# Planning Obligations—Where are We Now?

**By Michael Cunliffe**[1]

## Introduction

Planning obligations pursuant to section 106 of the Town and Country Planning Act 1990 enable persons with an interest in land to enter into obligations (either by agreement or unilateral undertaking) with local planning authorities whereby they bind their land. The general purpose of planning obligations is to address the impacts of a proposed development and to require the landowner to undertake measures to make the application acceptable to the local planning authority. That sounds fairly straightforward and uncontroversial.

The reality is, however, that the subject area of planning obligations or planning gain is perhaps the most contentious area of planning law and practice. It has been and is the subject of much political and public debate and is of major concern to planning practitioners and the development industry. Lord Nolan's Committee on Standards in Public Life stated in their Third Report *Standards of Conduct in Local Government* (July 1997) that planning obligations were "the most intractable aspect of the planning system with which we have had to deal ... (and that they) have a tremendous impact on public confidence" (paras 302–303).

There was a growth in the use of planning obligations in the 1990s. The University of Sheffield estimated, in a survey carried out in 1999, that while the percentage of planning applications with associated planning obligations remained very small, the total number of planning applications with associated planning obligations grew by 40 per cent between 1993–1998. They estimated that approximately 17 per cent of major planning applications and 26 per cent of major housing schemes were accompanied by obligations. These percentages seem surprisingly low and belie the position in practice where nearly all major schemes seem to attract planning obligations.

The growth in the use of planning obligations is likely to continue as the Government looks more and more to the private sector to make contributions, for example to affordable housing and public transport infrastructure, and to fund urban regeneration and renewal generally.

It could be argued that the present system, based as it is on flexibility and discretion works well and is well understood by the users of the planning system. On the other hand there are those that argue that the present system is flawed and ought to be reformed in that it is uncertain, arbitrary and confusing and does nothing to dispel the long standing belief held by the public, and reinforced by the findings of the Nolan Committee, that planning permissions are being bought and sold.

The position does however have to be seen in perspective. It is only the rogue cases that cause an outcry. In this writer's view, planning obligations are in the main properly used and are a vital part of the planning system.

The Government has had reform of the planning gain system in mind ever since January 1998 and before that when it was in opposition. The Government's primary concern is to improve the way in which planning obligations are used both to increase openness, transparency and predictability and to achieve greater consistency in implementation by local authorities and developers.

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A Consultation Paper on the future of the system has been promised for some considerable time but has not yet materialised. The delay is surprising as reform of the system could be of great importance in underpinning other "joined-up" thinking initiatives in other areas. There has been speculation that the delay has been caused by the Treasury's concern that lengthy negotiations on section 106 Agreements are holding up employment generating schemes and acting as a hurdle to investment.

In June 2001 the Chancellor of the Exchequer announced as part of a Treasury report on enterprise that a Green Paper on reforming the planning system would be published later this year. The Chancellor was concerned that the current planning system was "based on the needs of the post war world" and that the Green Paper proposals would "aim to strike the right balance in a radically different economy which puts an even higher premium on speed, efficiency and flexibility". It is understood that the consultation on planning obligations is likely to be run in tandem with the consultation on the Green Paper. There will be various consultations with interested parties in advance of the Green Paper being issued, and it may be that views on planning obligations will be sought as part of that process. It remains to be seen whether the Government will offer any radical suggestions as to reform of the planning gain system, or whether it will be "business as usual" with some cautious suggestions for reform.

It is intended in this Paper to highlight various perceived deficiencies in the current system, which may or may not be referred to by the Government in its reform proposals, and to suggest reforms that might be introduced to deal with these deficiencies.

It is highly likely that the Government's reforms when they do emerge will consider the introduction of impact fees. There has already been widespread debate on the question of impact fees and whether they, or some other form of standardised or formulaic system, should be introduced into the planning system. It is intended to consider that issue in this Paper.

The Government has also speculated as to the use of economic instruments to negotiate planning obligations as a way of speeding up discussions with applicants. The use of tradeable permits has also been canvassed. It is intended to consider these issues also.

It is also intended in this Paper to consider two thorny topics that are of current concern to planning practitioners and the development industry, namely, affordable housing and sustainable transport and, in particular, travel plans.

## Terminology

Planning gain is a term that is well known to all planning practitioners and those in the development industry. It does not however officially exist as a planning concept. It was laid to rest by the Conservative Government in Circular 16/91. The Government's concern was that the expression gave credence to the belief that planning permissions were being bought and sold and that local planning authorities were seeking to obtain unwarranted benefits out of development schemes by bribery and extortion.

The concept of planning obligations was introduced in the substituted section 106 of the 1990 Act, brought in by section 12 of the Planning and Compensation Act 1991, which came into force on October 25, 1991.

A planning obligation can be either a planning agreement or unilateral undertaking. Those are the alternative legal instruments. The subject matter of the planning obligation has, however, to be called something. To call the subject matter of the instrument a planning obligation would be rather clumsy.

In this Paper it is proposed to use the expression planning obligation, where it refers to the legal

instrument (either a section 106 Agreement or a Unilateral Undertaking), and planning gain or planning benefits (more neutrally) for the subject matters to be included within the instrument.

## Do we need planning obligations?

Is there a need for planning obligations? Could not planning gain be dealt with by way of planning conditions?

The use of conditions would clearly simplify matters and would avoid the delay and cost of negotiating and completing planning obligations. It sounds attractive.

The problem is, however, that planning obligations are often too complicated to be reduced to a condition. Further, planning obligations are often imposed on a local planning authority and it would be inappropriate to place requirements on a local planning authority under a planning condition.

Planning obligations often include cash payments to a local planning authority. Indeed they are specifically permitted by the 1990 Act (s.106(1)(d)). Some commentators argue that there is nothing illegitimate under the tests in *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578, preventing cash payments. Even if that is right, a problem arises if the money is not spent, or is only partially spent, and the money or the unspent amount is to be refunded to the developer. A planning obligation can deal with the mechanics of that, but a condition cannot.

In short therefore there is a major role for planning obligations in the planning system. Having said that local planning authorities should be more receptive to arguments that matters arising from a development should, if possible, be controlled by condition, and only if a condition is not appropriate should thought be given to a planning obligation. Local authorities should also be dissuaded from the practice of adopting a "belt and braces" approach of controlling matters by both planning conditions and planning obligations.

## Deficiencies of the Present System and Suggested Reforms

### (i) Divergence Between Law and Policy—A Two-Tier System

As a result of the case of *Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 W.L.R. 759 there is a divergence between law and policy. In *Tesco* the House of Lords held that a planning obligation which has nothing to do with a proposed development will not be a material consideration in determining whether or not to grant planning permission for that development and that it could only be regarded as an attempt to buy a planning permission. But they also held that, if the obligation has some connection with the development, which is not *de minimis*, then regard must be had to it as a material consideration, although the weight (if any) to be given to it was a matter for the discretion of the decision maker acting reasonably.

The Secretary of State's policy on the use of planning obligations is set out in Annex B to Circular 1/97 "Planning Obligations". He is concerned that there should be certainty and uniformity of approach and that the planning system should operate within the public interest, with the fundamental principle that planning permissions may not be bought or sold.

The Secretary of State's policy therefore requires planning obligations to be sought only where they are:

- necessary
- relevant to planning
- directly related to the proposed development

- fairly and reasonably related in scale and kind to the proposed development and
- reasonable in all other respects. (Paragraph 7 of Circular 1/97).

These are essentially the same tests as used in relation to the imposition of planning conditions set out in Circular 11/95 "The Use of Conditions in Planning Permissions".

Although the Secretary of State's policy (then contained in Circular 16/91) was recognised by the House of Lords in *Tesco* to be a lawful policy, a local planning authority is not bound to apply it. It may give it such weight as it reasonably thinks fit.

The Secretary of State's policy is accordingly more restrictive than the law. Circular 1/97 can be seen as an attempt by the Secretary of State to limit the effect of the *Tesco* case and to curb the discretion given to the decision maker.

This discretion, and the reinforcement in the *Tesco* case of the view that the Courts will only rarely interfere with a decision on its planning merits, means that local planning authorities may be tempted to demand additional planning gain outside the scope of Circular 1/97 in the knowledge that the Courts will not quash their decision simply because they do not follow the Secretary of State's policy advice.

Whilst the reality might be that local planning authorities do follow the advice in Circular 1/97 either generally, or by incorporating reference to the need to abide by its advice in their development plans, there will be those authorities who see the *Tesco* decision as an opportunity to exploit and extort.

The apparent latitude permitted to local planning authorities has led to criticism that planning obligations are being used to enable planning permissions to be bought and sold, that developers are being held to ransom and are being asked to provide benefits which have little or nothing to do with the development proposed.

Developers know that if the local planning authority makes unwarranted demands for planning gain they could go to appeal where they know that the Inspector or the Secretary of State will apply the strict letter of Circular 1/97. The launching of an appeal however is a time consuming and expensive exercise with no certainty as to the outcome. The developer may therefore decide, on balance, to accede to a local authority's demands, even though those demands might be questionable, in order to obtain planning permission from the authority, rather than suffer the delay and costs involved in any appeal.

What has been created therefore is an unsatisfactory two tier system which is completely at odds with the Government's aim of having a system that is predictable.

## Reform

The Planning and Environmental Law Reform Working Group of the Society for Advanced Legal Studies considered the problems caused by the divergence between law and policy in its "Report on Planning Obligations" published in November 1998. It recommended that a restriction should be introduced into planning legislation as to the extent to which planning obligations undertaken in connection with a development should be treated as a material consideration in determining any planning application. In essence a planning obligation would only be a material consideration if it reasonably related to the proposed development, and it was reasonably required if planning permission were to be granted for that development. This would have the effect of limiting the discretion given to local planning authorities as a result of the *Tesco* case and arguably would make the system more predictable for a developer in accordance with the Government's aspirations.

### (ii) An Alternative View—Circular 1/97 Should be Redrawn More Liberally—The Tesco Decision is too Narrow

Circular 1/97 is very tightly drawn, tying planning obligations very closely to the proposed development. The Government was intent on ensuring that planning obligations should only deal with the direct impacts of a development that are necessary in planning terms to enable a development to proceed. This advice in the Circular is often then constrained.

Thus Circular 1/97 provides at Paragraph B 14 of Annex B that the costs of subsequent maintenance and other recurrent expenditure should normally be borne by the body or authority in which the asset is to be vested. Where payments are made, Government advice is that they should be time limited and not required in perpetuity. This advice is too narrow, given the financial strictures on local authorities.

