

Developers' Agreements and Planning Gain

David L. Callies*

Professor, William S. Richardson School of Law,
University of Hawaii at Manoa; A.B., DePaul
University, 1965; J.D., University of Michigan School
of Law, 1968; LL.M. University of Nottingham, 1969.

I. Introduction and Background

THE SPATE OF CASES¹ IN BELLWETHER LAND use states which have divested owners of development rights in land, together with increased interest of local governments in a vehicle for extracting concessions from would-be developers,² have resulted in considerable interest in so-called "developers' agreements."³ Such agreements between local governments and developers, usually sanctioned by state statute,⁴ set out, *inter alia*, various use limitations and infrastructure/public facility exactions sought by the former, and the freezing of land use controls for a fixed period together with service guarantees for the latter.⁵ Conspicuous among states with such statutory procedures are California and Illinois.⁶ At least

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1. See, e.g., *County of Kauai v. Pacific Standard Life Ins. Co.*, 65 Hawaii 318; 653 P.2d 766 (1982); *Avco Community Developers Inc. v. South Coast Regional Comm'n* 553 P.2d 546, 132 Cal. Rptr. 386 (1976). See generally C. SEIMON, W. LARSEN & D. PORTER, *VESTED RIGHTS* (1982) [hereinafter cited as C. SEIMON]; Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 Sw. U.L. REV. 545 (1979).

2. See generally C. SEIMON, *supra* note 1.

3. See, e.g., Callies, *Land Use Controls: of Enterprise Zones, Takings, Plans and Growth Controls*, 14 URB. LAW. 781, 831 (1982); Holliman, *Development Agreements and Vested Rights in California*, 13 URB. LAW. 44 (1981); Hagman, *Development Agreements*, in 1982 ZONING AND PLANNING LAW HANDBOOK 173 (F. Strom ed. 1982).

4. See, e.g., CAL. GOV'T CODE §§ 65864-65869.5 (West 1983); ILL. ANN. STAT. ch. 24, §§ 11-15.1 to 11-15.1-5 (Smith-Hurd Supp. 1984-1985).

5. Hagman, *supra* note 3, at 181, 186-89.

6. E.g., CAL. GOV'T CODE §§ 65864-65869.5 (West 1983); ILL. ANN. STAT. ch. 24, §§ 11-15.1 to 11-15.1-5 (Smith-Hurd Supp. 1984-85).

one state, Hawaii, has considered and rejected similar legislation.⁷ Another, Washington, has recently enacted legislation limiting (by type and time) municipal-developer agreements on certain development fees and exactions.⁸ While the few courts which have had the opportunity to review such legislation (and agreements executed thereunder) have generally approved,⁹ serious questions concerning the “bargaining away of the police power” and limiting of the duties and actions of future local legislative bodies remain to be addressed by most jurisdictions. As between the sanctity of the contracts clause of the federal constitution and the need of local and state governments to act “unfettered” in the public interest, which controls? This dilemma is particularly vexing when the local government agrees not to change its land use regulations, clearly affecting its ability to exercise the police power in the future.¹⁰ It is therefore useful to examine what practices concerning developers’ agreements and exactions exist outside the United States, where legislation authorizing such agreements has been in place for many years.¹¹ Such agreements—often covering exactions called “planning gain,”¹² not otherwise normally obtainable by local government—are the subject of section 52 of the latest version of England’s benchmark Town and County Planning Act.¹³

II. Developers’ Agreements

A. *The British Land Control System in Brief*

In England, the development of land more closely resembles a privilege than a right. The completion of several land use studies,¹⁴

7. H.R. 1208, 12th Leg. Hawaii (1983). See comment on earlier Hawaii bills in Hagman, *supra* note 3, at 197.

8. S. 4972, 47th Leg., 1st Ex. Sess., Wash. (1982) (codified at WASH. REV. CODE ANN. § 82.02.020 (Supp. 1985)).

9. Hagman, *supra* note 3, at 186–87.

10. Meegan v. Village of Tinley Park, 52 Ill. 2d 354, 288 N.E.2d 423 (1972); LaSalle Nat’l Bank v. Village of Villa Park, 42 Ill. App. 2d 529, 356 N.E.2d 182 (1976); City of Colorado Springs v. Kitty Hawk Dev. Co., 154 Colo. 535, 392 P.2d 467 (1964); Mayor & Council of Rockville v. Brookville Turnpike Construction Co., 246 Md. 117, 228 A.2d 263 (1967).

