Heritage, landscape and spatial justice: new legal perspectives on heritage protection in the Lesser Antilles

Byer, A.B.

Chapter 5 Planning legislation

5.1 Introduction

Land is the connective tissue linking planning, heritage and environmental law. The development of planning law principles parallels the diminishing of landscape and heritage, and the emergence of spatial justice issues in the history of Britain and its colonies. In fact, Nicole Graham observes that enclosure is an early form of planning, and responsible for the fabrication of landscape as scenery.[861] This upheld land's conversion to property law, defining land by its ability to be exclusively possessed.

Planning law regulates the development of land, and tangible, terrestrial natural and heritage resources are protected by virtue of their connection to the land. [862] This concept of land, and in many cases, rights to property, depends on the legal concept of land as abstract space.[863] This is the abstract space preferred by gardeners, legislators and colonisers, the preordained cartographic structure of abstract space in opposition to place or landscape, which is formed by local conditions and local relationships. The idea of space folds land within the realm of human knowledge and control. Standardised, universal and measurable space could be grafted over place so that physicality and particularity of places become irrelevant.[864]

It is thus no accident that planning, environmental and heritage law began to crystallise as distinct bodies of law following the consolidation and creation of landed estates in Britain. The loss of common land stimulated emigration from rural areas, and led to increased urbanisation during Britain's early industrial period. The environmental health consequences of overpopulation due to inadequate city planning compelled public authorities to develop new planning laws to reconcile incompatible land use. Planning and environmental law therefore share a close relationship.[865] At the same time, the rapid urbanisation of settlements stimulated a wave of nostalgia for a purer time, when nature was pristine and man had closer ties to the land

[861] Graham 63.
[862] James 53.
[863] Ibid.
[864] Graham 66.
[865] Winston Anderson notes that as a result of this common origin 'planning and environmental law' can still be found as a taught course in many universities; see Anderson, *Principles of Caribbean Environmental Law* 171.

and his history. The heritage movement was launched to protect monuments and sites, some of which were endangered by demolition to make way for new urban infrastructure.[866] This chapter explores the role of planning law in the destruction of place, and by extension the implications for heritage in the Lesser Antilles today.

5.2 The Industrial and Post-war foundations of planning law in the Lesser Antilles

Planning in Britain today concerns itself with reconciling conflicting interests in land in order to achieve sustainable development,[867] but this was not the system's raison d'etre. Planning emerged as a response to the environmental consequences of economic growth following the rapid urbanisation of Britain's population in the eighteenth century. Migration of workers to settlements developing around increasingly mechanised industrial centres led to new public health crises as a result of overcrowding and haphazard expansion of towns.[868] The need for public health and housing policies to address the resulting economic costs created a new government role via town and country planning. Local authorities could control development of new housing areas, and were empowered to make and enforce building bylaws for controlling street widths, and the height, structure and layout of buildings; eventually these laws were consolidated in the 1909 Housing, Town Planning Act.[869]

As the previous chapters have shown, the effect of industrialisation was landscape's 'ideological transformation into private property';[870] a national development agenda that abhorred 'waste' in favour of improving the land through cultivation (pastoralism and agriculture) using the processes of enclosure and emparkment;[871] and the arrival of a heritage movement that now ascribed value to a constructed pastoral ancient England that appeared to be rapidly disappearing, relying on heritage institutions such as the National Trust to uphold this imagined past, protect public spaces and prevent the growth of slums. Indeed, the interwar years saw rapid suburbanisation and urban congestion due to developments in transportation, challenges that the

[866] Dennis Rodwell, *Conservation and Sustainability in Historic Cities* (Wiley-Blackwell 2007) 25.
[867] Barry Cullingworth and Vincent Nadin, *Town and Country Planning in the UK* (Routledge 2006) 1-2.
[868] Ben Christman, 'A Brief History of Environmental Law in the UK', *Environmental Scientist* November 2013, 4.
[869] Cullingworth and Nadin, 15 and 16.
[870] Olwig, 'Recovering the Substantive Nature of Landscape', 638.
[871] Graham 35 and 100.

existing administrative machinery was ill-equipped to face. A central authority was needed, one that would be responsible for formulating a plan for dispersal from congested urban areas.[872] The fillip for undertaking such comprehensive planning on a national scale was provided by the Second World War following the destruction of parts of Britain.[873] The Attlee Labour government introduced the Town and Country Planning Act 1947 as a means of controlling the rebuilding process. Highly centralised, the law had two main features: local authorities had to produce their own local plans, which detailed land-use policies and proposals for certain developments; and planning permission was required from local authorities for developments to ensure that they adhered to local plans.[874]

The result was an unprecedented shift in the state's control over the use of private property, by nationalising the development value of land. The development of planning controls combined the promotion of public health and pleasant urban development, with the restriction of private interests, although a bias in favour of development remained.[875] Each phase of planning has thus been shaped by historical developments in the UK. Containing urban sprawl and maintaining open spaces is related to early industrialisation. Town and country planning was not about meeting social and economic goals, but rather was largely administrative in character.[876] Planning tended to be procedural, with very little content; there was no guidance on the information to be contained in plans, which could change from time to time,[877] and so plans did not have the force of law.[878] While modern planning has diverged from its post-war roots, it is these early influences and signature features which shape postcolonial planning systems. It is therefore unsurprising that when transposed to the colonial outposts of the Caribbean, the planning system by design could only serve imperial objectives.