Government guidance in Circular 1/97 places too great an emphasis on the use of physical works to solve transport problems. Whilst contributions to the capital costs of such schemes from developers are important one must not lose sight of the fact that the schemes will also need revenue support. Indeed without that revenue support the schemes will be of little practical use. Local authorities do not have the funding. Should not therefore a developer be required to meet the revenue costs of those public service needs as well as the capital costs? There should therefore be an acknowledgement in Government guidance that revenue funding is also an important part of planning obligations.

There is often a need for new public transport facilities which are beyond the scope of any one development or developer. Local authorities should be enabled, through the mechanism of planning obligations, to raise joint contributions from a number of developers towards one major environmental or transport scheme. Circular 1/97 is not helpful in facilitating such arrangements.

Circular 1/97 therefore needs to be replaced with advice that is more positive and creative that will allow local planning authorities more leeway to pursue sustainable initiatives.

Quite apart from the deficiencies of Circular 1/97, one could argue that the *Tesco* decision is too narrow. Should not local planning authorities be able to use planning obligations to encompass wider benefits within the local authority area as a whole, even though the planning gain has nothing to do with the proposed development? Should they not be able to use planning obligations for social engineering purposes within the local authority area as a whole?

Why should not a developer who is to profit from a proposed development be required to make good a shortfall in public funding in a cash-strapped local authority area, for example, to enable important social initiatives such as employment training schemes or environmental improvement works to be carried out, where those schemes or works have no relevance to the development in hand but where those schemes or works are urgently required to be provided to benefit the local authority area as a whole?

If there is a need for a public amenity in a deprived community, should not a developer be required to provide that in return for planning permission for a development, even though that amenity has no relevance to the development to be carried out? The developer will still reap a profit from the development and the community will benefit as well. What is wrong with that?

### (iii) Uncertainty and Unfairness

It is often said that the present system is uncertain, unfair and very much a lottery. A developer buying an area of land for future development will probably not know what planning gain demands are likely to be made of him by the local planning authority when he comes to develop that land. Those demands

could affect the terms of the acquisition and could have a major impact on the profitability of any development. Even when the developer discovers what planning gain he will have to provide in return for a grant of planning permission, he may well be unclear as to whether the planning gain demanded is directly or reasonably related to the development.

Whilst some development plans might give an indication as to the planning benefits that might be sought in relation to development proposals, other plans will be silent. Even where planning benefits are specified, the amount required to obtain those benefits is unlikely to be quantified in the plan.

Increasingly developers are being asked to bear the cost of necessary infrastructure, not just highway provision or highway improvements, but facilities that were always traditionally the responsibility of the public sector. Thus it is common for a residential developer to have to contribute towards facilities such as schools, community centres and sports facilities. The position is not uniform however. In one part of the country planning benefits may be required, whereas in another part of the country no benefits will be required. In this latter case the local planning authority may be only too glad to welcome business investment in an area with high unemployment. Even neighbouring authorities with similar social-economic profiles may have different requirements.

The London Borough of Brent produced a Planning Design and Development Brief for the New National (Wembley) Stadium in 1998. It was produced as a guide to the local planning authority's requirements and expectations for the redevelopment of the Stadium and its setting. The Brief stated that the Council would require a section 106 Agreement to address the off-site impacts of the development and to ensure improved accessibility for the public. The Heads of Terms for the Agreement were contained in an appendix to the Brief. An indication of the costs of the off-site works (about £30 million) was given.

On the face of it Brent's approach was consistent with Government advice in Circular 1/97. However the Brief then stated in terms:

> "The Council will be asking for other community benefits which are beyond what can be asked for under planning legislation. In particular the Council is aware that considerable public money will go into this project and the Council will seek other benefits for the local community as part of this scheme."

There is no indication as what the community benefits might be nor as to the cost of them. That is unfair to the developer and he ends up in a lottery.

**Reform**

The introduction of a system of impact fees or formulaic fees would help to bring certainty and predictability.

A requirement that development plans should be specific as to the kinds of planning gain or planning benefits that will be sought alongside a particular development would assist in bringing more certainty. This would improve public accountability, as the planning obligation aims of the local planning authority would be the subject of public consultation and debate through the development plan inquiry process.

The use of Supplementary Planning Guidance would also assist in updating and adding details into the planning obligations policies in the development plan. More weight perhaps should be given to Supplementary Planning Guidance, provided that public consultation on it meets the development plan standard.

Current Government advice, however, is to the effect that the existence of plan policies should not preclude negotiation on proper and appropriate planning obligations on their merits in relation to individual planning proposals (Paragraph B16 of Annex B to Circular 1/97). That, of course, introduces an element of uncertainty which one is trying to avoid. That advice needs to be re-cast. Even if development plans were required to include planning gain policies, it is unlikely that the policy will inform the developer what quantum of planning gain is required. There will therefore still be uncertainty. Setting out a quantum of planning gain is in any event discouraged at Paragraph B16 of Annex B to Circular 1/97. That states that it is not acceptable to set out precise requirements since planning obligations should be directly related to individual proposals if they are to be given any weight. Only impact or formulaic fees are likely to bring the necessary certainty as to the quantum.

**(iv) Delays**

The negotiation and completion of a section 106 Agreement can take a considerable period. It is common, particularly in relation to large development schemes, for negotiations to take over twelve months. This can lead to anger and frustration on the part of a developer. Such delays hinder regeneration and inhibit economic growth and, as mentioned above, this is of major concern to the Government.

It might be thought that the use of unilateral undertakings would assist in overcoming problems of delay. That is not the case. Unilateral undertakings are a useful tool in relation to appeals, where the local planning authority is not prepared to negotiate an Agreement with the appellant, even on a without prejudice basis, for fear of weakening its case. At first instance, however, it is the local planning authority who will be issuing the decision and they do not have to accept a unilateral undertaking submitted to them. They may therefore seek to negotiate the terms of that unilateral undertaking in the same way as they might do in relation to an Agreement. There is therefore no advantage.

It is perhaps surprising that no two local planning authorities appear to have the same standard draft Agreement. A lot of time can be wasted in negotiations on an Agreement considering standard "boiler-plate" provisions before one ever reaches the substantive provisions.

**Reform**

As a matter of practice local planning authorities are often under-resourced and cannot therefore commit the time to negotiate an Agreement quickly. They should of course take heed of the advice set out at Paragraph B22 of Annex B to Circular 1/97 which states : "In the interests of speed, and if both parties agree, the first draft of an agreement creating a planning obligation may be prepared by the developer's solicitor or by a solicitor approved by the local planning authority whose fees are met by the developer." The use of private firms to negotiate Agreements on behalf of a local planning authority does speed up the system.

The Urban Task Force in its Final Report entitled *Towards an Urban Renaissance* (1999) suggested that national guidance on the use of planning arguments should be revised to provide a guideline that section 106 Agreements should be settled within eight weeks of a resolution to grant planning permission. That is unlikely to have any impact on the negotiation of the more complex Agreements, unless there were to be sanctions for non-performance. The Task Force has additionally suggested the establishment of a "fast-track" independent arbitration process for the conclusion of section 106 Agreements which can be triggered by either party, after a set period, at their cost. This is certainly worth considering further.

There should be standardisation of "boiler-plate" provisions. The Government should issue guidance

as to model forms of standard provisions, in the same way as there are model planning conditions in Circular 11/95.

**(v) Lack of Transparency**

Invariably discussions on a section 106 Agreement take place in private between the landowner or developer and the local planning authority. Those discussions often begin before the planning application is reported to the Planning Committee. Meetings will be held, travelling drafts of the Agreement will pass between the developer's solicitors and the local authority and an agreed draft, or a substantially agreed draft or, at the very least, heads of terms will often have been agreed by the time the application is reported to Committee.

Government advice at paragraph B19 of Annex B to Circular 1/97 dealing with Public Involvement is that the process of negotiating planning obligations should be conducted "as openly, fairly and reasonably as possible". As a minimum planning obligations and related correspondence should be listed as background papers to the Committee report relating to the development proposal concerned. Application of this advice by local planning authorities could be burdensome and prejudicial to developers, who might not want their correspondence with the authority to be open to public view, particularly not to any competing developers. This might discourage developers from putting anything in writing to the authority and for the negotiations to be purely verbal and therefore secret.

In any event the Committee Report will usually set out an outline of the proposed planning obligations, whether or not the proposed planning obligations and related correspondence are background papers.

Cambridge City Council almost came unstuck with reference to a committee report in the case of *R. v. Cambridge City Council, ex parte Warner Village Cinemas Ltd* (Harrison J. July 31, 2000). Here there was an application for permission for judicial review challenging the Council's decision to grant planning permission for a substantial mixed use development providing leisure facilities (including a multi-screen cinema with 1,700 seats and 7 screens), a multi-storey car park, and hotel, housing, auction rooms and some retail use. The applicants for judicial review were Warner Village Cinemas Ltd, the operator of a multiplex cinema in the Grafton Centre in Cambridge. At a committee meeting on December 1, 1999 the Council resolved to grant planning permission for the development subject (*inter alia*) to a satisfactory section 106 Agreement to meet traffic and other objections. Heads of Terms for the Agreement were before the committee at its meeting on December 1, 1999. The matter came back before the committee on February 9, 2000 when approval was given and the section 106 Agreement was approved in draft. The sole purpose of the February meeting was to consider the section 106 Agreement. The applicants were concerned that the terms of the draft Agreement had been watered down in the period between the two committees and that the Agreement did not do what it was supposed to do and what the committee were told in December 1999 it would do.

Mr Justice Harrison stated that it was unfortunate that the brief report to the committee in February 2000 did not explain to members the way in which the Agreement would work in practice. He formed the view, however, that the members were not misled and there was therefore no error of law when the committee approved the draft section 106 Agreement at its meeting on February 9, 2000. Members had been given a copy of the Agreement before the meeting and there was a long discussion at the meeting about its terms. There was uncontradicted evidence that members understood it. There was therefore no error of law in the way in which it had been handled by the committee. The applicants sought permission to appeal against that judgment, but their application was dismissed by Brooke L.J. on November 2, 2000.

Whilst the local planning authority will have consulted local residents, amenity societies and third party groups on a planning application there is no requirement for the authority to canvass views from third parties on proposed planning obligations. Of course members of the public are potentially able to see Committee Reports, and any background papers to the Report, three days before they are considered by members at the relevant Committee. In practice this may not happen and, even if it does, there may be insufficient time for the public to make representations or for any comments to be digested by the officers and the Committee. Any comments made at this late stage in the proceedings, when agreement on heads of terms is already likely to have been reached, are unlikely to be influential.

