Liberating control of the use of land and buildings

The General Permitted Development Order is being rewritten; time to rethink the Use Classes Order too, says Brian Waters.

Brian Waters is a chartered architect and town planner

The 1947 Town & Country Planning Acts took the development of land and buildings into state control, defining development to include both building operations and changes of the use of land and buildings. This was an affordable way of trying to achieve the political wish to nationalise development land.

The consequence is a system of land rationing which predictably has created both shortages and millionaires. The Barker Reviews of Housing and of Planning have been commissioned by H M Treasury to consider ways of overcoming the side effects of the planning system which are perceived as damaging the country's economic performance.

Two of the principal legal mechanisms for maintaining such control go by the names of the Use Classes Order (UCO) and the General Permitted Development Order (GPDO). Both have evolved to become complex to the point of sclerosis. A review of the GPDO is already under way as a necessary condition for freeing up smaller domestic developments, house extensions and the like, as called for last year by the Householder Development Consents Review steering group (the steering group). This said: "Parts 1 and 2 of the General Permitted Development Order have become so complicated and so difficult to understand that they need to be redrawn from first principles. A new Permitted Development Order designed to meet the needs of Householders is required. Explanatory guidance in plain English should accompany it." (para 3.17).

Their Box 6 (below) compares the existing regime with the one they envisage.* They went on to say: "It is important to continue to seek a streamlined mechanism for low impact householder developments that raise no neighbour objections. The aim in developing such a process would be to speed up the planning process rather than change the outcome of any decision. It could be designed to operate in parallel with proposals for more streamlined processes for dealing with householder appeals now being developed by the Planning Inspectorate."

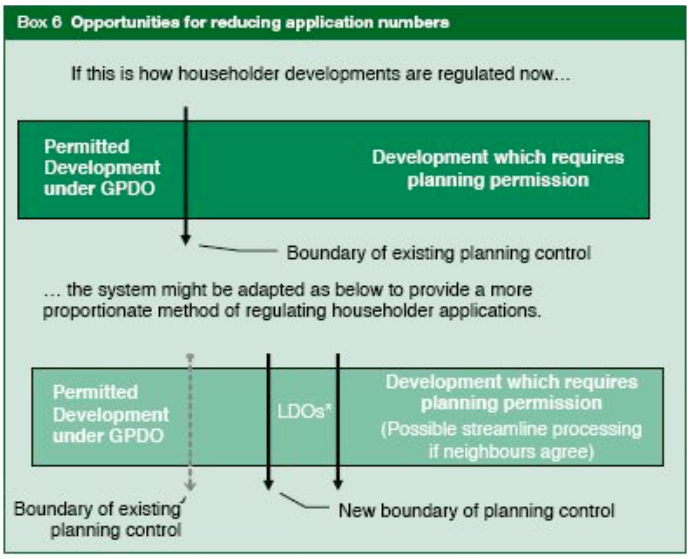
The Barker Review of Planning supports this process and suggests it be widened to embrace smaller commercial developments such as shop fronts and signage.

The steering group homed in on the need to redefine developments in terms of their impacts rather than by reference to a host of dimensional criteria which has evolved into a playground for lawyers and other experts. In the process they acknowledge the desirability of merging planning control with building and environmental health regulation particularly in view of the increasing overlap of these regimes as they grapple with environmental, 'sustainability' and climatic conflicts and criteria.

They also saw the merit, not only of achieving greater permissiveness for its own sake, but of allowing consenting neighbours to manage agreements where potential conflicts can be resolved without recourse to the local planning bureaucracy. A modernised planning regime can thus go further and privatise the majority of low-impact and policy-compliant developments thorough the engagement of certified professionals as happens now with both Building Regulations and the Party Wall Act. Impacts will have to be cleverly defined, and guidance in the form of 'deemed-to-satisfy' examples produced.

Pursuant to the Barker Review of Planning, a member of her team is drafting a new Use Classes Order and it is my contention that it should follow a similar direction to that being taken by the reform of the GPDO.

The Town and Country Planning (Use Classes) Order 1987 is a Statutory Instrument which revoked and replaced the Town and Country Planning (Use Classes) Order 1972 which itself followed earlier Orders of 1948 and 1963. The 1987 order has since been amended seven times, most recently by the Use Classes



* Further permitted development under locally determined local development orders (LDOs).

