

PLANNING GAIN IN TOWER HAMLETS

A thesis submitted for the degree of Doctor of Philosophy in Law

by

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To my father

ABSTRACT

This thesis examines in detail the operation of a planning gain policy in the London Borough of Tower Hamlets between 1971 and 1983, using data obtained from records held at the Borough and observations of the practice. The practice of planning gain is set into the broader context of planning and the still broader social and political context. The existing literature and definitions of planning gain are critically examined in the light of a theoretical framework which concerns itself with the identification of power and politics within the planning process. The responses made to the practice of planning gain by the Department of the Environment, planning inspectors and the courts are explained and critically analysed to indicate the lack of articulated opposition.

The use of planning agreements as a mechanism for the enforcement of planning gain is also examined. Section 52 of the Town and Country Planning Act is analysed, together with the available case law. The use of these agreements in Tower Hamlets is discussed in detail.

The schemes examined at Tower Hamlets are presented in full to provide an overall view of the operation of a planning gain policy. Details include the effect of negotiation on the content of schemes and problems of implementation.

Comparative material is provided covering the operation of a planning gain system which has legislative recognition in Sydney, Australia. This part of the thesis is used to illustrate the continued existence of negotiation for planning gain and of the restrictive responses to the autonomy of local government.

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LIST OF SELECTED ABBREVIATIONS

BOMA	Building Owners and Managers Association of Australia Limited
BP	Borough Plan
CA	Court of Appeal
CC	City Council
CDA	Community Development Area
CHCL	Campaign for Homes in Central London
CWS	CoOperative Wholesale Society
DCP	Development Control Plan
DEP	Department of Environment and Planning
DF	Docklands Forum
DJC	Docklands Joint Committee
DOE	Department of the Environment
EG	Estates Gazette
ELR	Environmental Law Reporter
EP&A	Environmental Planning and Assessment Act
EP CASE NOTES	Environmental Planning Case Notes
ER	Estates Reports
GLC	Greater London Council
GLDP	Greater London Development Plan
HMSO	Her Majesty's Stationery Office
IDP	Initial Development Plan
JDAG	Joint Docklands Action Group
JPL	Journal of Planning and Environmental Law
LANDCOM	Land Commission of New South Wales
LBA	London Boroughs Association
LBTH	London Borough of Tower Hamlets
LEP	Local Environmental Plan
LGRA	Local Government Reports of Australia
MC	Municipal Council
MHLG	Minister for Housing and Local Government
NSW	New South Wales
P&CR	Property and Compensation Reports
PAG	Property Advisory Group
RIBA	Royal Institute of British Architects
RICS	Royal Institute of Chartered Surveyors
RTPI	Royal Town Planning Institute
SC	Shire Council
SEPP	State Environmental Planning Policy
SHPRS	Spitalfields Housing and Planning Rights Service
SLC	Spitalfields Local Committee
SLP	Spitalfields Labour Party
SSE	Secretary of State for the Environment
TCPA	Town and Country Planning Act
THET	Tower Hamlets Environmental Trust
UDIA	Urban Development Industry Association
WSROC	Western Sydney Regional Organisation of Councils

PART I: PRELIMINARY

INTRODUCTION

The purpose of this thesis is to examine, through a study of the operation of planning gain in the London Borough of Tower Hamlets, the extent to which local authorities are able to create and retain autonomy within broad areas of policy-making so as to facilitate the growth of their own power structures. Opposing views of the nature of power and the methods available to mobilise that power will be considered so as to suggest that power is not owned or possessed, but circulates. The central concern is not the lawfulness of the practice of planning gain within any particular jurisdiction but its legitimacy in the socio-political context in which it occurs.

This thesis aims to show how a London borough uses existing structures provided by formal planning laws, and develops its own techniques, to perform the functions ascribed to it by central government. The form of these techniques and their espousal by professional planners will be examined, together with the type of reaction received from the formal structure of control to illustrate reassertions of the formal distribution of power to mould and shape the mechanism of planning gain, rather than to seek to exclude it. In other words the official responses given to planning gain have been an attempt to limit its use within the confines of the superstructure, yet to allow its continuance by using language and controls sufficiently flexible to maintain its operation. It will be argued that this is not only evidence of the gap which exists between formal limitations of power and reality, but of the interdependence, rather than conflict, between them.

Planning gain is a topic which has, over the last fifteen years, attracted interest from academics, the planning profession and from central government, yet the issue remains nebulous and ill-

defined. Certain patterns can be seen in the treatment of it: some studies have an empirical base but most are based on no particular methodology; the commentaries by lawyers are largely concerned with the issue of legitimacy, whilst those by planners and sociologists are more concerned with the effectiveness of the practice. Within legal works there has been identified a 'rational-legal' approach, which portrays the law as the logical and objective arbiter of legitimacy in planning, and a contextual approach, which takes into account the factors promoting the practice and the decisions of the courts. There is also a genre of articles which are concerned with the mechanics of the use of planning agreements to secure gains without considering their legitimacy or exploring the reasons for such use. Studies by planners have concentrated on the effectiveness of the practice, again with an eye upon legitimacy but in the light of 'proper planning considerations' rather than upon the precedent of decisions in other areas of planning. Work has also been done by sociologists and economists with a view to assessing effectiveness but without the benefit of collected data.

From these different approaches arise a number of different views on the practice of planning gain. It has been denounced as blackmail, or as a practice of 'doubtful legality', applauded as positive planning, or as a method of compensation for the victims of development; it has been identified as a form of unauthorised taxation and as the performance of the legitimate functions of a planning authority. These views are necessarily reflective of the standpoint of the researcher, which in turn is influenced by her or his academic and professional background, the motivation for the study and the context in which it was carried out. This thesis cannot avoid those same

influences, some of which can be controlled for and some of which cannot, but they should be acknowledged as far as they are discernable to myself.

My standpoint is essentially that of a lawyer, whose academic background could be described as 'socio-legal'¹ and has emphasised the importance of a multi-disciplinary approach. By that is meant any subject is approached with the firm belief that law cannot be studied, assessed or commented upon without an exploration of the whole circumstances in which it operates and an assessment of the political and historical reasons for its conception. The objectivity and logic of the law cannot simply be accepted without question. 'Legal rules' in the form of legislation or caselaw cannot be considered absolute, but are open-textured and capable of diverse interpretation and application. To understand the operation of law it is, therefore, impossible to rely only upon the decisions of the courts or the commentaries by legal scholars and practitioners: the work of sociologists, political scientists, economists, experts on public administration are all relevant and necessary resources. Before outlining the methodology used in this thesis it is necessary to indicate the influence of this type of approach on the study as a whole.

¹ The term 'socio-legal' is not used here to indicate a taking of sides against 'sociology of law', but rather to demonstrate an interest in using the methods and theories of the social sciences to examine problems about the nature and operation of law. In this sense the battle between socio-legal studies and sociology of law which was perhaps most evident in the 1970's is not sustained here. See Campbell, C.M. & Wiles, P. "The Study of Law and Society in Britain" (1976) 10 Law & Society Review, pp.547-578. This thesis regards the aims of both as compatible by examining the inter-relationships between law and real people within a theoretical framework which offers a critique of the role of law within the social order.

ON THE APPROACH ADOPTED TOWARDS PLANNING LAW

Any subject of interest in the social sciences possesses an amorphous quality: it may appear distinct and self-contained but on closer examination it is revealed to merge with surrounding areas and disciplines. Planning law cannot be contained simply within a box bearing that label but necessarily overlaps into political ideologies, western liberal thought, the character of professional power, the nature of decision making and competing views on human nature. Conceptions of the nature and role of planning and of law are firmly embedded within the more general expectations prevalent in society, and these expectations affect not only the system in its theoretical form, but also the manifestations and administration of that system in reality.