Because land's placelessness or 'atopia' now elevated possession as its defining characteristic,[879] land all over the globe could be acquired and cultivated for the benefit of the nation state. With the removal of native populations and the importation of enslaved West Africans, land in the

[872] Cullingworth and Nadin 20.
[873] Ibid., 21.
[874] Christman 4.
[875] Ibid., 5.
[876] Cullingworth and Nadin 10.
[877] Ibid., 11.
[878] Ibid., 3.
[879] Graham 91.

British Caribbean colonies was cultivated based on these 'scientific' principles, which, as proof of their superiority, were universal in application, with no reference to local or native knowledge, customs or practices, since these 'primitive' cultures had allowed land to lie fallow and untapped.[880] Rather than adapt an appropriate economy to the new or local ecology and then adapt the law to suit, colonial property law was imposed with the old or foreign economy regardless of its property. Colonial land law was inappropriate, literally 'out of place', but land law was expected to adapt to the law.[881]

The colonial era therefore established a pattern of planning practice at odds with the local conditions, relationships and needs of modern democratic states, [882] because the very notion of planning was an extension of colonial hegemony. Colonial planning superimposed the accomplishments and reforms in public health from London over the colonies; early planning was simply an instrument to serve the interests of the colonial administration and business interests.[883] Notions of the public good and public discourse had little meaning. There were no attempts to inform or involve the population, let alone any conception of the 'public interest' as local community and custom could be erased from the land, and environmental determinism underpinned land use. The complete reduction of ecosystems in slave colonies as a result of planning diktats therefore had important ramifications for land use and cultural memory in these islands, since planning upholds exclusive use of privately owned property by the landowner, regardless of community interests in the land.[884] But the ownership model of property that avers that 'property can be assigned unproblematically and clearly to a single individual or corporate owner works more as ideology than fact'.[885]

Herzfeld notes that in the postcolonial era, planning relied on these globally dominant images of 'the West' to reinforce the process of the social and cultural evacuation of space, now for the purpose of nationalist or culturally fundamentalist projects.[886] Spatial cleansing by municipal and state authorities in the planning sense often manifests as 'a persistent streak of nouveau-riche

[880] Olwig, *Landscape, Nature and the Body Politic* 114 and 157-58.
[881] Graham 88.
[882] Jon Talbot and Ronnie Buddley (2007) 'Postcolonial town planning in Commonwealth nations: A case study of the Solomon Islands—an agenda for change', (June 2007) *The Round Table*, 96(390): 319-329, 323.
[883] Talbot and Buddley 322.
[884] Anderson 126.
[885] Mitchell, 'Go slow' 124.
[886] Herzfeld 132.

abhorrence of anything that looks dilapidated'.[887] Planning is not viewed as destructive, but rather as a fast route to civilised living, where spatial boundaries are clarified and former inhabitants are viewed as intruders or squatters.[888] Heritage and planning law continue to be at cross purposes, because urban development is often seen as an obstacle to heritage protection and vice versa. The perception of heritage as purely pastoral and idyllic has led to the rejection of urbanisation in favour of this idealised conception of the past.[889] At the same time, planning law has supported the conservation of the architectural heritage, since this is the aspect of heritage that lends itself most readily to managed change and complements the aesthetic and morphological features of the landscape.[890] Today, property rights continue to be held as sacrosanct despite their potential for inefficiency and development viewed as forward-thinking modernisation while heritage conservation is expensive and outmoded.

5.3 Heritage in the planning process in the Lesser Antilles

The eight independent Lesser Antillean states as former subjects of the British Empire have legal systems that bear the imprint of colonialism. Much of statutory law is modelled on British legislation, and planning law is no different, reflecting the earliest developments of the planning system.[891]

As in Britain, colonial town planning was linked to housing issues. Town planning legislation based on the 1932 English legislation was introduced in Trinidad and Tobago in response to local political pressure for better living conditions, at a time when the British Empire needed to ensure loyalty of the colonies as the Second World War loomed.[892] Notably, the response to this conflict between local needs and imperial policy was not to consider local needs at all. Subsequently in the post-war world order, 'town planning played a part in the British attempt to delay nationalist pressure for decolonisation and constitutional change through promises of better

[887] Herzfeld 142.
[888] Ibid., 143 and at 142.
[889] Rodwell 26.
[890] Ibid., 55.
[891] Desmond Heap, 'New developments in British Land Planning law – 1954 and after' (Summer 1955) *Law and Contemporary Problems* 20: 493-516.
[892] Robert Home, 'Transferring British Planning Law to the Colonies: The case of the 1938 Trinidad Town and Planning Regional Ordinance' (1993) *Third World Planning Review* 15:4: 397-410, 408.