This secret system could be seen to be a breach of the Human Rights Act 1998. Article 6 of the European Convention on Human Rights seeks to protect the right to a fair trial. This is predominantly concerned with procedural fairness in relation to both criminal charges and civil rights and obligations. Section 6 of the Act provides that it is unlawful for a public authority to act in a way which is incompatible with a convention right. Any public authority will therefore have to ensure that, in carrying out its obligations and duties, it is acting in a manner which is compatible with the Convention.

Section 7 of the Act confines the class of persons who may bring proceedings claiming a violation of a Convention right to those who are "victims" of the unlawful act. The test is narrower than that which normally applies in judicial review proceedings where a party only has to show a sufficient interest in relation to the decision being challenged. It might therefore be difficult for third party groups to mount challenges under the Act, although the law is ever evolving.

It is possible that third party objectors to a scheme could engineer an opening with the local planning authority, to enable them to be consulted on a draft section 106 Agreement being negotiated between that authority and a developer, by threatening judicial review proceedings against the authority unless the third party is enabled to consider the draft Agreement to see to what extent the draft Agreement addresses the third party's concerns.

What of competing developers? Until recently there was thought to be no obligation as such upon a local planning authority to divulge the precise terms of a section 106 Agreement to a developer of a competing site, who might be in discussion with a local planning authority on its own proposals. The position on this was considered in the case of *R. v. Lichfield District Council, ex parte Lichfield Securities Ltd* [2000] P.L.C.R. 458. Lichfield Securities Ltd ("LS") obtained planning permission for development and entered into a section 106 Agreement to meet the cost of the provision of roads adjoining and feeding parts of its site. LS was aware that another developer had also applied for planning permission for a development on an adjacent area of land and that a section 106 Agreement was being considered in relation to that application. LS asked for a draft copy of the section 106 Agreement being negotiated with the second developer, but received no response to its request. The Council then granted planning permission for the second development, and the second developer entered into a section 106 Agreement to pay a sum of money to the Council, which the Council covenanted to apply to defined highway improvements. The second developer also covenanted to implement a green transport plan.

When LS discovered that the Council had granted planning permission for the second development with a section 106 Agreement, it sought a judicial review, contending that the Council had acted unfairly in not making the Agreement available to it so that it could make representations as to the terms. It was submitted that LS had a direct financial interest in those terms, and in the provisions agreed to in the green transport plan, since they could adversely affect its ability to realise the full development potential of its site.

The High Court found that the Council had suggested, after initial consultation, that LS would be permitted to make further representations regarding the section 106 Agreement to be entered into with the second developer, thereby creating a legitimate expectation that anything further that LS wished to submit would be considered. The Judge however refused relief as he considered that the application for judicial review had not been made promptly.

LS appealed to the Court of Appeal. The appeal was allowed and the Council's decision quashed. The case was reported at [2001] E.G.C.S. 32. The Court held that it was a fundamental principle of section 106 of the Act that it must be used only for legitimate planning purposes. The Council's failure to bring LS and the second developer into a single process of consultation, however brief, about the best formula for apportioning the road infrastructure costs had been unjustified and potentially unfair to LS. However potential unfairness was not enough. It was the combination of process and impact that had to be shown to have been unfair before a public law challenge could succeed. In the instant case the Council's conduct had not simply been unsatisfactory, but had also been unfair, since LS had not been afforded a sufficient opportunity to attempt to reverse the effect of the section 106 Agreement with the second developer. The Court also held that the Judge should not have embarked upon the issue of undue delay.

The implications of the Lichfield case are very important indeed where there are developers of competing sites. In the case of *Jelson Ltd v. Derby City Council* [1999] E.G. 149 the solicitors acting for William Davis Ltd were unaware of the section 106 Agreement that had been entered into by Jelson to provide 30 units of affordable housing. The Council's solicitor was able to take advantage of this and by keeping each company ignorant of its dealings with the other adopted a stratagem to obtain 15 additional affordable units. In the event Jelson was freed from its obligations to construct 15 affordable housing units because of failure to comply with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

The *Jelson* case was very much a one-off decision with the Council seeking to manipulate the two developers to its advantage.

**Reform**

How could the system be reformed? This was a matter considered by the Planning and Environmental Law Reform Working Group of the Society for Advanced Legal Studies in its "Report on Planning Obligations" published in November 1998.

One way of reforming the process would be a requirement that proposed planning obligations be placed in Part 1 of the Planning Register.

Notice would be required to be given to any person who had been required to be consulted on the planning application (either by site notice or other advertisement), not less than thirty days before the planning application was proposed to be determined by the local planning authority, that planning obligations were proposed in connection with the development, and that the proposed obligations could be inspected on the Planning Register.

Any representations in respect of the proposed obligations would be required to be made to the local planning authority not less than ten days before the application was proposed to be determined.

The Government has already stated its intention of introducing relevant legislation at a suitable opportunity so that planning obligations are placed on the Planning Register. This is to be welcomed. That however does not go far enough. Proposed planning obligations also need to be placed on the Register.

This reform would overcome the problem that was created by the *Lichfield* case. It might also have helped to defeat the Council's stratagem in the *Jelson* case.

For planning appeals the relevant inquiries procedure rules should expressly require that any statement of case should include particulars of any proposed planning obligation to be taken into account in determining the appeal.

### (vi) Ransom

Local planning authorities can often hold a developer to ransom by requesting an item of planning gain that may be excessive, but which the developer is prepared to accept rather than incur the cost and delay in taking his planning application to appeal. Reluctantly therefore the developer will enter into a planning obligation. Should the developer be entitled to appeal to the Secretary of State against that excessive planning obligation?

### Reform

This was a matter considered by the Planning and Environmental Law Reform Working Group of the Society for Advanced Legal Studies in its "Report on Planning Obligations" in November 1998.

If there were to be a right of appeal to the Secretary of State planning authorities would be more wary of seeking unjustifiable planning gain. A right of appeal would be attractive to a developer, but only if the appeal did not prejudice the planning permission obtained alongside the planning obligation entered into.

An unscrupulous developer might be tempted to offer or accept excessive planning gain deliberately in order to obtain his permission. Having banked his permission, he could then appeal against the excessive planning gain package. On any appeal the Secretary of State would apply the strict tests in Circular 1/97 and the likelihood is that any excessive planning gain would be struck down. The developer would then have his planning permission with only "necessary" obligations. That would clearly not be satisfactory.

Any incentive for a developer to make unjustifiable offers would be reduced if the Secretary of State had a power of direction, to enable him to deal with the relevant planning application as if it had been made to him in the first instance, thus enabling him to review not only the planning obligation, but the planning permission as well. The developer would then be left with the choice of retaining the planning permission granted, but complying with the obligations undertaken, or of pursuing his appeal, but recognising that the planning permission might be lost.

Whilst a power of direction might deter the developer from making unjustifiable offers of planning gain it could introduce an element of uncertainty, which would detract from the advantages of granting a right of appeal against excessive obligations.

The Planning and Environmental Law Reform Working Group of the Society for Advanced Legal Studies could not reach a consensus as to whether there should be a right of appeal and suggested in its "Report on Planning Obligations" in November 1998 that the Secretary of State should consult on this issue.

There is perhaps something inherently unsatisfactory about a developer being able to appeal against a planning obligation freely entered into, perhaps very soon after that obligation was entered into. There should be consultation by the Government on this important issue. The introduction of a right of appeal might well be attractive to the Government, leaving aside the possibility of unscrupulous behaviour by a developer, as it could well curb the excesses of the more exploitative local authority.

**(vii) Multiple Developments**

A problem that often arises is how the cost of providing a piece of necessary infrastructure, which will serve a number of land parcels, should be spread between various developers. This is becoming a critical issue as local planning authorities increasingly look to developers to share the cost of funding major infrastructure projects. It is surely unfair that if one of those developers comes forward with a development scheme he should be expected to meet the full cost of that infrastructure. It is equally unfair if the last of the developers to appear with a development scheme should be expected to meet the full cost of that infrastructure, if it is only the cumulative impact of that last scheme that triggers the need for that infrastructure. Why should the previous developers avoid liability by virtue of the timing of their development? There needs to be a mechanism to be able to spread the burden fairly among developers.

In this context it is not just major developers who should share the burden. A development other than a major scheme can exacerbate problems, and there needs to be a recognition that such developments should also make commensurate contributions towards infrastructure projects.

Whilst the local planning authority could negotiate section 106 Agreements with each of the developers as their sites come forward for development, there is always the possibility of an individual developer stepping out of line by refusing to accept the terms of an Agreement and appealing to the Secretary of State against a refusal of planning permission or deemed refusal. The Secretary of State might take a different view as to what an appropriate contribution by a particular developer should be, or whether a developer should be required to make a contribution to the project at all. A successful appeal by one developer could leave those developers who have already entered into obligations dissatisfied. That could lead to a shortfall in funding for a project overall.

The problems caused by multiple developments came to a head in the case of *R. v. South Northamptonshire District Council, ex parte Crest Homes plc* [1994] 3 P.L.R. 47 where, under the Structure Plan, Towcester was identified as an area which would be expected to accommodate much of the residential development within the county. The town could not expand without additional infrastructure and the A5 by pass was essential. Public finance was not available and the Council began discussions with a consortium of landowners and developers (including Crest Homes) with a view to securing contributions to infrastructure, including the A5 bypass. Initial negotiations proceeded on the basis of there being one global agreement, with all members of the consortium putting in a contribution. That, however, soon proved impracticable and it was decided that there would be separate agreements with each owner/developer with their financial contributions being based on a percentage of the enhanced land value added by the grant of permission.

Land values fell however and it became clear that the necessary infrastructure would only be achieved if most of the development was advanced to take place prior to the construction of the bypass.

The Council had to modify its approach and resolved to split the proposed growth into pre and past bypass phases. The second phase was to be entirely dependent on the prior provision of the bypass, whether from the public or private purse, or a combination of both. Crest's site fell within the post by pass phase. They withdrew from the consortium and applied for planning permission for development of their site but did not offer to enter into a planning obligation. They were refused planning permission and appealed unsuccessfully. In the meantime other members of the consortium completed their section 106 Agreements providing for contributions to infrastructure. The Council subsequently published its draft local plan for the area, which included a policy to the effect that the Council would

require developers to make provision for infrastructure and community facilities related to their proposals, normally by way of a contribution.

Crest then challenged the Council's various actions, the central allegation being that the Council were selling planning permissions. They had unlawfully introduced a local development tax and were only prepared to grant planning permission for those who paid for it.

The planning obligations were held by the Court of Appeal to be lawful, but this decision turned very much on its own facts. One of the crucial facts was the slump in property values which brought about a change in the Council's approach which meant that the application of the formula for development values did not result in developers having to pay more than the cost of the impact of the developments. The decision might well have been the other way had property values continued to rise. As Henry L.J. explained the facts of the case were crucial "because they legitimise a formula which if used in other factual contexts could be struck down as constituting an unauthorised local development land tax" ([1994] 3 P.L.R. 47 p. 61D).