These expectations existed within the utopian visions of society as portrayed by Plato, More and Marx, but also within the less optimistic visions of Durkheim, Weber and Comte and have progressed through cycles of structuring, destructuring and restructuring society to produce a 'better world'. At various stages of development, theories on the form of society and the position of the state have been optimistic and pessimistic: they have both guaranteed individual freedom and advocated that a strictly limited sphere of freedom is the best we can expect. Claims for restructuring have been revealed as packages of 'more of the same' by perpetuating the formalism, rationalism, centralism, bureaucracy and professionalism identified in the nineteenth century.

Within this the city was traditionally² a metaphor for the rest of society: an ordered city would produce an ordered society. After the industrial revolution the cities became the dehumanising reality of disorder, as opposed to the natural, organic order of community rural life.³ The emergence of town planning, then, was accompanied by two major ideologies: the first, that planning and regulation would restore order and so promote a better, healthier, richer way of life, and the second, that community life was the ideal to be recreated within the city itself.⁴ In England, responsibility for urban planning was vested in local administration, the local borough, as the grass roots body concerned with the implementation of policy and while the failure of planning to achieve social order through physical determinism has been acknowledged,⁵ concepts of regulation and of community or neighbourhood have persisted.

Within the legal system the city borough now plays little formal role. Its powers are restricted to those which are delegated to it by government, and where discretion has been given, it has generally

² For example, in the works of Plato and Aristotle. See Sennett, R. *Classical Essays on the Culture of Cities*, 1969, New Jersey: Prentice Hall.

³ This view is portrayed in the work of Emile Durkheim and discussed within the context of the city by Frug, G.E. "The City as Legal Concept" (1980) 93 *Harvard Law Review*, 1057.

⁴ The state was to be responsible for restoring social order through the city and in some places, such as Paris and Vienna, this was blatantly portrayed in the layout and design of space to augment the physical control over urban unrest so as to avoid a repeat of the 1848 revolutions. This is discussed in Cohen, S. *Visions of Social Control*, 1985. London: Polity Press.

⁵ For a lucid introduction to the role of, and problems surrounding, physical determinism in planning see Foley, D.L. "British Town Planning: One Ideology or Three" (1960) 11 *British Journal of Sociology* 211.

been tightly circumscribed by the courts; where autonomy exists it is strictly confined to 'local' issues. While the legislative structure may create discretion,⁶ the framework of administrative law⁷ and the prevalence of direct government intervention⁸ makes its operation limited. Government restraint is felt most directly through the public purse by controls on rate revenue, cut-backs in capital expenditure budgets, limitations on the method and rate of spending, and restrictions on borrowing. There is also restraint in the ability of local boroughs to make law or governing rules: they have the power to make policies and plans but they are not legally binding.

These restrictions, together with the assumptions they raise, govern perceptions of what amounts to legitimate action on the part of the borough in providing services for the local population in pursuance of the social welfare role they have historically played. The limited budget they have, the difficulties they face in augmenting it and the limitations on discretion are in no way controversial, but are rather unchallenged, and generally unacknowledged factors within the normal picture of local government. It is similarly assumed that

⁶ This trend is evident within planning law from the Town & Country Planning Act 1947 onwards and is discussed in Part II below.

⁷ For example, the application of the ultra vires doctrine to the ability of local planning authorities to impose conditions upon planning consents only within the ambit of 'planning purposes' (Pyx Granite Co Ltd v Minister of Housing and Local Government [1965] 1 QB 554) and the concept of fettering discretion applied to planning authorities entering into agreements under section 52, Town & Country Planning Act 1972. Discussed below in Part II.

⁸ Through the use of ministerial circulars and economic restraints. See Loughlin, M. *Half a Century of Municipal Decline 1935-1985*, 1985. London: Allen & Unwin.

city boroughs should not enjoy the 'freedom' of private entities⁹ which generally have power to act in any way in which they are legally entitled, provided they have adequate finance. The fact that local government is controlled by imposed limits, rather than by the operation of market forces, is not regarded as extraordinary but as the natural result of hierarchical government.¹⁰

At least two further assumptions can be recognised. First, it is a non-issue that local city administration exists within the system of government¹¹ and secondly, it is assumed that local government will misuse any powers it has. Rather than acting in the 'public interest' it will, if uncontrolled, act out of private interest and become corrupt. Consequently, in order to protect the 'public interest' central government and the courts must watch over its operations. The weak position of local government within the system appears, then, to be the inevitable consequence of the economy and the expanded

⁹ This is not to say that local boroughs do not engage in the market to raise revenue, for example by entering into partnerships with developers on particular schemes or by charging entrance fees to council facilities. The point is rather that these activities are circumscribed beyond the freedom of individuals or companies.

¹⁰ This point is made by Frug (1980) *op.cit.* supra note 3.

¹¹ This has, to an extent, been challenged by the abolition of the GLC and the reorganisation of other metropolitan councils in 1985. These moves seem to have been directed towards the large Labour controlled councils standing in opposition to central government rather than against the division of responsibilities between central and local government generally. It could, however, be argued that it amounts to the same thing as the result is a move towards centralism and a further reduction in local autonomy, particularly as it followed closely on the heels of the Rates Act 1984 which limited the level of local rates and restricted spending. See the Government White Paper *Streamlining the Cities* (1983) Cmnd. 9063. For a discussion see Loughlin, M. "Municipal Socialism in a Unitary State" IN: McAuslan, P. & McEldowney, J.F. *Law, Legitimacy and the Constitution*, 1985, London: Sweet & Maxwell, pp.82/106.

bureaucracy typical of the modern state.¹² Tight controls are necessary to prevent local protectionism at the expense of national political objectives.

Accompanying this are the criticisms made of the development of modern society which have called for increased individual involvement in societal decision-making to move away from the domination of bureaucracy, the ruling class or other power elites. Assuming that pure self-determination would be impossible, the tendency has been towards increasing public participation within the existing hierarchical system through the use of local filters, such as the borough, to reduce the scale of decision-making.

It follows from this type of analysis that the lack of power presently given to local government and the assumptions that powerlessness has engendered, discourages or even precludes effective participation.¹³ By restricting discretion the distribution of power is reinforced and its hierarchical division is preserved. In other words by formulating the role of local government as one of a powerless representative of the state it excludes the opposite role, according to the dualities of liberalism,¹⁴ of a collectivity of individuals promoting its own interests. Local government then is a personification of reason and rationality, acting out of necessity and in the interests of the state for the communal good rather than a body acting out of desires and passions in the interests of its individual members.

¹² See Gerth, H. & Mills, C.W. (eds) *From Max Weber*, 1956, London: RKP, esp. pp.196/244.

¹³ For a discussion of this in an alternative context see Minow, M. "The Supreme Court 1986 Term, Foreword: Justice Engendered" (1987) 101 *Harvard Law Review* 10.

¹⁴ As described by Frug (1980) *op.cit. supra* note 3.

This definition of its role, and the acceptance of that definition, has been achieved through the declared apolitical, objective, deductive intervention of the law as arbiter. Through its apparent generality and consistency the law represents an ideology of what is 'right' for society. It has consistently classified the borough as acting either as an individual (freedom of contract) or as a part of the state (the inability to fetter its own discretion) on a limited mandate (ultra vires). This declared role has affected public perceptions of the scope of local government and consequently not only does participation seem ineffectual, but local government acts which do not conform strictly with this model also appear to fall outside of its legitimate functions.

