

THE NIGERIAN JURIDICAL REVIEW

Vol. 11

(2013)

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NIGERIAN JURIDICAL REVIEW

VOLUME 11 (2013)

To be cited as: **(2013) 11 Nig. J. R.**

ISSN: 0189 - 4315

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PUBLISHED BY
Faculty of Law, University of Nigeria,
Enugu Campus

PRINTED BY:
Sylva Prints, Enugu & Abuja
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IS ENVIRONMENTAL PROTECTION IMPLICIT IN PLANNING LAW?^{*} [†]

ABSTRACT

The objective of the Nigerian Urban and Regional Planning Act, among others, is to ensure that there is sound land development framework and that the ecological and aesthetic values of the nation are preserved and enhanced. However, the Planning Act does not explicitly require or articulate criteria for integrating environmental conservation into the planning process. Even the judiciary has advocated that planning law has little or nothing to do with environmental protection. Yet, planning law ought to be able to establish regional land use framework geared towards total and holistic environmental conservation. This paper therefore seeks to answer the question whether or not environmental protection is implicit in planning law with special emphasis on Nigeria.

1. Introduction

The incorporation of environmental considerations in land-use planning globally began after the United Nations Conference on the Human Environment in Stockholm, Sweden in 1972. One of the key principles developed in reference to planning and human activity was:

In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with

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the need to protect and improve environment for the benefit of their population.¹

Planning Law in most national legislation was therefore geared towards proffering elaborate provisions or approaches in the distribution of human pressure on the physical environment; improvement of aesthetic quality of the environmental standard in buildings. The Nigerian planning law, exemplified by the Nigerian Urban and Regional Planning Act, 1992² (NURPA), is exceptional in incorporating controls over use of land as well as over the design and form of the built environment. It plays a control role in environmental protection in relation to location issues as well as in determining how much of any particular activity is allowed, and the intensity of such development. Planning law, therefore, has a wider role in organizing not only economic development but also in balancing economic, political, social and environmental factors. To this end, planning law is viewed as a tool of environmental policy. This is because, as echoed by the Stockholm Declaration,³

rational planning constitutes an essential tool for reconciling development and environmental needs and that planning must be applied to human settlements and urbanization with a view to avoid adverse effects on the environment and obtaining maximum social, economic and environmental benefits for all.⁴

In this respect the weight accorded by planning law to environmental considerations can be seen in the case of *West Coast Wind Farms Ltd. V. Secretary of State for Environment and North Devon DC*.⁵ In that case an application to construct two wind farms was refused. Although government planning advice supports energy from wind, it also recognizes the need to

¹ UNCHE 1972, Principle 13 available at www.unep.org/docs. last accessed on 22 July 2013.

² The Act was promulgated as Decree No. 88, 1992, now Cap N128LFN 2004.

³ Conference was held in Stockholm, Sweden in June, 1972.

⁴ Principles 14 and 15 of Stockholm Declaration, 1972

⁵ [1996] PL J. 797

protect local environmental quality, and this latter factor was accorded more weight.

The reason for this is that every human developmental activity is earth-bound. However, land upon which such activities are carried on is scarce, limited in supply and unevenly distributed. This has made land to be always a contentious issue and a closely guided property right. This is even made worse by the fact that the quantity of land is relatively fixed and, in the face of unbridled population growth, rapid urbanization and industrialization, land is readily being depleted. Two other factors also worsen the above ugly picture of land. First, man, by his gregarious nature, may want to utilize his land in any way he deems fit, unrestrained and undistributed. Secondly, land which makes up only 30% of the earth's entire surface is not only fixed but is also currently under serious threat from the vagaries of weather and climate, which unfortunately, is attributable to man's activities in the course of his exploitation and usage of resources found on land.

Where this unpleasant situation is allowed to continue, especially allowing man to exploit and utilize land unrestrained, it will affect the value of land in the long run (through slumfication). This is because to permit anyone to do what he absolutely likes with his property will be to make property generally valueless. Thus there should be "an integrated and co-ordinated approach to development planning so as to ensure that development is compatible with the need to protect and improve the human environment."⁶

2. Environmental Consideration in Planning Law

In this paper, an attempt shall be made to examine the relationship between planning law and environmental protection both at common law and formal regulations. We hereby posit that planning law and environmental protection and management are not distinct and separate and that

⁶ Principle 13, Stockholm Declaration, 1972.

planning legislation can be used as an instrument of environmental protection.