11. Hagman, *supra* note 3, at 198; D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT 923 (2d ed. 1980).

12. *Planning Gain: The Law Society’s Observation* 1982 J. PLAN. & ENV’T L. 346.

13. Town and Country Planning Act, 1971, ch. 78, § 52 (found in 41 Halsbury Stat. 1572–2022).

14. See, e.g., REPORT OF THE ROYAL COMMISSION ON THE DISTRIBUTION OF THE INDUSTRIAL POPULATION, CMD. 6153 (1940); REPORT OF THE COMMITTEE ON LAND UTILIZATION IN RURAL AREAS, CMD. 6378 (1942); REPORT OF THE EXPERT COMMITTEE ON COMPENSATION AND BETTERMENT, CMD. 6386 (1942).

coupled with the physical destruction and turmoil resulting from World War II, led England to adopt in 1947 a sweeping land use planning law¹⁵ which abolished the private right to develop land. Extending to every acre in the British Isles, the law requires a landowner to seek local government permission to undertake any form of land development. Land development is broadly defined as the carrying out of building, engineering, mining or other operation in, on, over or under land *or* the making of any material change in the use of any buildings or land.¹⁶ Although the law provides for the drawing up of both general and area-specific development plans which would characterize certain lands as appropriate for development, even owners of such land must seek permission from local government before commencing development. Moreover, a local government may legally deny such an application for development even though its own development plans show such land in a development category.¹⁷ While the law purports to "nationalize" or condemn existing development rights by setting up a multi-million dollar fund against which landowners denied development permission can (for a time) claim, no one in England doubts the law would be valid without such "just" compensation.¹⁸ Moreover, the British tax laws levy a development tax on new, permitted development which, since 1947, has ranged from 30 percent to 100 percent of the value of the development "increment" upon land value.¹⁹

B. *The Statutory Framework for Developers' Agreements*

The basic language of Section 52 of the law sets out the parameters of the British developers' agreement:

52.—(1) A local planning authority may enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement; and any such agreement may contain such incidental and consequential provisions (including provisions of a financial character) as appear to the local planning authority to be necessary or expedient for the purposes of the agreement.

15. Town and Country Planning Act of 1947, *amended by* Town and Country Planning Act, 1971, ch. 78, § 52.

16. Town and Country Planning Act, 1971, ch. 78, at §§ 22 and 290.

17. D. HEAP, *AN OUTLINE OF PLANNING LAW* 88 (6th ed. 1973); *see generally* Garner & Callies, *Planning Law in England and Wales and in the United States*, 1 *ANGLO-AM. L. REV.* 292 (1972).

18. J. B. CULLINGWORTH, *TOWN AND COUNTRY PLANNING IN ENGLAND AND WALES* 15-33 (2d ed. 1967).

19. *Id.* at 110-31.

(2) An agreement made under this section with any person interested in land may be enforced by the local planning authority against persons deriving title under that person in respect of that land, as if the local planning authority were possessed of adjacent land and as if the agreement had been expressed to be made for the benefit of such land.

(3) Nothing in this section or in any agreement made thereunder shall be construed—

(a) as restricting the exercise, in relation to land which is the subject of any such agreement, of any powers exercisable by any Minister or authority under this Act so long as those powers are exercised in accordance with the provisions of the development plan, or in accordance with any directions which may have been given by the Secretary of State as to the provisions to be included in such a plan; or

(b) as requiring the exercise of any such powers otherwise than as mentioned in paragraph (a) of this subsection.

(4) The power of a local planning authority to make agreements under this section may be exercised also—

(a) in relation to land in a county district, by the council of that district;

(b) in relation to land in the area of a joint planning board, by the council of the county or county borough in which the land is situated,

and references in this section to a local planning authority shall be construed accordingly.