living conditions within the overall programme of colonial development and welfare.'[893] It was inevitable that town planning was incapable of providing real change, as the relationship of physical planning to wider issues of development planning or social issues was non-existent. The 1938 legislation in Trinidad and Tobago marked the beginning of a new government role in land management and land use regulation responding to the demands of population growth.[894] Trinidad's legislation was deemed suitable for West Indian conditions, and was adopted in Saint Lucia in 1945, St Vincent, Dominica, and Grenada in 1946, and St Kitts and Antigua in 1948.[895]

This law was subsequently updated with the introduction of the Physical Planning and Development Control Act (PPDCA), a modern planning law that supplanted the town and country planning legislation of the colonial era. This model physical planning legislation was drafted by the OECS for its member states and has been enacted by all with the exception of St Vincent and the Grenadines.[896] St Vincent, and the non-OECS states Barbados and Trinidad and Tobago, have retained their town and country planning laws. Nevertheless, the model legislation has roots in that earlier law, echoing traditional ideas of maintaining a balance between urban and rural areas that reflect British historical developments rather than Caribbean ones. The relationship between planning and heritage is one such retention, and has a profound impact on heritage resources, their regulation and existence in the region.

5.3.1 Town and Country Planning Legislation

Barbados' Town and Country Planning Act (TCPA), replicates many standard UK provisions in planning law, starting with the long title:

> An Act to make provision for the orderly and progressive development of land in both urban and rural areas and to preserve and improve the amenities thereof, for the grant of permission to develop land and for other powers of control over the use of land, to confer additional powers in respect of the acquisition and development of land for planning, and for purposes connected with the matters aforesaid.

[893] Home 408.
[894] Ibid.
[895] Ibid., 403.
[896] Jonathan Pugh and Janet Henshall Momsen (eds), *Environmental Planning in the Caribbean* (Ashgate Publishing 2005).

Such a 'scene-setting statement' is meant to convey the overall policy or principles guiding the planning process and establishes the essential character of the planning system.[897] It makes clear that the planning process concerns land use, the focus of which in this case is the development (not conservation) of land and enhancing its desirability via the preservation of associated amenities. There is a Town and Country Advisory Committee, which is empowered to advise the Minister on any relevant matters, including the preparation of development plans.[898] The preparation of the plan falls to the Chief Town Planner, who can include nature reserves and open spaces in this plan.[899]

Heritage is associated with the architectural heritage, specifically historic buildings.[900] Protection of such heritage is provided via the use of a Building Preservation Order (BPO), where deemed expedient by the Minister to protect any building of 'special historical or architectural interest'. The test for a BPO is that the works proposed would 'seriously affect the character of the building',[901] though this standard is not explained. No criteria are provided for determining 'special architectural or historic interest' and in fact none of these terms, inclusive of heritage, is defined in the legislation. Section 29 states that a 'List of Buildings of special architectural or historic interest' can be made by the Minister, or any pre-existing list, compiled the Barbados National Trust may be approved by same. In terms of the listing process, the Minister must decide that it is 'expedient' to list such a building, but he is required to engage in consultation with experts before compiling, modifying or approving the list.[902] Nevertheless, consultation does not require the Minister to accept the contributions of the authorities consulted as it is a procedural step; in effect the list, whether pre-existing or a current compilation, can be amended without any input.

While contravention of a BPO results in a fine[903] section 30 also confirms the lack of appropriate safeguards for built heritage. The chief difference between a listed and a non-listed building is that once a building is listed, a contractor must contact the Chief Town Planner for permission at

[897] Cullingworth and Nadin 2.
[898] Barbados Town and Country Planning Act, s 4
[899] Ibid., s 5 and s 6
[900] Ibid., s 28
[901] Ibid., s 28(2)
[902] Ibid., s 28(4)
[903] Ibid., s 28(6)

least two months before the works (which can run the gamut from alteration to demolition) are scheduled to take place. This permission may be granted should the Chief Town Planner deem it acceptable to do so, regardless of the special architectural or historic interest that secured the building's listed status in the first place. Unlawful alteration or demolition may trigger requirements for reinstatement or restoration, but these remedies involve enforcement notices that give the offender twenty-eight days to undertake the restorative works, which can be further delayed if an appeal is sought. Subsequent monitoring would be necessary to determine whether the reinstatement meets an acceptable standard, for which there appear to be no guidelines.[904]

In spirit, Barbados' Town and Country Planning Act faithfully upholds planning law's relationship with the historic environment. Heritage is referred to in the Second Schedule to the Barbados TCPA, entitled 'matters for which provisions in development plans may be made'. In Part IV, which concerns 'amenities', heritage preservation is a discretionary form of land use, particularly as 'preservation of buildings, caves, sites and objects of artistic, architectural, archaeological or historical interest.' The ordinary dictionary meaning of amenity relates to a function or visual appeal; this puts the emphasis on the aesthetic value of terrestrial heritage resources, which is a legacy of British land law and essential to maintaining the concept of landscape as scenery. Notably, Barbados has no separate legal regime for the protection of heritage resources, as Britain did with its monuments legislation. In Britain's monuments legislation, a distinction is made between monuments and listed buildings, with the former to be preserved in its current condition, minimal works being permissible to preserve the structure or allow public access, while the latter are usually intended to remain in an economically viable state and significant works may be allowed to meet modern living standards or change to a viable use.[905] There is no such distinction in Barbados' legislation, because there were no local rural communities following the enclosure process to drive a similar process to protect heritage as the heritage movement did in Britain.