The basic purpose of planning is to control land use. But the questions to be asked are: why control land use? What does land use control entail and what are its benefits? The need to control land use emanates from the fact that all development is earth-bound and land upon which such activities take place is scarce, limited in supply and relatively fixed in quantity. The term 'land use control' refers to restrictions on the use of land by the property owner for the common good. Traditionally, such restrictions may be imposed through either common or statutory law actions, though there are also elements of land use control implicit in customary law.⁷

(a) Land Use Control at Common Law

The common law approach to land use control is essentially a reactive case-by-case response driven by very specific circumstances. For example, the common law concept of nuisance, which is commonly seen as an unreasonable interference by one party with another's enjoyment of his or her land, serves to preserve the character of the neighbourhood through the elimination of non-conforming uses of land, activities or acts. For instance, the operation of a company may result in air or noise pollution, diminishing the value of a neighbouring parcel. If the neighbour takes the offending company to court, the result might be an injunction against the offending activity or monetary compensation to the neighbouring property owner. The nuisance complained of may be private or public nuisance.

A nuisance is private if it does not cause damage or inconvenience to the public at large, but does interfere with a person's use or enjoyment of land or of some right connected with land in his possession.⁸ To this end, private nuisance may be caused by a person who, though he is doing lawful acts on

⁷ These elements of land use control can find expression in the doctrine of "eminent domain," corporate ownership of land, customary farming and land use patterns, customary forest reserves, etc.

⁸ Section 235 Anambra State Torts Law 1986.

his land, his lawful acts produce consequences that are not confined to his own land but extend to the land of his neighbour, by causing encroachment on his neighbour's land, or building, or unduly interfere with his neighbour in the comfort and convenient enjoyment of his land.⁹ Thus, in the case of *Ojo Eholor v Idemudia Idahosa*,¹⁰ the respondent/plaintiff built his house in line with the building regulations. When the appellant/defendant built his, the building was high and, having over-developed by building wall-to-wall, caused rain water from his roof to drip on the roof and onto the premises of the respondent's house, causing a deterioration and considerable reduction in value of the house. The lower court awarded ₦56, 429 and ₦43, 671 as special and general damages respectively, on the grounds that the appellant/defendant action constituted a nuisance. On appeal, the Court of Appeal upheld the judgment of the trial court and dismissed the appeal.

At times in private nuisance, the plaintiff need not prove physical damage to his property. All he needs to prove is that there was substantial interference with use or enjoyment of his land. This was applied in the case of *Abiola v. Ijeoma*¹¹ where the parties occupied adjoining premises in Surulere Lagos. The plaintiff complained that excessive noise made by the chickens kept by the defendant in the early hours of the morning disturbed his sleep and that nauseating smells emanating from the pens interfered with his comfort. The court found that the Plaintiff had suffered more than a trifling inconvenience than an ordinary person living in that part of Surulere. The injunction sought was granted, although the plaintiff suffered no physical damage.

However, in arriving at its conclusion when no physical damage is shown, the court must consider the locality in question in order to establish the standard for the particular

⁹ See Akpata J.C.A. in *Abdullah v Governor of Lagos State* (1989) 3 NWLR (Pt. 97) 358 and applied in the case of *Eholor v Idahosa* (Supra). See also the case of *Ige v Taylor Woodrow Nig. Ltd.* (1963) LLR, 140.

¹⁰ [1992] 2 NWLR (Pt. 223) 327.

¹¹ (1970) 2 All NLR 268.

locality. The defendant will be liable only if his conduct or the nuisance created by him falls short of the standard of that locality. This is because the court does not consider the nuisance merely according to elegant and dainty attitudes and habits of living, but according to plain and sober and simple notions obtaining among the members of the community. Therefore, inconvenience suffered must be substantial and substantial interference is given an objective construction. Thus, in the case of *Tebite v. Nigeria Marine and Trading Co. Ltd.*,¹² the plaintiff, a Legal Practitioner with office at 11 Robert Road Warri (a mixed-use zone) succeeded in an action in nuisance against the defendant with workshop for boat building and repairing at 9 Robert Road, Warri. The defendants by operating their machines continuously for several hours a day persistently caused to emit from their workshop loud and excessive noise and noxious fumes, which diffused to the Plaintiff's premises and caused him much discomfort and inconvenience. The court held that the noise was completely out of character with that ordinarily produced by ordinary people in any neighbourhood in the country.

The basis for the above decisions, and other decisions, is that a just balance must be struck between the rights of the defendant and that of the plaintiff to the undisturbed enjoyment of his property, it is a compromise that borders on social co-existence. It is immaterial that the plaintiff brought himself to the nuisance, that is, that the act complained of was in existence before the plaintiff commenced his occupation of the land. What is important is that the plaintiff had suffered some physical damage to his property. Thus, in the case of *St. Helen's Smelting Co. v Tipping*¹³ the defendant's plea that the locality in question was devoted to industries was rejected and the plaintiff recovered damages.