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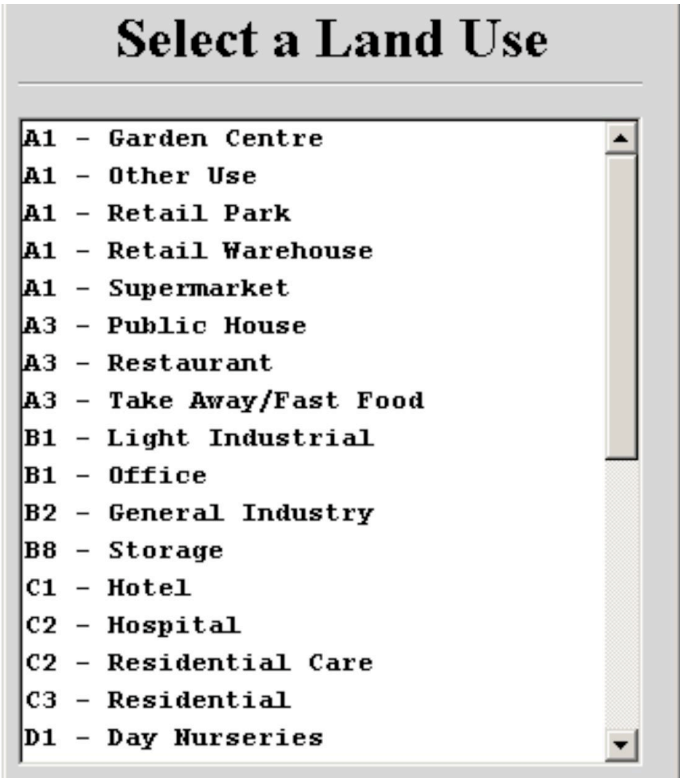
(Amendment) Order 2005 which came into force on 6 April 2006 [and had the unexpected and as yet not fully appreciated effect of allowing all pubs and restaurants to be changed into shops or professional service offices without planning permission].

The Order specifies classes of use of buildings or land for the purposes of the current Planning Act. It specifies operations or uses which are not to be taken for the purposes of the Act as involving development, and which therefore do not require planning permission. It provides that a change of use is not to be regarded as involving development where the former use and the new use are both within the same Use Class.

First it has to be acknowledged that part of the purpose of the planning system involves confronting the excesses of the market and that it has to reconcile conflicting interests not all of which are economic. Equally it tends to lose touch with changes in society and to run behind market realities inhibiting such changes often in a costly and damaging way. Plans and policies take an inordinate length of time to fall into place by which time the realities on which they are based have often moved on.

A 'plan-led' system should provide a common basis for setting expectations and making decisions, but with layers of plans evolving at different paces and sometimes contradicting each other, it is presently not working well. There needs to be a heavy pruning of development control so as to release planning skills and political focus to concentrate on a continuous and up-to-date plan making process, one capable of responding to unpredicted but welcome development proposals with amendments to the plan.



The Barker Review of Planning makes these points about the control of uses:

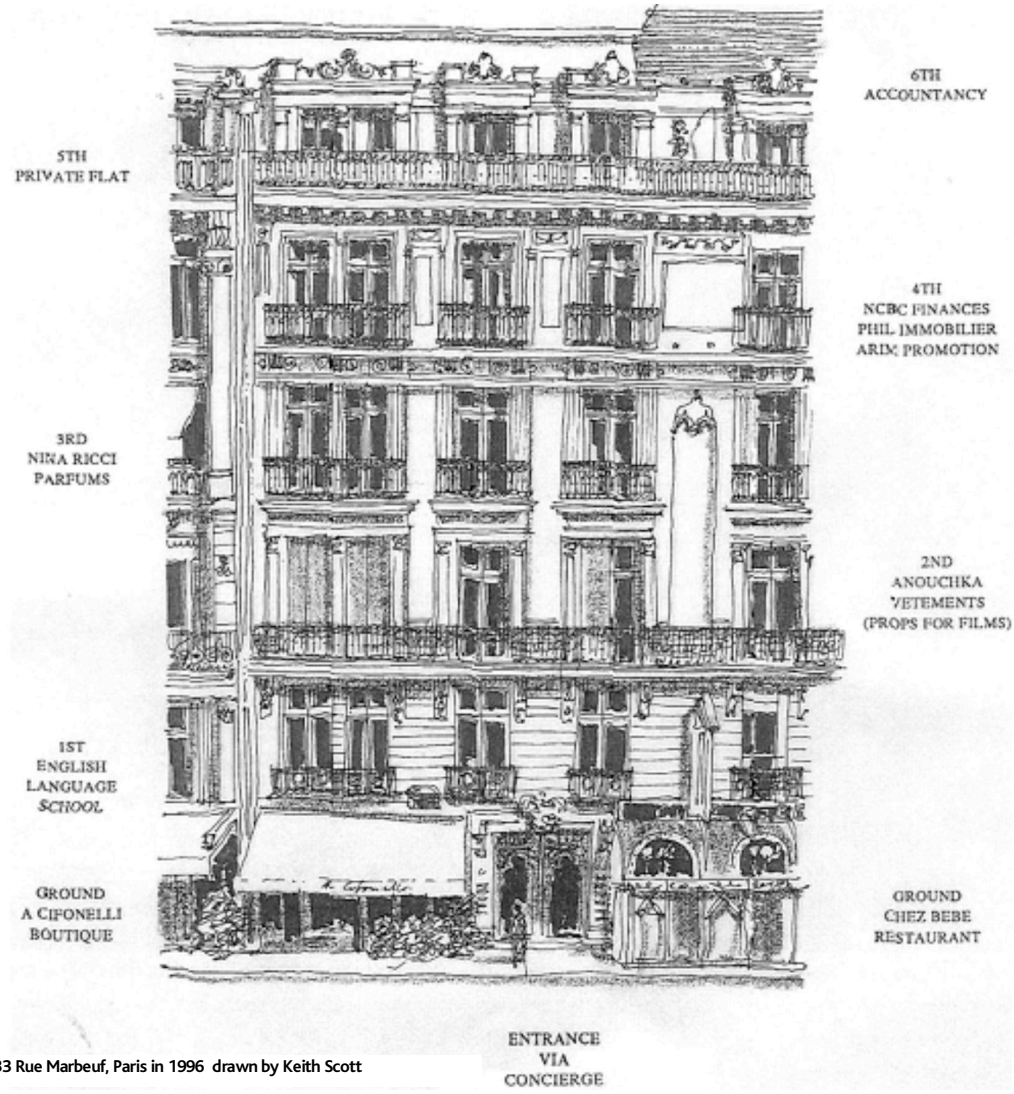
"...the importance of other economic issues, such as the need for a range of high-quality sites for small businesses to grow, should not be neglected. A marked reduction in the extent to which sites are designated for single or restricted use classes could improve efficient site provision... In addition, ... national policy should reflect the need for planning to be more responsive to changing circumstances, due to an increased rate of economic change driven by technological innovation and globalisation. This implies including an emphasis on the changing nature of the economy and employment. Planning needs to take better account of the changing economy. There has been substantial growth in the retail sector, for example, but the use class for allocating land for use as shops is different from the use class for businesses, meaning that the employment benefits of the retail sector may not be fully reflected in local development documents. Equally, increased live-work uses mean that the boundaries between housing and employment use classes are now blurred, particularly for start-up firms."

Her recommendation 6 includes: "a marked reduction in the extent to which sites are designated for single or restricted use classes – the need to ensure provision for live-work units is relevant in this context; the impact principle could also be brought to bear on the Use Classes Order. This currently acts as a proxy for impact through, for example, prohibiting any change of use from a hotel without applying for planning permission. But in reality there may be numerous instances where a change of use has no impact. Requiring planning approval in these circumstances loads extra burdens onto the system for no public interest benefit."

The UCO has been reviewed from time to time. The professed aim has been its simplification; the outcome is nearly always to add more classes or subdivisions so making the control more restrictive. At the last count we have 15 different classes of use, broken down into 42 subdivisions. Given that there are perhaps thousands of different actual uses of land or buildings, grouping them into 42 categories may not sound so bad, but in reality many uses are defined as sui generis, ie of a class of their own, and so cannot be changed to anything else without an express planning permission.