The call for increased and effective public participation within the existing structure of government does accept that the role of local government within the city is the result of various factors including political ideologies, economic conditions and the role of the state under western liberalism. Yet it carries with it presumptions about the nature of power and the existence of 'community values' which suggest that power only exists within the formal structure and can be meaningfully redirected from above to an identifiable group with shared interests. This thesis questions the validity of these assumptions by identifying the mobilisation of power by actors within the process of planning and by challenging the objective nature and existence of 'community values'.

The idea of power which is presented is not power simply as something which is exercised through individual acts, nor in winning contests for political control, but as something which is at its most pronounced when it is least visible. That is power can be made use of and directed by the shaping of preferences and the arranging of

agendas so as to exclude challenge¹⁵; it is most effective when it hides its own mechanisms, rather than when it is formally harnessed within the system.¹⁶ The institutionalisation of 'community values' does not, therefore, produce 'public freedom' but begs the question of what ideas of reality are undermined by making them a part of accepted structures.

It will be argued that the restrictions and limitations imposed on power as it is said to be distributed within the formal structure does not leave the city boroughs without power, but constrains them to produce other mechanisms of power which are not acknowledged by that structure. These mechanisms are not devious or radical nor are they an abuse of the system: they are rather a necessary product of that system and, moreover, they give that same system the support and ability to carry on. Further, by failing to recognise the assumptions upon which it operates, the law projects the view that existing structures - social and economic relationships - are desirable and normal: actions or inactions which preserve the status quo are regarded as neutral. By supporting and reinforcing the desirability of the status quo in the name of 'certainty' and 'neutrality', the courts and the government deny the value of conflicting views and so perpetuate existing structures and power differentials. Hidden assumptions affecting the pattern of decision-making need to be revealed so as to assess the justice of the result. By justice is meant not only the value of human interaction as framed by the distribution

¹⁵ See Lukes, S. (ed) *Power*, 1976, London: Basil Blackwell. Readings in Social and Political Theory Series.

¹⁶ Foucault, M. *The History of Sexuality, Volume 1: An Introduction*, trans. R. Hurley, 1978, New York: Pantheon.

of power relationships within which the interaction occurs, but also taking account of the many other perspectives that exist.

Most of the empirical research which has taken account of issues of power within the exercise of local government discretion has concentrated on the policy-making process.¹⁷ The work done has indicated the complexity of local government bureaucracy and its strong influence on policy and has examined the relationship between party politics and patterns of decision making. Yet it has generally confined itself to the formal institutions of local government rather than the manifestations of power on the periphery of those institutions. Some work has been done on the particular occasions of such exercises of power but from other perspectives. Other studies on planning gain relating to this thesis have been largely concerned with the legitimacy of the process itself. Most of the lawyers who have done research in this area have viewed it as being illegitimate because it operates outside of the formal system of control and those who have considered it contextually have regarded it as a reaction to that formal control process in the light of economic necessity. None of the work has analysed planning gain in terms of it forming a part of the system, within the superstructure of formal control, or as an illustration of the mobilisation of power within that system.

¹⁷ These studies have generally been carried out in the field of sociology, see, eg. Jones, G. *Borough Politics*, 1969, London: Macmillan; Hampton, W. *Democracy and Community: A study of politics in Sheffield*, 1970, Oxford: OUP. These studies and others are assessed in Saunders, P. *Urban Politics: A Sociological Interpretation*, 1983, London: Hutchinson.

ON THE ARRANGEMENT OF THIS THESIS

For the purpose of examining the relationship between planning gain and local government power structures, this thesis first sets out the specific concept of planning gain into the broader context of the planning process which, in turn, is put into its wider socio-political context. Part I consists of preliminary matters which introduce the thesis itself, explaining the methodology and the meaning of the process which forms the subject matter. The reader is then in a position to proceed to Part II which contains discussion of the general issues surrounding planning gain in Tower Hamlets. The theoretical framework is laid out here and, drawing upon the available literature and the empirical study itself, critically examines the context within which a planning gain policy is operated by giving consideration to issues within government, the development of planning law, the process of decision-making and the policies and plans influencing that decision-making in Tower Hamlets itself. The aim is to suggest the factors giving rise to a planning gain policy and the mechanisms supportive of such a policy. Therefore, this part also makes use of the theoretical framework and the results of the Tower Hamlets study to discuss the role of negotiation, and of planning officers, in the decision-making process. Finally, the use of agreements as a structure to implement planning gains is analysed by examining the authorising legislation and the approach the Minister and the courts have taken to the scope of such agreements.

In Part III the details of the operation of a planning gain policy in Tower Hamlets is discussed. The results of the study are presented in narrative form, with each development scheme representing an

individual case study to which references are made throughout the thesis. It is in a largely descriptive form to illustrate the techniques of the process and the variations produced in schemes through the process of negotiation. This forms the basis of the following assessment of the methods used in Tower Hamlets to implement planning gain through the structures available. Having thus established the relationship between the official role of the local council and its own creation and use of structures to increase autonomy, in Part IV the location of the study moves to an alternative jurisdiction. The process of obtaining developer contributions in Sydney is examined to demonstrate similarities in the reality of local authorities' actions, and the responses to it, in a planning law system which has brought the process within the ambit of 'legality'. The empirical work done in Sydney is important to the arguments raised in the thesis generally as it illustrates the difficulties involved in making structural reforms to a process which is largely informal and the necessarily political nature of decisions affecting the allocation of resources.

Finally, in Part V the official responses to planning gain in England and in Tower Hamlets, embodied in ministerial circulars and the decisions of planning appeals and the courts, are examined. These 'official conclusions' are set alongside the conclusions drawn by this thesis, taking into account the issues raised throughout.

A few words must be added on the limitations of this thesis. First, this thesis dwells primarily on the practice of planning gain and, indeed on planning gain in Tower Hamlets. Whilst I am of the opinion that many of the issues raised are of relevance to other areas of planning law, and public law generally, and whilst an attempt is made

to indicate this, I also accept the difficulties of generalising from the specific. In an area largely dependant upon the exercise of discretion, and where the discretion of local administrators can be replaced by that of a Minister or a judge, there is inevitably a high level of subjectivity involved. The intention here is to recognise and illustrate that subjectivity within a specific context. Before these findings can be generalised many similar studies need to be carried out in other areas of administrative discretion.

Second, this thesis is concerned with examining the subject within its socio-political context and the importance of economic considerations is acknowledged. However, the overall impression may be an understatement of these economic considerations, as the financial predicament of local authorities and the property market both fall outside of this thesis. This is largely because other research has explored town planning generally, and planning gain itself, from this perspective. Consequently, the reader is referred where necessary to appropriate texts which deal with the financial arrangements, for example, between central and local government and the decline of the welfare state. The importance of economic concerns is asserted, however, in this thesis on a theoretical level.

Third, a word of warning is necessary about the use of Foucault's work in this thesis: his ideas are drawn upon largely uncritically and the wide-ranging debate over whether he is really a marxist, a non-marxist or an anti-marxist is not explored at all. He acknowledges this debate himself and admits to teasing his critics by using concepts and phrases from Marx while declaring the redundancy of labelling himself marxist. This thesis uses his work instrumentally and adopts his view of power as something more than the relationship

between capital and labour, which orthodox marxists consider to be its greatest weakness, as its greatest strength. His absolute denial, as a structuralist, of human agency is not accepted outright: the effect of human agency is limited by the system and the relationships it produces but is still an influential factor. Consequently the context of the political economy is of course accepted as significant and essential to the study of planning, but power is considered to extend beyond its confines as techniques and institutions are formed and operate within systems which encompass the exercise of power for reasons other than the pursuit of capital.¹⁸ To do otherwise would deny the complexity of the process under examination.