Circular 1/97 was at pains to point out the special factual circumstances in the *Crest* case, whilst pointing out that it is not acceptable for local planning authorities to seek to secure a percentage of enhanced land values.

The *Crest* case spells out graphically the problems that can occur on multiple developments and the fragility of the negotiation process when a number of developers are involved. These problems need to be addressed.

### Reform

Clearly a system of impact fees or a formulaic mechanism could help to overcome the problems of multiple developments.

The Planning and Environmental Law Reform Working Group of the Society for Advanced Legal Studies in its "Report on Planning Obligations" in November 1998 recommended that the Secretary of State be given a power to make an order by statutory instrument, on the application of a local authority, to enable that authority to require contributions to be made to the cost of specified infrastructure by the owners of land on which specified development is carried out.

This would enable public notice to be given about any specified project, to the proposed means of financing it and to the contributions which might be required, and to the scheme for dealing with the contributions received.

This system would allow the merits of such proposals to be the subject of scrutiny and debate, possibly at a public inquiry, and for their approval, with or without modification, by the Secretary of State and Parliament.

### (viii) Modification and Discharge of Planning Obligations

A planning obligation can be modified or discharged by agreement between the parties at any time. Unlike the procedure under section 106A of the 1990 Act, where an application to modify or discharge a planning obligation has to be publicised, there is no requirement for any consultation to take place with the general public, or indeed with neighbouring landowners, where the parties agree for example to modify the terms of a section 106 Agreement. Such a modification could have an impact upon other public bodies, commercial interests and local interests and yet they will have no say in the matter. The modified Agreement may not be made public, unless and until it is reported to Committee or is

completed, and the local land charges register is amended. There could therefore potentially be serious prejudice to third parties. In the case of *R. v. Ashford Borough Council, ex parte Shepway District Council* [1999] P.L.C.R. 12 a section 106 Agreement was varied by agreement between Ashford Borough Council and the developers to allow a relaxation of a planning obligation, restricting the type of goods sold at particular premises, or the use to which particular facilities could be put. The effect of the relaxation, which would allow a factory outlet centre, was of concern to Shepway District Council because of the effect they envisaged the development would have on a new town centre development being planned for Folkestone within their district. Shepway challenged the decision on a point of interpretation of the scope of the outline planning permission. There was no ground of challenge on the consultation point, and nor conceivably could there have been a ground for challenge on this point.

It would appear that the lack of any requirement for consultation could fall foul of Article 6 of the European Convention on Human Rights.

Applications to modify or discharge planning obligations can of course be made pursuant to section 106A of the 1990 Act five years after the planning obligation was entered into. An application cannot, however, be made before that period has expired. This seems illogical. If the planning obligation ceases to be required for the proper planning or development of an area within the five year period, then arguably there is no reason why it should continue to be enforceable.

Incidentally, there have been very few appeals made under section 106B of the 1990 Act. A search of the Compass database revealed only seven such appeals. Of course it may well be that there have been a number of applications made to local planning authorities under section 106A that have either been granted or refused and not pursued to appeal. The reality is, however, that in practice many planning obligations will have been satisfied or spent by the time the five year period expires. There will therefore be nothing to either modify or discharge at the end of that period.

### Reform

The Planning and Environmental Law Reform Working Group of the Society for Advanced Legal Studies, in its "Report on Planning Obligations" in November 1998 recommended that all proposed modifications and discharges of planning obligations (including those where a modification or discharge is agreed with the local planning authority) should be the subject of an application which should be publicised and the public (and adjoining local authorities) be given an opportunity to comment.

The Working Group also recommended that the Secretary of State should have power to call in for his own determination any such application in order that third party interests might be considered and protected if necessary by him.

The Working Group also recommended that there should be no restriction on when an application for modification or discharge should be made and, if any obligation ceased to be required for the proper planning or development of an area within five years, there was no reason why it should continue to be enforceable. The Working Group therefore recommended that the five year rule should be scrapped.

## Tariff or Impact Fee System—Would it Work?

There is a general consensus that the introduction of impact or standardised fees on the American model would require primary legislation. Having said that there are already examples of local authorities using the equivalent of impact fees through various tariff or formulaic systems and the use of those systems seems to be increasing.

**Tariff or Formulaic Systems already in Operation**

*Leeds Supertram*

Leeds City Council operate a formulaic system in relation to the proposed Leeds Supertram. Developers are asked when applying for planning permission to make a contribution to the Supertram fund depending on the size, location and type of the development.

The Supertram policy is given backing by policies in the UDP and is justified by the Council by reference to Government Policy and in particular PPG 13 on Transport. The Council assesses by reference to locational factors, and the scale of development proposed, whether particular developments should contribute to the Supertram Fund. All developments which are within easy walking distance of a tramstop, or which are located in the City Centre, are subject to the requirement for developer contributions to the Supertram. A framework has been devised using the TRICS guide (the Trip Rate Information Computer System widely used in highway development control) for identifying developments where contributions should be made. Thus, for example, for B1 offices and light industry all offices in excess of 1,400 square metres should contribute, for A3 restaurants and public houses all food and drink proposals in excess of 200 square metres should contribute and for C3 Dwelling Houses private residential development over 25 units will need to contribute.

The Council has acknowledged that there is no established practice available to indicate how an appropriate level of contribution should be determined relative to the benefit to be provided to individual developments. The key Supertram facility that provides access to the principal benefits the implementation of the system will bring to developers' proposals (*e.g.* for B1, B2 and B8 uses convenience for staff, access to wider potential labour market, time savings for business meetings, etc, release of car parking spaces for development, improved corporate green image) is the tramstops. The Council has therefore derived a methodology for calculating a proportionate contribution to the cost of a tramstop, dependent on the likely number of trips a proposed use would generate and the distance of the site from the nearest tramstop.

The Council does however allow other factors to be taken into account (*e.g.* abnormal costs incurred as a result of listed building or conservation requirements, whether the development is liable to contributions to other community benefits) in reaching a final agreement on the level of contributions to be provided. Once the level of contribution has been assessed payment is made by means of a section 106 Agreement and payments can be phased following an initial payment.

The Council has produced a standard form section 106 Agreement to be entered into, a standard letter to be sent to prospective developers where contributions are sought and suggested reasons for refusal of planning permission where a developer refuses to pay a contribution to enhancement of public transport, or to otherwise address anticipated deficiencies in public transport facilities.

This is a highly developed system which is fairly prescriptive and almost tantamount to impact fees. This formulaic approach may well be beyond the guidance in Circular 1/97. The approach however has produced a standardised system which is open, transparent and predictable and the developer can see precisely where he stands. It has much to commend it. It is also noteworthy that it is not a totally rigid system, as there is some flexibility as to final level of contributions to be made by a developer.

*Ashford Borough Council*

Ashford Borough Council has drawn up a table of specified community facilities required to be provided in relation to a given amount of residential development proposed. These are cross referenced

to the relevant local plan policy. Again it is questionable whether this is contrary to the advice in Circular 1/97. There is also a table of trigger points. Thus for example the development of a certain number of houses will trigger the provision of affordable housing, play areas, open space, community facilities and schools. This provides clear guidance to developers as to what is required of them in any particular case. It is open, transparent and predictable.

*London Borough of Tower Hamlets Millennium Quarter*

The London Borough of Tower Hamlets has designated an area of 20 hectares (50 acres) in the heart of the Isle of Dogs as the Millennium Quarter. The Council has prepared a master plan for the Quarter to guide future development. The master plan envisages very substantial commercial and residential development taking place in the Quarter. This will directly impact on the transport, social and open space infrastructure of the area and its ability to support new development. Developers will therefore be expected to contribute to the funding of the necessary infrastructure, through entering into section 106 Agreements with the Council.

The Council prepared a framework as a basis for negotiating individual obligations so as to ensure that capacity was available, as and when required, that landowners had guidance to assess their likely obligations and to ensure that obligations were placed equally with landowners throughout the period of the master plan. The Council considered that this approach would provide a transparent, flexible and equitable framework to assist in the negotiation of individual financial contributions.

The framework is not intended to allocate precise contributions in advance. That will be a matter for negotiation. The framework is intended to provide guidance to those promoting schemes in the Quarter as to the works likely to be required and the potential cost of those works on individual schemes. The formula in relation to transport contributions is based on gross floor area of development. In order to arrive at the contribution for each site the total cost of transport infrastructure is divided by the total notional floor area to provide a cost per square metre. The Council also intends to deal with the question of social and community benefits in the proposed formula.

This provides clear guidance to developers as to what will be expected of them. It is a system that is open, transparent and predictable.

**Impact Fees**

A possible solution to the charge that planning permissions are being bought and sold, and to avoid the delays inherent in the negotiation of planning agreements, would be to introduce a system of impact fees along the lines currently operating in the United States, where a twofold test is applied to ensure that impact fees are valid. Firstly there must be a rational nexus between the fee and the development. The impact fee must be for the purposes of meeting a need created by the development, and must be proportionate to that need. Secondly the fees collected must be used for the purpose identified. The level of fee, which is predetermined, would be based upon the impact that a scheme is likely to have on the surrounding environment and the payment made would meet the need for public services generated by the new development.

How would the system operate in this country? The Government could issue guidance with suggested figures for the impact of different types of development which local planning authorities could apply to the particular circumstances of their authority area through their development plan. The plan could set out explicitly what the impact charge is to be used for and the manner of expenditure would have to be clarified for developers. The amount paid would be proportionate. Fees would have to be reviewed

from time to time to reflect changes in local circumstances. As the development plan system is notoriously slow and unwieldy there might be scope for use of supplementary guidance which can be reviewed more readily.

Warwickshire County Council introduced reference to the use of impact fees in the Deposit Draft of the Warwickshire Structure Plan 1998. Policy GD3, which embodied the Plan's direction of most new development to existing urban areas so that objectives for affordable housing, new jobs, integrated transport and brownfield land recycling could be delivered, had in its explanatory text reference to the fact that the policy might require the use of planning obligations and/or the application of impact fees to secure the necessary infrastructure and services. This reference to impact fees met with an objection from the Government Office for the West Midlands, who stated that impact fees were outside the scope of planning legislation and therefore requested deletion of the reference. Apparently they were concerned about the blanket tax approach frowned upon in Circular 1/97. The House Builders Federation and one or two developers objected to the reference to impact fees and stated that there was no legal authority to impose impact fees and that the reference to them should be deleted.

The County Council backed down on this particular point in the face of threats of directions on related policies. The stance of the Government Office showed how sensitive the issue of impact fees must be. It was not as though the reference to impact fees was contained in a policy. It was in the explanatory text. Yet the Government Office still sought to object.