Again, the fact that the act of the defendant is usually in the locality or is beneficial or useful to the community will not in itself act as a bar to deny the plaintiff the claims sought. To

¹² (1971) 1 UILR 432. See also the case of *Moore v Nnado* (1967) FNLR 156.

¹³ (1865) 11 ER. 1483.

this end, in the case of *Rushmer v. Polsue and Alfieri Ltd*¹⁴ the court granted a plaintiff's claim for injunction to restrain the use of the defendants' printing presses at night, even though the premises were in the printing area of London. Furthermore, in the case of *Bellew v. Cement Co. Ltd*¹⁵ the court was unmoved by the defendants argument that their cement production was vital to the public interest at a time when building was an urgent public necessity. While granting the injunction sought,¹⁶ the court held that the plaintiff should put up with harm because it is beneficial to the community as a whole is unacceptable. That would amount to requiring him to carry the burden alone of an activity for which many others benefit.

Another aspect of common law nuisance applied in land use control is public nuisance. A public nuisance, on the other hand, is an unlawful act or omission to discharge a legal duty which act or omission endangers the lives, safety, health, property or comfort of the public. According to Karibi – Whyte, J.S.C. (as he then was) in the case of *Adediran and Ors v Interland Transport Ltd*,¹⁷ a public nuisance is one which inflicts damage, injury or inconvenience to the generality of the population or upon all of a class who come within its ambit. In an action under public nuisance, a private individual must establish that he as sustained particular damage other than and beyond the general inconvenience and injury suffered by the public and that the particular damage is direct and substantial. Failure to show this will mean that the action will be dismissed by the court. Thus, in the case of *A.S. Amos and Ors v. Shell Petroleum Development Company*¹⁸ the plaintiff claimed general and special damages from the defendant for “unlawful damages caused by the defendants by deliberately and negligently blocking for about three months the Kolo Creek new water way. The Supreme Court dismissed the

¹⁴ [1906] 1 Ch 234, [1907] AC 121.

¹⁵ [1948] ER 61.

¹⁶ Closure of the Factory for 3 months.

¹⁷ [1991] 9 NWLR (Pt. 214) 164.

¹⁸ (1977) 6 SC. 109

action, *inter-alia*, that the plaintiff failed to prove they suffered damage over and above that suffered by the general public.¹⁹

However, in the case of *Ejowhomu v Edok-Eter Mandilas Ltd*,²⁰ the plaintiff who sued the defendant for blocking a public road, which consequently barred access to his poultry farm and caused him some loss, recovered. The court found that the plaintiff's injury was "beyond the general inconvenience and injury suffered by the public." Also in the case of *Anthony Savage v Akinrinnade*²¹ the defendant caused a public nuisance by blocking a public highway. The plaintiff's action was based on the fact that blockage interfered particularly with the access of the staff, parents and pupils to his school. The court held that this amounts to particular damage to the plaintiff over and above that suffered by other users of the highway. These are however, responses to a specific set of circumstances and they have their limitations as instrument for land use control and development.

Another instrument applied by the common law in land use control and development is the use of restrictive covenants.²² Restrictive covenants, also known as deed restrictions, refer to private land use control mechanisms that supplement or even replace zoning regulations. They are often employed in new housing developments as a means of providing property value protection for adjacent landowners by placing restrictions on the use of property. When a person purchases a piece of property, he or she agrees to certain restrictions in terms of what can be done with that property. The restrictive covenants may provide more stringent requirements above those imposed by the zoning restrictions. For example, covenants might place limitations on the density (e.g., only single family detached units in a zone

¹⁹ The same reason was applied by the Supreme Court in dismissing the claims in *Adediran & Ors v Interland Transport Ltd (Supra)*.

²⁰ [1986] 5 NWLR (Pt 39) 1 or (1986) 9 SC. 41 at 107 - 108.

²¹ (1964) All NLR, 238.

²² See the case of *Tulks v Moxhay* (1848) 2 Ph. 774.

allowing attached housing) or they might increase the building set back lines beyond the zoning limits.

Covenants may also be included as a means to enhance property value protection requirements. For example, they may specify minimum building square footage requirements, limitations in terms of acceptable construction materials, or specifications on architectural styles. They may also be used to address environmental protection issues, relating to amounts of grading allowed, acceptable fertilizers, well and septic requirements, vehicle storage, etc. One major limitation of restrictive covenants is that they must be diligently overseen to be effectively enforceable. This is because they require “self-policing” by the members of the community to whom the deed restrictions apply or by members of the Planning Authority the monitor and enforce these covenants.

In spite of the application of common law nuisance and restrictive covenants in land use control, that it became necessary to control land use and development through legislation and regulations.

