THE LAW SOCIETY THE BAR COUNCIL

THE ROYAL INSTITUTION OF CHARTERED SURVEYORS

JOINT CONFERENCE 1978

D E V E L O P M E N T C O N T R O L - T H I R T Y Y E A R S O N

CONDITIONS AND AGREEMENTS - THE DEVELOPER'S VIEWPOINT

by

DR. T. HOYES, MA, Ph.D, DIP EST MAN (Cantab), FRICS

Exeter College, Oxford 22 - 24 September 1978

DEVELOPMENT CONTROL

CONDITIONS AND AGREEMENTS - the Developer's Viewpoint by

T. Hoyes MA, Ph.D, Dip Est Man (Cantab), F.R.I.C.S.

Introduction

The development control operation of a planning authority should be seen as a positive service to the public, including applicants for permission. It should not appear to be a bureaucratic machine designed to make life difficult for anyone wishing to develop land or change the status quo. In the words of a recent commentator the system should be about the management of change and not the prevention of change.

This updated and more constructive view of the development control system does not mean automatically that the methods and approaches to control adopted over the last 30 years are no longer valid, but rather that a reconsideration is opportune.

Seasoned campaigners have been heard to remark that there are four approaches to the task, all beginning with the letter 'B': bluff, bargain, blackmail and buy.

Bluff presupposes a gullible applicant, bargain a negotiable situation, blackmail that the applicant will seek further consents in the future and buy is a kind of final solution to a planning nightmare.

The context of this paper relates to the "bargain" approach and obviously to the aftermath of the initial and friendly "skirmish" between the prospective developer and the planning officer. The bell has gone for round one, which has established that permission can be recommended and may well be granted, subject to reservations. The concern therefore shifts to the nature and extent of the reservations.

For the purposes of discussion and investigation, a developer invariably starts from the position that his proposals are entirely straightforward and acceptable, but the planning officer has wider issues to grapple with which are likely to cast doubt on the developer's stance.

An earlier paper has outlined the legal position relating to conditions upon planning permission within the statutory framework. My task is to put forward views on how far in practice an "accommodation" can be arrived at between the parties within the framework, and if this is not possible, to explore the nature and usefulness of agreements which may properly be made outside the main statutory framework.

Circumstances Where Conditions are Unnecessary

Planning permission is very frequently sought for development which is entirely straightforward and devoid of contention. In such circumstances, conditions are obviously inappropriate and they should not be imposed. Unfortunately, experience suggests that this is not always the practice, and it can only be concluded that those responsible are over zealous in the exercise of their duties by, for example, imposing conditions as to the approval of goods to be sold in the proposed shop.

In the context of the management of change the guiding light should be Circular 9/76, Paragraph 2 (1) :-

> "The basic principle is that planning permission should be granted unless there is a sound and clear-cut planning reason for refusal. The onus therefore lies on the authority to show that the proposed development is not acceptable, rather than on the applicant to show that it is".

The other situation where conditions are inappropriate is when discussion prior to formal submission of the application has fully exposed the aspects which cause concern in the mind of the planning officer and the development has been designed to overcome the expressed problems. Examples of this can be cited at length and are well known to those in the field; suffice it to say that prior discussion is good practice and may well transfer the proposal into the straightforward category above.

Outline Applications

In the nature of things, an application for outline planning permission eschews detailed information irrelevant to the issue of the making of a basic land use decision in principle.

The concept of an outline planning permission is sound from the viewpoint of the developer and the planning officer, since it establishes an adequate measure of certainty for a minimum expenditure of resources. Moreover, by its nature it also preserves to the parties a degree of flexibility to meet changing circumstances, particularly those prevailing at the time physical development is to commence. Examples of such matters in practice are:

1. The size, layout, design and density of dwellings to meet expected demand at the point of development.
2. Cladding materials on large industrial and commercial buildings to take account of technical advances and market availability at the point of development.
3. Methods and materials for the screening of development and the layout of associated landscaping both of which have become progressively more sophisticated in recent years.

No doubt the public participator tends to dislike outline applications as being too generalised for his purpose, and in the event the conditions imposed on the outline will prevent his raising other matters at the stage of approval of detailed particulars.

In the context of an outline application, the planning officer will quite properly seek to safeguard by conditions against all eventualities of a genuine planning nature. The applicant can assist in two ways; firstly by being fairly specific upon a matter which otherwise would be at large, e.g. the approximate number of dwellings to be built or the area of buildings to be constructed upon the site; secondly by the provision of sketch plans,

illustrative only of the proposed development but not comprising part of the formal application document. These can only be helpful to a planning officer in that they put a little flesh on the skeleton proposal and in the process focus his mind towards the kind of conditions which are required and appropriate in planning terms so as to secure the provision of detailed information at a later date.