**Advantages of the Impact Fee System**

- Impact fees would be consistent with the Government's aim of making the planning system more open, transparent and predictable and would enable planning obligations to meet the reasonableness and proportionality tests at paragraph 7 of Circular 1/97.
- Impact fees would bring a greater level of certainty to the planning system. Developers would have the advantage under an impact fee system of advance warning of and better guidelines as to what fees might be charged. This would avoid arbitrary cost assessment in individual cases, and encourage standardisation of procedure and practice.
- An impact fee system should lead to a much faster procedure than the present slow, ad hoc, opportunistic, negotiation process for section 106 Agreements.

**Disadvantages of the Impact Fee System**

- There would be high capital and administrative costs to set up the system in the early stages and there would be a good deal of bureaucracy.
- There is a concern that local authorities might not have the necessary skills for the setting of fees and predicting infrastructure costs.
- An impact fee system might not have the flexibility to deal with local individual circumstances.
- It may well be that impact fees would apply to all developments, whereas planning obligations tend only to relate to major schemes. This may have the effect of increasing the amount of private funding of public infrastructure. This could well be unpopular as a sort of back door taxation.
- If impact fees were set nationally, developers could be attracted to areas where land values were high because flat rate costs could be absorbed more easily. They could also act as a disincentive to development in areas where land values are low and which are often in most need of regeneration.

- There would be a loss of the flexibility and discretion that are the hallmarks of the planning system. A formal system would be less flexible and it would be more difficult to come up with creative solutions to planning problems.

### What do Others Think?

The Local Government Association in its *Policy Note on Planning Obligations* (March 1999) considered that the complete replacement of the current system with a system of impact fees was not the best way forward. The Association thought that, compared to the present system, impact fees would be more bureaucratic, more expensive to operate and would need to be adapted to cope with the very tight boundaries of local authorities over which the impacts of development are often felt. They thought however that enabling legislation should be introduced allowing for the voluntary adoption by local planning authorities of impact fees for calculating contributions towards public facilities. This could be applied where appropriate for certain types of application or as one element of a wider section 106 Agreement.

The Urban Task Force in its final report *Towards an Urban Renaissance* 1999 backed impact fees on the grounds that they would make greenfield sites more expensive to develop and thus tilt the balance in favour of brownfield sites.

The Urban Task Force also recommended that the negotiation of planning gain for smaller urban development schemes (for example an end value of less than £1 million) should be replaced with a standardised system of impact fees. The fees collected should be spent on local environmental improvements and community facilities that reflect the priorities of local people.

The RICS in its Paper *Planning Obligations* (September 1998) was of the view that the present system, although flawed, provides the most practical method of ensuring that developers pay for remedying the impact of their developments. Whilst acknowledging that impact fees might have a role in certain circumstances, the RICS was of the view that impact fees lacked the flexibility to reflect local needs.

The RTPI in its policy paper *Planning Gains and Obligations* (December 2000) suggested that there should be a new look at policy which "rejects antipathy to formulae but rather directs itself towards the development of a tariff or scale based approach where a balanced and well planned development can be secured best by developer contributions to infrastructure".

In the writer's opinion there is merit in considering the use of impact or standardised fees in a limited way for contributions to transport and social infrastructure, developing on the systems operated by Leeds City Council, Ashford Borough Council and the London Borough of Tower Hamlets referred to above. The writer is concerned, however, that the element of discretion, that is a hallmark of our present planning system, should not be lost in a prescriptive sea. It is always said that a policy that permits of no exceptions is a bad policy. By the same token any impact fee or formulaic system would need to have some flexibility built into it, so that it could operate fairly.

## Economic Instruments and Tradeable Permits

### Economic Instruments

The use of economic instruments was floated by the Government in "Modernising Planning" January 1998 to supplement planning policies including such financial incentives as taxes, subsidies or tradeable

permits that promote a policy objective through the operation of the market. It was suggested that such measures would supplement rather than replace the traditional restraint and regulation of town planning and could be used, particularly for negotiating planning obligations, as a way of speeding up discussions with applicants. The Government has given no real indication as to what it has in mind, although presumably the intention would be to transfer development value from landowners and developers and apply it to infrastructure. The Chancellor has come up with a number of fiscal measures, which will assist in bringing forward development of previously developed land. But how these measures would assist in negotiation of a planning obligation remains to be seen.

### What are Tradeable Permits?

Presumably the Government has in mind the exchange that now operates between power generators on emissions, so that overall guidelines are met while generators operate individually according to their needs.

In the planning field presumably the idea would be that developers would exchange permits, as long as they did not breach the spirit of an overall development plan. It is difficult to see how this would operate in practice.

The Government also wishes to see how economic instruments could be used to make obligations imposed on developers in planning agreements more "predictable and transparent", thus preventing the hold ups in the planning process that lengthy negotiation over planning gain deals can cause. This presumably is a reference to impact fees.

## Affordable Housing

### Origins

The concept of affordable housing was introduced in PPG 3 "Housing" in 1992. This recognised a need, particularly acute in rural areas, for local authorities to indicate in their development plans a target for affordable housing within their area. Among the strategies to be used to achieve this was negotiation between authorities and developers in order that developers' proposals included an element of affordable housing. A willingness to include such housing would be a material consideration when the planning application was considered by the authority.

Affordable housing has become a hot planning and politically sensitive issue over the last few years. This sensitivity manifests itself in negotiations on a section 106 Agreement which is the usual vehicle for delivering affordable housing as a result of development proposals. There is even sensitivity in the term "affordable housing" itself. To the Government it means low cost market and subsidised housing. To many local authorities it means only subsidised rented accommodation. To many developers it means what they can get away with, and which will least damage the quality of the rest of their development, or their bank balance.

In the past there was always a demarcation between public and private sector responsibilities and one looked to the local authority to make provision for social/affordable housing. That is no longer the case, and with cut backs in public sector capital funding there has been an increased reliance on the private sector to provide affordable housing.

**Material Considerations**

In the light of section 54A of the 1990 Act there is a premium on a local planning authority to have an up to date development plan containing affordable housing policies, to justify any demands they may make for affordable housing arising from a planning application.

It could be argued that an offer by a developer to provide affordable housing, in return for a grant of planning permission, is an attempt to buy a planning permission. It could also be argued that the demand by a local authority for the provision of affordable housing by the developer, in return for a grant of permission, is pure blackmail and has nothing to do with the planning application and that the local authority is attempting improperly to burden the developer with the local authority's public housing obligations. What have the Courts had to say on this?

In the case of *R. v. Hillingdon London Borough Council, ex parte Royco Homes Ltd* [1974] Q.B. 720 the local planning authority had granted planning permission for residential development of land, but subject to conditions requiring that the houses be occupied only by persons on the Council's own housing waiting list, and with security of tenure. The High Court quashed the permission on the ground that the conditions would require the developers to take on, at their own expense, a significant part of the housing duty imposed on the authority themselves. In retrospect the Council's decision was most enlightened and innovative when judged by affordable housing policy aspirations today. Alas, not in 1974.

The *Royco* case was considered in the case of *R. v. Tower Hamlets London Borough Council, ex parte Barratt Homes Ltd* (Sullivan J. March 2, 2000). In that case there was a challenge by Barratt Homes Ltd to a statement of supplementary planning guidance that had been adopted by Tower Hamlets, which the applicants contended was unlawful. In one of its grounds of challenge Barratts argued that the supplementary planning guidance, which required them to contribute towards the provision of affordable housing to meet the existing needs of the community, had the effect of transferring the Council's obligations as a local housing authority to provide affordable housing for those in need of such housing, to them.

Mr Justice Sullivan accepted that times had changed since *Royco* in 1974 and that the local authority was no longer a direct provider of housing, but a facilitator of provision by other agencies. Against that factual background, Barratts had accepted that the application of Circular 6/98 and the development plan policies to allocated housing sites, would not offend against *Royco*, and Mr Justice Sullivan thought that that was correct.

The *Royco* case is to be contrasted with the case of *Mitchell v. Secretary of State for the Environment* [1994] 2 P.L.R. 23 where the Secretary of State had refused planning permission to change the use of a house, in multi-occupation, to use as seven self contained flats, on the ground that there was a need in the area for all types of housing, including, in particular, housing in multiple occupation for those requiring cheap rented accommodation. The Secretary of State was satisfied that the house in question would continue to be used for those purposes if planning permission were refused. In the High Court the Judge took the view that the decision had been based simply on the factors of price and tenure, and that what the Secretary of State had sought to do was to cast some of the local authority's public housing obligations onto the applicant (shades of *Royco*). The Court of Appeal disagreed with that and held that the Council's policy was a material consideration. The Court of Appeal reaffirmed the decision reached in *Clyde & Co. v. Secretary of State for the Environment* [1977] 1 W.L.R. 926 that it was undoubtedly the law that material considerations are not confined to strict questions of amenity or environmental impact, and the need for housing in a particular area was a material planning consideration. The fact that the

need might be dictated by considerations of cost or type of tenure seemed to the Court to be immaterial.

## Planning Policy

*Circular 6/98 "Planning and Affordable Housing"*

The Circular's central proposition is that a community's need for affordable housing is a material planning consideration, which may properly be taken into account in formulating development plan policies and deciding planning applications.

The Circular gives extensive advice on achieving the provision of affordable housing, including assessment of need, affordable housing policies to be included in local plans, securing affordable housing and controlling occupancy and the involvement of a registered social landlord to achieve control over future occupancy of affordable housing. Specific examples are given of conditions and planning obligations that might be used to achieve affordable housing.

The Circular has, however, been criticised by local authorities in that it advises that the expression "affordable housing" should always include both low cost market housing and subsidised housing on the basis that planning policy should not be expressed in favour of any particular form of tenure.

Many authorities regard affordable housing as being housing for rent and do not recognise low cost housing for sale as being affordable. This is perhaps to be seen as blinkered ideology and hardly helps to achieve the Government's aim of achieving balanced and mixed communities. Surely low cost or discounted housing for sale has its place within a development, alongside rented accommodation and market housing, so that a hierarchy of affordable housing, meeting different needs, is created. Of course a local authority may justify its stance on rented accommodation by pointing to its housing needs survey. The preparation of these surveys is often not the subject of consultation and surveys may be out of date. Whatever the surveys reveal, many Councils appear to draw the conclusion from their surveys, that the identified need is for subsidised rented accommodation and nothing else. Local authorities need to broaden their outlook if the Government's aim of achieving balanced and mixed communities is to be achieved.