(b) Land Use Control through Legislation

Conceptually, a town and country planning legislation institutionalizes a land use planning system which operates to govern land development and control in a given society along its urban and rural regions. The law imposes, operationally, a system of regulatory zoning restrictions upon the general right of every landowner to use or develop his land the way he likes based on pre-conceived socio-economic pattern so as to achieve a purposeful utilization of land in the interest of the general welfare of the community to which it relates.²³ Legislation and regulation therefore provide a more formal, encompassing approach to land use control and development control than the application of common law doctrines, especially the doctrine of nuisance. The most veritable

²³ A. A. Utuama, *Contemporary Issues in Nigeria Law (Essays in Honour of Judge Bola Ajibola)* Okonkwo, C.O. (ed) (Enugu: Pine Press, 1992) pp 345-346.

instrument used by legislation and regulation to control land use and development is zoning. In this particular instance, zoning would likely separate the incompatible land uses, precluding the offending impact from arising in the first place. What then is zoning?

Zoning is a regulatory device aimed at classifying land within an entity into areas, layouts and districts or zones and prescribing and applying in each area, layout, district or zone regulations concerning building and structure design, building and structure placement and use to which land, buildings and structures within such designated areas, layouts, districts or zones may be put. It is a system of land use regulation which designates the permitted uses of land based on location. To this end zoning is a regulation of uses of land, allowing government through the local planning agencies or council to exercise stronger control over the use of land in a particular community.²⁴

Zoning commonly includes regulation on the kinds of activities which will be acceptable on particular lots (such as open space, residential, agricultural, commercial or industrial), the densities at which those activities can be performed (low density housing such as single family homes to high density such as apartment buildings), the height of buildings, the amount of space structures may occupy by limiting how close a building may be from the edge of the lot, the proportions of the types of space on a lot (for example, how much landscaped space and how much paved space), and how much parking must be provided. What then are the bases for zoning?

The traditional concept behind zoning is to separate potential conflicts among incompatible land uses. There may be a variable number of zones designated as part of the zoning regulation, depending upon the size and complexity of a given city or jurisdiction. Typically, the zoning regulation will include the following categories of use: residential, commercial, industrial, office, public/institutional, and agricultural. There may be several subcategories as well such

²⁴ Kayode Oyesiku, *Modern Urban & Regional Planning Law & Administration in Nigeria* (Ibadan: Kraff Books Ltd., 1998) p. 107.

as detached or attached residential zones of various size or density or heavy or light industrial uses. Each zone is regulated by a number of conditions in addition to use including density, or physical restrictions such as height, area coverage, parking requirements, screening, etc. In addition, as indicated above, there may be zones based upon environmental conditions such as open space, flood plains, and steep slopes. To this end, zoning “attempts to separate non-conforming or contradictory socio-economic activities spatially from other land uses and putting conforming uses together in a mixed-use zone.”²⁵ It therefore operates as a dispersal device of human population and activities within available spatial order. In this process this device of planning law serves as a mechanism for protecting the environment from abuse and degradation.

Based on the above, zoning can therefore be regarded as a form of ‘police power’, which is delegated to the planning authority through enabling legislation to ensure the welfare of the community by regulating the most appropriate use of the land. The zoning regulation is therefore the mechanism by which new development is controlled as growth occurs. As such, zoning is a classification of land uses that limits what activities can or cannot take place on a parcel of land by establishing a range of development options. In this respect, zoning can be a valuable tool for directing and controlling growth within a city. When utilized as a tool for achieving planning goals rather than serving as the plan itself, zoning has proven to have positive merit especially as it relates to environmental protection. Arising from the above zoning therefore is a planning device which attempts at a rational apportionment of land comprised in a planning scheme among the various uses which often conflict with each other. Zoning thus ensures that there is harmonious interrelationship between these, often, competing land uses.

²⁵ A. A. Utuama, “Planning Law & Environmental Protection” in J. A. Omotala (ed): *Environmental Laws in Nigeria including Compensation*, (Lagos: Faculty of Law, University of Lagos, 1990) p. 16

The utility of zoning as a veritable tool for environmental protection can be buttressed by examining the purpose of zoning in land use control. The purpose of zoning in this regard is to achieve purposeful utilization of land in the interest or general welfare of the people and the locality to which the land situates and relates. These can be buttressed by the following cases.

In *Ademola v Rutili and ors*²⁶ the defendants attempted to build a school on a piece of land zoned as an open space in the approved Victoria Island (Lagos) Scheme. The court restrained the defendants from continuing with the project on the ground that the purported development contravened what was approved on the planning scheme.

