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Planning gain: why it's such a no-brainer

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Introduction

What we in the UK call "planning gain" is a relatively simple and straightforward phenomenon that we have managed to convert into a complex and secretive transaction. This has rendered its workings completely impenetrable, not only to bemused observers of our planning system from abroad, but equally to politicians, civil servants and practitioners at home. Indeed, as I shall suggest, even distinguished members of the judiciary have fallen from time to time into its many and various elephant traps.

First, a personal reminiscence. My first publication on the topic appeared 28 years ago, in 1975[1]. This was an admittedly early and somewhat precocious venture. So far as I could see, apart from a few early notes in the JPL, nobody had previously got themselves entangled with the theme. Indeed, it was not clear at that time how extensively the powers to enter into planning agreements were being used in practice, something which only emerged with the publication in the following year of the conclusions of Jeffrey Jowell's seminal research[2].

[1] "Planning by agreement" [1975] JPL 501, and see also "Developers' Contributions and Planning Gain: Ethics and Legalities" [1978] J.P.L. 8.

[2] "Bargaining in development control" [1976] JPL 401

Up until 1968, it had been necessary for local planning authorities to obtain the written consent of the Minister before signing an agreement, and there was only a handful of them each year. But then two or three forces developed quite independently: first, the abolition of the requirement of ministerial consent, for which the justification was that it was an unnecessary control, rarely used, though with no detailed analysis of what might happen were it to disappear.

Second, the land-price inflation of the late 1960s and early 1970s, most acutely in the case of housing land, which started to shatter the previous dominant assumption that the provision of off-site infrastructure was the exclusive preserve of the state. Absent adequate infrastructure, there was a valid objection to granting planning permission. This was a matter of great concern to local planning authorities, Ministers and developers. Failure to bring forward infrastructure improvements in a timely manner merely exacerbated the land-price crisis. Values rose rapidly, yet developers could not capitalise on them until infrastructure was available. So a mixed economy emerged, in which private finance was offered to fund the provision of public goods.

The legal tools that were available to achieve this outcome were remarkably primitive. The most sensible approach would have been through planning conditions, but this usage had recently been outlawed by the Court of Appeal in *Hall & Co v Shoreham Urban District Council*[3]. The court's ideology reflected the prevailing paradigm of state provision. A planning condition had been imposed on the development of an industrial estate, in order to secure access for possible future development of adjoining land owned by others. The court held that it was clearly for a planning purpose, and that it related fairly and reasonably to the permitted development. However, in the opinion of the court it failed the third of Lord Denning's tests in *Pyx Granite*[4] (later to become the *Newbury* tests[5]): it was manifestly unreasonable to impose such a condition, which amounted to the acquisition of rights over the developer's land, when there was an alternative course open

[3] [1965] ???

[4] *Pyx Granite Ltd v Minister of Housing and Local Government* [1958] QB ??

[5] *Newbury District Council v Secretary of State for the Environment* [1981] AC ??

to the local planning authority which was to exercise its compulsory purchase powers and pay full compensation.

That ideology was rooted in the public sector economics of the time, though it was to be severely shaken over the coming 15 years with the UK economic crisis and the stern injunction issued to the Government in 1976 by the International Monetary Fund. Public sector spending had to be brought under strict control, and there was therefore no choice but to find new ways of attracting private capital into the vacuum.

Yet even today, despite some general and inconclusive reflections on the theme by the House of Lords in the *Tesco* case, there is a belief that planning conditions cannot lawfully be used for such transactions: a belief, because the matter simply has not been tested in full frontal manner, and it is conceivable, if not likely, that the House of Lords would reverse or qualify the *Hall & Co* ruling were it called upon to do so. However, it is not an area which is ideal for judicial reform. To shift formally the basis of planning conditions for this new purpose actually needs clear political thought and analysis, a rigorous evaluation of different models for delivery, of issues of security and enforcement of obligations and also consideration of alternative safeguards, not merely for the protection of landowners and developers which is what *Hall* ensures, but also for the broader interests of local residents, other developers and the planning process more generally.

The tragedy of the recent consultation process around the reform of planning gain, with its proposed introduction of a tariffs system, was the absence of any indication that any of this vital preparatory work had been done.

The third important historical thread in the early development of planning gain was meantime being woven into the draft Greater London Development Plan, which was put through a public inquiry under a panel chaired by one of the founders of the Oxford Joint Planning Law Conference, Sir Frank Layfield QC. The plan, promoted by the former Greater London Council, was the precursor of structure plans. It proposed that planning

permission for certain development should be granted only where the development could show some community benefit. This was translated in practice as requiring, for example, that an office development should include some council housing; or, as in one celebrated instance developed by Tower Hamlets, that commercial development on the fringe of the City should carry an obligation to contribute financially to off-site public benefits such as the restoration of Christ Church, Spitalfields[6].