I suggest it is for the applicant to judge the extent of illustrative material which should be provided, assisted no doubt in this judgement by informal prior discussion with the planning officer, then for the planning officer to use his Section 29 (1) powers to impose conditions on the permission. It is not for the planning officer to request more and more illustrative material and thereby convert the application from an outline into a detailed or full application.

The Economics Of Development

The motivation to undertake development in the private sector has essentially two main facets:-

1. Direct occupation of the land or land and buildings for use by the developer for the purpose of residence, recreation or business enterprise.
2. For occupation and use by others with the developer adopting either an investment or trading role or sometimes a combination of the two.

In the latter situation there is a direct concern with either an investment return or a capital return in the form of a trading profit which at any point in time are products of forces in the market.

In the former circumstances of direct occupation an investment return of a wider dimension will be sought where business or trading activity is concerned in the created development. Even where occupation as a private

residence or for recreation is the motivation, the aspect of finance cannot entirely be ignored since most forms of development involve capital expenditure which has to be provided from a personal or institutional source by either saving or borrowing.

Whilst at first glance there may be some forms of development in which the economic equation is totally irrelevant, on a detailed analysis, this is only very rarely the situation. The only realistic approach for developers and planning officers to adopt is to assume that there is virtually always an economic aspect. A development scheme which is so restricted and conditioned that it ceases to be economically viable in the wider context outlined above will rarely be implemented. It should always be remembered that the total planning process in the real world has two facets, namely, plan making and implementation, the former being essentially a backcloth for the latter.

Some Economic Consequences of Conditions

1. Lack of Demand for the Development - Residential developments where the form of the layout and or density is not attractive and acceptable to house purchasers.

2. Development which is too expensive for occupiers - in capital or rental terms arising from

   a) density limitations on commercial development (e.g. offices)
   b) the requirement of costly construction methods or materials e.g. the retention of existing building facades, the use of traditional materials for roofing or cladding which are no longer readily available in quantity.

3. Effective limitation of potential occupiers/purchasers - by restricting the use which may be made of the completed development

   a) narrowing the Use Classes Order from the general to a specified use
   b) controlling the identity of the occupier to a

named occupier, such as the applicant, or an occupier from a specific geographic area or already established in the locality

c) limitation upon the hours of operation in industrial and commercial premises

d) restricting car parking provision at a service depot to "operational only" thereby eliminating car parking for staff and casual callers

4. The inability of the site and the finished development to attract construction (bridging) and long term finance - due to the constraints imposed resulting in the created development/investment not meeting the criteria adopted by lending institutions, particularly that of ready marketability in the event of financial failure by the developer or borrower.

The Economic Judgement

Once the inevitable economic equation has been introduced, the issue which follows is who should make the judgement; ideally, the answer is that both parties should make their own appraisal and be prepared to enter into open discussions to discover the real limitations.

In theory this must be correct, but assessing the economics of development is a complicated process which requires direct contact with practical development and conditions in the market place. By implication therefore the developer is best placed and in reality it is often his main motive for becoming involved in the development. Moreover, the planning officer, as will be demonstrated by another speaker, has many other aspects to concern himself with, such as the broader economic, social and political policies of his authority which have an influence upon development.

This practical situation however does not mean that the planning officer should be unappreciative of or unreceptive to matters relevant to the economics of

development because he should always remember that only development which is viable in economic terms will be implemented. If a use and general scheme is acceptable for a particular location in planning terms, every effort should be made to preserve its viability by not imposing conditions which are too onerous to the actual or a likely developer. The vacant sites and semi-derelict under used buildings on the fringes of our city centres bear ample witness to this situation.

Perhaps in the end, the developer has to be regarded as hypothetical because it would be invidious for a planning officer to have different standards with respect to conditions dependent upon the identity of the developer actually making the application the subject of consideration. Such is the complexity of our land ownership system and development processes that the possibility of the applicant for planning permission being the actual developer is often remote. Even if he is the developer the greater economic or financial interest may be vested elsewhere.

Partly as a result of the Community Land Scheme and also from more historic land acquisitions, the district planning authorities themselves in their capacity as landowners will come more and more to comprehend the financial/economic dimension of development control as they seek to market their landholdings. Conditions upon planning consents which erode economic viability will deter prospective developers in these less optimistic times and delay in site disposal quickly increases the cost of the land held.