Fourth, there is included in this thesis some comparative data and information on planning in Sydney. This is not an exhaustive study of the planning system, nor of the process of developers' contributions as it exists in that jurisdiction. Its purpose is to indicate similarities and to highlight the possible ineffectual results of legislating for planning gain, while continuing to restrain the political and financial position of local authorities. The intention is not to draw direct comparisons between London and Sydney and the differences between them may be such as to deny the validity of any attempt to do so. The section does, however, provide important support for the arguments within this thesis by illustrating the continued restrictive approach of the courts and state government towards local autonomy and the measures adopted by local authorities to secure their own power structures. These power structures in Sydney, as in London, continue to exist in a political/economic

¹⁸ See Foucault, M. *Power/Knowledge*, 1980, ed. C. Gordon, New York: Pantheon Press.

environment where they are necessary to allow the local authorities to fulfill their expected role.

Finally, the data for this research was collected some time ago and precedes a number of changes within Tower Hamlets and in central government policy. No further circulars have been issued and no legislation has been tabled and the practice of planning gain has continued, and in fact has spread to boroughs, such as Southwark, which, at the time of the study, were operating a restrictive policy of no office development (and therefore no planning gain) in their area. This study is not intended to be applied generally to the operation of planning gain policies and is concerned with data restricted in both time and location to particular political and economic considerations. The political affiliations of the councillors at Tower Hamlets and of the officers have not been considered, nor controlled for, as the scope of the research was not concerned with isolating particular party concerns, and thus could be questioned on that basis. This is not to say that these concerns are irrelevant, indeed the officers were concerned about the political objectives of their leadership and envisaged changes in policy as the firmly Labour, and at one time Communist, controlled council lost its monopoly with the arrival of Liberal/SDP councillors in the 1978 elections.

Yet it is also true that other boroughs with staunchly Conservative membership, such as the City of Westminster and Kensington and Chelsea, operated planning gain policies, while a number of left wing councils, most notably Southwark, refused to administer such a policy as it entailed granting consent for offices in their borough. The ethos behind planning gain, therefore, seems to encompass both political justifications based upon streamlining the

planning process so as to make it easier for developers to obtain their consents and also justifications based upon redistribution of profits. Similarly objections to the policy have come from right and left wing councils. The GLC, for example, has been opposed to any office development in Central London and has taken a much more restrictive approach to planning gain than Tower Hamlets. As a result of these considerations, the single factor of party affiliation has not been explored in this thesis, nor has it been discounted. Comparative data from a Conservative borough was not obtained during the study and, thus, the influence of party politics could not be isolated as a particular influence upon the policy in Tower Hamlets.

Despite these limitations this thesis does represent a detailed study of the operation of a practice generally misunderstood as a result of lack of information, and does provide an alternative framework for analysis. If it is accepted that a dialectic progression between empirical research and theory is a meaningful way of contributing towards resolving questions facing public law, then the conclusions from this study should provide stimulus for finding answers.

CHAPTER 1: METHODOLOGY

Any empirical research in the social sciences will encounter at least two sets of identifiable problems. The first set relates to the internal validity of the research design, and addresses questions of objectivity, reliability and commitment through an examination of the relationship between the researcher, her or his theory and the subject under study. The second set relates to problems which are external to the design and reside in the social and political context in which the design is carried out, addressing such issues as accessibility to material and the quality of that material. The choice and usefulness of the research design may be greatly influenced by this second set of problems but, in the area of law and policy at least, is also determined by the researcher's perception of the nature of law itself. A major problem within legal research which has examined law and social control has been the failure to identify the difficulties inherent in the nature of law through an assumption that the effectiveness of law can be measured against an ideal, and that the 'true' nature of power relations is there to be discovered.

This chapter, therefore, is concerned not only with clarifying the choice of research design employed in this thesis, but also with identifying the effect of my perception of law and of power relations upon that choice. It is impossible to present the methodology of a thesis for scrutiny without acknowledging its theoretical base. To attempt to do so would be to perpetuate the misconceived view of research techniques as neutral devices based upon neutral theoretical suppositions and so deny the role of theory in guiding research and the interpretation of its findings. Thus research which is geared

towards testing the effectiveness or impact of law¹ by examining the actuality of its operation against its stated purpose shares a common methodological perspective by collecting data to test an hypothesis, but it also shares a common understanding of the form and functions of law. It can therefore be argued that if the latter understanding is flawed, then the value of the research is severely limited, no matter how carefully conducted, and no matter how many variables are controlled for.

PERSPECTIVES ON LAW

Most survey research in the social sciences is concerned with identifying a theoretical population, discovering a sampling frame which meets its characteristics and then using the responses or actions of the sample to generalise to the predicted reactions of the theoretical population. For example, if the subject to be studied is the affluent worker, a sample of car workers could be used and a research device could be chosen by using questionnaires, longitudinal studies, records, observation or other recognised techniques to answer particular hypotheses. There will undoubtedly be problems in the choice of design and in its application. The study of law and power relations, however, experiences problems at the first hurdle if assumptions are made about what law is and how power relationships exist. Thus identifying the theoretical population of those with power

¹ There are many examples of this type of work, particularly in criminology where the effectiveness of various pieces of criminal law has been examined. For examples of this type of research in various fields see the works contained in Black, D. & Maleski, M. eds. *The Social Organization of Law*, 1973. New York: Academic Press.

requires an initial decision on where to look for that population. An immediate reaction may be to look at those ascribed a particular status, and the choice of sample may then be members of the House of Commons or the councillors in a particular area. This choice, however, is based on the assumption that power is bestowed on certain individuals and denies any analysis of power which perceives it as arising through various other informal structures.²

Similar issues arise with the study of law. Researchers have tended to assume that legal goals are self-evident or that they are readily identifiable. In examining the effectiveness of law in a specific area, or in comparing a practice in reality with the law itself, those goals are often not clearly articulated but are rather taken as read. This is certainly related to the language of law and the nature of judicial and legislative process, but provides a vehicle through which the individual preconceptions or biases of the researcher can be represented as 'objectivity'.

Another problem which should be raised here is the way in which law is perceived within general social theory. Is it a particular form of social control worthy of general theory which is distinctively legal? Or is it merely one type of rule interlocking with many which shape and alter the behaviour and aspirations of those they touch? Laws do vary from one culture to another, and from one time to another. Disputes which are decided within a legal forum in one time and place may be decided within the family, through self-help or conciliation in another. Alternatively, there may be no dispute at all. The type of behaviour attracting the sanction of the criminal law, for example,

² This is discussed in detail in Part II.

varies across cultures and what is criminal in one may be considered 'normal' in another.

Certainly, law is influential and cannot be ignored by social scientists. It does deserve particular attention, but it should not be detached from other sources or manifestations of authority and power with which it interacts. This view has clear implications for methodology, as it requires law to occupy a position within the research programme which allows at least equal treatment of other factors influencing behaviour, and also makes the role of law more complex than 'effectiveness' testing research has acknowledged.