What went wrong?

Hence, there were four powerful strands in the early development of planning gain, and they continue to dominate today:

(1) the need to undertake these transactions through unconventional legal mechanisms: the philosophy of *Hall & Co* was essentially that landowners and developers needed to be protected from the confiscatory ambitions of local planning authorities. But the court did not foresee that there might be cases where there would be serious economic advantage to them in entering into precisely these transactions. So planning gain was forced off balance sheet. The perverse consequence of this was that although developers and landowners could enter into agreements which were notionally voluntary to achieve the same ends, they lost all the protection which the right of appeal would have given them had they been able to use planning conditions, and that which was legally voluntary became economically compulsory.

(2) the doctrine that contributions were negotiable rather than fixed. The vehicle was, after all, a contractual agreement rather than a unilateral condition. Negotiation does not, of course, necessarily equate with voluntariness. The longstop has always been whether planning permission was likely to be granted on appeal without the contributions or other benefits to be secured by the agreement. If it would not, it is because the local planning authority have a valid objection to the

[6] An appropriate moment to recall the imaginative thinking and determination of the late Adrian Stungo in developing this approach.

development proceeding, which can only be overecome by a planning agreement/obligation. If it would, then the developer has the sanction, against an over-ambitious authority, of pursuing an appeal and avoiding liability. The real world, however, is more complex than this. The *Hall & Co* rule, developed to protect developers against local authorities acting unfairly, lost its raison d'etre and it effectualness when developers did chose to make contributions going beyond what would have been necessary for them to get their planning permission. Such contributions were not normally driven by philanthropy. They were prompted by commercial considerations. They were the best route to getting planning permission, with greater certainty and speed than was likely by going through the appeals route. By continuing to approach the phenomenon on a purely doctrinal basis, the courts wholly overlooked the commercial reality of the transactions. Moreover, local planning authorities also played the game by seeking to impose fresh obligations right at the point immediately before planning permission was granted, leaving developers with little choice but to pay up or abandon negotiations at this last minute, and start all over on an appeal;

(3) the notion that financial contributions were to meet particular planning issues, and had nothing to do with the taxation of land value increase. This is a difficult conundrum. A developer/landowner has the greatest incentive to offer or agree to a financial contribution when it will advance the grant of planning permission and hence unlock development value in land. And the land value differential is greatest when the permission is for a significant change in use, at a time or to an extent than is more beneficial than might reasonably have been anticipated in the market, so that, for example, the developer's acquisition of the land was on the basis of various assumptions in which the prospects of such development had been heavily discounted. So more extensive contributions might be exacted in such cases, than in a case where the developer's/landowner's capacity is more limited, as in the redevelopment of a brown field site requiring decontamination. Indeed, the local planning authority themselves, or some other public agency, might be making a financial contribution to the developer in order to bridge the

funding gap. Like it or not, local authorities were in the business of development economics, though often without the benefit of actual financial data which would allow them to ensure that they had completed a successful bargain.

(4) the notion that on-site provision (even if commuted off-site) was nothing to do with planning gain. The epitome of this is affordable housing. Historically, this too was almost exclusively the responsibility of the State, and it was a major commitment for all post-war governments through to the 1980s and the Thatcher Government. The principal vehicle was the construction and management of low cost housing by local authorities and new town development corporations. But council houses were sold at a discount to sitting tenants, and the provision of new housing became restricted to particularly vulnerable groups. Housing associations came to play a more significant role, and some local authorities disposed of all their housing stock to such associations. Some authorities were able during the 1980s to negotiate contributions from private developers towards the provision of social housing, either as part of a private housing scheme or as a contribution towards the cost of providing housing elsewhere. Another, parallel, initiative, was to allow local authorities to grant planning permission for low cost housing for local people in rural areas on land not allocated for housing in the development plan: its effect was to allow land to come onto the market without the significant uplift in land values that would follow a development plan allocation. In effect, the low cost of the housing was made possible because of the low cost of the land, for which this type of housing was the highest and best use. However, in 1990 the Government ventured upon a more general scheme of shifting to the private sector the cost of providing affordable housing. This has been achieved, not through legislation, but through policy advice to local planning authorities. The process started under the Conservative Government, and has been continued, in nearly identical terms, by the Labour Government elected in 1997. Although the current circular, Circular 06/98, *Planning and Affordable Housing* uses the language of voluntary provision, and relies upon developers' contributions being secured through negotiation, neither the purpose nor the effect of its requirements is

