It all started on July 1, 1948, the day on which the new, post-World War II planning and development control legislation came into operation—the day on which the famous (or infamous, depending on one's point of view), historic, and controversial enactment, the Town and County Planning Act of 1947, came into full force and effect. In Britain, the land would, after July 1, 1948, never be the same again. The 1947 Act, which was announced as being fit to create a revolution among landowners and entrepreneurial developers, was of a brand new, even revolutionary, character. The whole impact of the 1947 Act was to be a great shock to us all. So warned the seers and the soothsayers and the prophets. But the British absorbed the shock, and the coming into operation of the 1947 Act proved something of a nine-days' wonder.

One of the most outstanding and novel features of the 1947 Act was its provision that the development of land (including not only building, engineering, mining, or other operations but also any material change in the use of land) was not to take place until planning permission for development (PPD) was first granted by a local governmental planning authority such as, for example, a county borough council or a county council elected on the democratic franchise of one man, one vote.

Thus, all 142 local planning authorities in England and Wales found themselves in possession of a new and powerful tool with which to control the development of land or buildings. This tool was especially powerful because the 1947 Act also provided that, in granting PPD's, local planning authorities could require "such conditions as they think fit." Did this provision give the planning authorities carte blanche to do what they liked in the way of conditions? This question was clearly settled in the negative when the leading case of Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government came.
before the English Court of Appeal in 1958 and before the House of Lords in 1960.6

In the *Pyx Granite* decision of the English Court of Appeal, the Master of the Rolls, Lord Denning, pronounced the now famous limitation in the following terms:

The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose "such conditions as they think fit," nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authorities are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest. If they mistake or misuse their powers, however bona fide, the court can interfere by declaration and injunction.7

Lord Denning's words were later approved in *Fawcett Properties Ltd. v. Buckingham County Council*8 and again in *Mixnam's Properties v. Chetsey United District Council*,9 both decisions of the House of Lords, the highest and, indeed, ultimate court of appeal in Britain.

These decisions made clear that, in granting PPD's with conditions, local planning authorities had to behave themselves. They had to remember that they were public authorities exercising a statutory discretion and that, in so doing, their hands were not entirely free but, on the contrary, were fettered by the law relating to land planning and development control.

The scheme worked well until around 1960 when a change came over local planning authorities. What was all this planning control about? New and (to some) dangerous thinking began to emerge from the complicated depths of planning control. Was this control, which had now been functioning for twelve years, designed to secure efficiency, urbanity, and artistic professionalism in the development of land? Clearly it was. But could not the control go further? Planning control could be used for social purposes such as, for example, giving to the "socially deprived" and the "underprivileged" (both emergent expressions in the planning field) new libraries, new houses, swimming pools, leisure centers, and so on. Once it was accepted that these were legitimate planning objectives, notwithstanding Lord Denning's remarks10 and the cases cited above,11 the question became who would provide these facilities? At this point certain local planning authorities hit on the new idea of attaching to a PPD grant conditions requiring the developer (the PPD applicant) to provide some or all of these facilities at his own cost and expense.

And so Britain moved into the era of planning gain—in the United States called exactions—and it was, and still is, as controversial in Britain as it is in the United States. Indeed, it was more controversial in Britain than in the United States although, even in Britain, the entrepreneur was reluctant to

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11. *See supra* notes 8 and 9.
challenge the validity of planning gain conditions by appealing imposition of the conditions as the law undoubtedly allowed. The developer did not usually challenge these conditions because he was keen to obtain the PPD and move forward with development as rapidly as possible before inflation and rising prices put his development schemes beyond financial reach. Moreover, appeals took time and the cost of development rose with every passing day.

There then arose concern over the actions of some local planning authorities in connection with planning gain conditions. After all, a principle was involved. Some felt that it was wrong that any public body should be seen as “getting away with it.” But the entrepreneur continued to waive his right of appeal, preferring to pay “ransom money” (some called it “blackmail”) to get hold of his dearly desired PPD and move forward with development.

The reader is invited now to read the article by my colleague, Antony Ward, and myself, which appears in Appendix A under the title, Planning Bargaining—The Pros and the Cons: or, How Much Can the System Stand? The article speaks for itself and requires no elaboration here. Suffice it to say that, after the article was published, the government called together the Property Advisory Group, which subsequently reported on planning gain. The report made some strong comments about the acceptability of planning gain. In short, it found that the practice of bargaining for planning gain was inappropriate except in a few specified cases.

The report had its effect. It led to guidance from the Department of the Environment in its Circular 22/83 addressed to all local government planning authorities. This important circular appears in Appendix B to this article. Like Appendix A, the circular speaks for itself and calls for little further comment here.