Restrictive covenants in England “run with the land” as they do in the United States. However, positive covenants (requiring a developer to *do* something on his land) do not run with the land in England.²⁰ Indeed, the whole notion of developers’ agreements under section 52 has been criticized on the ground that such agreements may not be entirely enforceable by a landowner against a recalcitrant local authority.²¹

C. *The Use of Developers’ Agreements Under Section 52 of the Town and Country Planning Act*

One of England’s leading members of the bar²² has recently completed a study²³ of so-called planning bargaining or “planning gain”

20. See, e.g., *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (1848).

21. Letter from J. F. Garner, Professor of Public Law (retired), Nottingham University, to the author (Dec. 9, 1982).

22. Jeffrey Jowell, Barrister and Professor of Public Law, University College, London. The reader will recall that the British legal profession is divided into barristers, those who practice before the courts, and solicitors (by far the greater number), who do not. By and large, the former are “briefed” by the latter when it is necessary to “take counsel,” and it is the solicitor, not the barrister, who deals with clients. Only solicitors may form partnerships. Barristers are restricted to the use of the occasional assistant or “junior” in his professional quarters, known as his “chambers.”

23. Jowell, *Bargaining in Development Control*, 1977 J. PLAN. & ENV’T L. 414.

in which the most common areas for use of section 52 developers' agreements are set out in full.²⁴

1. ADDED USE

Twenty-five local authorities reported having bargained with developers to incorporate a use in the development beyond that which the developer had contemplated. While some were incorporated as a condition to receiving permission for development,²⁵ several were accomplished by section 52 agreement:

- (a) to provide space for members of a trade in a new development.
- (b) to revert to previous use upon cessation of present use.
- (c) to use for agricultural purposes only.²⁶

2. PUBLIC RIGHTS OF WAY

Seventeen local authorities reported securing from developers, agreements that the latter would provide public rights of way over land for which development permission was sought. There is, however, some apparent legal difficulty in obtaining such an agreement as a condition to the grant of permission to develop.²⁷ Five authorities did so by means of a section 52 agreement. In several cases, the grant of right-of-way included construction of footpaths, a bridge or the widening of a roadway.²⁸

3. DEDICATION OF LAND

Sixteen local authorities required developers to dedicate land for some kind of public use or purpose: open space, recreation, amenity. In several cases, the developer was required to provide maintenance or building funds. The majority of these cases were negotiated through section 52 agreements.²⁹

4. EXTINGUISHING EXISTING RIGHTS TO USE

Fourteen local authorities reported requiring developers to give up a use to which they were otherwise entitled. Again the majority were by means of 52 agreements. Among the uses "extinguished"

24. The study surveyed 106 of 370 local authorities in England (28 percent) and responses were obtained from 87. *Id.* at 418 and n.19.

25. *Fawcett Properties, Ltd. v. Buckingham County Council*, [1960] 3 All E.R. 503.

26. Jowell, *supra* note 23, at 420.

27. *Hall & Co. v. Shoreham-by-the-Sea Urban Dist. Council*, [1964] 1 All E.R. 1.

28. Jowell, *supra* note 23, at 421.

29. *Id.* at 422-23.

by such agreements were a gas station, a factory, an office and a parking lot. Nonconformities were apparently particularly popular subjects for termination by section 52 agreements.³⁰

5. REHABILITATION OF PROPERTY

Six authorities agreed with developers that certain restorations should take place before development permission would be granted. The restoration of land used as a quarry and as a dump was made the subject of a section 52 agreement.³¹

6. INFRASTRUCTURE

Six local authorities reported requiring infrastructure. Three instances were by means of section 52 agreements involving drainage and sewers.³²

As discussed below, "planning gain" was obtained through "negotiation" *outside* the section 52 agreement structure for everything from sports centers and public swimming pools to public housing.³³

D. "Fettering of Powers": What the Local Authority May Agree To

Subsection 3(a) of section 52 limits the terms of such agreements to those which do not "limit" any powers of the authority. "Authority" means "planning authority," usually the local government legislative body. Taken in its broadest context, this limitation would conflict with the language setting up the agreement in the first place, as, by its subject matter, the agreement is bound to restrict the local authority.³⁴ Beyond this, the critical question is the extent to which local authorities can "fetter the future exercise of their powers."³⁵ To this, one looks to English case law.