Conditions

Having concentrated initially upon circumstances where conditions are unnecessary and followed with a brief journey into the economics of development, we should now consider other situations.

Circular 5/68, as will be well known, catalogues six useful tests when considering or imposing a condition.

Is it: a) necessary, b) relevant to planning,
c) relevant to the development to be permitted,
d) enforceable, e) precise, f) reasonable.

These matters are not only the rudiments of good practice with respect to conditions, but, with the possible exception of the issue of need, are now fairly well ordered and defined by decisions of the Courts.

Upon the need for a condition Circular 5/68 is remarkably brief when it states that:

> "one good test of need is whether, without the condition, permission for the proposed development would have to be refused. If the answer to that question is "No," the condition needs some special justification. It is not enough to say that a condition will do no harm. If it is to be right to impose it, it ought to do some good."

Reading this paragraph with paragraph 2 (1) of Circular 9/76, cited earlier, we have a situation where there is a planning reason for refusal but it is not of such gravity that it cannot be overcome by a legitimate condition. In effect the condition tips the balance in favour of consent and away from refusal. It may do this by being concerned with matters which, from the developer's point of view, are peripheral and cosmetic, or it may touch and concern issues at the heart of the development and erode economic viability.

In the real world, there would seem to be three broad categories of condition which from the developer's viewpoint can be classified according to acceptability.

Normally Acceptable

Most developers, after careful thought, will accept conditions which have as their main objective the achievement of compatibility of the proposed and existing development. Indeed, developers may well find at the end of the day, for many the point of disposal, the result of the condition has been beneficial to them.

Examples are conditions which seek:

a) to uphold local "planning standards" concerning density, provision of vehicle parking, ease of traffic flow and on site circulation.

b) to preserve and if possible enhance the quality of a particular locality, be it a town centre, residential street or small hamlet, by regulating building lines, building mass, cladding and roofing materials.

c) to respect the reasonable aspirations of neighbours and other informed local opinion by reducing the impact of new buildings, extensions and changes of use at site level. Careful siting to avoid interference with natural light, to maintain privacy and preserve trees which are an established part of the local scene are aspects of this approach.

Acceptable With Reservations

All developers recognise that in many situations the very process of development is a long term activity which will be implemented by a number of individuals and agencies who will operate at different periods of time.

It is inevitable therefore that it will be necessary to impose conditions upon the development of one area of land which will safeguard the development future of another.

Examples are:

a) the line of a new road.

b) land required for the future improvement of an existing highway.

c) future access to adjoining land in the context of development for housing or for goods delivery and servicing to commercial premises in a town centre.

Acceptability will no doubt be governed by the severity of the sterilisation of use imposed, both in terms of the physical area of land and the time scale. In many situations, particularly within town centres and commercial or industrial areas, the economic impact of the condition can be mitigated by the grant of temporary planning permission for such uses as open storage, vehicle parking, temporary buildings and even advertisement hoardings as a screen to unsightly activities to the rear.

Unacceptable

In the main these are conditions which interfere with the development process, or seek to destroy the established use of other land in the ownership of the developer or fundamentally undermine the economics of development.

Examples are:

a) the requirement of abnormal phasing for a residential or industrial development so as to result in considerable capital expenditure in advance of a normal development programme. A long spine road to be constructed before any houses or factories are occupied on site when market demand for the development will extend over several years.

b) phasing conditions on residential development requiring the completion of Phase A before the commencement of Phase B, without variety as to the density and dwelling types being allowed in each phase. The effect of this being to restrict market demand and thereby reduce the rate of actual development attainable in practice.

c) a condition in a planning permission for a new factory requiring the existing factory buildings to be used for storage only, when they are patently physically unsuitable for such purpose, and therefore become effectively sterilised.

d) conditions limiting occupation of the finished development to a specified individual or firm or to a narrow specialist activity, thereby making the premises unsaleable in the general market, and of virtually no consequence as security for finance.

e) time limits on planning permission which render the new building or conversion works uneconomic to carry out.

PLANNING AGREEMENTS or PLANNING BY AGREEMENT

Contrary to its title planning by agreement is not a manifestation of the ultimate in democracy within our planning system. Some may indeed say that it is far removed from the democratic scene, and makes possible in obvious form the "bargaining" approach to planning referred to at the outset.

Regardless of how planning agreements are viewed in theoretical terms, it cannot be denied that they are an exceedingly useful tool in development control. In a sense they add a further dimension to the system in that most important area of planning, namely implementation.