Attention should be drawn, however, to a few of the more important matters set out in the circular. First, the definition of planning gain is of particular note. Second, the circular states that “[a] wholly unacceptable development should not of course be permitted just because of extraneous benefits by the developer.” This statement is especially important because it goes to the very roots of the purpose of planning control over land development—obtaining the right development in the right place at the right time. The circular also sets forth the tests to be applied to any planning

13. I do not intend to suggest that the article caused the government to form this group.
16. Id. at para. 2. “Planning gain” is defined as:
   a term which has come to be applied whenever, in connection with a grant of planning permission, a local planning authority seeks to impose on a developer an obligation to carry out works not included in the development for which permission has been sought or to make some payment or confer some extraneous right or benefit in return for permitting development to take place.
17. Id. at para. 4.
condition to ascertain whether it is within the law.\textsuperscript{18} Finally, the conclusion of
the circular is also important. It stresses that a developer, aggrieved by the
efforts of a planning authority improperly acting to extract a benefit for itself
or its district by way of planning gain or exaction, can appeal such action to
the Secretary of State for the Environment.\textsuperscript{19} The Secretary, in making its
determination on appeal, will undoubtedly bear in mind the advice given in
the circular. Consideration of the advice may lead not only to a decision in
favor of the developer but also to imposition of liability on the planning
authority for the developer’s appeal costs.

Circular 22/83 carries two appendices.\textsuperscript{20} In Appendix A, paragraphs 3, 4,
and 5 are most important. They relate to the scope of agreements that can be
made under section 52 of the Town and Country Planning Act,\textsuperscript{21} the principal
British act in this field. Of particular note is the last sentence of paragraph 3,
which states: “It should be noted that a developer cannot be required to
enter into such an agreement by means of a planning condition.”\textsuperscript{22}

All section 52 agreements are, or should be, entirely voluntary. It is
improper for any local planning authority, in order to extract from a
developer some quantum of planning gain, to pressure him, subtly or
otherwise, to enter into a section 52 agreement, knowing that he may be
driven to sign such an agreement in order to obtain his precious PPD as
quickly as possible!

The above sets out the British experience in this controversial matter of
planning gain (exactions). Has the situation been improved by the central
government’s advice and warnings to all local planning authorities as set forth
in Circular 22/83? Yes and no; commeqi, commeqa. The fact is that no developer
has yet made a real issue of planning gain by appealing, first to the Secretary
of State and, then, as a matter of law only, to the courts. The whole of this
business of planning gain is a matter of law, and the whole of it seems to fly in
the face of the words of Lord Denning in the landmark case of Pyx Granite.\textsuperscript{23}
Thus, we are left in a twilight world of imprecision. Two questions arise.
First, where is the determined developer who will challenge the local planning
authority playing the game of planning gain to see what it can squeeze out of a
PPD applicant? Second, are the local government planning authorities going
to continue indulging, whenever they can, in the lawlessness of planning gain
or are they going to heed Circular 22/83 and behave themselves in the
disciplined and orderly fashion that is the hallmark of any well-mannered, law-
abiding local governmental planning authority? For the answers to these
questions, one shall have to wait and see.

\textsuperscript{18} Id. at paras. 6-8.
\textsuperscript{19} Id. at para. 13.
\textsuperscript{20} These appendices are attached to the Circular. See infra app. B at 48-50.
\textsuperscript{21} Town and Country Planning Act, 1971, ch. 78, § 52.
\textsuperscript{22} Circular, supra note 15, para. 3.
\textsuperscript{23} [1958] 1 Q.B. 554, 572; see supra text accompanying note 7. As noted earlier, these words
were twice later confirmed by the House of Lords. See supra text accompanying notes 8-9.
PLANNING BARGAINING—THE PROS AND THE CONS: OR, HOW MUCH CAN THE SYSTEM STAND?*

SIR DESMOND HEAP AND ANTONY J. WARD†

I

PLANNING GAINS—SECTION 52

The use (and misuse) of section 52 agreements (under the Town and Country Planning Act 1971) in the development control process is, these days, one of the most widely disputed and debated aspects of town planning law. It is a subject on which strong views are held, and rightly so, because it is the one area where there is a very real danger of the planning system being brought into disrepute. References in this article to section 52 agreements embrace agreements made under section 126 of the Housing Act 1974, section 16 of the Greater London Council (General Powers) Act 1974 (and the like provisions under similar local Acts), section 40 of the Highways Act 1959 and, indeed, any kind of binding agreement made between a local planning authority and a developer on the occasion of the grant of planning permission for development.