St Vincent and the Grenadines' Town and Country Planning Act of 1992 also retains structural similarities to early planning legislation. Section 3 establishes a Physical Planning and Development Board, which does not specify any representation from any heritage organisation in

[904] Barbados Town and Country Planning Act, ss 40(4), 45 and 46
[905] Harwood 13.

St Vincent, although the legislation does not explicitly exclude such a presence. The Board is required to prepare a national development plan, regional and local plans.[906] Factors to be considered in the preparation of these plans include economic and social development trends, prevailing physical and environmental conditions, and the need for national parks, public open spaces and forestry reserves.[907] However, no cultural or community concerns are explicitly required to be taken into account in the planning process.

BPOs are provided for and reflect the language contained within the Barbados TCPA.[908] The Minister may, where he finds it expedient based on the Board's recommendation, make such an order if the building is of 'special architectural or historical interest', a term not defined in the Act. This standard is qualified by other considerations: to be found objectionable, the works proposed must seriously alter the character of the building, or affect public health and safety, which brings to mind the public health origins of planning law.[909] A fine is to be paid on contravention of this order.[910] In terms of listing, sections 24 and 25 repeat sections 29 and 30 of the Barbados TCPA, although in this case the Minister does not compile lists but is obliged to approve, with or without modification, pre-existing lists of buildings of architectural or historic interest, where prepared by the St Vincent National Trust or similar body. This was discussed in Chapter Four. As with Barbados, consultation (but not participation) is mandatory in the decision to amend such lists. Upon gazettal of the list, the listed building's status is similar to its counterpart in the Barbados TCPA. Heritage is therefore subject to the prerogatives of Planning.

Structurally, Trinidad and Tobago's Town and Country Planning Act mirrors Barbados' TCPA. There is no mention of managing heritage resources in its planning law. This is due in part to the fact that the National Trust of Trinidad and Tobago is empowered to compile a register of listed buildings, to monitor their status, and to enforce orders for listed property where damaged or destroyed.[911] Co-operation between the Trust and relevant government departments such as the planning authorities is relegated to ad hoc arrangements via the use of memoranda of understanding and other un-named mechanisms to effect 'integrated programmes for

[906] St Vincent and the Grenadines TCPA 1992, s 7
[907] Ibid., s 8(2) and (3)
[908] Ibid., s 23
[909] Ibid., s 23(2) and (4)
[910] Ibid., s 23(5)
[911] National Trust of Trinidad and Tobago Act, ss 8, 26 and 27, as discussed in detail in Chapter Four.

preservation of monuments or the protection and management of the environment'.[912] Both Trinidad and Tobago and St Vincent and the Grenadines may be contrasted in the application of planning law to heritage.

5.3.2 Physical Planning Legislation

The most striking feature of the new model physical planning legislation that was drafted for the OECS member states to replace town and country planning laws is that it enumerates broader social, economic and environmental objectives than originally envisaged in town and country planning legislation.

By way of illustration, two objectives of the Antigua Physical Planning Act 2003 (APPA) are to 'protect and conserve the cultural heritage of Antigua and Barbuda as it finds expression in the natural and the built environment' and 'to foster awareness that all persons and organisations owning, occupying and developing land have a duty to use that land with due regard for the wider interests, both present and future, of society'.[913] This is the first time that planning legislation in the Lesser Antilles explicitly mentions preservation of cultural heritage as a goal of planning, taking into account cultural heritage's relationship with the environment, the sustainable use of land by alluding to future generations, or intergenerational equity, as well as the wider general interests of society in the environment, which implies transcending private interests. The APPA establishes a Development Control Authority, of which the Town and Country Planner serves as the Chief Executive Officer.[914] In preparing development plans, the Town and Country Planner must be inclusive and develop strategies for obtaining representations from the public.[915]

Publicity and a duty to consult have also been introduced for environmentally vulnerable projects.[916] Environmental impact assessments (EIAs) are required only for a specific class of projects listed in the Third Schedule of the APPA. Projects impacting cultural heritage are not explicitly referred to but may be captured in the catch-all provision of 'any other matter'.[917] In

[912] National Trust of Trinidad and Tobago Act, s 15B
[913] APPA, s 3(f) and (g)
[914] Ibid., ss 5 and 6(2)
[915] Ibid., s 9(2)
[916] Ibid., ss 20 and 22
[917] Ibid., s 23(2)(f)

addition, development permits may attract conditions such as the preservation of any buildings or sites of importance to the cultural heritage of the country[918] but the law does not oblige the Development Control Authority to do so and no listing criteria or listed buildings are identified in the APPA.