In another instance, in the case of *Abiola v Ijeoma*²⁷ both Plaintiff and Defendant were neighbours living at adjoining properties in Surulere Area of Lagos State zoned for residential purpose. The defendant operated a poultry in the compound of his house which made excessive noise and smell to the annoyance of the plaintiff. The court granted the injunction sought by the plaintiff restraining the defendant from the use of his compound to keep poultry. The decision of the court was based on the fact that the area is zoned for residential purpose only.

Also in the case of *Defactor Bakeries and Catering Services Ltd. v Ajilore & Anor*²⁸ the plaintiffs over-developed their plot and wrongly inserted a number of doors and windows as well as other outlets along the boundary adjoining the 1st defendant's property, contrary to the Ilupeju Planning Scheme in Lagos State. However, when the 1st defendant developed his land in accordance with the planning schemes the plaintiffs brought the present action that they were entitled to right of easement of light as the defendant's building obstructed the enjoyment of this right. The court dismissed this claim. This was affirmed on appeal to the Court of Appeal.

²⁶ Suit No. LD/784/84 (Unreported) delivered on 21 September 1985. See also JPPL Vol. 4, 1985, p. 43.

²⁷ Above note 11.

²⁸ (1974) ALL NLR, 385.

On appeal to the Supreme Court, the appeal was again dismissed on the ground that the appellants were in contravention of the planning scheme of the area and therefore should not be heard to complain.

At times an area may be zoned not as a single use but as a mixed use. This notwithstanding, the law enjoins land owners to use their land in such a way that one use should not conflict irreconcilably with other land owners use of his land nor should it interfere with his enjoyment of the land or degrade the said property or the environment where the land situates. Where such a situation arises, the law is usually invoked against the defaulting land owner for the protection of the other land owner's use. This state of affairs is aptly illustrated by the following cases. In *Tebite v. Nigerian Marine & Trading Co. Ltd.*²⁹ the Plaintiff, a Legal Practitioner, had his office and residence in an area in Warri designated as a mixed-use zone where the defendant company engaged in the manufacturing of steel products and servicing of boats. The plaintiff complained that the defendant worked round the clock thereby disturbing him from the use of his chambers at night, also denying him a good night's sleep and causing soot to be deposited on his window blinds and room. He brought an action for injunction against the defendant. The court, in granting the injunction, held that the defendants' use of their land unreasonably interfered with that of the plaintiff. Also, in the case of *Karagulamus v. Kolawole Oyesile*³⁰ plaintiff brought this action against the defendant on the ground that fumes from the defendant's machines caused damages to his bedroom and that such fumes were offensive. The court granted the injunction sought.

In order to preserve and protect the environment, in extreme situations, the contravention of the zoning policy may attract demolition of the offending building or structure. Thus in *Ikpadiola & Ibadan Metropolitan Planning Authority v Abiodu*³¹ the first appellant obtained planning permit from the

²⁹ (1971) U.I.L.R, 432.

³⁰ (1973) 3 U.I.L.R.

³¹ [1987] 3 NWLR (Pt. 59) 18.

second appellant. This planning approval was, however, in contravention of the Federal Highway Building Lines Regulation. The respondent had earlier obtained an approval from the 2nd appellant and had developed his land in accordance with the building lines, plans and set-back of 46 metres. As a result of the construction work of the 1st appellant, the respondent's view to the highway was blocked. Consequently, the respondent sought a declaration that the first appellant built in contravention of the Building Line Regulation through active connivance of the second appellant. Both the lower courts and the Supreme Court decided in favour of the respondent. The planning authority, the second appellant, was ordered to enforce the approved planning scheme of the area. The 1st Appellant's building was subsequently demolished. In the case of *Chika Ibeneme V. Governor of Anambra State*³² the plaintiff who was a Commissioner in Anambra State (1992 – 1993), in abuse of her office connived with the planning authority who had her official residential quarters carved out into plots, allotted it to her and gave a planning approval for the development of the plot. When the military struck in 1993 a review panel was set up to review all land allocations by the ousted civilian administration. The panel found that allocation of the plot to the plaintiff and approval of the planning permit application were in contravention of the zoning policy of the area as it offends the minimum building space as are applicable to the Government Residential Area (GRA). The Governor ordered for the demolition of the building. The plaintiff then brought the present action for damages and trespass. The action was dismissed. The aforementioned cases illustrate the place of planning law in regulating the way land owners make use of their land thereby ensuring environmental protection.