The landmark *Brandrose* case³⁶ originally set out very broad parameters for developer's agreements. Unfortunately, it has just been overruled because it went too far in prohibiting local author-

30. *Id.* at 423-24.

31. *Id.* at 425.

32. *Id.*

33. *Id.* at 421-26.

34. See discussion in Young & Rowan-Robinson, *Section 52 Agreements and the Fettering of Powers*, 1982 J. PLAN. & ENV'T L. 673, 673, 677.

35. *Id.* at 674.

36. *Windsor and Maidenhead Royal Borough Council v. Brandrose Inv. Ltd.* [1981] 1 W.L.R. 1083.

ities from exercising their powers.³⁷ In *Brandrose*, a local government gave permission³⁸ for site development under a "section 52 agreement" which, since the site was occupied, would require the demolition of certain buildings. However, prior to demolition, the local government extended the boundaries of a conservation area to include the site. Local government permission is required prior to the demolition of buildings in a conservation area. The developer proceeded to demolish on the basis of his section 52 agreement, and the local government sought to enjoin demolition on the ground that separate permission had not been obtained. The court held that a section 52 agreement could prevent a local government from exercising its land planning powers to prevent such demolition. The court also held that a local government could restrict the exercise of all its land planning powers *except* where the subsequent exercise would be in accordance with an adopted development plan (or a direction by the Secretary of State for the Environment based on such a development plan), as set out in section 52.³⁹

On appeal, the court of appeal specifically disagreed with that part of the lower court decision which prevented the local authority from extending the boundaries of a conservation district, thereby requiring permission to demolish buildings within it. Indeed, the court of appeal suggested that since a local authority could not bind itself not to exercise statutory powers under which it would be performing a "public duty," parts of a section 52 agreement could always become "ineffective" if conditions—as here—changed between the time the agreement was executed and the time the authority undertook its "public duty" in granting permission for development.⁴⁰

A number of English decisions broadly state the principle that any body charged with "statutory powers" cannot "fetter" itself in the use of such powers.⁴¹ While these cases either predate the first

37. *Extending Scope of Conservation Area*, Times Law Report, 3 Feb. 1983 (judgment Jan. 27, 1983).

38. "Planning permission" is permission to use land for purposes of development as set out in the Town and Country Planning Acts. "Development is extremely broadly defined as any new use in, on, over or under land." For full discussion see Garner & Callies, *supra* note 17.

39. See Young & Rowan-Robinson, *supra* note 34, at 679–81.

40. [1981] 1 W.L.R. 1083.

41. *York Corp. v. Henry Leatham & Sons Ltd.*, [1924] 1 Ch. 557; *William Cory & Son Ltd. v. London Corp.* [1951] 2 K.B. 476; *Southhead-on-Sea Corp. v. Hodgson (Wickford) Ltd.*, [1962] 1 Q.B. 416.

Brandrose decision or are otherwise distinguishable, the reversal of *Brandrose* on appeal gives these cases new significance. For example, in one case,⁴² a local authority had agreed under a predecessor of section 52⁴³ not to exercise its statutory powers to restrict future development of the subject property. The court found that the statute under which the agreement had been made was meant to allow the local authority to accept *developer* promises placing conditions upon development, *not* to permit the local authority to restrict its statutory powers. In a second (1969) case,⁴⁴ a local authority agreed *not* to condemn a site so long as it was used for a private sports ground. If it ceased to be so used, the authority acquired an option to purchase which, if unexercised, would permanently bar it from compulsory acquisition. The court agreed with a subsequent local authority that the agreement was unenforceable against it. However, nothing in the report of the case indicated the agreement was based on *any* statutory provision.⁴⁵