The 'preservation of buildings, sites and other features for architectural, cultural or historical reasons' is a factor that 'may' be considered by the Town and Country Planner in the preparation of development plans.[919] Part VI of the Act addresses environmental protection, and integrates cultural heritage with natural resources requiring protection. However, this seems to be restricted to the traditional definition of built heritage, and omits archaeological sites. The Town and Country Planner is responsible for compiling a list of such buildings, in consultation with local heritage bodies and which must be finally approved by the Minister.[920] The BPO is reintroduced, now an interim preservation order that lapses after 90 days unless renewed by the Minister.[921] The presumption therefore is that development is the default legitimate land use unless active intervention is approved for heritage protection. The Authority 'shall have regard to' a number of factors in considering whether to preserve the building: whether it is desirable having regard to the importance of preserving the landscape, architectural, cultural or historical heritage and whether the economic activity in the building would facilitate its preservation and the quality of architectural design.[922]

The Town and Country Planner is not required to consult with technical expertise on matters concerning preservation of the historic environment, and in keeping with this trend, Part IV of the Second Schedule concerning amenities retains language identical to that of the Barbados TCPA in the preparation of development plans. In addition, the First Schedule, which addresses the composition of the Development Authority, does not make explicit provision for any cultural or archaeological heritage representation, although environmental expertise is required.

[918] Ibid., s 27(1)(a)(viii)
[919] Ibid., s 10(4)(c)
[920] Ibid., s 43
[921] Ibid., s 44
[922] Ibid., s 44(6)

The APPA echoes much of the language contained in Dominica's Physical Planning Act (DPPA), which was passed a year earlier. BPOs are addressed in similar language,[923] as are environment protection areas.[924] In addition to a survey of the area and representations from the public, heritage-pertinent criteria that can be considered in designating an environment protection area include:

> (iii) any outstanding geological, physiographical, ecological, or architectural, cultural or historical features of the area which it is desirable to preserve and enhance;
>
> (iv) any special scientific interest in the area;
>
> (v) any special natural hazards to which the area is or may be subject; and
>
> (vi*) the characteristics, circumstances and interests of the people living and working in the area*.[925]

This language suggests that environment protection areas can potentially protect landscapes, which distinguishes such areas from traditionally regulated protected areas and national parks. However, the Authority is required to submit a report to the Minister who will make an environment protection order if he believes it is desirable to do so. In addition, while development is limited, it is not withdrawn entirely.[926] An environment protection area management plan may be produced to support its maintenance.[927] Part IV of the First Schedule also includes the language on heritage as an amenity value which may be considered in development plans.

The Saint Lucia Physical Planning and Development Act 2005 (SLPPDA) states that one of its objects is to 'protect and conserve the natural and cultural heritage of Saint Lucia'.[928] This act, as well as Antigua and Dominica's planning legislation, calls for a purposive and liberal interpretation to facilitate attainment of the objectives of the act.[929] Physical plans may allocate

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[923] DPPA, s 47
[924] DPPA, s 56 and APPA s 52(3)(c)
[925] DPPA, s 56(3)(c) (emphasis added).
[926] Ibid., s 57. Conservation areas first appear in the UK Civic Amenities Act 1967. Because even minor alteration can severely impact a conservation area, development rights can be completely withdrawn in these areas. See C Sanz, *The Protection of Historic Properties: A Comparative Study of Administrative Policies* (WIT Press, 2009) 134 and 136.
[927] DPPA, s 59
[928] SLPPDA, s 3(1)(e)
[929] Ibid., s 3(2)

land for conservation,[930] and zoned areas may be reserved for 'specific purposes'.[931] The Head of the Physical Planning and Development Division shall not approve any application for the development of land in that area which is inconsistent with the purposes for which the area is reserved,[932] which could conceivably include landscapes. The Head of the Physical Planning and Development Division is required to compile lists of buildings, monuments and sites of special prehistoric, historic or architectural interest, which may be approved lists from other sources such as the Saint Lucia National Trust.[933] This law is the first to include preservation orders for sites; nevertheless, the regime for protection, in terms of the standard to be met, the factors to be considered, enforcement and remedies, is mostly unaltered from traditional provisions. There is also the matter of whether it is appropriate to list both monuments and sites, given the distinct legal effect each category attracts in the common law, discussed later in this chapter. The First Schedule addresses composition of the Physical Planning and Development Appeals Tribunal, which does not specify heritage management expertise. Part IV of the Second Schedule concerning heritage as an amenity value is reproduced verbatim.