A rare example of a relaxation of the UCO was the merger in 1987 of light industrial with office uses to create a 'Business Use' class. This change was attributed with as important a boost to the economy as Big Bang. It illustrates both the power of the Order to inhibit the economy and how out of touch with reality it gets. I was fighting appeal after appeal seeking the use of abandoned factory buildings in the inner city by new, creative enterprises. We made special pleadings and described the office uses as studios and suchlike – and won the appeals until the change rendered that distinction redundant and small businesses were allowed to flourish in areas abandoned forever by manufacturing.

Following the 1990s recession areas like Shoreditch, just north of Broadgate, were blighted by 'Defined Employment Areas' restricted to manufacturing and a policy prohibition on residential use which would conflict with noisy, smelly industry. Again I found myself contriving to get permissions for live/work units and working with Hackney planning officers to populate this urban desert. Once the benefits were understood the area was allowed to blossom; values went up and creative indus-



33 Rue Marbeuf, Paris in 1996 drawn by Keith Scott

tries took root along with residents – often the same people. Now seen as too much of a good thing, the planning brakes have been slammed on again by changes in local policy!

Analysis of the interaction of the creative industries with urban regeneration is right to emphasise their importance and the idea of clusters, but they flourish by having the freedom to colonise low-cost areas of decline, not because a planner has drawn a line on a map and earmarked a protective zone for them. Yet another Use Class, as some suggest, would merely reduce such opportunities. Creatives and artists germinate in run-down, low cost areas with a whole mixture of mutually supportive activities including entertainment and residential. They move through like a wave, raising values as the areas regenerate and establishing successful businesses. Others are attracted to join the wave and move on to adjacent areas to continue the benign process. Shoreditch moved north to Hoxton and the wave has now moved happily on to the eastern reaches of inner Hackney.

The best analysis of the phenomenon is Richard Florida's book 'The Rise of the Creative Class'. He says: "The key to success today lies in developing a world-class people climate... This entails remaining open to diversity and actively working to cultivate it, and investing in the lifestyle amenities that people really want and use often as opposed to using financial incentives to attract companies... An effective people climate needs to emphasise openness and diversity, and to help reinforce low barriers to entry. Thus it cannot be restrictive or monolithic." So, fewer restrictive Use Classes, not more!

Barker's suggestion that the management of changes of use should be based on impacts, as with the reform of the GPDO, implies a merger of planning with building and environmental controls and their more objective processing. The Association of Consultant Architects (ACA) has responded to government consultations on planning policy with a proposal that there should be just three classes of use: Domestic, Commercial and Noxious. Although elegant, majoring on impacts should eliminate Noxious, but live-and-work will straddle Domestic and Commercial, perhaps suggesting the obvious: there should only be one class of use and changes between all uses should only be regulated in relation to their impacts.

OK, maybe a bit too ideal and, as well as pulling out the prop which artificially supports specific property asset values, it fails to acknowledge legitimate, positive policy aspirations, such as maintaining a certain proportion of retail frontages in designated high streets. But it is not so fanciful if we look abroad.

On the continent there is generally nothing to prevent a solicitor or a dentist setting up shop in a flat, or vice versa. The building illustrated at 33 Rue Marbeuf, Paris in 1996 contains these uses: a penthouse flat, a firm of accountants, a financial consultancy, Nina Ricci perfumes, a film prop rental company, an English language school, a boutique, and a restaurant, not forgetting the formidable concierge! This shows how rich mixed uses could emerge if the grip of the UCO were to be sensibly

relaxed.

How might a relaxation of the UCO help with the priority being given to the provision of new housing,? It will have to go hand in hand with a loosening of restrictive land use policies so that 'windfall' sites of all kinds – think of a builders' yard or a car park site – can go over to use for a residential development without the change in the use itself being an obstacle. Provided both that the impacts and the design of the proposed development were acceptable, it would be easier to add to the housing stock. Presently the system implicitly carries a presumption in favour of the status quo and against change. Eliminating the UCO will help to change this and to achieve a return, as suggested by Kate Barker, to the presumption in favour of development, which used to prevail.

Another control well overdue for scrutiny is the extraordinary protection afforded to agricultural land. It is not in any use class and agricultural buildings are generally exempt from planning control. This is an inheritance from a wartime subsistence economy (and suited the landed gentry), but farmed land can be reasonably protected by policy and the Green Belt, though this is also overdue a fundamental reappraisal.