E. *Development Agreements: The Effect of the British Common Law and Some Commentary*⁴⁶

Several items are worth noting before proceeding to the matter of "planning gain" (subdivision-like exactions) and developers' agreements in England. First, as in the United States it is possible for a local government to exempt any and all of its land use controls from a "freeze;" likewise in England it is possible for a local government to preserve all its statutory powers by so stating in a section 52 agreement.⁴⁷ Of course, this might make such an agreement unattractive to a developer.⁴⁸ Second, it is clear from the second *Brandrose* decision that an authority cannot "fetter" certain statutory powers at all. This may include all statutory powers other than those conferred by the 1971 Town and Country Planning Act in which section 52 is found.⁴⁹ Third, it has been suggested

42. *Ransom & Lush, Ltd. v. Surbiton Borough Council*, [1949] 1 Ch. 180.

43. Town and Country Planning Act, 1932, § 34.

44. *Triggs v. Staines Urban Dist. Council*, [1969] 1 Ch. 10.

45. See Young & Rowan-Robinson, *supra* note 34, at 677.

46. *Id.* at 681-84. See also Hawke, *Planning Agreements in Practice*, 1981 J. PLAN. & ENV'T L. 5.

47. [1981] 1 W.L.R. 1083.

48. *Id.*

49. R.N.D. HAMILTON, A GUIDE TO DEVELOPMENT AND PLANNING 354 (7th ed. 1982), as noted in Young & Rowan-Robinson, *supra* note 34, at 682; see also D. HEAP, *supra* note 17, at 130.

a section 52 agreement can not restrict the power of local government over land other than that to which the agreement applies.⁵⁰ This may affect its utility for planning gain. Fourth, section 52 absolutely prohibits a local government from contracting out of its development plan or any order of the Secretary of State for the Environment in relation to that plan. It has been suggested, however, that a local government might not escape some liability if its principal purpose in amending its development plan was to frustrate the section 52 agreement.⁵¹

Other areas often covered by agreements⁵² which are usually upheld if reasonably related to development permissions include type of occupancy to be permitted;⁵³ abrogation, restriction or modification of otherwise permitted uses of land;⁵⁴ regulation of future development of land; regulation of complex development; regulation of sewage and drainage; pollution control; and enforcement.

III. Developers' Agreements and Planning Gain

A. *Planning Gain Defined and Criticized*

In its broadest context, planning gain is promises for planning or community benefits "collateral to the scheme in question," which are extracted from developers seeking permission from local government to develop by withholding such permission until a section 52 or similar agreement has been executed.⁵⁵ However, a close reading of applicable statutes and commentary results in a much more limited definition:⁵⁶

[P]anning gain occurs when in connection with the obtaining of a planning permission, a developer offers, agrees or is obliged to incur some expenditure, surrender some right or concede some benefit which would not, or arguably could not, be embodied in a valid planning condition.

Implicit in this definition is the assumption that those types of concessions or contributions which are authorized under the rel-

50. Young & Rowan-Robinson, *supra* note 34, at 683.

51. *Id.* at 683-84.

52. *See, e.g.*, Hawke, *supra* note 46, at 6-14.

53. Fawcett Properties Ltd. v. Buckingham County Council, 1961 A.C. 636.

54. Little-used on the ground that one needs local development permission for virtually all development, *even if* "permitted" by the terms of the local development plan. *See* Garner & Callies, *supra* note 17.

55. PROPERTY ADVISORY GROUP, PLANNING GAIN, § 1.01 (1981); Ward, *Planning Bargaining: Where Do We Stand?* 1981 J. PLAN. & ENV'T. L. 74, 75.

56. PLANNING GAIN, *supra* note 55, at § 3.01.

evant statutes as conditions attached to development permission are not (and should not be) the subject of section 52 agreements.⁵⁷ This is the position taken by the Property Advisory Group (to the United Kingdom Department of the Environment) in its recent report, *Planning Gain*, a follow-up on its criticism of planning gain contained in its earlier report, *Structure and Activity of the Development Industry*.⁵⁸ There is a separate body of case law which deals with those things that may properly be the subject of so-called "planning conditions" which local governments are authorized to impose "as they think fit."⁵⁹ This last broad grant of authority has been limited by the courts, however, to those conditions which ". . . fairly and reasonably relate to the permitted development. The authority are not at liberty to use their powers for an ulterior object, however desirable the object may seem to them to be in the public interest."⁶⁰