The Development Control and Planning Act of St Kitts and Nevis is also modelled on the OECS physical planning legislation, and provides for similar objects under its Act[934], introduces a procedure for the designation of environment protection areas that contemplates landscape as a protected resource (though not identified as such),[935] and can impose conditions on development permission.[936] Like Saint Lucia, preservation orders are extended to sites[937] and interim preservation orders may be made for any building or site not already listed under section 52 of the National Conservation and Environment Protection Act, for which there is a separate regime. It should be noted however that in cases of conflict, the Development Control Act prevails. As with St Vincent, development is prioritised over heritage preservation. The First Schedule addresses composition of the St Kitts Development and Planning Board; environment is represented and there is a catch-all provision for any other area of public interest that the

[930] SLPPDA, s 11
[931] Ibid., s 32
[932] Ibid., s 32(2)
[933] Ibid., s 33
[934] SKDCA, s 4
[935] Ibid., ss 12 and 54
[936] Ibid., s 31
[937] Ibid., s 49

Minister considers relevant to physical planning. Part IV of the Second Schedule preserves the language on heritage as an amenity value.

Finally, Grenada's Physical Planning and Development Control Act (GPPDCA) states that the Planning and Development Authority has the duty 'to contribute to the protection and conservation of the cultural heritage as it finds expression in the natural and built environment'.[938] Interestingly, the Act was passed in 2016 and replaced the 2002 Act which had much stronger language on preservation of heritage, making it an objective of planning in keeping with the model Act and stated that the Act should be given a liberal and purposive interpretation. The Physical Plan for Grenada prescribes land use, and 'may' allocate land for conservation.[939]

The GPPDCA devotes Part VI to the conservation of natural and cultural heritage. The Authority is designated as the national service for the identification, protection, conservation and rehabilitation of the natural and cultural heritage of Grenada, in accordance with the World Heritage Convention, to which Grenada is a party.[940] This is significant, because this is the only planning law in the Lesser Antilles that serves as implementing legislation for a State Party's commitments under international heritage law. The Authority coordinates with other departments via a cross-sectoral 'Natural and Cultural Heritage Advisory Committee' comprising officers from Ministries with portfolios for culture and tourism, as well as representatives from the National Trust, the Grenada Society of Architects, the Grenada Institute of Engineers, and members from civil society.[941]

On the advice of the Committee, the Authority 'may' compile a list of buildings, monuments, and sites, or 'may' adopt and amend lists already prepared by the National Trust.[942] Critically, there is no distinction between buildings and monuments, so all listed heritage resources are subject to potential development or demolition. This merges two separate and distinct regimes, where listed buildings were to be developed with an eye to their aesthetic and architectural character, while 'monuments that were scheduled were not in active use and not intended to

[938] GPPDCA, s 3
[939] Ibid., s 11
[940] Ibid., s 38
[941] Ibid., s 39
[942] Ibid., s 39(1)(a)

evolve the way that buildings and structures usually do as uses and ways of living change. The emphasis in scheduling is to preserve the monument as it is, subject only to works designated to preserve it.'[943] With the exception of St Vincent, these islands have no legislation corresponding to the UK's monuments legislation, though the term seems to have been imported into the law along with the listed building regime. This merging of listed buildings and monuments also characterises the aforementioned physical planning legislation of Saint Lucia and St Kitts. Such a conceptual blurring appears to indicate a misunderstanding or lack of knowledge on the part of the authorities as to the significance of the distinction in law, as well as ignorance of the range and diversity of national heritage, which should direct the development of protective mechanisms appropriate to the various categories of heritage, rather than vice versa. The Town and Country Acts do not make reference to monuments and sites at all.

The Committee may also advise the Authority on applications for the altering or demolition of listed sites; declaring environmental protected areas as well as permitting development in such areas and incorporating the protection, conservation and rehabilitation of the natural and cultural heritage into the planning policy at the level of local, regional and national development plans; preparing plans for protecting buildings or groups of buildings of historic or architectural merit; designating Heritage Conservation Areas for such buildings, and permitting development in such Areas or near listed sites; and preparing abatement notices for the preservation of amenities.[944]

What is clear from the Advisory Committee's powers is that its primary function is to facilitate development as defined in section 2 of the legislation, 'the carrying out of building, engineering, mining or other operations in, on, over or under land, the making of any material change in the use of land or buildings or the subdivision of land'. This is at odds with its responsibilities as the focal point of the World Heritage Convention. The Committee is not empowered to advise the Authority on the treatment of heritage resources valued by communities, nor is there provision for consultation with other bodies that may provide guidelines on such activities. As an advisory body, none of its findings or recommendations is binding.

There are several mechanisms offering protection to private landowners. Owners and occupiers of the listed building or property, as well as any other person are permitted to make objections or

[943] Harwood 13.
[944] GPPDCA, s 39(2)(c) – (j)

representations, which must be taken into consideration in determining whether to list the building, or site.[945] A notice that the building, monument or site has been listed is to be served on any owner or occupier, and the list is to be gazetted.[946] The language outlining the effect of listing replicates the corresponding provision in the Barbados Town and Country Planning Act, as well as the model legislation, requiring two months' notice of any proposed works to a listed building, which may be refused or granted, with or without conditions. Works are permitted where it can be proven that it was necessary in the interests of health and safety, again pitting public health against heritage conservation. Where consent has not been granted, this act constitutes an offence and is liable on summary conviction to a fine of eighty thousand Barbadian dollars, or a term of five years' imprisonment, or both.[947] Significantly, no remedies involving restoration of the building, monument or site are included.