All these agreements provide opportunities for local planning authorities to impose on developers obligations of a kind which could not be made the subject of a condition attached to a planning permission. Let it be said, therefore, at the outset that, where each party is ready and willing to enter into such a commitment and accept the need for the agreement, then there is no doubt that a section 52 agreement can perform a valuable function.

What this article is concerned to demonstrate is the manner in which these agreements are being used by some local planning authorities to secure for themselves some kind of benefit or gain which might not otherwise have been provided, or even contemplated, by the developer. These benefits and gains have acquired labels such as “community benefits,” “planning gains” and “planning bargains” all of which suggest that the bargaining process is a recognised and respectable incident of the exercise of the development control function. It is the purpose of this article to question that suggestion and to draw to the attention of those who ought to be concerned with the proper operation of the development control system some of the less acceptable features of the planning bargaining process as it has grown up over the last ten years or so.

† See also Current Topics, 1980 J. PLAN. & Env' TD. L. 557, 558-60.
Briefly, planning bargaining involves the withholding by the local planning authority of planning permission for development until a section 52 agreement has been negotiated and completed. The agreement may provide, for example, that the developer shall allow the exercise of public rights of way across the development site, that part of the site shall be dedicated as amenity or public open space, that new or improved roads or sewers shall be constructed or that a particular part of the proposed development shall only be used in a particular way. Sometimes the deal involves the developer giving up land for community schemes such as municipal housing, leisure or recreation centres whilst, occasionally, developers are actually asked to construct or pay for the construction of such things. If the developer is not prepared to enter into an agreement of this kind then planning permission is refused.

Clearly, where such agreements require the provision of amenities or infrastructure which are reasonably required by reason of the proposed development, or which are needed in the area or vicinity of the development site and cannot conveniently be provided elsewhere, then there cannot be much objection to the local planning authority requiring that provision be made for them in association with the proposed development. However, the town planning justification for some of the more extreme examples of community benefits such, for example, as the provision, or the financing, of municipal housing or community centres which have no real connection with the development proposed or with the development site—is not so clear. This is because, in the examples just quoted, the developer is being asked to provide facilities which it is the local authority’s statutory duty to provide themselves and, in addition, because the scale of the community-benefit provision which is being required of the developer is frequently assessed mainly, if not exclusively, by reference to the estimated profitability of the completed scheme. Thus, in such cases, the local planning authority are revealed as an authority more anxious to find themselves participating in the expected profits of the development than an authority found to be applying appropriate planning policies to the proposed development in a straightforward way.

Admittedly, it must be difficult on occasion to know how to draw the line between, on the one hand, a community benefit scheme (or planning gain) which has a palpable connection with the development proposed or with the immediate locality and one which, on the other hand, has no such connection. For instance, it may be reasonable for a local planning authority to ask that a developer spend money restoring a listed building standing on the development site but it is clearly an abuse of discretion to refuse to grant planning permission for an otherwise unobjectionable scheme of office development until the developer has agreed to spend money on the restoration of someone else’s listed building at the other end of the borough!

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1. A summary of the more common types of agreement is contained in Jowell, Bargaining in Development Control, 1977 J. PLAN. & ENV’T L. 414.
II
THE LOCAL AUTHORITIES—"WHAT'S IN IT FOR US?"

The arguments advanced in support of the planning bargaining process are familiar. They centre around the idea that it is the community which effectively creates the increase in value of land attributable to the grant of planning permission for development and, accordingly, that the community should take a share of the wealth produced by the exploitation of planning permissions. Now, this is by no means a novel concept nor, indeed, is it one which, these days, produces much disagreement either amongst politicians or practitioners in the planning field. It first saw the light of day in 1948 when the State nationalised development rights in land at what must now appear to have been the bargain price of £300 million. That particular scheme was abolished before it ever really got off the ground but another attempt to capture development profits for the community was made in 1967 with the enactment of the Land Commission Act. That scheme had an even shorter life and in 1975 along came the Community Land Act which, ultimately, would have required that all development land should pass, before actual development, through the hands of a local authority so that development profits could be realised by the local authority on behalf of the community. In the meantime development land tax was to have provided a means of taxing unacceptable "windfall" profits arising from the development of land thereby allowing the community to take its share. Thus, in the past the initiative for the nationalisation of development rights and for the taxation of development profits has always come from central, rather than local, government. Indeed, it would be surprising today if the central government was prepared to allow local authorities to make up their own minds on a political issue of this importance. The Community Land Act 1975 is meeting the same fate as its predecessors although the taxation of development gains remains in the form of development land tax. But if the taxation of development profits is organised by the State on a national basis, what then is the role of local planning authorities in the scheme of things? Indeed, do they have a role in this sphere at all? The present government has answered the question in the negative by repealing most of the provisions of the Community Land Act and providing for the taxation of development gains on a uniform, national basis through the operation of development land tax. Thus, there is now no formal legal procedure whereby local planning authorities as such can participate in the recoupment of gains made through the development of land.