*Circular 1/97 "Planning Obligations"*

As mentioned above Circular 1/97 sets out the Secretary of State's restrictive policy on the use of planning obligations, and is intended to bring about certainty and uniformity of approach, which is to be contrasted with the legal position arising from *Tesco*, which gives local authorities a wide discretion.

The Circular recognises, at paragraph B11 of Annex B, that the inclusion of arrangements to secure the inclusion of affordable housing in a larger residential or mixed use development would be an appropriate planning obligation. Paragraph B26 of Annex B provides that planning obligations should not include the transfer of interests in land or positively worded requirements for such transfers. That should be dealt with in a separate instrument. The Circular recognises, at paragraph B11 of Annex B, that the inclusion of arrangements to secure the inclusion of affordable housing in a larger residential or mixed use development would be an appropriate planning obligation. Paragraph B26 of Annex B provides that planning obligations should not include the transfer of interests in land or positively worded requirements for such transfers. That should be dealt with in a separate instrument.

**Deliverability of Affordable Housing—Conditions and/or Planning Obligations**

National Policy Guidance gives full backing to a local planning authority seeking the provision of affordable housing in connection with a development, either by condition or section 106 Agreement. The legislation and case law also back this up. Local planning authorities have considerable discretion under *Tesco* as to whether a planning obligation is a material consideration.

What mechanisms should be used, planning obligations or conditions, to deliver affordable housing? Both Circular 11/95 and Circular 1/97 make it clear that if there is a choice between imposing conditions and entering into a planning obligation, the imposition of a condition, which satisfies the tests in Circular 11/95, is preferable. This is because the imposition of restrictions by means of a planning obligation deprives the developer of any right to vary or remove the obligation, except by way of an application under section 106A five years after the obligation was entered into. By contrast an appeal can be made to the Secretary of State against a condition on a planning permission within six months of the date of the permission.

Where conditions are imposed on a planning permission, Circular 11/95 advises that they should not be duplicated by a planning obligation. Permission cannot be granted subject to a condition that the applicant enters into a planning obligation under section 106 of the 1990 Act.

In Circular 6/98 the Government laid down two suggested approaches to the provision of affordable housing. First, the local planning authority could ask the developer to enter into a planning obligation, or it could impose a condition in the planning permission, that a proportion of the general market housing could not be occupied, until the affordable housing had been constructed and transferred to a registered housing association. As an alternative, it was suggested that the developer could transfer land to a social landlord to build affordable housing. Secondly, the developer itself could provide the affordable housing on its own site and planning permission could be granted, subject to a condition that the general housing on the site should not be occupied, until the affordable housing had been built and allocated.

As a matter of enforceability/deliverability local planning authorities much prefer planning obligations as a method of control over affordable housing. Whilst Circular 6/98 sets out suggested wording to ensure the provision of affordable housing, either by way of conditions or planning obligations, there is much more certainty from the local planning authority's point of view if there is a planning obligation. There can be no application by the developer to modify or discharge the obligation until five years has elapsed from the date of the planning obligation, and provided that the Council can justify its position in policy terms, that there is still a need for affordable housing in its area five years later, the planning obligation should remain intact. In many instances, however, the obligation will already have been spent at the expiry of five years, so that any application to modify or discharge will be irrelevant.

A section 106 Agreement is also better able to control the precise arrangements for the development of the affordable housing and its transfer to a registered social landlord. The question of discounts from market value, tenure, price, nominations and criteria for nominations are more effectively dealt with through an Agreement and are not really susceptible to proper control by condition. Indeed paragraph 97 of Circular 11/95 advises that conditions should not normally be used to control matters such as tenure, price or ownership. Further the *Mitchell* case does not go as far as sanctioning reference to price or tenure on the face of a planning permission. A section 106 Agreement is also the only way of dealing with commuted payments for off site provision. Financial payments fall outside the ambit of planning conditions, both as a matter of law and policy, although, as mentioned above, some commentators

think otherwise. A section 106 Agreement is also the only effective means of dealing with the repayment of a commuted sum, should the sum not be spent within an agreed period.

**Differences in the Approach to Affordable Housing**

There are differences in the approach to affordable housing in different local authority areas. As mentioned above many local authorities do not recognise as a concept the provision of affordable housing for sale, but merely seek the provision of rented accommodation. Some authorities insist that affordable housing is provided on site as part of the proposed residential development, whereas others are prepared to accept a commuted payment for provision of housing elsewhere in the local authority area. It has to be said that the use of commuted payments militates against the idea of having balanced communities and can only create social division. Further this has the effect of delaying the construction of new housing schemes, as the money will often sit in a local authority's coffers for a long period before it is used.

If the concept of commuted payments is to continue, then restrictions on that sum being applied only within the relevant local authority area need to be removed. Arguably, if the money is not immediately needed by the local authority in receipt of it, it should be allocated for use by a neighbouring authority or perhaps come within a regional or county housing pot.

Where affordable housing is to be provided on site, some local authorities will accept that the affordable housing be sited on land separate from the market housing, whereas others will request that the affordable housing be spread throughout the development The former practice contravenes a central principle of the Final Report of the Urban Task Force *Towards an Urban Renaissance* (1999) that mixed households are an important factor in creating more balanced and sustainable urban communities.

Differences in interpretation and implementation of planning policies in different local authorities do not help. Developers will cite more lenient regimes in one local authority area when negotiating levels of affordable housing in a stricter area. There are indeed variations between different authorities. Affordable housing in the London Borough of Hammersmith and Fulham has been as high as 53 per cent compared to a London average of 20–25 per cent.

**"Towards the London Plan"**

In May 2001 the Mayor published *Towards the London Plan*, his initial proposals for the Spatial Development Strategy which will provide strategic guidance for London over the next 15–20 years. This document sets out for consultation a vision for London and the broad policy directions which will guide the preparation of the full draft London Plan. The draft London Plan is expected to be published later in 2001 or early 2002. *Towards the London Plan* addresses six key strategic challenges facing London, which are integral to achieving the vision of London becoming an exemplary sustainable world city. One of these challenges is increasing the supply of housing.

Paragraph 2.58 states that the need for additional homes, especially affordable homes, is the single most pressing land use problem in London.

Paragraph 2.63 states that the need for affordable housing is particularly acute. It records the fact that the Mayor's Housing Commission and the Assembly's Affordable Housing Scrutiny Committee both concluded that the housing shortage and the resulting increases in prices were key factors in explaining the growing recruitment and retention difficulties being faced by both public and private organisations. The Plan points to the fact that these difficulties are threatening economic growth and the improvement of public services in London.

*Towards the London Plan* proposes a 50 per cent target for affordable housing as called for by the Mayor's Housing Commission. This includes 35 per cent for social renting for those on low incomes and 15 per cent to be part of a new intermediate category, addressing the needs of workers on moderate incomes with no priority for traditional social rented housing, but who cannot afford open market options. There is however some flexibility as the Plan makes it clear that the target will be re-thought if economic impact assessments indicate that it would jeopardise London's house building targets.

There is a major concern that a 50 per cent policy, which the Mayor will seek to impose in those planning applications that have to be referred to him and which he will expect the London Boroughs to conform to in their unitary development plans and as part of development control practice, would drive many developers away from London and as a result fewer homes would be built in London. This is going to be a major battleground as the draft London Plan goes through its statutory consultation process and an examination in public.

### Affordable Housing in Commercial Developments

The Mayor has suggested that quotas for affordable housing should also be included in commercial developments. The matter was raised as an issue in the recent report of the Mayor's Housing Commission *Homes for a World City*, where the Housing Commission was of the view that the Spatial Development Strategy should require the London Boroughs to seek an affordable housing element within all commercial, retail and other relevant development or a financial contribution to affordable housing off site, commensurate with the demand for affordable housing generated by the development.

The rationale is that commercial developments need a workforce, and labour supply increasingly depends on housing being available. In other strategic planning terms—air quality, congestion and quality of life—it is not sustainable for a large section of the workforce to have to commute long distances. Where commercial development schemes add to the need for affordable housing, the argument put is that it is acceptable to require a contribution to affordable housing commensurate with that need.

This is a highly controversial issue and has caused great concern amongst developers. The Mayor's special adviser on housing has however offered talks with developers and landowners to discuss this further. Again, this will be a contentious issue and will no doubt elicit major objections from commercial developers as the draft London Plan goes through the statutory consultation process and an examination in public.

### Section 106 Mechanisms and the Mayor

*Towards the London Plan* states that the London Plan will be implemented in many different ways. One way is through direct planning mechanisms including section 106 Agreements. In relation to section 106 Agreements, paragraph 4.13 of the Plan states as follows:

> "Section 106 Agreements (Planning Obligations) are negotiated as part of the process of considering and approving planning applications. They have to take account of the commercial viability of each scheme and there is a balance to be struck between obtaining a reasonable level of community benefit and undermining the commercial rationale for the development. The Government has indicated its intention to review the system of planning obligations, to consider a widening range of local improvements that can be supported by planning obligations and to introduce impact fees to reflect the cost of the development in terms of its environmental consequences."

This is a surprisingly bland statement which is out of step with reality, certainly in the realm of affordable housing. The Mayor's 50 per cent policy, and his desire to see the provision of affordable housing in commercial developments, is tilting the scales in favour of the community and against the developer. It does not strike a balance and will have the effect of undermining the viability of schemes. The statement is misleading in one respect, where it suggests that the Government has indicated its intention to introduce impact fees. It has not, the introduction of impact fees is an option it wishes to consider.

Another way the London Plan will be implemented is through close working with the local communities. At paragraph 4.18 reference is made to Community Chests which are to be funded by developers to provide resources for community activities, for example from the increased development value resulting from a development. This is tantamount to imposition of a tax and will no doubt be translated into demands for planning gain. This could become an area of major contention, as local communities will no doubt seek to exploit this policy, through lobbying of the GLA and their local authorities. Developers will be most unwilling to enter into planning obligations on these terms and unless the policies are modified through the statutory process, there could be a number of development schemes that will fall away.

On page 91 of the Plan there is a statement on "delivering the vision". Amongst the proposed policy directions for the GLA in delivering the London Plan is "to set out a pan-London framework for borough negotiations with developers on section 106 Agreements". This sounds most intriguing. What precisely it means will no doubt become clear when the draft London Plan emerges.

## Sustainable Transport

### Transport White Paper "A New Deal for Transport: Better for Everyone" (1998)

The Government's Transport White Paper published in 1998 showed the Government's firm commitment to an integrated transport policy, which would encourage people to use the car less and public transport more. The Government wanted to provide people with real choice about how they travel for work and for leisure and to set out new ways of funding safe, reliable, clean and comfortable public transport.