What then are the benefits of zoning policy *vis-à-vis* environmental protection? Without zoning no property owner can complain about encroachment on his property. For

³² Unreported decided by the Anambra State High Court sitting at Onitsha, in 1993.

instance, in the case of *Oladehin v Continental Textiles Mills*,³³ while construction work was going on in the plaintiff's land, poisonous fumes and effluents escaped from the defendant's property and caused damages to the building materials in the plaintiff's land. The lower court found the defendant liable. This was upheld on appeal to the Supreme Court. In *Ojo Eholor v Idemudia Idahosa*³⁴ the defendant, in contravention of the planning regulation which required specific setbacks and offsets, developed his property wall-to-wall. The roof from the building jolted into the plaintiff's compound and when it rained, the plaintiff's compound was flooded causing damages therein. In the present action, the court held that the defendant's use of his land encroached on the plaintiff's and granted the relief sought.

Furthermore, without zoning policy, the concept of material change in use of land would never be applicable. To this end landowners would not have been constrained by the courts to guide against altering the character of an area by changing its use or intensifying an approved use. Thus, in *Abiola v. Ijoma*,³⁵ because the use to which the defendant subjected his land changed the character of the building and adjoining land, his act amounted to material change in use. Based on this, the planning authority (Lagos City Council) demolished the pens.

Moreover, without zoning, no specific use might have been designated for a property. In this respect, where a developer in the course of developing a project, used the land for the purpose for which it was not designated, the offending project is usually ordered to be pulled down. In the case of *Anthony Savage and Anor v Akinrinade*³⁶ the defendant erected a store building along a public high way in Surulere, Lagos, in contravention of the planning scheme of the area. The building

³³ (1978) 2 SC, 23

³⁴ [1992] 2 NWLR (Pt. 223), 327. See also *Ige v Taylor Woodrow (Nig) Ltd.* (1963) LLR, 140.

³⁵ Above note 11. See also *Tebite v Nigerian Marine & Trading Co.* above note 12.

³⁶ (1964) ALL NLR, 238, see also *Ademola v Rutili & Ors.*, above note 26.

blocked the only access road to the school in the neighbourhood. In an action by the residents of the area, the court ordered for demolition of the offending building.

Finally, without planning law and the use of zoning policy, exercise of an individual's right as to the injury likely to be suffered as a result of encroachment would simply be subject to the general common law liabilities and all that it entails, usually, to the detriment of other land users. For instance, in *Adediran & Ors v. Interland Transport Ltd.*,³⁷ an action to restrain the defendants failed as the court disregarded the purpose of zoning policy under planning law and relied on the common law tortious liability principles of public nuisance. The case failed because, according to the court, the plaintiffs could not show that they suffered any wrongs over and above other residents of the area. The court disregarded the fact that the area was zoned as purely residential and that the activities of the defendants: parking of trucks along the entrance to the estate, day and night rattling of trucks and the noise from the workers loading and off-loading cargoes, among others, impinged on the plaintiff's use and enjoyment of their land.

3. Environmental consideration under the Nigerian Urban and Regional Planning Act³⁸

The Urban and Regional Planning Act is aimed at overseeing a realistic, purposeful planning of the country to avoid overcrowding and poor environmental conditions. In this regard, the following provisions become instructive: The Act requires a building plan to be drawn by a registered architect or town planner.³⁹ It establishes that an application for land development would be rejected if such development would harm the environment or constitute a nuisance to the community.⁴⁰ It also makes it an offence to disobey a stop-work order. The punishment under this section, is a fine not

³⁷ [1991] 9 NWLR (Pt. 244), 155.

³⁸ Cap N138, LFN 2004.

³⁹ NURP Act, s. 30(3).

⁴⁰ *Ibid*, s. 39.

exceeding ₦10, 000 (Ten thousand naira) and in the case of a company, a fine not exceeding ₦50, 000.⁴¹ It provides for the preservation and planting of trees for environmental conservation.⁴²

There is a correlation between planning law and environmental protection. This relationship is enunciated in the *Halsbury's laws of England*⁴³ which states that; 'the town and country planning system is designed to regulate the development and use of land in the public interest; and *it is an important instrument for protecting and enhancing the environment*⁴⁴ in town and country...' This issue was part of the several issues canvassed in *AG Lagos State v AG Federation & 35 Ors.*⁴⁵ The plaintiff's position was that it is correct and imperative that urban and regional planning must take account of environmental factors and seek always to protect and develop the environment and conserve biodiversity. They submitted, however, that the two roles- urban and regional planning and management of the environment- are distinct and separate under the Constitution and cannot and should not be merged.⁴⁶ A majority opinion agreed that the NURP Act was deliberately dealing with planning policy and development control and is not aimed at protecting or improving the environment as envisaged by section 20 of the Constitution.⁴⁷

However, we humbly subscribe to the minority opinion of the court that there is a *nexus* between town and country planning system and the environment. They asserted that where in a federation, the federal government is empowered to make laws for the protection of the environment; it cannot be denied that it can employ the town and country planning system as one of the instruments for achieving that goal⁴⁸. The only limitation being that it must not, in so doing, impair the state's integrity or take over its traditional governmental

⁴¹ *Ibid*, s. 59.