III
PLANNING CONTROL OR A SHARE IN THE SPOILS?

What then is the justification for planning bargaining? It is submitted that there is no justification at all for local planning authorities seeking to obtain their own independent share in the profits of land development. If the government of the day has enacted that development profits shall be
redistributed to the community by means of development land tax, then it is not for local planning authorities to seek to have first bite at the cherry by bargaining with developers seeking a grant of planning permission. This sort of thing may have been understandable in the days of the Community Land Act, but that legislation, and the political philosophy which lay behind it, are about to be laid to rest. Accordingly, at least for the moment, it seems that there is no authority for local planning authorities getting in on the act of sharing in development profits.

However, whether local planning authorities should, or should not, have a share in development profits is not the issue which should be of greatest concern to anyone wishful to see a proper discharge of the development control function. What ought to be of real concern to such people is the manner in which local planning authorities are seeking to achieve their ends—a manner which involves the use or misuse of their undoubted powers of development control. There are serious doubts about the legality and the ethical basis of the planning bargaining process which tend to be overlooked largely because it is not usually in the interests of the principal parties to the process to seek to upset what has been agreed and it is difficult for others to demonstrate the *locus standi* necessary to challenge what has occurred. But it really is high time that the whole process was critically examined in order to expose the potential problems inherent in allowing the exercise of administrative discretion to be influenced by the forces of the market place. The system was never designed to be used in this way, as a most cursory examination of the relevant provisions will demonstrate.

IV

THE LIMITS OF STATUTORY CONTROL

Section 29(1) of the Town and Country Planning Act 1971 provides:

> . . . where an application is made to a local planning authority for planning permission, that authority in dealing with the application, shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations, and—

(a) . . . may grant planning permission, either unconditionally or subject to such conditions as they think fit; or (b) . . . may refuse planning permission.

A local planning authority’s discretion as to how applications for planning permission should be dealt with is not unlimited. Section 29(1) sets out the matters which an authority are entitled to take into account and, where it has been necessary, the courts have never hesitated to control the exercise of an authority’s discretion. It is well settled that a public body holding the privileged position of being able to exercise their discretion when coming to a statutory decision must exercise that discretion reasonably and in good faith.\(^2\) The local planning authority’s power to impose “such conditions as they think

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fit” has been scrutinised by the courts on several occasions.3 Lord Denning M.R. in Pyx Granite Co. Ltd. v. Minister of Housing and Local Government4 had this to say on the subject:

The principles to be applied are not, I think, in doubt. Although the planning authorities are given fairly wide powers to impose ‘such conditions as they think fit’ nevertheless the law says that those conditions to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest. If they mistake or misuse their powers, however bona fide, the court can interfere by declaration and injunction.

It is precisely because most of the matters now covered by section 52 agreements would be ultra vires if they were made the subject of a planning condition that local planning authorities have taken to insisting upon the completion of section 52 agreements before planning permission is granted. These agreements provide a way around the constraints imposed by the courts on the use of planning conditions. Surely there can be no objection to a developer voluntarily entering into an agreement to provide community benefits—or so those who approve of planning bargaining would argue. However, the argument does not end there. If, as is usually the case, when a local planning authority come to make their decision on an application, they make it in the knowledge that a section 52 agreement has been completed or offered by the developer, then the authority are having regard to that agreement when dealing with the application. Now section 29 provides that they shall have regard only to certain things, namely the provisions of the development plan so far as it is material to the application and to any other material considerations. Obviously, it is necessary to look carefully at the section 52 agreement to see whether its contents are material considerations to which the planning authority are properly entitled to have regard.

It is clear that if the courts applied the same tests to section 52 agreements as they apply to planning conditions, then vast numbers of these agreements would be found to contain matters to which the authority should not, in law, have had regard.