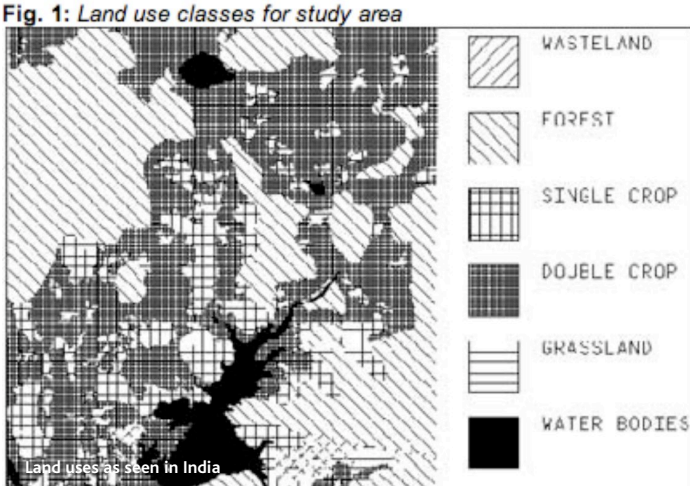
As to the affordability of housing, the provision of new homes will always be of marginal effect and it is time the people who qualify for subsidy to meet their housing costs were given access to the whole housing stock and the nonsense of subsiding the bricks and mortar was dropped. But back to the control of uses.

The ACA produced concise proposals for the reform of planning in its response to the Barker Review and its recommendations are listed in the box.

In this spirit, control of changes of use should be managed only in terms of conflicts such as noise and other disturbance and traffic, and by reference to clear, unambiguous, positive and up-to-date policies. The current UCO, adapted from time to time, should remain available for the sole purpose of defining classes of uses and may be referred to in policies, leases and other contracts.

The procedures outlined by the ACA provide the means for achieving this outcome through real rather than imagined simplification, and planning can become more of a visionary process rather than a continuing burden on the economy.

Fig. 1: *Land use classes for study area*



The Association of Consultant Architects proposals for the reform of planning

• Big things like airports and nuclear power stations are for government white papers and Parliament to decide, while government policy dictates regional things like motorways, housing allocations and national parks;

• mayors and local planning authorities make plans and determine locally strategic developments such as major sports stadia, transport interchanges, land releases for housing, green-belt developments and new centres;

• the GPDO is rewritten as suggested by the HDCR to determine development rights only on the basis of measurable impacts - supported by 'deemed-to-satisfy' guidance - and the Use Classes Order is simplified by focusing on impacts rather than specific uses; development proposals comply with the new-style strategic plans and compliance is certified by 'approved agents' who, as with building control, can be officers of local authorities or professionals, but are appointed and paid by applicants. If a proposal does not comply, an application is made to the local planning authority for determination. Their decision may be appealed and determined by the Planning Inspectorate as now;

• three levels of proposal may be considered: outline, full, and approved for construction. Outline and full will generally be subject to conditions which may call for the approval of reserved matters in the subsequent stage(s). Full applications will be able to deal with sustainability issues in principle - performance specifications - but not in detail. Local development plans cannot duplicate matters covered by other legislation (public health, access regulations, building regulations, etc.), except where special local conditions apply. Approved for construction proposals will have to satisfy both planning and building regulations requirements, on a 'deemed-to-satisfy' basis which will rely on clear guidance with the option of a determination or appeal in exceptional cases (as now for Building Regulations approvals);

• only strategic decisions and clearly non-compliant applications need be considered by elected members, all others being delegated to officers or agents. Planning resources are focused on planmaking and keeping adopted policies up-to-date;

• approved agents assess the impacts of proposals and only where these affect other owners are they obliged to follow a consultation procedure, which is modelled on the Party Wall Act (including provision for a 'third surveyor'). No such agreement may override a clear plan policy. Agents deal with planning compliance, building/environmental regulations and party walls in an integrated way, with specialist input as necessary for matters like engineering, traffic impacts and biodiversity; and approved agents certify completion of developments in compliance with certified proposals. Architects and other qualified professionals may self-certify compliance (as they, in effect, do today), but owners are obliged to notify the Land Registry once development is complete, and attach specified information to their title deeds.