Interim preservation orders are available for protecting any unlisted building, monument or site from threat and development activity.[948] The effect is to treat the unlisted heritage resource as listed, but as discussed, this protection is minimal. Interestingly, where works are carried out in contravention of an interim preservation order, restoration of the affected building, monument or site to its former state at the expense of the owner or occupier of the building, monument or site is required.[949] This is not a requirement for listed buildings where unlawful works have taken place. Nevertheless, this section creates a cumbersome process for unlisted heritage, rather than a streamlined approach in keeping with the capacity of a small island state.

General responsibility for conservation and rehabilitation of these buildings, monuments and sites is placed entirely on owners and occupiers of listed buildings.[950] The government may assist owners of listed heritage with the procurement of technical and financial assistance and issue notices where conservation or rehabilitation is necessary.[951] Where these notices have not been complied with, planning authorities may enter the premises, take steps to rehabilitate and

[945] Ibid., s 40(2)(b) and (c)
[946] Ibid., s 40(3)
[947] Ibid., s 41
[948] Ibid., s 39(2)(b) and s 42
[949] Ibid., s 42(7)
[950] Ibid., s 43
[951] Ibid., s 43(3)

recover the debt in court or compulsorily acquire the heritage resource.[952] This is in complete contrast to St Vincent's Preservation of Historic Buildings and Antiquities Act 1976, which charges the Planning Minister to do all that is necessary to restore a building where the owner does not comply.[953] It is also appears a less than satisfactory approach to heritage, as it relies on punitive mechanisms, rather than the practical strategy of educational or technical support as in the St Kitts NCEPA. There are no national or harmonised standards for heritage protection, or plans for monitoring and reporting by these landowners, or mechanisms for exchange of information or collaboration with local communities, which are some of the components of international best practice laid down in UNESCO guidance.[954]

The Authority on advice from the Advisory Committee, may by order published in the Gazette, designate any area containing a group of separate or connected buildings which, because of their history or architecture, their homogeneity or their place in the landscape, are of outstanding universal value, including such other land in the vicinity of that group of buildings as is necessary, to provide a peripheral protection belt or buffer zone, as a Heritage Conservation Area.[955] Outstanding universal value is a well-known criterion in designating heritage sites in accordance with the WHC –this does not appear to be appropriate for designating national heritage protection as it requires the heritage resource to be recognised globally before national authorities will designate it. Provision is made for representations from private landowners.[956] The Authority can publish proposals for Heritage Conservation Areas, including conditions for the use of buildings and land other than listed buildings, monuments and sites within the area, and such proposals shall be incorporated into the physical plan for the part of Grenada in which the Heritage Conservation Area is located, if any.[957] HCAs have yet to be designated.

Lists of areas of natural beauty may be compiled, including submarine and subterranean areas and their flora and fauna, and introduces a new area, a natural area, that is explicitly defined as

[952] Ibid., s 43(4)
[953] SVG Preservation of Historic Buildings and Antiquities Act 1976, s 4(3) and 4(8), as discussed in Chapter Four.
[954] UNESCO *Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage* 16 November 1972, and see the WHC arts 4 and 5
[955] GPPDCA, s 44
[956] Ibid., s 44(2)
[957] Ibid., s 44(3)

excluding reserves, parks and marine protected areas as designated under other legislation.[958] Where such an area deserves special protection, it may be declared an environmental protection area and gazetted.[959] Representations may be made by affected persons, and provision is made for the authorisation of works and the undertaking of EIAs to facilitate development in such areas, the restriction and prohibition of development and public access, as well as controlled uses for the purposes of agriculture, forestry and fisheries.[960] Such areas have also never been declared. Notably, the law maintains the division between the cultural and natural heritage, and between maintaining a rural pristine natural area versus a lived in landscape.

In addition to opportunities to make objections to the listing or designation of heritage in conservation areas, owners and occupiers of listed heritage may appeal any listing before the Physical Planning Appeal Tribunal established under section 58.[961] The Tribunal shall consist of not less than three or more than five members appointed by the Minister, of whom the Chairperson shall be a legal practitioner of not less than ten years standing, and the other members shall have training or experience in environmental services, physical planning, engineering, architecture, land surveying or land development.[962] Notably, heritage-related disciplines are absent. An appeal may lie against inter alia, a development permit, conditions subject to which a permit is granted, revocation of a permit, refusal of a building permit, and a preservation order.[963] Where the Tribunal decides that a listed building, monument or site should be removed from a list, or that any building or other land should be excluded from a Heritage Conservation Area, the Authority shall amend the list or designation order accordingly.[964]