voluntary[7]. The Government believes it appropriate that private housebuilders should, on housing schemes over a certain size (25 dwellings or one hectare of land[8]), provide affordable housing in addition to market housing. By "affordable housing" is meant both low cost market housing, and also subsidised housing (irrespective of tenure, ownership or financial arrangements) that will be available to people who cannot afford to occupy market housing. are to secure that any new housing development of a substantial scale incorporates a reasonable mix and balance of housing types and sizes to cater for a range of housing needs. Once a local planning authority have established that a requirement for an element of affordable housing is appropriate, they are entitled to insist that it should be provided as part of the proposed development (para 21). The circular makes it clear that, if the developer is unwilling to make this contribution, then planning permission may be refused. Given that this is a statement of Government policy, an appeal by the developer to the Secretary of State will not be successful in challenging its principles, only its application to the particular case. This is a more telling instance of a betterment tax than planning gain generally, because it proceeds from a different base. Instead of being a public good, the need for which is generated in whole or in part by the developer's proposals, affordable housing is a public good the need for which is generated by a shortfall in housing supply generally, and in particular by the Government's withdrawal from providing affordable housing as a tax-borne public good. The tenuous character of the link drawn in the circular between private and affordable housing is demonstrated by the Government's willingness for the obligation to be commuted to a financial contribution by the developer, towards the provision of affordable housing elsewhere in the local authority's area (para 22). Separate provision may indeed be preferable in land policy terms depending on the circumstances of the local area, and an ability to commute the liability is a sensible and pragmatic approach which allows the local authority to secure the provision of affordable housing

[7] See also the current reform proposals intended to up the ante on affordable housing by increasing the effective rate of tax: ODPM, *Influencing the size, type and affordability of housing,* August 2003 (reproduced in the August 2003 *Monthly Bulletin* of the *Encyclopedia of Planning Law and Practice.*

[8] Or 15 dwellings or 0.5 hectares in Inner London: para 10

where it wishes. But it then becomes more difficult to portray the process as a planning instrument rather than as an instrument of taxation.

The contribution of the judiciary

Enough of the potted history. We are where we are, with a jurisprudence that is as muddled as government policy. Indeed, early attempts by the courts to introduce principle and clarity to the process generated some particularly dismal jurisprudence[9]. There was a simple conceptual muddle. It was believed that planning agreements should be subject to the same tests for validity as planning conditions. This was an approach which wholly overlooked their different characters. Where planning conditions were a unilateral impost by a public authority exercising statutory powers, planning agreements were contracts. In the former case, a *Wednesbury* approach was entirely appropriate. Parliament could not have intended that the power to impose conditions on a planning permission should be used for a wholly different purpose, such as the unrelated taxation of enhanced land values. But in the case of a planning agreement, an unqualified adoption of *Wednesbury* is doctrinally eccentric. The agreement has the consent of the developer/landowner, so on what conceivable basis could they subsequently have the agreement struck down as if it were a planning condition to which they had not formally consented? Or worse, why should the courts allow a third-party, almost invariably a rival developer, to bring a challenge against another's agreement with reference to rules that were intended to protect that other party from a local authority's abuse of power? At this point, the doctrine departs so entirely from reality as to suggest that it is the wrong doctrine entirely.

The proper starting point for a planning agreement—though it has never to the best of my knowledge been recognised in any of the case-law, even in the *Tesco* litigation—is clearly that of freedom of contract, under which the court will uphold and enforce the promises that parties make to each other in commercial transactions. Given that one of the parties is a public authority, their contracting power is not unlimited. The authority

[9] I have analysed these cases in "Planning permission for sale?", in *Current Problems in Property Law: Blundell Memorial Lectures* (1994); 71-89.

must demonstrate that it has the statutory capacity to enter into the transaction, either under a specific power, such as the Town and Country Planning Act 1990, s.106, or the general incidental powers under the Local Government Act 1972, s.111.

Not until the 1990s did the courts start, cautiously, to recognise that they had reached the end of a jurisprudential cul-de-sac. Gradually a more commercial perspective started to emerge[10]. Next, the House of Lords simply announced the withdrawal altogether of the courts from the task of assessing the lawfulness of planning gain in cases where developers (or third parties) complained that too much was being sought or paid[11].

The current position is that the validity of a transaction involving planning gain falls to be considered under two heads: the validity of the obligation itself, in terms of s.106; and the validity of any planning permission to which it relates.

Section 106

The section could hardly have been couched in broader language. The redrafting that was udnertaekn in the Planning and Compensation Act 1991 that introduced the revised version of s.106 into the 1990 Act was intended to clear up doubts on a number of fronts: the use of planning agreements with positive as well as negative terms; the use of agreements whose sole purpose was to secure the transfer of financial contributions, as opposed to regulating the use or development of land (which had been the wording of the previous section); enforcement powers; formalities of execution of obligations; power to offer unilateral obligations, and matters relating to modification and discharge.