However, it may be unlikely that the courts would adopt such a restrictive approach when considering, for the purposes of a section 52 agreement, what is, and what is not, a material consideration within the meaning of section 29(1). But this still does not mean that the local planning authority can have regard to whatever matters they choose when they are considering a planning application. There must be limits to what they can take account of and those planning bargains which have no affinity or connection with the development which is the subject of the application, or with the development site, are not matters, it is submitted, which can properly be regarded as material considerations, more particularly, if they involve a gift of land or a payment of

money to the authority. Whatever justification there may be for a local planning authority's wish to share in the profits made by developers, it would be surprising indeed if that wish were ever accepted as a material consideration in the determination of applications for planning permission.

V

DEVELOPMENT CONTROL OR PROFIT CONTROL?

The implications of admitting that local planning authorities may use their powers of development control for the purpose of diverting part of the profits of land development to themselves are disturbing. Such authorities are entrusted with the privilege of determining applications for planning permission by reference to sound planning principles and not otherwise. They have a monopoly of the grant of planning permission for development and, once they allow self-interest to enter into their considerations, they must necessarily prejudice the proper exercise of the development control function. It is not good enough for authorities to argue, as some do, that they are entitled to have regard to agreements freely entered into by applicants for planning permission. The truth is that, more often than not, the initiative for these agreements comes from the authorities who then proceed to indicate to the developer that his planning permission depends upon his willingness to do as they ask. The authorities have a disproportionately strong bargaining position by reason of their ability to give or withhold planning permission. The developer can, as is known, take the matter out of the local planning authority's hands by lodging an appeal to the Secretary of State but the expense and, what is often worse, the delay thereby involved, act as powerful disincentives to any such course. If an appeal is lodged, the developer can be confronted with the unwholesome spectacle of planning authority officers seeking to argue, apparently in all sincerity, for policies which, a few months earlier, they were quite ready to abandon on the right terms. Must not all this be unattractive on any angle of approach?

No doubt with one eye on section 29(1), there is developing a tendency amongst planning authorities to include in their structure and local plans provisions (however vague) as to their expectations about planning gains. Even so, the view is taken that such provisions, even when expressed in unequivocal terms, cannot validate something which is fundamentally alien to the development control function.

VI

PLANNING PRINCIPLES AND COMMERCIAL ADVANTAGE

The planning process can lead to all kinds of other difficulties. For instance, if the authorities are to put themselves in a position to bargain with a developer they must be able to point, at the outset, to some aspect of the proposed development which, in planning terms, is unacceptable but which, if the bargained terms were right, they would be prepared to accept. Now, if
that which is offered by the developer is designed to overcome the particular planning objection taken by the authorities then it would be perfectly right and proper for the two parties to enter into an appropriate agreement. But if, as is often the case, the authorities agree to waive their planning objection in return for a planning gain which has no connection whatever with the principle, policy or criterion which is to be waived, then either the authorities never really believed in the planning objection in the first place or, what is worse, they have taken a conscious decision to sell out to the developer.

The temptation to forsake sound planning principles for commercial advantage is obvious and it is not made any easier for the local planning authority to resist by the fact that negotiations for these planning bargains are almost invariably conducted in secret. There is usually no opportunity for members of the public to express a view on what is going on and there is no right of appeal available to a third party who objects to the terms of the bargain made in his name by the local planning authority. Although the courts have in the past expressed themselves willing to control the exercise of discretion by public authorities it is by no means certain that it would be possible for a third party, even one with the necessary energy and resources, to bring such a matter before the courts.5

VII
WHAT CHANCE OF A CHALLENGE?

It is because the likelihood of challenge in the courts is small that the practice of planning bargaining has been enabled to develop as it has done—in such an unrestrained fashion. Even if they could discover what was going on, third parties have no obvious way of bringing the issues before the court. As for developers they are most unlikely to want to rock the boat once they have a planning permission and so, albeit grudgingly, and often complainingly, they encourage, by acquiescence, the continuation of the practice.

But the absence of challenge should certainly not be taken as evidence that all is well. Bargaining in the field of statutory controls is inherently objectionable. Development control is a regulatory function—and it is no more than that—the powers available to a local planning authority being, like it or not, negative in nature. The system was not designed, nor is it suitable, for achieving the ulterior object of sharing out development profits in land. So far the Department of the Environment has been uncharacteristically reticent about planning bargaining. Bearing in mind that the practice is growing and that it is unlikely to be tested in the courts the Department really should decide (and declare) what is its attitude to it all. It is, in the nature of things, difficult to be precise about the extent of the practice of planning bargaining but nothing is more certain than that some local planning

authorities, whether they realise it or not, are desperately in need of reliable guidance.

October 1980
1. In October 1981 the Secretary of State for the Environment published the report of his Property Advisory Group Planning Gain. In publishing that report he invited comment from interested bodies and people. He and the Secretary of State for Wales have now considered the report in the light of comments received, and the purpose of this circular is to give guidance to local authorities and others concerned.

