 1986, their rare application has been heavily focused on industrial and warehousing uses, despite their much wider remit (Allmendinger 1997).

## 4.3 Outline Planning Permission

Because of the high costs associated with the uncertainty of a planning application achieving a positive outcome, outline planning consent was introduced in 1990. Its intention is to increase certainty for the developer that the principle of development is acceptable to the Local Planning Author-

ity, thus making the planning application effectively a two-stage process. Whilst an outline permission is determined like any other full planning application, with details known as "reserved matters" to be submitted at a later stage, it is less detailed and can establish the principle of development before requiring that detailed plans be submitted. While this obviates much of the risk associated with obtaining permission to develop, it remains a developer-led process and can entail significant investment by the developer prior to receipt of outline permission (Gallent/de Magalhaes/Freire Trigo et al. 2019).

## 4.4 Local Development Orders

Introduced in 2004, Local Development Orders (LDO) allow local planning authorities to extend Permitted Development Rights (PDR), a form of automatic planning approval granted only for change of land use since the early days of the discretionary system in the 1940s. While national permitted development rights have allowed the conversion of sites between similar uses – for example between a butcher's and a baker's – without the necessity of being awarded planning permission, Local Development Orders allow Permitted Development Rights to be defined in the local plan. This has been described as the nearest England has come to zonal planning (Gallent/de Magalhaes/Freire Trigo 2021). Local Development Orders can be used to cover specified areas within the plan area or for particular sorts of development across the plan area. Similar to Simplified Planning Zones, Local Development Orders have been little used, and their use has been inclined towards employment rather than housing. This may be partly due to the restrictive conditions on their use, as neither planning fees nor planning obligations are required from developers. A further inhibiting factor is that, where their aim has been to facilitate residential development, local authorities have used them for more difficult sites where developer interest has been lacking, requiring investment of scarce public resources in master planning and ground investigations (PAS 2018).

## 4.5 Recent reforms to Permitted Development Rights

Permitted Development Rights have long played an important role in the day-to-day functioning of the English planning system by facilitating uncontroversial changes of use within relatively tightly defined categories, but recent changes have significantly expanded the type of development that is permitted and was the most pervasive change of the system, albeit almost through the backdoor. The most significant change was introduced in 2013, when permitted development rights were extended to include the change from office to residential uses without requiring planning permission. Instead, developers only submit an application for "prior approval", which is a much lighter process and severely limits the factors that the local planning authority can consider when determining the application, including the impacts on transport and highways, contamination and flood risks. Framed as deregulation (Ferm/Clifford/Canelas et al. 2021), it is nevertheless a rules-based instrument that provides certainty mainly for developers. For change of use, permission via prior approval has clearly overtaken full planning applications as the main means of granting development rights and delivered an even larger number of housing units (Clifford/Canelas/Ferm et al. 2020). Whilst successful on paper in delivering more homes, there have been concerns about housing quality, amenities and space standards being worse than if a development had to go through planning permission. Moreover, the Local Planning Authority loses out on fees and developer contributions to mitigate the impact of development and put towards wider public policy goals such as affordable housing (Ferm/Clifford/Canelas et al. 2021).

## 4.6 Permission in Principle

Permission in Principle (PiP) is a fast-track procedure introduced in 2016 that automatically grants planning permission if a site is listed on a local brownfield register (Gallent/de Magalhaes/Freire Trigo 2021). Permission in Principle is similar to outline permission in aiming to establish that development of a particular sort is acceptable to the planning authority in principle before further details can be agreed. It differs in that, whereas outline permission is development-led, being sought by developers on any site, Permission in Principle is plan-led, being established by the planning authority on brownfield sites within the plan area. As with Local Development Orders, a connection between permission to develop and the plan is inherent to the instrument. Given how recently it was introduced, the effects of Permission in Principle are yet to be evaluated.

## 4.7 Towards a rules-based planning system

Whilst a zone-based planning system is for now clearly off the table, there have been several reforms that can be regarded as introducing rules-based principles into a discretionary system (see also Gallent/de Magalhaes/Freire Trigo 2021). Indeed, the notion of a simple rules-based zonal planning system has been a part of a longstanding narrative of liberalisation and deregulation since the early 1980s, when the Adam Smith Institute, a New Right thinktank, issued its Omega Report on UK planning reform (Adam Smith Institute 1983). The influence of thinktanks on gov-

**Table 2** Overview of main land use plans in Germany, Netherlands and Switzerland

| | Germany | Netherlands | Switzerland |
|---|---|---|---|
| *Strategic Plan* | Preparatory Land Use Plan (*Flächennutzungsplan* or *FNP*), self-binding, outlining future development with intended broad land use categories | Indicative Structure Vision (*structuurvisie*) outlining future development | Informal urban development concepts (non-statutory) |
| *General Land Use Plan (local authority)* | | Destination Plan (*bestemmingsplan*) for the whole municipal territory, but usually consisting of multiple plans of various sizes and approved at different times | Land Use Plan (*Nutzungsplan*, name differs between cantons), binding |
| *Detailed Land Use Plan (site)* | Binding Land Use Plan (*Bebauungsplan* or *B-Plan*) | | Special Land Use Plan (*Sondernutzungsplan*, name differs between cantons) |

ernment policy has since increased, if anything, with many of the recent changes being directly attributable to their work (Haughton/Allmendinger 2016; Foye 2022). The various reforms of the planning system and planning policy have generally strengthened the role of developers by creating a higher degree of certainty that development rights will be granted.