These appeal procedures, in addition to other mechanisms in the GPPDCA (the listing process, preservation orders, the Advisory Committee, and the creation of conservation areas) reinforce that heritage is subject to many of the same derogations that afflict the physical planning laws in other islands which can result in the upholding of property law priorities, such as requiring the Authority to take into account objections from landowners whose property may fall within a

[958] Ibid., s 45
[959] Ibid., s 45(2)
[960] Ibid., ss 45(3) and (4)
[961] Ibid., s 50
[962] Ibid., s 58(2)
[963] Ibid., s 59(2)
[964] Ibid., s 50(3)

proposed heritage conservation area.[965] While this may enable landowners to assert their rights where outdated colonial law applies, it can also result in damage to heritage resources where common law rules uphold landowners' rights to exclude heritage users and even (mis) use resources as legal owners. In addition, protection for environment and culture is subject to development prerogatives, because applications may be submitted for development of these areas.[966] All proposed developments in the Third Schedule to the GPPDCA are subject to an EIA, 'unless the Authority for good cause otherwise determines'.[967] While projects concerning parks or sensitive areas are subject to an EIA, there is no such requirement for heritage resources. No standards are provided for the rehabilitation of listed buildings, or the designation process, or the management of heritage conservation areas to enable implementation of the law. It is unclear whether two new categories for conservation areas, especially categories that isolate environment from heritage, are feasible or even desirable. In fact, the GPPDCA's Second Schedule describes heritage as an amenity value to be addressed in development plans 'as appropriate', virtually identical to the language in Barbados' TCPA.

What is noticeable about these laws, whether located within the traditional town and country planning cluster or the more modern physical planning cluster, is that they fail to reflect best practice when it comes to accommodating indigenous and local communities in the development process.[968] Participatory mechanisms are limited, and there are gaps in the criteria for environmental impact assessments where cultural heritage is concerned, such as designing protocols to guide interaction with local communities and benchmarks for assessing impacts on their livelihoods, use and access to resources, local practices involving land use, and social cohesion.[969] Examples of planning situations illuminating these shortcomings and the consequences for heritage protection are considered in depth in Chapter Seven.

5.4 Conclusion

[965] Ibid., s 44(2)
[966] Ibid., s 39(2)(e)
[967] Ibid., s 22(2)
[968] Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment.
[969] Akwé: Kon Voluntary Guidelines para 43.

Planning and heritage law rarely work in alignment. This is because planning law promotes development objectives, which can conflict with heritage protection. Planning law does not recognise the multiplicity of uses of public space, focusing on preserving aesthetically pleasing architectural buildings while paying little attention to the contexts for those buildings which may be valued by communities. Because it cannot accommodate various spatial definitions, there is friction between heritage and planning law. Where it does recognise heritage, it is narrowly defined, as degraded heritage resources are associated with public health risks, in keeping with spatial cleansing narratives.

Planning law in the Lesser Antilles reflects the needs, norms and values of postwar Britain, not the islands themselves. Because that legal system is spatially located, these laws are regulating development somewhere else, regulating a different place in a different time, to the detriment of the present day communities they should be serving. This is the essence of spatial injustice, because failure to consider the geographic location, its features and significance to the local people, means that implementation or lack of implementation disadvantages community's access to heritage, and ultimately leads to loss.

Because community valuation of heritage is excluded, communities are not involved in heritage protection, except for the duty to consult in certain instances. Knowledge, both technical and local, is relegated to the advisory and procedural aspects of decision-making, rather than playing a substantive role in determining the significance of heritage. Mechanisms for public consultation do not equate to a community-led definition of heritage. In valuing 'placelessness' of property, land's specific features have no meaning, and the meanings attached as a result of community interaction are irrelevant. Cleaving land from community excludes people. Minimal consultation with stakeholders secures minimal interest in protecting these resources.

Private landowners are therefore afforded rights to make representation and appeal any planning decision that affects their private property. This is underscored in the recent amendments to Grenada's physical planning legislation. In its current iteration, property does not allow for the incorporation of the concept of a duty to preserve and protect (and is therefore unsustainable), because it implies control by the owner, expressed by his ability to alienate, exploit and exclude others from the object for site in question. This excludes any communal interest in heritage, and leaves unacknowledged other forms of land use. The aim of the planning framework should be

to geographically situate its planning tools in the Caribbean islands so that spatial justice is realised.

Such an approach would ensure the law reflects the needs of local communities and an understanding of local conditions. In such a framework, the relationships between people and their environment could be captured as a dynamic process. The present narrow concept of heritage vis à vis land use and protection of property rights is a legacy of colonialism that inhibits a sustainable approach to heritage protection. Heritage bodies rarely have representation, safeguards for heritage resources are subject to a number of exceptions, and there are no technical guidelines for assessing development impacts on the variety of existing heritage resources. Given these challenges with planning law, the next chapter examines the success of protective mechanisms such as parks and protected areas in the sustainable protection of heritage resources.