The PAG report predictably fueled a growing debate over the legality of bargaining for planning gain through the vehicle of the section 52 agreement. Through such agreements, local authorities were apparently seeking to obtain "ultra vires" conditions through the "voluntary" agreement process,⁶¹ a process labelled by one prominent attorney as "blackmail-sales of planning [development] permission."⁶² The prestigious Law Society's Standing Committee on Planning Law and Land Development (one of two rough counterparts to the ABA Section on Urban, State and Local Government Law) "broadly" accepted the conclusions—largely negative—of the PAG report,⁶³ allowing as how "the increasing use made by local planning authority of their powers of development control for the purpose of negotiating some form of public or community benefit is a cause of some concern within the profession."⁶⁴ The committee's principal concerns were: (1) that

57. *Id.* at § 2.00.

58. *Id.* at §§ 5.11 and 5.12.

59. Town and Country Planning Act, 1971, ch. 78, § 29.

60. *Pyx Granite Co. v. Ministry of Hous. and Local Gov't*, [1958] 1 Q.B. 554, 572.

61. *Planning Gain: The Law Society's Observations*, *supra* note 12, at 346; 1982, *Heap & Ward, Planning Bargaining: The Pros and the Cons*, 1980 J. PLAN. & ENV'T L. 631; McLoughlin, *Planning Gain: Another Viewpoint*, 1982 J. PLAN. & ENV'T L. 352; *Ward, Planning Bargaining: Where Do We Stand?*, 1982 J. PLAN. & ENV'T L. 74; previous literature on planning gain is listed in the bibliography to PROPERTY ADVISORY GROUP, *PLANNING GAIN*, *supra* note 55.

62. *Ward, supra* note 61, at 80.

63. *Planning Gain: The Law Society's Observations*, *supra* note 12, at 346.

64. *Id.*

the potential of "free" gain would influence local authorities' decisions on development permission, which should be guided by statutory planning considerations; (2) that the hope of planning gain obscures the "fundamental principle" at the root of the British system, which is that a developer is entitled to permission for any development to which there is no substantial planning objection; (3) that bargaining for planning gain is inconsistent with the development control function which is essentially negative; (4) that section 52 agreements are really not voluntary because to appeal a denial of permission which may be based on refusal to enter into such an agreement for planning gain is both time-consuming and costly; (5) that planning gain badly distorts the tax system, which is the statutory vehicle for returning to the community part of private development gain which arises from the granting of development permission; and (6) that local government is essentially taking unfair and illegal advantage of its position.⁶⁵

With this broad approval in mind, it is useful to briefly describe what planning gain is in practice, and the PAG views thereon.

B. *Planning Gain in Practice*

Starting with the proposition that "[w]e are unable to accept that, as a matter of general practice, planning gain has any place in our system of planning control,"⁶⁶ the PAG report sets out essentially seven examples of situations in which local government seeks "planning gain," and finds but two acceptable "special exceptions."⁶⁷

1. *Infrastructure*: Where a section 52 agreement provides for payment for services/infrastructure beyond requirements of the developer's site, especially if aimed to benefit the neighborhood generally. This is a fairly common practice.⁶⁸
2. *Public Amenities*: The local government under a section 52 agreement requires a developer at his own expense to provide public open space, recreational or social facilities. PAG found this "very common." So did a recent survey, though not always by means of section 52 agreements.⁶⁹
3. *Discontinuance of Use*: The developer is asked to agree to discontinue a nonconforming use (or tear down derelict

65. *Id.* at 348-49.

66. PLANNING GAIN, *supra* note 55, at § 6.02.

67. *Id.* at § 4.02.