It is no doubt conceivable that the validity of a planning obligation could be challenged for going beyond the four corners of s.106, but it is, on the face of it, unlikely. The section provides a more than adequate basis for constructing the vehicle for financial contributions, the planning obligation.

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[10] See e.g., *R v South Northamptonshire District Council, ex p Crest Homes Ltd* [1995] JPL 200; *R v Plymouth City Council ex parte Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78.

[11] *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636.

Section 70

Section 70 is a different matter. It requires that in determining planning applications, local planning authorities must have regard to the development plan and to other material considerations, a duty that is underpinned and to some extent reinforced by s.54A. It is possible that an agreement could be valid and unenforceable for the purposes of s.106, yet irrelevant to the grant of planning permission under s.70. If so, the fact of it having been taken into account would be enough to have the planning permission overturned.

The *Tesco* case, however, established appropriate parameters. It confirmed the doctrine from *Plymouth* that there was no necessity test. It might validly exist as a tenet of the Secretary of State's policy framework for planning gain. But local planning authorities were entitled as a matter of law to go further, provided they observed the niceties of "having regard to" the Secretary of State's policy.

The current proposals

The Government harboured radical plans for change to planning gain, which were promoted in a consultation paper published in December 2001[12]. The central proposal was that the present framework for planning obligations should be reformed so as to allow them to be used explicitly to promote sustainable development, and that for this purpose local planning authorities should set standardised tariffs for different types of development. There should also be procedural reforms for speeding up the process and making it more transparent. Negotiation on a site-by-site basis would be replaced (though it was not clear to what extent) by a system of standardised tariffs, and would remain necessary only where there were special site-specific circumstances. However, planning obligations still seemed to be the vehicle for securing the tariffs in all cases, on the basis of standardised clauses. The paper fell short of proposing that the tariff, calculated on a simple basis such as an impost per dwelling or unit of floorspace, should be imposed as

[12] DETR, *Reforming Planning Obligations: a consultation paper* (2002).

the price of granting planning permission: no secured payment, no permission. That would have provided an effective enforcement machinery, though the model would require some further sophistication for phased developments.

The key propositions in the consultation paper were:

(1) local planning authorities should no longer be bound by the "necessity" test of circular 1/97 (para 2.3);

(2) tariffs should be broader in their purpose than simply to defray impacts (para 2.3);

(3) tariffs should not therefore be calculated in a way comparable to a US-style impact fee (Annex B);

(4) their purpose should instead be to fund the sustainable development policies of the local planning authority, including: "housing, transport, regeneration, education, health, 'liveability' and public open space, recreation and other community benefits" (para 4.5);

(5) hence schemes which already contribute to sustainable development in its own right might be exempt (para 4.9);

How far might these objectives be pursued instead by changes in the planning guidance?

The necessity test

This test, in its crude sense, is already test as a test of legal validity, as a result of *Plymouth* and *Tesco*. Indeed, it is widely ignored as a matter of day to day practice, save in the rhetoric of professional advisers and minutiae of inspectors' decisions. It is, indeed, an impracticable test for the courts to apply, because it involves their second-guessing a commercial choice.

Broadening the purposes

This issue is not so straightforward. The *Tesco* test remains intact. A planning obligation must be for a planning purpose if it is not to undermine the validity of the permission with which is associated.

No impact fees

This is a bizarre qualification, and stems apparently from a misunderstanding of the purpose and design of impact fee schemes in the US. The real issue that it disguises is the methodology through which tariffs would be established generally, and applied in particular cases. The logic is similar to that above. A tariff might be, as in the *South Northamptonshire* case, the product of a calculation taking account of all material considerations and arriving at an outcome, however expressed, which captures sufficint of the nexus between the sum to be paid and the ends sought.

What is important in this process is the integrity of the process, and this is where US impact fee methodology has a major contribution to make. The setting of local shopping lists is a legitimate starting point for local planning authorities in applying planning gain policies, if only for identifying local priorities for the provision of public needed to sustain new development. But the next stage is the equitable apportionment of the total liability between different sites. It is here that tariffs come into the calculation as a tool of apportionment. Instead of allocating capital sums by reference to a sub-division of the total cost, according to land extent or value, a tariff apportions by reference to some convenient unit of volume.

Affordable housing, for example, is such a tariff. There is no reasonable basis for challenge to such methodology provided it is clear and straightforward in establishing relationship between development, impact and liability. A tariff can be a vehicle for establishing the requirement that the contribution should relate fairly and reasonably to the permitted development.