**Definition**

2. “Planning gain” is a term which has come to be applied whenever, in connection with a grant of planning permission, a local planning authority seeks to impose on a developer an obligation to carry out works not included in the development for which permission has been sought or to make some payment or confer some extraneous right or benefit in return for permitting development to take place. As such, it is distinct from any alterations or modifications which the planning authority may properly seek to secure to the development that is the subject of the planning application—such as changes intended to reduce the scale or intensity of the proposed development, or to improve its layout or its impact on the local environment. In the case of “planning gain” the obligation sometimes arises from the terms in which development is permitted, e.g. from a condition of the planning permission, (conditions are dealt with in Ministry of Housing and Local Government and Welsh Office Circular 5/68 which is currently being revised) and sometimes from an agreement made in association with it. In some cases the developer may offer some such works or payment in applying for planning permission or in the course of subsequent negotiations: the advice in this circular is relevant in those circumstances as well as to cases where the authority seeks to impose such obligations. This circular is not concerned with cases where the authority is disposing of land which it owns and where the terms and conditions on which it is prepared to sell are matters for negotiation with prospective purchasers. Nor is it concerned with matters arising from other legislation, e.g. the requisitioning of the provision of a water supply or of a public sewer from the Water Authority under the Water Acts 1945 and 1973, or agreements made under the Public Health Act 1936.

**Legal Aspects**

3. Guidance on these is set out in Appendix [2A]. The main points to bear in mind are:

   (1) the limitations on the scope for imposing positive obligations by way of conditions on permissions;
   (2) the scope of the powers under section 52 of the Town and Country Planning Act 1971 to enter into agreements with persons having an interest in land for the purpose of restricting or regulating the development or use of the land,
(3) the wider scope for making agreements under section 111 of the Local Government Act 1972, which are normally enforceable only against the person or body with whom the agreement was made.

General Policy

4. It is a matter of law as well as of good administration that planning applications should be considered on their merits having regard to the provisions of the development plan and any other material consideration and that they should be refused only when this serves a clear planning purpose and the economic effects have been taken into account. (More detailed advice is given in DoE Circular 22/80 (WO Circular 4080)). By the same token, the question of imposing a condition or obligation—whether negative or positive in character—should only arise where it is considered that it would not be reasonable to grant a permission in the terms sought which is not subject to such condition or obligation. A wholly unacceptable development should not of course be permitted just because of extraneous benefits offered by the developer.

5. If a planning application is considered in this light it may be reasonable, depending on the circumstances, either to impose conditions on the grant of planning permission, or (where the authority’s purpose cannot be achieved by means of a condition) to seek an agreement with the developer which would be associated with any permission granted. Such agreements may well assist towards securing the best use of land and a properly planned environment. But this does not mean that an authority is entitled to treat an applicant’s need for permission as an opportunity to obtain some extraneous benefit or advantage or as an opportunity to exact a payment for the benefit of ratepayers at large. Nor should the preparation of such an agreement be permitted to delay unduly the decision on the application.

6. The test of the reasonableness of imposing such obligations on developers depends substantially on whether what is required:

(1) is needed to enable the development to go ahead, e.g. provision of adequate access, water supply and sewerage and sewage disposal facilities (advice on the provision of infrastructure is given in Annex A to DoE Circular 22/80 (WO Circular 4080) and on land drainage in DoE Circular 17/82 (WO Circular 15/82)); or

(2) in the case of financial payments, will contribute to meeting the cost of providing such facilities in the near future; or

(3) is otherwise so directly related to the proposed development and to the use of the land after its completion, that the development ought not to be permitted without it, e.g. the provision, whether by the developer or by the authority at the developer’s expense, of car-parking in or near the development or of reasonable amounts of open space related to the development; or

(4) is designed in the case of mixed development to secure an acceptable balance of uses.
Appendix [2B] illustrates the application of these general principles to the provision of car parking.

7. If what is required or sought passes one of the tests set out in the preceding paragraph, a further test has to be applied. This is whether the extent of what is required or sought is fairly and reasonably related in case and kind to the proposed development. Thus, while the developer may reasonably be expected to pay for or contribute to the cost of infrastructure which would not have been necessary but for his development, and while some public benefit may eventually accrue from this, his payments should be directly related in scale and kind to the benefit which the proposed development will derive from the facilities to be provided.