It is not necessary here to go on to analyse in depth the role of law in planning as this is explored further in the general part of this thesis. However, by rejecting a goal-testing approach to the subject of this research, it should be added that the Austinian view of law inherent in much socio-legal work³ is no longer assumed. Consequently, laws are understood not simply as commands backed by varying degrees of threats of sanction but as including, in Kelsen's terminology, both static and dynamic forms. That is, rules which require specific behaviour and define specific acts together with rules which define offices and give authority to those offices. The latter dynamic rules may limit discretion and lay down procedures for the exercise of power and are obviously important in considering administrative behaviour. They are also of particular concern as they bestow authority significantly to effect and alter the position of individuals, but at a level of low visibility.

³ This is discussed in Feeley, M.M. "The Concept of Laws in Social Science: A Critique and Notes on an Expanded View" (1976) 10 *Law & Society Review* 497/524.

By moving away from the command model of law, the assumptions underlying any approach to empirical research are dramatically altered. Laws which merely define or confer rights and status or which offer selective incentives to conform, through for example, taxation, enter the arena as methods of social control. Areas which have traditionally been regarded as depoliticised and falling within the mechanistic actions of bureaucrats come under scrutiny, but how should they be scrutinised? It has been acknowledged⁴ that very few disputes come to be litigated before the courts and that the most pervasive social control function of law lies in the process through which law is applied by individuals to themselves, without resorting to court. That is, individuals respond to the abstract set of rules and alter their behaviour accordingly in anticipation of the reactions of the court in administering law.

" In a host of both blunt and subtle ways law creates a set of categories through which people must filter their thinking and organise their lives. It is a complex pricing system which not only puts a value on the wants people may be inclined to pursue, but also affects them indirectly in that people must also adjust their wants to the behaviour of others whose preferences are in turn shaped by the law. "⁵

Thus any methodology adopted must move beyond the limited usefulness of considering court decisions alone and also take account of the wider, more indirect, effects of the reactions of individuals or organisations to the impact of law, and the adaptations they make to facilitate that law.

⁴ See, for example, Fuller, L. *The Law in Quest of Itself*, 1940, Boston: Beacon Press.

⁵ Feeley (1976) *op.cit. supra* note 3 at 515.

By taking account of these issues the methodology of this thesis, and the choice of research techniques used, did not address the subject of study by placing law and power in the position of independent, defineable variables, to be measured beside the 'actual' results. Rather it sought to identify the elements and dynamics of the process of planning gain, generate a theory about the calculus involved in pursuing that process and then examine the whole system, with special emphasis upon the function of law.⁶ Under this model, law is only one of a range of factors considered, and the theory generated is one of decision-making in a particular set of circumstances, rather than a theory of the effectiveness of law. Law is perceived to be a part of the exercise of political power, rather than an independent variable available for comparison.

THE RESEARCH TECHNIQUES

The above section was intended to illustrate that no research technique is neutral, but is dependant upon the relationship between theory and empirical work. A more readily recognised external problem is one of accessibility to information and material. This also raises particular problems where the subject of the research is not

⁶ This approach can be compared in general terms with the economic approach to law in that the concern there is to take into account all of the factors influencing decision-making and thus produce a calculus of efficiency. While this thesis does not adopt the market model the methodology used has benefitted from research conducted by others who have ascribed to that model. A good example is provided by Ogus, A.I. "Quantitative Rules and Judicial Decision Making" IN: Burrows, P. & Veljanovski, C.G. *The Economic Approach to Law*, 1981, London: Butterworths. pp.210/225.

only concerned with power relationships, but with politics and controversy. A literature survey was conducted covering both English and Australian material, and included sociological, economic, political science as well as legal writing. The amount of academic work on the specific topic was limited especially in England but accessibility to the material that did exist was not a problem, particularly as I had access to the University of New South Wales library as well as various libraries in London.

Accessibility to unpublished information did present different problems in the two jurisdictions where empirical work was done, at least partly as a result of the unspoken, but firmly entrenched, informal rules operating in Britain to protect exclusivity of information. This is well-developed in an area which is acknowledged as 'political', and becomes heightened where there is also overt opposition to the process being studied. The effect of this exclusivity is a type of defensiveness, to protect knowledge from outside scrutiny, which is felt not only by those being examined, but also by the researcher herself. As Banfield explains

" The case study method requires that the investigator go behind the scenes to discover what 'really' happens. In the United States this is easy: there is widespread feeling (witness the affair of the Pentagon papers) that it is outrageous for a public body to have any secrets. In Britain by contrast, the general opinion, certainly the opinion of persons in office, is that what goes on behind the scenes is not at all the business of 'outsiders'. It would be surprising if British political scientists did not share this attitude to some degree, at least to the extent of feeling embarrassed to ask questions that will be viewed as invasions of official privacy. "7

⁷ Banfield, E. "Urban Renewal and the Planners" (1972) 1 Policy & Politics pp.163/169 at 164, cited by Saunders, P. Urban Politics, 1979, London: Hutchinson, p.327.

While I am unaware of the situation in the United States, research in Sydney was certainly more relaxed than the British counterpart.

This point can be fairly briefly illustrated by the attitude towards interviews and tape recorders experienced in both jurisdictions. In Britain⁸ not one person interviewed agreed to my using a tape recorder, and some refused to answer any questions which were not included on a previously approved interview outline. I often felt reticent to suggest taping conversations as a result of the reaction of suspicion that I received when I did make such a request. My later experience in Sydney, on the other hand, shocked me. Councillors, developers, representatives of state and local government were happy to be taped. In early meetings I armed myself with lists of typed questions, only to receive the reaction 'Why don't I just tell you all I know about developer contributions and afterwards you can question me about anything else you need to know or that I've left out.'

The reaction in Sydney was to make everything as open as possible, whereas in London it was far more geared towards releasing as little information as was necessary. This anecdote does not provide evidence of differences in attitude generally, and could be explained by other variables between the two jurisdictions or between the individuals involved. Yet it did have an effect on my perception of the types of question that would be answered, and the type of methodology necessary to obtain certain information. In Sydney specific information could be obtained by asking a very general

⁸ These comments relate to my experience with councillors and other officials in London who I interviewed. I did not experience the same difficulty with those lawyers and planners at Tower Hamlets who I saw on a regular basis and who readily provided me with information.

question, or even no question at all, but in London this was not so. Similarly copies of documents, plans, policy statements were supplied to me without hesitation by those interviewed in Sydney, again often at their initiative rather than my own.

Whilst these underlying problems with accessibility were pronounced they had little practical effect upon the thesis as a whole because of the formal links established with Tower Hamlets before the empirical work was undertaken. These links, effectively diluted problems of accessibility as far as information from planners and lawyers at Tower Hamlets was concerned and provided me with a status which allowed me access to councillors, developers, the GLC which would otherwise could have been denied or, at least difficult. Thus, the interviewing problems in London were confined to my encounters with persons who saw me as a researcher, rather than as a person connected to Tower Hamlets. This in itself may have created additional problems, in that the information I was given may have been coloured by the image I possessed but, if anything, disclosure was perhaps more, rather than less frank, as a result of my close association with Tower Hamlets.

The links with Tower Hamlets arose through the funding of the empirical work and essentially provided me with freedom of access to all the planning gain scheme files held at the legal and planning departments at Tower Hamlets. These links indirectly brought me into a close working relationship with a number of planners and lawyers who made themselves available to explain, clarify and add to the information available from the records. In addition they would include me in meetings with developers, the GLC, interest groups and other councils as well as circulating copies of memorandum and other

internal documents to me. This situation arose as the result of existing connections between the legal department of the borough and Brunel University Law Department which developed through a placement scheme for students as a part of their undergraduate studies. Brunel made inquiries of all the placement solicitors in this scheme who qualified as potential participants in the Collaborative Award in the Social Sciences scheme introduced through the Economic and Social Research Council in 1982. Tower Hamlets suggested participating in a research project on planning gain and the research design submitted was authorised by the ESRC for funding.