The legal authority for the making of agreements is Section 52 of the Town and Country Planning Act 1971, Section 126 of the Housing Act, 1974, and in an ever increasing number of local planning authority areas, Private Acts which frequently duplicate and extend the powers of Sections 52 and 126.

The Need for Agreements

Briefly, agreements enable planning permission to be granted where otherwise it would be refused and the proposed development delayed because there is a significant planning objection to immediate development. Moreover, the planning objection is incapable of being overcome by attaching a condition in the conventional manner, as discussed above.

If the development control system is to function effectively in the immediate future, particularly in the sense of the management of change, agreements will need to be more widely used, so as to avoid a significant further slowing down of development.

The statutory development control system has very severe limitations at the present time, especially from the developer's point of view.

1. The accepted approach to development control has been to operate against a backcloth of fairly specific plans and policies as expressed and illustrated in traditional Development Plans. These have become outmoded over time, but for the greater part of the country have not been replaced as yet by their real modern equivalent of Local Plans. In many areas at the present time development control is proceeding in a vacuum, and often, to protect all future possibilities, the easy solution is to refuse permission pending a more certain backcloth against which to make the decision. In the alternative the decision can be made by the Secretary of State on appeal at considerable cost to the applicant.

2. Quite properly, the ability of planning authorities to impose conditions upon planning permission is circumscribed by the appeal system and the Courts. This necessary discipline itself produces problems

for planning authorities and developers in that if the planning objection to the development cannot be removed or mitigated by conditions, the application for permission can only be refused unless resort is had to an agreement outside the main statutory system. Agreements can therefore cater for the unusual in terms of the nature of the proposed development and the unexpected in terms of time scale. They can introduce an element of flexibility which has a sensitive regard to the circumstances of both site and applicant.

3. Apart from the current lack of an effective planning backcloth, the input of local authorities and statutory undertakers in recent years by way of expenditure for the benefit of development generally has been severely curtailed as a matter of government policy. New and improved roads, main drainage and sewage disposal facilities and the like have all been cut back, even though they are the lifeblood of development.

The Prerequisites of a Planning Agreement

Given that a planning permission cannot be granted outright due to some significant planning reason, what are the essentials for resolving the issue by means of an agreement?

1. A willingness by the planning authority and the applicant to discuss and negotiate as though they were parties in the private sector, and to discard for the time being the relationship of planning authority and applicant.

2. There must be a solution in practical and physical terms to the planning objection, the drainage or access difficulty must be capable of being overcome, the restoration and subsequent landscaping of a disused quarry must be physically feasible in the sense of being pumped dry of water and the ready

availability of fill material.

3. Assuming that a practical solution exists, what are the basic economics? Is it financially worthwhile from the developer's point of view to take the permission at the present time and meet the financial burdens or the consequences of other constraints which will flow from the agreement or contractual arrangement? This is a matter of fine judgement which will be influenced by the following:-

   a) the prospects in terms of time of the deficiency, in say drainage, being made good by the relevant Water Authority.

   b) the extent of land ownership and the cost of acquisition. If the land has not yet been purchased, the price to be paid to an owner can no doubt be made to reflect the costs of meeting the terms of the agreement.

   c) will the expenditure benefit only the land of the negotiating developer, or will it provide say drainage capacity to other owners or indeed relieve the Water Authority of an existing problem arising from current overloading.

   d) the overall profitability of the development scheme, can the scheme support the costs issuing from the agreement?

   e) the implications of Development Land Tax, and in particular whether the costs or expenditure incurred in fulfilling the agreement in the final analysis reduce the Development Land Tax liability which would otherwise arise on the commencement of the development scheme. This is largely a question of opting for the tax liability to arise at the most beneficial time and the use of correct valuation procedures under the Development Land Tax Act, 1976.

Perhaps the answer, in respect of both conditions and agreements, lies simply in problem analysis and the application of sweet reason. This deduction brings to mind a character well known to valuers and exquisitely defined in Domestic Hire Company v. Basildon Development Corporation, 1969, decided in the Lands Tribunal by the late John Watson.

> "The prospective purchaser is the consistently "reasonable" man; seldom encountered in the flesh, he haunts the highways and the byways of our jurisprudence. To guage the contents of his hypothetical mind the valuer must not merely stand in his shoes, but look with his eyes, question with his lips, listen with his ears, and reason with his assumed intelligence. If the reasonable man would have harboured prejudice, the valuer must foster the same prejudice. Prejudice can influence values either upward or downward, and subject to a prejudice having been reasonably harboured, it is immaterial for the purposes of valuation if it was founded on a fallacy".