8. There is also a final test, namely whether what the developer is being asked to provide or help to finance represents in itself a reasonable charge on the developer as distinct from being financed by national or local taxation or other means—e.g. as a charge on those using the facility provided. The essential principle to apply is that the facility to be provided or financed should be directly related to the development in question or the use of the land after development. It would not normally be reasonable, for example, to seek a contribution to road construction or improvement in the immediate vicinity of the proposed development unless the need for this arises wholly and substantially from the new development.

Minerals

9. These general considerations hold good in their application to mineral development. As explained in DoE Circular 1/82 (WO Circular 382), the Town and Country Planning (Minerals) Act 1981 provides specific powers for a minerals planning authority to add aftercare conditions to minerals planning permissions where the land is to be reclaimed for agricultural, forestry or amenity use. There are also provisions which have not yet been brought into effect relating to the review of existing workings and, under certain circumstances, the imposition of up to date conditions. Even when these new powers are available, there will still be occasions when agreements between planning authority and developer will be appropriate, or where an agreement in advance of planning consent is the only way of achieving certain preliminary works (for example improvements to site [sic] lines at road junctions). It is also hoped that planning authorities and developers will continue to enter into voluntary agreements to achieve environmental improvements where both sides recognise that existing planning conditions are inadequate or inappropriate. Such agreements reflect the greater sensitivity towards environmental needs that has developed in recent years, and in particular an awareness by both the industry and planning authorities of the need for the restoration of land previously worked but left unrestored for lack of satisfactory conditions requiring works to be carried out for his purpose. But advice will be given when the 1981 Act is brought fully into effect on how the cost to developers of undertaking such voluntary works
might be taken into account in the compensation calculation which would follow the subsequent imposition of new conditions.

Provision of Public Access

10. Where open space or other facilities, *e.g.* amenity walkways, are provided by the developer, he cannot be required to dedicate these to the public (though he may volunteer such an arrangement). If local authorities think general public access appropriate, and the developer does not wish to provide it, it is for them to seek acquisition of the necessary rights in the land. If the developer is willing to donate the land to another public body (*e.g.* a parish council), that body should be involved in the discussions at the earliest possible stage.

Maintenance Payments

11. The issue has arisen whether in addition to providing facilities such as open space or contributing to their capital costs, developers should also be expected to pay towards their maintenance costs. Where such a facility is of public benefit and the developer is willing to dedicate it to the public, the developer’s responsibility should be limited to providing what is needed in the first instance. The cost of subsequent maintenance should normally be borne by the authority or body in which the asset is to be vested, and the planning authority should not attempt to impose commuted maintenance sums when considering the planning aspects of the development. In the case of small areas of grass or landscaping principally of benefit to the development itself rather than to the wider public, the developer can reasonably be expected to make suitable provision for subsequent maintenance although this is not a matter which can be dealt with by means of a planning condition.

Cases Involving Other Land or Buildings

12. Obligations imposed on developers may reasonably affect other land than that covered by the planning permission provided that there is a direct relationship between the two. For example permission might be given for a new building where the developer is willing to agree to demolish a nearby building in which he has a legal interest, the rationale of this being that the impact of the new building would be offset by the environmental improvement resulting from the removal of the existing building. Similarly, it might be appropriate to seek the restoration of a nearby building as a screen for the new building. However, it would not be appropriate to seek to require the demolition of a building which is unrelated to the proposed development.

Conclusion

13. This circular is particularly intended to provide guidance to local authorities about the proper limits of other statutory development control powers. Where they intend to seek to impose obligations which meet the tests
set out in this circular, they should, where appropriate, provide guidance to
this effect in development plans. Should authorities seek to impose
unreasonable obligations in connection with a grant of planning permission
the applicant may refuse to accept them and appeal to the appropriate
Secretary of State against a subsequent refusal of permission or imposition of
a condition, or the non-determination of the application. Such appeals will be
considered in the light of the advice given in this circular. Where an appeal
has arisen because of what seems to the Secretaries of State to be an
unreasonable demand on the part of the local planning authority in such a
case, and an inquiry has been held, they will consider sympathetically any
application which may be made to them for the award of costs.

Cancellation

14. Ministry of Housing and Local Government Circular 54/67 (WO
Circular 47/67) is cancelled.
1. The scope for using conditional planning permissions under Part III of the Town and Country Planning Act 1971 for the purpose of imposing positive obligations on developers is subject to limitations described in Ministry of Housing and Local Government and Welsh Office Circulars 5/68 (currently being revised). Any conditions must achieve a proper planning purpose, be relevant to the development authorised by the permission and be reasonable in other respects.

2. Some local planning authorities have, under local Acts of Parliament, powers to impose conditions which are additional to those mentioned in this Annex or to enter into other forms of agreement.