Whilst more and more rules-based instruments have been introduced since the 1980s, their scope has been fairly limited. Simplified Planning Zones and Local Development Orders lead a fringe existence in the planning system. Although Outline Planning Permissions, Permission in Principle and Prior Approval are widely used, their impact is more mixed for different reasons. Both Outline Planning Permission and Permission in Principle have marginally increased certainty during the process by establishing the principle of development earlier in the planning process. Although the extension of permitted development rights did have a significant impact, though widely perceived as negative, these only apply to individual buildings.

A common factor that has limited the use of rules-based instruments in England to date is that planning authorities have preferred to use them in areas where development incentives are otherwise lacking. However, they have found that, in contradiction of the premise behind the notion that it is discretionary, case-by-case decision making that has inhibited development in such areas, there may be other dominant factors at play. It may be that weak residential property markets stemming from negative externalities from neighbouring sites and insufficient local services and infrastructure require interventionist rather than regulatory planning tools before developer interest can be garnered.

## 5 Lessons from Europe

The drive to increase certainty in the English planning system and the frequent reference to zoning systems elsewhere justifies a comparison with a number of European land use planning systems and how their planning systems provide certainty. Germany, the Netherlands and Switzerland have been chosen because the neo-performative nature of their planning systems makes them comparable with the performative nature of the English planning system (Berisha/Cotella/Janin Rivolin et al. 2021). The review is based on a previous study looking at housing land allocation, assembly and delivery (Satsangi/Hoolachan/O'Brien et al. 2020).

In terms of land allocation for development, there is considerable variation in the instruments, but the unifying feature is that planning systems, at least in practice, are very restrictive in providing direct development rights, usually only covering ersatz building or development in keeping with the area (Table 2). In the Dutch and German systems, municipalities outline their intended development in a self-binding preparatory land use plan (*Flächennutzungsplan*) in Germany and an indicative structure vision (*Structuurvisie*) in the Netherlands, both of which only state the intentions of the municipality but do not create any rights for landowners. The German preparatory land use plan does indirectly provide development rights in the "unplanned" existing built-up area, but development must blend in with the immediate surroundings, which puts limits on the kind of development that is possible. In the German case, the preparatory land use plan is also frequently amended through a relatively simple administrative procedure (Feiertag/Schoppengerd 2023). While the Swiss land use plan (*Nutzungsplan*) does provide blanket development rights in combination with the local building ordinance, most municipalities will designate areas that are likely to be developed or which they intend to develop as zones requiring a special land use plan, giving the municipalities the possibility to deviate from the building ordinance but also introducing an additional layer of public scrutiny, as special land use plans are subject to Swiss direct democracy and need to be put to a popular vote. The land use plan therefore only rarely provides the development rights that are suitable to a developer's needs, given the additional layer of public scrutiny.

Development rights are provided through dedicated land use plans that are usually drafted specifically with an investor lined up. The *Bebauungsplan* (binding land use plan) in Germany, the *bestemmingsplan* (destination plan) in the

Netherlands and the *Sondernutzungsplan* (special land use plan) in Switzerland are all prepared for clearly delineated sites of varying size and the costs are usually borne by the developer. Although historically, binding land use plans in Germany were drafted without implementation being secured, this practice has become increasingly rare due to the high costs for the public purse. The Netherlands have introduced legislation that allows them to recoup the public costs of the land use plan, though the preferred solution is a public private contract (Tennekes 2018). Recent attempts in the Netherlands to establish a more flexible approach to planning by incorporating uncertainty over the exact shape of the development have failed and municipalities have reverted to a project-based approach to land use planning that is directly responsive to the intended development (Dembski 2020). Land use plans in the Netherlands have been described as more akin to a contract following a long process of negotiation (Tennekes 2018), but the same can be said for Germany and Switzerland, which are equally classified as neo-performative planning systems (Berisha/Cotella/Janin Rivolin et al. 2021).

For most developments, and certainly major ones, the local planners are at least theoretically in full control, market conditions permitting. The local planning authority has substantial autonomy to decide on the rules for the use of land, notwithstanding substantive legal norms outlining the general aims of planning and regional planning provisions. In none of the countries can the local planning authority be forced to draft a land use plan that meets the needs of the developer. Therefore, planning authorities and developers usually work collaboratively on a land use plan that meets the needs of the local authority and the developer (Satsangi/Hoolachan/O'Brien et al. 2020).