68. Jowell, *supra* note 22, at 425.

69. *Id.* at 422-24.

buildings) in return for development permission to construct a commercial or industrial development on a conforming site, even though such new development would *not* create an "over-provision" of such uses in the area. A recent survey indicated this "extinguishing existing use" through section 52 agreements to be very common.⁷⁰

4. *Rehabilitation of Buildings*: In return for development permission, to change the use of an "architecturally meritorious" building, a developer is asked to restore its deteriorated external facade, even though there is no connection between use and facade. A recent survey found this to be commonplace, but not necessarily by means of section 52 agreements.⁷¹
5. *Environmental Treatment*: A developer of commercial or residential development gets development permission after agreeing to lay out his development in such a way as to open up a view or otherwise achieve an aesthetic or visual effect unconnected with the scheme itself.
6. *Public Rights*: A developer with a site near a scenic area agrees, in return for development permission, to dedicate land for open space or public right-of-way in order for the general public to enjoy the area. A recent survey found this to be the most likely element for bargaining/planning gain, though not always—or even primarily—through section 52 agreements.⁷²
7. *Payments of Money*: The local government asks a developer to make a payment toward the restoration of an historic building "or other worthy cause" that bears no relation to the proposed development, if development permission is granted.

The exceptions which PAG is prepared to accept:⁷³

1. When public facilities/services necessary for the proposed development are for some reason off-site, and it is therefore technically difficult to make a statutory condition for development permissions.
2. Certain mixed-use developments where individual parts might be objectionable unless viewed as a whole and with

70. *Id.* at 423.

71. *Id.* at 224–25.

72. *Id.* at 422–23.

73. PLANNING GAIN, *supra* note 55, at §§ 7.02 and 7.04.

some nonrequired amenity—like clearing non-greenbelt sites for permission to develop in a greenbelt.

IV. Conclusion: Development as a Privilege?

It is clear that many of these methods of achieving planning gain have counterparts in United States experience, which will increasingly come about through annexation and developers' agreements as state courts continue to chip away at vested rights or, indeed, any "right" to develop land. Indeed, the totality of land regulation in states like Hawaii and California raises an increasingly common philosophical issue: is the use of land a right or a privilege? Unquestionably, it started out as a right. Blessed with a surfeit of undeveloped land virtually from its inception, the history of the United States is that of land acquisition and development throughout the eighteenth, nineteenth and twentieth centuries. The plentiful supply of undeveloped land was a critical factor in the population and settlement of the nation.⁷⁴ It is more than a hundred years since Frederick Jackson Turner implicitly raised the question: what happens when we run out of new lands to settle?⁷⁵ As many parts of the United States became highly developed and uses of land overlapped, the question of competing land uses became increasingly critical.⁷⁶ Thus, while controls had always been within our land philosophy,⁷⁷ they became increasingly prevalent in the mid-twentieth century.⁷⁸

Disputes over whether land use is a right or a privilege characterize much of the thought-provoking literature in the past decade. Some preferred to see the development of land continue as a right of ownership.⁷⁹ Others expressed a desire to move toward other Anglo-American systems of land development where, if the right to develop had not yet metamorphosized into a privilege dispensed by government, it at least was subject to special scrutiny as "affected with a public interest"⁸⁰ if not paid for outright as in a

74. A. STRONG, *LAND BANKING* 24-36 (1979). See generally B. HUBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* (1965).

75. See generally F. TURNER, *THE FRONTIER IN AMERICAN HISTORY* (1920).

76. F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 3-4 (1971).

77. *Id.* at 1-2; F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE*, ch. 6 (1973).

78. F. BOSSELMAN & D. CALLIES, *supra* note 76, at 2.

79. F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 77, at ch. 8.

80. Babcock & Feuer, *Land As a Commodity "Affected With A Public Interest,"* 52 WASH. L. REV. 289 (1977).

“windfall” to compensate those whose development rights were “wiped out” by public land use control decisions.⁸¹ While no United States jurisdiction has, as in England, formally abolished or “nationalized” the right to develop land, we have not yet decided whether land development is a private right, which may be regulated for health, safety and welfare of the people at large, or a privilege, for which a private landowner must seek permission and/or pay. How the states deal with such issues as vested rights and land use controls may well decide the utility of—if not the necessity, for—developers’ agreements.

81.D. HAGMAN & D. MISZYNSKI, WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (1978).