The effect of this relationship between Tower Hamlets and myself was to provide a unique opportunity to examine in detail the operation of a planning gain policy, not only through documentation but also through personal contact with those administering the practice and its implementation. A similar relationship did not exist in Sydney and the data I obtained there was not comparable, in that it provided an overall picture of the situation. That data was collected for the purpose of illustrating structural differences and similarities whereas in Tower Hamlets the research project was designed to explore the detail so as to promote a deeper understanding of a practice which could only be superficially assessed from the outside. Consequently, both projects will be dealt with independently.

Methodology in Tower Hamlets

As indicated above, the reasons for choosing Tower Hamlets as the area for this study were all pragmatic, but can be supported on the grounds that Tower Hamlets would, under other circumstances,

have been a sensible and obvious choice. Planning decisions regularly involve negotiation between planners of the relevant authority and the developer submitting an application. Those negotiations may concern the physical details of the scheme, the timing of the scheme and the possible problems with approving the scheme, and thus may also extend to the actual content of the application or anticipated application. It follows that an important aspect of development control lies in negotiation and those negotiations may result in planning gains for the borough. In any negotiation the bargaining power of the parties is a vital consideration and in Tower Hamlets this aspect was well pronounced.

As a London borough it is likely to attract far more development than rural areas and significantly more than many of the Northern cities. The western edge of the borough abutts the City and as such offers prime sites for the expansion of the business and financial centre of London. It represents an area where office development is highly profitable and where land values are susceptible to rapid fluctuation and available sites are in short supply. Developers are anxious to build commercial developments in the area and at the same time it is traditionally residential and industrial, and has also experienced problems of urban decline and deprivation. In these circumstances there is a need for housing and public buildings and a corresponding demand for development.

In addition, Tower Hamlets published a planning gain policy in 1972 identifying a requirement to provide a 'community benefit' on any application for office development within the borough. This policy was issued in response to the demand for development and the schemes offered by developers to encourage the grant of permission at

the time of the property boom in London and has been consistently applied to produce a large number of planning gain schemes, and thus a working sample. Within this sample the range of planning gains actually provided was reasonably broad and included housing, shopping facilities, industrial floorspace, restoration of listed buildings, the renovation of an art gallery and theatre, the restoration of an important church and some 'community' buildings. Further the borough had taken the policy to appeal and had made use of section 52 agreements in implementing the schemes.

All of these factors meant that information on the operation of a planning gain policy was likely to be available and that a sizeable number of schemes were likely to have been implemented. It was in fact possible to examine systematically all of the files in the planning and legal departments on office schemes in the borough since the policy was first implemented. The study was completed shortly before the Borough Plan Inquiry when the office policy became part of that plan, which had gone on deposit in February 1983. This was largely coincidental in that the original proposal to collect data between January and July 1983 was extended by a further six months because the number of schemes and the bulk of documentation had been underestimated. The policy included in the borough plan largely mirrored its office policy counterpart, but also coincided with the publication of a government circular on planning gain and a substantial internal reorganisation of staff at the borough. The planning officer responsible for most of the schemes in Spitalfields was promoted to a different position and the solicitor who had dealt with all of the section 52 agreements also left the Council. The information produced by the study therefore spanned a period of eleven years in which

there was no direct interference by central government and in which internal relationships in the Council and with developers became well established.

The actual results of the study which appear in Part III of this thesis were achieved from a variety of sources. Foremost among these were the contents of the files held at the borough and the unstructured conversations with planners and lawyers involved with the schemes. The file data were undeniably useful although the information contained therein was not always complete. Also it was largely based upon objectives different from my own and generally lacked information on a number of the more interesting and pertinent questions addressed, such as the process of negotiation. The benefit of observational material, such as that collected through attending council meetings, public inquiries and planning appeals similarly was constrained by a formality which my research hoped to transcend.

I spent twelve months in all at the legal and planning departments as there were over two hundred files dealing with the past cases of planning gain. As a result of this I became a familiar part of the council and was privy to many meetings and discussions on planning gain schemes which were under consideration. This information was not structured and was at best qualitative, rather than quantitative, and at worst impressionistic but was certainly necessary to supplement the less problematic documentary data. As an overt observer, however, I was also subject to the limitations of my position. I was still at the mercy of my contacts and, consequently, it is not possible for me to judge how even my access to information was in reality. As I was attempting to observe an informal and

largely private decision-making process it was not possible to guarantee that I was always 'in the right place at the right time'.

In addition to this information collected at Tower Hamlets I also conducted a small number of interviews with developers, representatives of interest groups in Tower Hamlets and representatives of the Greater London Council. The sample of persons involved was not significant and the interviews were a combination of formal questions and unstructured conversation. In view of the subject matter involved it soon became evident to me that an unstructured approach was preferable, as direct questioning produced formal responses which really told me very little about the interviewees opinions or experiences. This part of the research in fact produced little valuable material other than reassertion of information largely available in published form.

Methodology in Sydney

Apart from the literature survey, the findings for this section came primarily from a series of interviews conducted with councillors, planners, developers and the Department of the Environment and Planning. A formal questionnaire was originally used but was not pursued mainly because, as indicated above, those interviewed provided information freely and spontaneously. Also it was not clear to me at the outset which questions were the most appropriate to ask, and in retrospect the questionnaire drafted⁹ appears banal. It seems that the main purpose for using a structured interview technique is to obtain

⁹ A copy of this questionnaire appears in the appendix.

quantifiable responses. This was not relevant here, partly because of the small sample of interviewees, but mainly because the purpose of the study did not lend itself to statistical analysis.

CONCLUSIONS

The information collected overall was brought together in the following chapters of this thesis to support a particular argument. The way in which the data has been interpreted is dependant to a large upon my acceptance of certain central theoretical and epistemological precepts, and can only be defended on that basis. The data is not representative of a test of the theoretical position but is an application of that theory which is capable of being tested by alternative interpretations. How reliable, then, are the results of this study ?

In order to answer this question it is necessary to consider what it is that social science research can in fact achieve in terms of value-freedom and objectivity. Weber recognised that values necessarily contribute to the selection and direction of research and recommended that those values be declared by the researcher so as to enhance objectivity. This recommendation has been widely criticised¹⁰ and social scientists have been accused of hiding their subjective views behind a mask of credibility. Gouldner,¹¹ for example, has

¹⁰ See, for example, Wright-Mills, C. *The Sociological Imagination*, 1959, New York: OUP, esp. Chapter 3, Abstracted Empiricism; Hughes, J. *The Philosophy of Social Science*, 1980, London: Longman, esp. chapters 2 & 3.

¹¹ Gouldner, A. *For Sociology*, 1973, Harmondsworth: Penguin Books.

referred to social scientists as being 'naive', in believing that they can recognise their own biases, and 'smug' in maintaining that the values they declare are acceptable ones. To Gouldner social research is necessarily partisan and objectivity can only be attained through the personal integrity of the researcher which prevents her or him from adopting the interests of a particular group and from suppressing data which runs counter to those interests. Popper similarly relied upon integrity but saw it arising through the 'community of scientists' subjecting findings of others to criticism.¹²

Certainly over the last twenty or thirty years the decline in positivism has encouraged the recognition of 'social studies' as defying scientific rigour.¹³ The concepts being examined are value-laden and often imprecise, and the data is manipulable, unpredictable and contingent upon the theoretical framework within which it is used. This does not mean that 'anything goes' in social science research,¹⁴ as a methodology is still necessary but it does mean that the integrity of the researcher and the internal consistency of its application are fundamental to the validity of the research produced. A further requisite for qualitative research to withstand scrutiny is that the results are presented in such a way that the findings may be empirically disconfirmed.¹⁵ In other words the deductions made from

¹² See Kuhn, T. *The Structure of Scientific Revolutions*, 1970, 2nd ed. Chicago: University of Chicago Press.