### Revision of PPG 13 "Transport" Public Consultation Draft (October 1999)

In furtherance of the Government's commitment in the White Paper it issued for public consultation in October 1999 a draft revision to PPG 13 ("Draft PPG 13") to replace PPG 13 "Transport" published in 1994. The general thrust of this document was to introduce a series of controls and incentives, to discourage the use of the car and to promote a modal shift to other forms of transport.

It should not be forgotten that the previous PPG 13 published in March 1994 had sown the seeds of a sustainable transport policy by encouraging local authorities, in carrying out their land use policies and transport programmes, to reduce the growth and the length and number of motorised journeys, to encourage alternative means of travel which have less environmental impact and to reduce reliance on the private car.

Draft PPG 13 sought to reinforce the message in PPG 13 of March 1994 that there must be a greater

integration of planning and transport in order to promote more sustainable transport choices and to reduce the need to travel, especially by car.

**PPG 13 "Transport" (March 2001)**

PPG 13 published in March 2001 sets out the Government's objectives to integrate planning and transport at the national, regional, strategic and local level to:

> "promote more sustainable transport choices for both people and for moving freight promote accessibility to jobs, shopping, leisure facilities and services by public transport, walking and cycling, and reduce the need to travel by car" (Paragraph 4).

**Travel Plans**

Draft PPG 13 of October 1999 introduced the concept of green transport plans. The thrust and the advice on green transport plans has now been incorporated in the final version of PPG 13 published in March 2001. There has been a change in terminology and the former green transport plans are now referred to as "travel plans".

The Government wishes to promote the widespread use of travel plans amongst businesses, schools, hospitals and other organisations to help raise awareness of the impact of travel decisions, primarily so as to bring about reductions in car usage and increased use of public transport, walking and cycling.

At paragraph 89 of PPG 13 the Government considers that travel plans should be submitted alongside planning applications which are:

> "likely to have significant transport implications, including those for:
>
> all major developments comprising jobs, shopping, leisure and services . . .
>
> smaller developments . . . which would generate significant amounts of travel in, or near to, air quality management areas, and in other locations where there are local initiatives or targets set out in the development plan or local transport plan for the reduction of road traffic, or the promotion of public transport, walking and cycling . . .
>
> new and expanded school facilities . . .
>
> where a travel plan would help address a particular local traffic problem associated with a planning application . . .".

Paragraph 90 of PPG 13 advises that where travel plans are to be submitted alongside a planning application, they should be:

> "worked up in consultation with the local authority and local transport providers. They should have measurable outputs . . . and should set out the arrangements for monitoring the progress of the plan, as well as the arrangements for enforcement, in the event that agreed objectives are not met. They might be designed for the applicant only, or be part of a wider initiative, possibly organised by the local authority, involving other developments in the area."

Paragraph 91 of PPG 13 advises that the weight to be given to a travel plan in a planning decision will be influenced by the extent to which it "materially affects the acceptability of the development proposed, and the degree to which it can be lawfully secured". It further advises that, under certain circumstances, "some or all of a travel plan may be made binding either through conditions attached to a planning permission, or through a related planning obligation".

**Practical Considerations**

The most effective travel plan will be one that has been tailor-made to fit the travel patterns of a known end occupier of a development and has been submitted as part of the planning application process. That company will know precisely what it is prepared to commit to in terms of its employees' travel behaviour and the running of its business. This will be all the more so on a company relocation. The local planning authority will also have a clear idea of the company's aspirations, and will be better able to commit the company to compliance with the travel plan and any modal shift targets in the travel plan.

A travel plan will only really be effective if its provisions become effective on the first occupation of a development. If it comes into force after occupation, travel habits are likely already to have been established and will be difficult to change.

For a speculative development however, the production of a travel plan is likely to be problematical and uncertain. If a landowner commits to particular travel patterns and modal splits under a planning obligation, then any potential occupier may not be able to comply with the restrictions entered into. If the potential occupier is still keen on the site, the reality may be that he will then have to renegotiate the travel plan arrangements with the local authority. This could be a time consuming and frustrating business and with no certainty as to the outcome.

It would of course be possible to include provisions within a section 106 Agreement to allow for the potentiality of reviewing the travel plan as and when there was any change.

Enforcement of travel plans is an issue. What happens for example if modal split targets are not met? Should there be penalties for non-compliance built into an Agreement? Potential penalties could be the payment of additional contributions towards non-car modes of transport or the delaying of future phases of development in bigger schemes. Whilst these measures would give teeth to travel plans landowners/developers are most unlikely to accept them.

**Examples of Travel Plans**

Some of the practical considerations set out above can be tested against practical examples.

Two travel plans which were both tied to section 106 Agreements have been examined to see what conclusions can be drawn as to their likely effectiveness in achieving sustainable travel patterns. The approach of Hertfordshire County Council to travel plans in the context of speculative development has also been examined. A travel plan in a speculative development, albeit controlled by planning condition rather than a section 106 Agreement, has also been examined. Details are set out below.

**Pfizer Limited—Walton-on-the-Hill**

The first example relates to proposals by Pfizer Limited for a new headquarters office building at Walton-on-the-Hill in Surrey providing 22,691 square metres of floorspace and accommodating a maximum of 900 employees. The company commissioned a company transport plan from an expert in the field. That company transport plan was annexed to a section 106 Agreement that was entered into between Pfizer, Reigate and Banstead Borough Council and Surrey County Council in May 1999. The plan had at its heart the introduction of incentives to encourage alternative transport behaviour to single occupancy vehicles and disincentives to discourage the use of single occupancy vehicles. The plan recommended the adoption of the objective of achieving substantial traffic reduction by a 40/60 modal split (40 per cent of all trips by single occupancy vehicles and 60 per cent by car-share, train/bus, bicycle/motor cycle and teleworking). On top of that a number of incentives and disincentives were

recommended to be adopted *e.g.* shuttle buses, discount of public transport fares, car share incentives, onsite service facilities such as cash point machines and limited car parking spaces.

The section 106 Agreement contained a commitment by Pfizer to the principles set out in the company transport plan, and a covenant that they would use all reasonable endeavours to achieve the company transport plan objective namely to manage the demand for transport to and from the land, and to deliver a modal shift away from the private car in favour of public transport and other means of travel.

Pfizer were required to submit annual reports to the Council and to the County Council, beginning on the date 12 months after the date of first occupation of the development, and continuing at yearly intervals, for a minimum period of 15 years showing how the company transport plan had operated during the relevant 12 months period and, specifically, how effective the Plan had been in meeting the company transport plan objective.

At the same time the company had to submit a company transport plan review for approval by the two Councils setting out what measures the company intended to take during the following 12 months period in pursuit of the company transport plan objective, and it was open to the Councils on a review to suggest ways of improving the effectiveness of the company transport plan which the company had to consider properly.

The company were required, in submitting the company transport plan review, to demonstrate to the Council and to the County Council, on each occasion, that it had used all reasonable endeavours to reduce further the number of single occupancy vehicle trips to and from the land, in an attempt to deliver a further modal shift away from the private car in favour of public transport and other means of travel. In addition to the submission of the company transport plan review annually, the company were at liberty to submit a review for approval at any time. It was open to the Councils to reject any company transport plan review submitted by the company, in which event the matter was to be determined as a dispute by an expert.

It is too early to judge how effective this company transport plan will be. It has to be said however that having a worked-up company transport plan annexed to the section 106 Agreement, as in the Pfizer example, with review mechanisms is the ideal approach and should be the model to be embraced by the development industry and local authorities, if the Government's aspirations on sustainable travel are to be met. That said, if the company were to vacate the building in the future any purchaser would be bound by the restrictions as a successor in title. That could well affect the marketability of the premises unless the Councils were sympathetic to possible variations to the company transport plan to suit the purchaser's operational requirements.

### Hi-Tech Company West of London

The second example is in relation to a large hi-tech company developing its own headquarters premises west of London to provide 23,234 square metres of floorspace to accommodate up to 1,200 employees. Planning permission was granted in November 1997 subject to a section 106 Agreement which required the company to implement a green travel plan. Annexed to the Agreement was a Report entitled "Sustainable Transport Initiatives". That document virtually comprised a travel plan in its own right. The Agreement specified that the eventual travel plan should incorporate such measures included in this Report judged to be both commercially reasonable and likely to result in an increase in non-car modes of travel by staff.

The Agreement required the company, within six months of the occupation of the building by more than 500 permanent staff, to carry out a survey to establish relocation of staff homes, staff's attitude to travel to and from the site and modes of travel by staff to and from the site.

Using the results of that survey the company had to prepare a travel plan identifying measures likely to increase the use of modes other than the private car. Those measures were to be drawn from the Sustainable Transport Initiatives Report annexed to the section 106 Agreement. The travel plan had to be submitted to the Council within 12 months of the occupation of the building by more than 500 permanent staff.

Transport consultants were subsequently appointed, following the occupation of the development, to draw up and negotiate the actual travel plan. The consultants found that overall this was a tedious and inefficient procedure and, in particular, pointed to the fact that the main provisions of the travel plan did not come into operation until nearly a year after the first occupation of the buildings, by which time staff travel habits were well established and therefore more difficult to change. In their view, to have been more effective, the Travel Plan should have been fully operational from the outset.

This case is in direct contrast to the *Pfizer* case, and provides an example of worst practice which will do little to meet the Government's aspirations on sustainable travel.

### Hertfordshire County Council's Approach to Speculative Development

Hertfordshire County Council has examined travel plans in the context of speculative development. Their approach is to split the travel plan into three distinct areas, with different triggers for implementation. The first part deals with the "physical" measures that would need to be taken into consideration in the design of the development, for example showers, cycle parking, changing areas, on site pedestrian/cycling routes, *etc.* The section 106 Agreement will require the developer to have this agreed before commencement of the development. The second part deals with the "softer" measures and includes car sharing databases, public transport information, season ticket loans etc. This second part has to be agreed prior to the occupation of the development. The third part comes into effect three months after the occupation of the development. This deals with existing modal splits and the setting of reasonable targets for the plan to aim to achieve.

This approach goes some way to meeting the problems of applying travel plans to speculative development. The requirement for physical measures sets the tone and the softer measures will help to educate. The third part, however, comes too late as the development will by then have been occupied for three months and travel habits will have been formed which will be difficult to break.

### Welwyn Garden City

A company in Welwyn Garden City obtained planning permission in February 2001 for the erection of four units providing some 5,786 square metres of B1/B2 and B8 floorspace. The application submitted by the landowner was a speculative development and the occupiers of the proposed accommodation were not known at the time of the grant of planning permission.

In order to encourage the long term use of sustainable modes of transport by employees on the estate, a condition of the planning permission was that a green transport plan must be produced and agreed by the local planning authority prior to any occupation of the estate. Transport consultants were appointed to prepare a green transport plan, based upon guidance from Hertfordshire County Council and Government guidance.