Scope for Agreements:

Section 52 of the Town and Country Planning Act 1971

3. Local authorities are given express powers under section 52 of the Town and Country Planning Act 1971 to enter into Agreements with persons having an interest in land for the purpose of “restricting or regulating the development or use of the land”. The advantage of using section 52 is that provisions in such agreements which are in the nature of negative covenants are, by virtue of sub-section (2) enforceable by the local planning authority against successors in title of the person or body who entered into the agreement. Positive covenants can be included in such agreements provided that they achieve the purpose of restricting or regulating the use or development of the land. Incidental and consequential provisions (including provisions of financial character) which are considered necessary or expedient for the purposes of the agreement may also be included. It should be noted that a developer cannot be required to enter into such an agreement by means of a planning condition.

Section 111 of the Local Government Act 1972

4. There is a general power for local authorities to make agreements with developers in section 111 of the Local Government Act 1972. It gives local authorities power “to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of their functions”. The section would, for instance, enable agreements to be made for the payment of money or the transfer of assets to a local authority where this will facilitate the discharge of the functions of the authority. The section does not empower the local authority to require such a transfer; the transfer must be by agreement.
Positive Obligations Running with the Land

5. Some kinds of positive obligations or covenants can be enforced against successors in title by virtue of section 33 of the Local Government (Miscellaneous Provisions) Act 1982 which has replaced section 126 of the Housing Act 1974. These are covenants which are entered into by a person with an interest in land undertaking to carry out works or to do any other thing on or in relation to that land; and they must be contained in an agreement (made under seal) which:

(a) is made for the purpose of securing the carrying out of works on land in the Council’s area in which the person entering into the covenant has an interest; or

(b) is made for the purpose of facilitating the development of land (in or outside the Council’s area) in which he has an interest; or

(c) is made for the purpose of regulating the use of land (in or outside the Council’s area) in which he has an interest (e.g. an agreement to use some of the land as a car park to serve the development on the remainder); or

(d) is otherwise connected with land in which the person entering into the covenant has an interest (e.g. an obligation to carry out certain demolition or other works or to pay towards the cost of such works if carried out by the Council).

Agreements under the Highways Act 1980

6. In certain circumstances, a highway authority who is proposing to carry out works can enter into an agreement with a developer under section 278 of the Highways Act 1980 to carry out the works in a particular manner or to begin or complete the works by a particular date for the benefit of the developer in return for the making of a contribution by the developer towards the cost of the works.
Parking Provision

1. Most developments require vehicle parking provision. Space for operational parking (e.g. service and delivery vehicles) will normally be expected to be provided on site. Subject to environmental, highway access, or traffic management considerations, the developer may also be required to provide appropriate non-operational parking on site. Planning conditions requiring a maximum or minimum number of spaces should be reasonable in relation to the size and nature of the development, the availability of public parking nearby, and local traffic management policies and parking standards. Consistency with local parking standards cannot be regarded as the sole test of the reasonableness of a planning condition. The reasonableness of the standards themselves may be open to question on appeal against refusal of permission. Local authorities should not include excessive requirements in parking standards in order to increase their income from commuted payments.

2. Planning permission may be withheld if reasonable requirements as to the provision of parking spaces cannot practicably be met on site or on other land nearby under the control of the applicant, but to overcome such a valid objection the developer may agree to make a contribution to the provision of public parking spaces by the local authority. Such contributions may also be accepted when the developer could accommodate the required number of parking spaces on site, but would prefer not to do so. Whether the agreement is to overcome a valid objection to planning permission, or to commute a valid planning condition, the parking spaces provided should be easily accessible and convenient to the application site, and should be provided within a reasonable time. If a significant part of their use is unconnected with the development this may be reflected in the size of the developer's contribution. Payments should be no greater than is necessary to overcome a valid objection to planning permission or to commute a valid requirement and it follows that they should not be used to finance existing parking spaces or for purposes unrelated to the development.

3. Similar tests should apply where planning authorities have made it a deliberate policy to restrict non-operational parking in order to discourage car commuting or to reduce car use in environmentally sensitive areas. Where the provision of parking away from the site arises from such policies, rather than the developer's preference or the limitations of the application site, the principle still applies that the developer's contribution should be used only to increase the existing provision, and that the spaces provided should be as convenient as possible to the users of the development, and reasonable in relation to its size and nature and to the local authority's parking standards. The test of proximity to the development may be relaxed in park and ride or pedestrianisation schemes. The key test is again that payments should be put to a use which overcomes a valid objection to planning permission.