¹³ See, for example, Ryan, A. *The Philosophy of the Social Sciences*, 1970, London: Macmillan; Keat, R. & Urry, J. *Social Theory as Science*, 1975, London: Routledge & Kegan Paul, esp. chapters 1 & 4.

¹⁴ See Feyerabend, P. *Against Method*, 1975, London: New Left Books.

¹⁵ See Ford, J. *Paradigms and Fairy Tales*, 1975, London: Routledge & Kegan Paul.

the account of data in any given study should be disprovable through the presentation of other facts. There are problems with this in that the interpretation of information as 'fact' can be subject to the same dependance upon standpoint and individual perception,¹⁶ but this requirement has some force if it is applied within the same paradigm as the study itself. Overall, this means that the application of data in this thesis must be judged within these confines, and should not be regarded as a universally applicable test regardless of theoretical standpoint.

¹⁶ See Hughes (1980) *op.cit.* supra note 9, chapters 4 & 5.

CHAPTER 2: DEFINITION OF PLANNING GAIN

In this chapter the various definitions given of planning gain will be discussed in order to illustrate the importance of giving due consideration to competing ideologies. This questions the usefulness of attempts by academics to ascribe a 'neutral' definition to a practice which concerns itself with the redistribution of resources and represents a preliminary insight into the competing approaches to the subject. The prevalent forms of analyses which are self-evident from the various definitions of planning gain appearing in the available literature are taken up in later chapters. The aim here is to reveal those forms and to stress the importance of recognising the standpoint of the definer.

As practised in Tower Hamlets, planning gain becomes an integral part of considering the planning merits of an application. When an application is received from a developer for the construction of an office building or a change of use to offices the reaction of the Council is, first, to inform that developer of its office policy and of the policy contained in the GLDP and then to invite the developer to discuss the application with a planner at the Council. The merits of the application are therefore not considered outside the issue of gain, only in the light of it. The office policy of the borough has been framed in such a way as to make planning gain a legitimate concern of the planner in assessing the value of a particular development, thus projecting a certain view of the scope of planning and the powers available to the council.

Few definitions have acknowledged this connection. The one given by the public lawyer Jeffrey Jowell in his empirical research into the extent and scope of planning gain agreements refers to the process of negotiation but puts it squarely in the context of extracting

a benefit for the community rather than as an aspect of planning itself.

" The achievement of a benefit to the community that was not part of the initial application (and was therefore negotiated) and that was not of itself normally commercially advantageous to the developer. " ¹

There are clearly a number of problems with this definition, some of which Jowell acknowledges. In the first place it refers to the 'initial application' which is factually inaccurate. In many cases developers would negotiate planning gains before any application was submitted. Secondly, it falls into the same trap as many of the less acceptable definitions by confusing the content of planning gain with the method of achieving it. A more blatant example of this is provided by the doyen of planning law, Sir Desmond Heap, in his article villifying the practice of pursuing a policy of planning gain which he defines as

" The withholding by the local planning authority of planning permission for development until a Section 52 agreement has been negotiated and completed. " ²

This has the additional factual error of assuming that planning gain only includes those schemes which use a section 52 agreement. While it is true that in recent years the use of section 52 agreements has increased, especially in connection with larger or more complex developments, planning gains have also been implemented in Tower Hamlets and elsewhere through the use of conditions on a planning

¹ Jowell, J. "Bargaining in Development Control " (1977) J.P.L. 414/433.

² Heap, D. and Ward, A.J. "Planning Bargaining - the Pros and Cons: or How Much Can the System Stand ? " (1980) JPL 631/637 at 631.

permission, by approving a modified planning application or by entering into a voluntary agreement under other pieces of legislation.³

Jowell's definition is also unacceptable in that it suggests that all planning gain is achieved through negotiation. It is true that the content of the gain is mostly the subject of negotiation but the suggestion to include some gain has come from developers as well as from the Council.⁴ It is not accurate to portray the process as one in which the negotiations always put the developer in the position of having to include something in his scheme that he had not anticipated. It may be that he did not anticipate the extent or the precise nature of the gain, but in view of the increasing number of published office policy documents in London, an acceptable definition must at least address itself to the knowledge of the developer.⁵

It may also be the case that a developer will include something in a scheme which may look like a benefit but is intended to improve the profitability of the scheme.⁶ As an extension of this the developer may include a gain proposal, knowing of the local authority's

³ eg., section 126 Housing Act 1974, section 111 Local Government Act 1972 and under local legislation.

⁴ This apparently occurs in other Boroughs as well as Tower Hamlets, See eg., Appeal against the decision of the London Borough of Richmond upon Thames Council to refuse planning permission...at 26/30 London Road, Twickenham, DOE Ref. T/App/5028/A/81/09717/G7. [1983] JPL 265-269; McLaren v SSE and Another, QBD 10 December 1980, unreported but noted (1979) SJ 370. (Transcript: Barnett, Lenton).

⁵ Within Tower Hamlets certain developers, such as Central & City always included gains in their schemes. In fact the director of that company was adamant that developers should provide gains within development schemes to reduce any detrimental effects it may have on the community and to reward the area for granting consent. This view was expressed in the course of correspondence and meetings between that director and the Council.

⁶ See Kirk, G. *Urban Planning in a Capitalist Society*, 1980.

office policy, in order to avoid the delays, and thus the costs, of negotiation. Thus, as well as avoiding the delays and costs of an appeal against a refusal, the developer who does this reduces delay to a minimum. In Tower Hamlets a number of schemes involved even years of negotiation, so the savings involved in volunteering benefits could be immense.⁷

A final problem with this definition as stated is that it includes the phrase 'benefit to the community' which categorises planning gain as a practice which appears to be outside of the responsibility of planning authorities. That is, if it were understood that planning was generally concerned with benefitting the public this phrase could be reworded so as to move planning gain into the ambit of planning. The choice of words and the implications those words are meant to convey requires careful clarification. This point highlights the often discernable divergence of opinion between lawyers and planners as to what planning actually is. The Royal Town Planning Institute ('RTPI') for example has portrayed public benefit as the pivotal concern of planning.

" It is a fundamental and proper objective of planning that new development should at least not offend the public point of view, and wherever possible be beneficial. Over the years, the public has grown to expect planning authorities to ensure that change not only meets basic standards but is,

⁷ See, for example Part IV, Results of Study chapter: Rodwell House or the Tarn & Tarn schemes as compared with Brushfield Street 16/18 & 31 Fournier Street or even the Camperdown House Scheme. It is also relevant to point out, however, that many of the delays were not produced simply by negotiating the gain, but rather in negotiating the terms of the S.52 agreement. For an example of this see Results of Study: Buck & Hickman scheme. This proposal was submitted in 2 parts, one in August 1978 and the other 2 months later, and the schedule of works under the s.52 agreement was not finally agreed until 1983. For discussion see chapter on Negotiation in Part II below.

additionally, generally to the public good and benefit and that every opportunity is taken to meet this expectation.