The plan noted that it was intended that the estate would be managed by a management company in

which each of the tenants would have shares. The company would endeavour to ensure that the occupier of each unit should provide and display up to date information within public areas within the units, as to bus and train timetables, location of bus stops and railway stations and information as to cycling and pedestrian routes to stations. It also explained the benefits for personal environmental and company reasons why using transport other than the private car would be beneficial.

In order to ensure that the green transport plan was implemented the plan stated that it was intended that the management company would appoint a green transport co-ordinator. The primary functions of the co-ordinator were to liaise with the local planning authorities, organise annual travel and parking accumulation surveys and to promote transport measures to the occupiers of each unit.

In order to encourage people to cycle, it was intended that, as part of the initial construction works, cycle parking facilities and showering and changing facilities would be provided.

In order to encourage people to walk to and from the estate, it was intended that as part of the initial construction works a direct convenient entrance to the site from the service road, and a clearly marked route from the estate entrance to the units, on which pedestrians would have priority, would be provided. Car sharing and home working were also part of the proposals in the green travel plan.

As to monitoring, that was to be undertaken by the transport co-ordinator. It was intended that there should be a survey of the existing travel patterns of each unit a minimum of three months after all units were occupied, and it was intended that questionnaires be distributed to each employee by the co-ordinator giving information as to the post code of residents, age and gender, normal working hours, mode of transport to work, amount of work related travel through the day, reasons for driving to and from the estate, reason for not using public transport, cycling or walking to travel to and from the estate, estimate of journey length and estimate of journey time to and from the estate.

These initial surveys would identify the proportion of staff travelling to and from the estate as the sole occupant of a private car. This would enable the introduction of realistic targets to reduce the number over the coming years. The County Council suggested a design modal split of 70 per cent private car, 30 per cent other modes.

At the end of the year follow up questionnaire surveys in conjunction with automatic traffic counts at the site entrance would establish the actual reduction achieved. If the targets had not been reached, then the measures within the green transport plan would be reviewed and modified to enable the target to be reached the following year. This process was to be repeated annually until no further reduction could be readily achieved.

The proposed green transport plan stated that one of the keys to the success of the plan was the proposed appointment of the green transport co-ordinator, who would seek to encourage travel awareness and a change in habit of the employees of each occupier of each unit on the estate.

The travel plan recognised that whilst the County Council had a desired modal split of 70:30 for car/other modes, any changes in travel mode would depend not only on the final occupiers but the modal split at the opening of the development. The travel plan finished on a slightly negative note that adoption of the targets in the plan was appropriate at that stage, however once the survey results were available, the various targets in the green travel plan might prove unrealistic.

In its response to the travel plan the County Council thought that the proposed questionnaire was not in itself an adequate method of monitoring due to the low take-up rate of responses. They considered that automatic traffic counts and manual counts carried out by an independent person would be a more effective survey method.

The County Council also suggested that, as the setting of targets and monitoring was an integral part of the first part of the green transport plan, it was suggested that the green transport plan should set out a desired modal split, say 70 per cent car, 30 per cent other modes at this stage.

The County Council also suggested that the green transport plan should be more specific about the role of the co-ordinator. It was suggested that an employee in a senior position in the organisation should be responsible for overseeing implementation and operation of the green transport plan.

This is an interesting example of how, even with a speculative development, a great deal can be done to seek to change travel habits. A key point here was that even though the occupiers were not known, when the green transport plan was submitted, the estate owner was committed to adoption of sustainable measures. The role of the green transport co-ordinator will be pivotal to the process and the intention to carry out the initial physical works will help to promote sustainable travel habits.

**Use of Planning Obligations for Other Sustainable Transport Objectives**

At paragraph 81 of PPG 13 the Government advises that local planning authorities:

> "should take a more pro-active approach towards the implementation of planning policies on transport, and should set out sufficient detail in their development plans to provide a transparent basis for the use of planning conditions if appropriate, and for negotiation with developers on the use of planning obligations as appropriate, to deliver more sustainable transport solutions."

Paragraph 83 of PPG 13 advises that the development plan:

> "should indicate the likely nature and scope of contributions which will be sought towards transport improvements as part of development in particular areas or on key sites. This will give greater certainty to developers as to what will be expected as part of development proposals, and also provide a firmer basis for investment decisions in the plan area."

Paragraph 84 of PPG 13 states that planning obligations may be used:

> "to achieve improvements to public transport, walking and cycling, where such measures would be likely to influence travel patterns to the site involved, either on their own, or as part of a package of measures. Examples might include improvements to a bus service or cycle route which goes near to the site, or pedestrian improvements which make it easier and safer to walk to the site from other developments or from public transport."

Paragraph 85 of PPG 13 states that planning obligations where appropriate in relation to transport should be:

> "based around securing improved accessibility to sites by all modes, with the emphasis on achieving the greatest degree of access by public transport, walking and cycling. While the individual circumstances of each site, and the nature of the proposal will affect the details of planning obligations in relation to transport, developers will be expected to contribute more to improving access by public transport, walking and cycling, for development in locations away from town centres and major transport interchanges, than for development on more central sites. Where development can only take place with improvements to public transport services, a contribution from the developer (payable to the local authority) would be appropriate."

**Park and Ride Schemes**

Paragraph 59 of PPG 13 recognises that park and ride schemes can "help promote more sustainable travel patterns and improve the accessibility and attractiveness of town centres".

Paragraph 62 of PPG 13 accepts that, in some circumstances, park and ride schemes may be permissible in the Green Belt, provided that any proposed location is the most sustainable option, that alternative sites have been assessed and that any scheme does not seriously harm Green Belt objectives. This represents something of a sea-change as by contrast the consultation draft of PPG 13 insisted that park and ride schemes constituted inappropriate Green Belt development.

PPG 13 acknowledges at paragraph 86 that it may be appropriate for local planning authorities to negotiate for contributions towards the provision of a park and ride scheme, "where this will improve accessibility to the site by public transport, or towards the costs of introducing on-street parking controls in the vicinity of the site". This could well become a contentious area just as commuted parking payments used to be. Commuted parking payments are, according to PPG 13, at an end. The Government's advice in PPG 13 (paragraph 86) is that, given that there should be no minimum parking requirements for development (paragraph 52), "it is inappropriate for a local authority to seek commuted payments based purely around the lack of parking on the site". The end of an era indeed.

## Conclusions

The planning gain system has come under increasing attack over the last few years, the charge being levelled against the system being that it is uncertain, arbitrary and confusing, with the perception that planning permissions are being bought and sold. The Government responding to these criticisms has promised a consultation paper which proposes to look at ways of reforming the system, but nothing has materialised in over three years.

Is there a problem with the present system? Arguably the present system, based on the planning tenets of flexibility and discretion, works well and it is only in a minority of cases where an issue arises. Having said that it is undoubtedly the case that the present system is confusing. There is a divergence between policy and the law, the system can be uncertain and unfair, and the delays that can occur in completing a section 106 Agreement are unacceptable. The planning gain system is a secret system and lacks transparency, developers are held to ransom, there are problems with multiple developments and how to spread the burden fairly, and there can be prejudice caused by the lack of any required consultation on modification or discharge of planning obligations by agreement between the parties.

Important questions emerge from these criticisms. For the developer who is held to ransom by a local planning authority holding out for extortionate planning gain, should he have a right of appeal against a planning obligation freely entered into? In the writer's view there is something inherently unsatisfactory about being able to appeal against a planning obligation, freely entered into. Should the wide discretion vested in local planning authorities following the *Tesco* case be restricted by legislation as suggested by the Planning and Environmental Law Reform Working Group of the Society for Advanced Legal Studies? In the writer's view the present system works reasonably well and many authorities use Circular 1/97 as their benchmark rather than *Tesco*. The suggested legislation would be helpful, however, in trying to eradicate the rogue cases.

In the alternative, should the shackles be completely removed from local planning authorities, to enable them to invest private money obtained from developers through section 106 Agreements in social and community infrastructure, needed by the authority in the absence of public funds, although this has nothing to do with the development? Clearly a removal of the shackles would be a most radical step and would lead to a free-for-all, which would be a step too far.

In order to achieve the Government's three pronged aim of making planning obligations more open, transparent and predictable, should a system of impact fees be introduced into the system? The tariff

systems operated by Leeds City Council, Ashford Borough Council and the London Borough of Tower Hamlets are good examples of how a formulaic system or tariff based system might operate. The writer considers that there is merit in considering the use of impact or standardised fees based on these systems. There would however need to be an element of discretion and flexibility built into any system.

Affordable housing is an area of major contention in the planning system. The private sector is now burdened with the task of providing affordable housing that was previously the province of local authorities. What was frowned upon in *Royco* is now a normal part of the planning system. The variations that occur in the approach to affordable housing by local authorities, including slavish adherence by many authorities to the provision of rented accommodation at all costs, need to be addressed. There needs to be a much more consistent and well managed hierarchical approach to affordable housing, if balanced and mixed communities are to be achieved in accordance with the Government's aspirations. This can be readily achieved through the mechanism of section 106 Agreements given a consensus between the developer and the local planning authority. There is a concern that the Mayor of London's affordable housing policies, when translated into negotiations on section 106 Agreements, will lead to rancour and many developments falling by the wayside. These policies will be subject to much scrutiny as the draft London Plan goes through its statutory process.

Developers are increasingly expected to meet the cost of sustainable transport initiatives, through section 106 Agreements, to meet the Government's commitment to an integrated transport policy, to encourage people to use the car less and public transport more. These initiatives might not physically materialise for some considerable time, if the local authority is seeking contributions from a number of developers. There is therefore an understandable reluctance on the part of developers to embrace sustainable transport initiatives, and reduce reliance on the car, until there is an effective public transport system in operation.

The Government wishes to promote the widespread use of travel plans to deliver sustainable transport obligations. Travel Plans are now being required by local planning authorities where proposed development is likely to have significant transport implications. The most effective travel plan will be one that has been tailor-made to fit the travel patterns of a known end occupier of the development, such as the Pfizer scheme, but even then there could be problems if the premises were to be sold, with any purchaser being bound by the restrictions as a successor in title. Clearly the restrictions could affect the marketability of the premises, unless the two Councils in that case were prepared to be sympathetic to possible variations. There are problems with speculative development where the occupier is not known, although the Welwyn Garden City example shows what can be done to seek to change travel habits. There are problems where travel plans come into effect after a development has been occupied so that habits have already been formed and are therefore more difficult to change.

The payment of commuted parking sums was always a thorny planning issue. PPG 13 has signalled the end of the payment of those sums. The new battleground is now likely to be contributions to park and ride schemes sought by local planning authorities.