⁴² *Ibid*, s. 72.

⁴³ 4th edn., vol. 46, para. 1.

⁴⁴ Emphasis ours.

⁴⁵ [2003] 12 NWLR (Pt. 833) 1-253.

⁴⁶ *Ibid*, p. 77.

⁴⁷ *Ibid*, per Kalgo, JSC, at p. 179. Section 20, Constitution of the Federal Republic of Nigeria, 1999 as amended provides that 'the state shall protect and improve the environment and protect the water, air, and land and wildlife of Nigeria.'

⁴⁸ *A.G. Lagos v. A.G. Federation*, per Ayoola JSC, at p. 228 above note 45.

functions relating to details of land use or management. In the words of Tobi, JSC:

... the effect or result of town planning qualifies as physical and economic development within the meaning of environment as it enhances the value of land being property. In my humble view, the Urban and Regional Planning Decree No. 88 of 1992 is designed to improve the environment by protecting the land, thus coming within the purview of section 20 of the Constitution. It is not my understanding of the Decree that any planning scheme carried out within the Decree will destroy or abuse the environment; on the contrary, such a scheme will protect and carry out improvements on the environment.⁴⁹

We totally agree with this submission in view of the fact that the basis of planning law is to control development whose essence is to improve and protect the environment. To do this, planning law employs the following measures:

- (a) Determining what is development;
- (b) Adopting zoning policy; and
- (c) Ensuring compliance with planning regulations.

All development is earth-bound, and land upon which such development activities takes place is scarce, limited in supply and relatively fixed, thus the need to control development. This is so because integrated and coordinated approach to development ensures that development is sustainable and compatible with the need to protect and improve the human environment. In order to do this, the activities that amount to development were clearly defined by the Act:

Development is the carrying out of any building, engineering, mining or other operations in, on, over or under any land or the making of any environmentally significant change in the use of land or demolition of buildings including the felling of trees and placing of free-standing erections used for the display of advertisement on land.⁵⁰

⁴⁹ *Ibid*, at p. 241.

⁵⁰ NURP Act, s. 91.

Two things flow from the above provision as to activities that can amount to development:

- a) Building, engineering and other operations; and
- b) Environmentally significant change in the use of land.

Operations generally involve some acts which change the physical characteristics of the land, or of what is under it, or of the air above it⁵¹. Such acts must result in some physical alteration of the land, which has some degree of permanence in relation to the land itself. In this respect, acts that are capable of affecting the land in these forms include building, engineering and mining operations, and these shall not be commenced until a development or planning permit is first had and obtained from the appropriate Development Control Department.⁵²

The Act also covers any development that makes environmentally significant change in the use of land or building. This comprises activities which are done in, alongside, or on the building or land in question but did not interfere with the actual physical characteristics of that building or land. For such new use to amount to environmentally significant change in the use of land or building, and thus development, the new use must be materially and substantially different from the old use. These activities shall not have been commenced without a planning permit. Options against a developer include; order for a stop work and service of enforcement notices⁵³, or in extreme cases, an order for the demolition of the offending structure or building.⁵⁴

⁵¹ Lord Parker CJ in *Cheshire County Council v Woodward* (1962) All ER, 517.

⁵² See NURP Act, ss. 28, 29, 30 and 33.

⁵³ NURP Act, ss. 47 – 60.

⁵⁴ NURP Act, ss. 61 – 63, 70. See also the cases of *Chika Ibeneme v Government of Anambra State* (unreported) delivered by an Onitsha High Court in 1993, *Ikpadiola and Ibadan Metropolitan Planning Authority v Abiodun* [1987], 3 NWLR (p. 59), 18. Also, the current demolition as Abuja and some major cities in Nigeria is instructive and flows from it.

Adopting a zoning policy in land use control is another way through which planning law achieves improvement and protection of the environment. Zoning is

A regulatory device employed by planning law aimed at classifying land within an entity into areas, layouts, districts, or zone, and prescribing and applying in each area, layout, district or zone, regulations concerning building and structure design, building and structure placement and use to which land, building and structure within such designated areas, layouts, districts or zones may be put.⁵⁵

Zoning, therefore, preserves the character of the neighbourhoods through the elimination of non conforming uses of land in designated areas, layouts districts or zones. A developer may be liable to environmental claim if he encroaches on the rights of others by:

- (i) Building on a place designed as open space to the annoyance of other land owners within the vicinity⁵⁶;
- (ii) Denial of access to public utilities such as a high way;⁵⁷
- (iii) Using a building or land against the use designated for such area⁵⁸; and
- (iv) Causing damage to property of other land owners.⁵⁹

Planning law improves and protects the environment from abuse by ensuring that conditions and terms attached to planning permit granted to a developer are enforced against the developer.⁶⁰ The Development Control Department (DCD) does this by using sanctions to elicit compliance. Such sanctions may include issuance of enforcement notices,⁶¹ contravention notices⁶² and stop work order;⁶³ revocation of

⁵⁵ Gordon Cherry: *Town Planning in Britain since 1990* (Oxford: Blackwell, 1996) p. 23.