More importantly, local planning authorities have become much more proactive in the application of land policy instruments, some of which have been strengthened through planning reforms, in response to population pressures in cities (Satsangi/Hoolachan/O'Brien et al. 2020). The Swiss planning system has recently undergone a substantial reform, restricting the amount of building land reserves in existing land use plans under conditions of population growth, forcing local authorities to be much more proactive in applying the existing land policy instruments to assemble land for development (Satsangi/Hoolachan/O'Brien et al. 2020). Similarly in Germany, there has been a big drive towards a more proactive land policy over the past decade and the recent reform building on the recommendations of the Building Land Commission gives more teeth to some of the already existing instruments (Hengstermann/Hartmann 2021). The Netherlands is well known for an active land policy and the strong role of the public sector (Van der Krabben/Jacobs 2013). More proactive strategies of land policy by local planning authorities by no means hamper development. On the contrary, developers benefit from local planning authorities being committed to and involved in land assembly whilst also requiring affordable housing and aiming for place making (Shahab/Hartmann/Jonkman 2021).

## 6 Conclusion: Certainty for whom?

This paper intended to reflect on recent changes in English planning towards a more rules-based planning system to create greater certainty in light of the (failed) attempt to establish a zoning system in all but name with the publication of the Planning White Paper in 2020. One of the key critiques of the planning system is the political nature of decision making at the very end of the process, when a developer has already made substantive upfront investments in the planning process without knowing if the development will be approved. Since the 1990s and certainly over the past decade or so, England has seen a number of planning instruments and policies being introduced that were intended to simplify the planning process and create greater certainty over the principle of development, e.g. outline planning permission and Permission in Principle or even granting direct development rights through Local Development Orders and the expansion of permitted development.

The impressive number of changes at increasing frequency to the English planning system has not delivered the desired outcomes yet. Planning reform over the past decade has been primarily driven by housing numbers, having reduced some parts of the planning system to an accountancy process (Bradley 2022). The changes to the English planning system have been justified against a very selective interpretation of certainty, which mainly increased certainty for specific types of development to the detriment of design quality. Their scope and application are at best partial. Instruments that could be applied to frame larger development sites creating more certainty such as Simplified Planning Zones and Local Development Orders are rarely used by Local Planning Authorities. Other instruments are clearly focused on addressing certainty for developers without, however, fixing the alleged supply issues of the English housing market (Foye 2022). Whilst the quality of new developments is increasingly recognised as a problem, as evidenced in the Planning White Paper (MHCLG 2020) and the Building Better, Building Beautiful Commission (BBBBC 2020), new instruments have focused mainly on cutting red tape whilst not adequately funding the planning service. Local planning authorities have never enjoyed the autonomy of decision making of their European counterparts as the discretionary system invites developers to ap-

peal the refusal of planning permission or any conditions attached to it. Planning is therefore highly adversarial, a situation which has only been exacerbated through the requirement of local planning authorities to evidence that they have a five-year housing land supply and the presumption in favour of sustainable development if the numbers do not stack up. This has left Local Planning Authorities with little capacity to act.

It is here that a comparison with European rules-based planning systems is insightful. Evidence from European planning systems has shown a deficit of certainty and many planning systems previously deemed conformative have become neo-performative in response to a desire for greater flexibility (Berisha/Cotella/Janin Rivolin et al. 2021). The narrative that these planning systems grant development rights at the outset of the planning process has become far less common than it was several decades ago. The land use plan, which ultimately grants development rights, is usually prepared in close collaboration with, if not directly by, the developer. The costs of plan making and the risks of non-implementation are simply too high for local planning authorities to draft plans without commitment from developers. Here, too, developers face the political uncertainty of the land use plan not being approved by the municipal council or, in the case of Switzerland, rejected in a popular vote. However, developers will usually work together with the local planning authority to reduce the political risk. There is a high degree of autonomy in local decision making, as long as the relatively broad aims of national and regional planning enshrined in plans and legislation are considered.

The most interesting finding of our comparison of recent planning reforms in England and the experience in three European countries is the different responses to the shared problem of housing affordability. Whereas the English planning reforms aim to increase housing supply by providing more building land and reducing risk for developers and have therefore become more rules-based or conformative, the European planning systems reviewed have adopted neo-performative strategies not dissimilar to the discretionary nature of the English planning system. They tend to focus on the mobilisation and delivery of existing building land reserves by developing new strategies of land policy and strengthening existing land policy instruments. The case of England shows that rules-based instruments are not a panacea and, if poorly designed, have serious drawbacks or have limited utility in delivering housing with high-quality design. Whatever reform comes next for English planning, it is important to learn from the experience of European planning systems in their struggle to combine housebuilding with place making.

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