⁵⁶ *Ademola v. Rutili & Ors* (unreported) Suit No LD/784/84 delivered on 21/9/85.

⁵⁷ *Savage v Akinrinade* (1964) All NLR, 238.

⁵⁸ *Karagulam v Kolawole Oyesile* (1973) 3 UILR,1. See also *Abiola v Ijeoma* (1970) 2 All NLR, 268.

⁵⁹ *Oladehin v Continental Textiles Ltd.*, (1978) 2 SC. 23.

⁶⁰ NURP Act, s. 35.

⁶¹ *Ibid*, ss. 47-50.

⁶² *Ibid*, s. 60.

⁶³ *Ibid*, s. 53-59.

the planning permit where the developer is recalcitrant,⁶⁴ and in extreme cases, order for the demolition for the offending structure or building.⁶⁵ Other infringements which may rise to cause of action include non-adherence to set backs and set offs,⁶⁶ easement,⁶⁷ and over development.⁶⁸

It can be seen from the foregoing that planning law, in order to protect and improve the environment and the rights of land owners and land developers, has put in place a number of source regions for planning and environmental claims. They range from insisting on obtaining permit before the commencement of a development to ensuring adherence to the zoning policy of an area and compliance to the various planning regulations. The apparent poor perception of planning law as a veritable tool of environmental protection has resulted to costly consequences as can be seen in the flooding of many cities and rural communities in Nigeria. NESREA and other regulatory agencies have suddenly embarked on media campaign urging people to adhere to planning regulations and to adopt proper land use practices in their construction of buildings and projects.

4. Conclusion

On the whole, planning law policy of zoning can be said to have restricted unnecessary encroachment on and the enjoyment of the adjoining land. By so doing, it has not only protected the land from degradation but has also encouraged environmental protection generally. It can, therefore, be said without equivocation that the concept of zoning as applied and enforced by the Planning Authority is a veritable tool for environmental protection under planning law. It is therefore our position that the essence of planning law is environmental protection and that implicit in planning law is environmental protection.

Thus, zoning generally serves to prevent new development from harming existing residents or businesses or an activity of land use having over-bearing preponderance on another. Through this way, planning ensures that that the

⁶⁴ *Ibid*, s. 39.

⁶⁵ *Ibid*, s. 61-63 and sections 70-71.

⁶⁶ *Defacto Bakeries & Catering Services v Ajiloye & anor* (1974) All NLR 385.

⁶⁷ *Metro Gas Ltd v Efearkaye* [2000] 14 NWLR (Pt. 686) 1.

⁶⁸ *Savage v Akinrinade*, above note 57.

environment is protected from prodigious abuse. To this end, one can conclude that planning decisions and environmental protection are intricately linked. According to Justine Thorton and Silas Beckwith:

It is sometimes unclear where the dividing line is to be drawn between 'planning' and 'environmental' controls. What is clear; however, is that very often the purposes of the two regimes converge, so that 'environmental' issues must form part of planning policy and procedure.⁶⁹

In spite of the above position, it is unclear why the Supreme Court of Nigeria per Umaru Atu Kalgo. JSC in *A.G Lagos State v A.G. Federation*⁷⁰ asserted that the Nigerian Urban and Regional Planning Law was deliberately dealing with planning policy and development control and is not aimed at protecting or improving the environment as envisaged by section 20 of the 1999 Constitution of Nigeria. The Supreme Court is urged with respect to reflect this trend within the earliest opportunity. It should be noted that Environmental Law encompasses all the laws within our legal system that are directed towards achieving an environmental end. To this end since planning law, and the whole gamut of the planning system, are directed towards achieving an environmental end, it follows that planning law and regulations are integral part of Environmental Law. It has been pointed out that environmental protection and land use development are inextricably linked, an understanding of how the planning system works is vital to an appreciation of the specific environmental controls which it supplements.⁷¹

69 Justine Thorton and Silas Beckwith, *Environmental Law*, 2nd ed. (London: Sweet and Maxwell, 2004). p. 355.

70 Above note 45, at 179.

71 Thorton and Beckwith, above note 69, p. 27.