Development control has the purpose of putting into effect policies aimed at achieving that objective, and determining the degree and nature of the public benefit to be derived; it is in achieving this that in practice applicants for planning permission and the local planning authorities negotiate. "8

Overall, the major deficiency in almost all of the definitions of planning gain which appear in the literature is the lack of any reference to its connection with the planning merits of an application. The effect of this is to maintain planning gain as an illegitimate concern of a planning authority and thus a misuse of power, and so to reduce the autonomy of planners to decide what its legitimate concerns are. Consequently, the domain of law, as a formal method of control, is preserved to circumscribe the practice as unlawful. In Tower Hamlets planning gain negotiations are seen as a necessary part of assessing the acceptability of the proposals on planning grounds thus retaining the power to treat them as legitimate.

This view is basically shared by the RTPI who see the problem as ensuring that planning gain negotiations do not go beyond this and into the realm of inducement to accept a scheme which is unacceptable on planning grounds.⁹ They go on to state that if gain negotiations are conducted to secure benefits beyond the merits of the scheme (which could be assessed by themselves through professional

⁸ RTPI Planning Gain Guidelines Working Party, Agreed Memorandum and Code of Practice, 16 November 1982. London: RTPI.

⁹ The views of the RTPI represent the opinions of the professional body laying down standards for its members and as such are strongly influential on what planners see as acceptable practice. See Vasu, M.L. Politics and Planning : A National Study of American Planners, 1979 Chapel Hill: University of North Carolina Press. For a discussion of the relationship between planners and their professional body.

guidance or through the courts if litigated) then the local authority would be seen as imposing a local tax or betterment levy on the developer.¹⁰ This view has also been expressed by the Royal Institute of British Architects ('RIBA')

" The RIBA is indeed opposed to the concept of developers securing a distortion of planning principles by offering inducements - 'the mere sale of development rights' - but at the same time views the act of planning as an exercise in balancing advantages and disadvantages in the interests of the community. The achievement of the greatest gain and the smallest loss will affect in different ways the developer, who is concerned with capital and running costs, taxation and financial return, and the local authority, which is concerned with wider social implications. "¹¹

This converts the problem from being one of the lawfulness of planning gain, to the control of reasonableness of the planner's (local planning authority's) act. In other words the RTPI assert that following a policy of planning gain is lawful and in accordance with good planning practice as long as it accords with published plans and policies and is pursued in a reasonable way. It would be unreasonable if monies collected from the developer were not used in connection with aspects of the scheme which make it acceptable in planning terms, nor would it be reasonable to allow it to compromise planning standards. The definition suggested by the RTPI, however, is not without problems and it again reflects a distribution of power within the structure so as to give themselves and their members a degree of autonomy from the courts and central government.

" A Planning Gain is a benefit which accrues when in connection with the obtaining of a planning permission, a developer incurs some additional expenditure or other

¹⁰ RTPI An Approach to Planning Gains, May 1981. London: RTPI.

¹¹ RIBA Comments submitted to the DOE on the PAG Report, January 1982, para.2.

liability beyond that required to meet normally accepted planning standards in providing a benefit he would not otherwise choose to provide but which the Local Planning Authority has justifiable planning grounds for seeking to achieve. " ¹²

The difficulties here, in so far as there continues to be a gap between the practice in Tower Hamlets and this definition, stem from the phrase 'normally accepted planning standards' and from the remaining impression that the developer would not suggest the inclusion of gains. The latter could be remedied quite simply by replacing the word 'otherwise' with 'necessarily'. As to the former there are problems of interpretation. As it stands, the phrase probably means very little at all and could be omitted while leaving the philosophy behind the definition intact.

" A planning gain accrues 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 other benefit which the local authority has reasonable planning grounds for seeking to achieve. " ¹³

Here the concern is what is fair and equitable in the exercise of the policy and this should be related to the wider context in which the decision takes place so as to examine whether the policy is

¹² RTPI Agreed Memorandum and Code of Practice (1982) op.cit. supra note 8 para.9.

¹³ Stungo, A. and Dempsey, M. "Current Topics: Planning Gain" (1982) JPL 2/5. This definition is almost identical to the one put forward by RIBA in its submission to the DOE on the PAG Report, except that the last line reads "which the local authority has reasonable grounds for seeking to secure." The definition suggested by the London Boroughs' Association was also very similar but not so precise as it merely refers to a developer "incurring some expenditure or other liability in providing a benefit which the LPA has reasonable planning grounds for seeking to achieve".

reasonable under the social and economic¹⁴ conditions that prevail. To do this requires an acceptance of the view that planning should take these elements into account and is not merely concerned with physical determinism. Certainly the 1968 and 1971 Acts bear witness to this and there is a growing body of literature to support the view that spatial arrangements are themselves an effect of, and effective on, social and economic distribution.¹⁵

The government definition, however, is a long way from this approach. In October 1981 the Secretary of State's Property Advisory Group ('PAG') published a Report entitled 'Planning Gain' as a consultative document.¹⁶ This was distributed to relevant organisations, including the RTPI, RIBA, Royal Institute of Chartered Surveyors ('RICS') and the London Boroughs' Association ('LBA') for comment and a circular was introduced under the 1971 Act at the end of 1983.¹⁷ The definition given in the circular demonstrates a failure

¹⁴ Conditions are described here as 'social and economic' because of the use of a distinction between economic conditions and other conditions which appears in the 1971 Act, for example in relation to structure plans ss. 6 & 7. This does not mean that the distinction is necessarily a valid one. See Posner, R.A. *Economic Analysis of the Law* 2nd ed. 1977, Boston: Little, Brown & Co, esp. chapter 1.

¹⁵ The starting point for the articulation of this view can be read in Foucault's work. See eg. *Power/Knowledge*, 1980, ed. C. Gordon, New York: Pantheon, esp. "Questions on Geography" at 63/78.

¹⁶ The RTPI were concerned that they were not consulted before the PAG Report was prepared because of the interests represented by PAG. 'The Group itself does not, of course, adequately embrace the planning view where this differs from the developer view and we would have been pleased to have helped at an earlier stage.' Letter from RTPI President to the Minister of Local Government & Environmental Services, DOE, dated 28 January 1982.

¹⁷ DOE Circular 22/83 "Planning Gain", 1983 London: HMSO. This document is discussed in greater depth in the chapter on Official Responses to Planning Gain in Part VI of this thesis.

to appreciate the role of the local planning authority as one including positive responsibilities in producing plans to influence and shape development in the light of social and economic considerations.

" '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. "

This really amounted to a denial of the RTPI and other professional bodies' view of planning and a reassertion of the views expressed in somewhat vaguer terms in the PAG Report, under the guise of a 'neutral' definition which purports to treat planning gain in a non-judgemental way.

" 'Planning Gain' occurs when, in connection with the obtaining of planning permission, a developer offers, agrees or is obliged to incur some expenditure, surrender some right or concede some other benefit which could not, or arguably could not, be embodied in a valid planning condition. " ¹⁸

This definition views the proper exercise of planning powers as being reflected in the courts' approach to what amounts to a valid planning condition.¹⁹ This severely limits the role of planning beyond that anticipated by the post 1947 Acts as the attitude of the courts has

¹⁸ Property Advisory Group A Submission to the Department of the Environment on "Planning Gain " 1981, London: HMSO.

¹⁹ This approach is not novel. See, eg., Ratcliffe, J. "Planning Gain is Not the Answer" (1974) Built Environment 148.

been to restrict²⁰ the type of conditions which may be imposed to those which 'fairly and reasonably relate' to the 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. "²¹

Taking this approach the attainment of planning gains becomes an ulterior purpose, rather than a legitimate planning concern.

" 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 for, nor is it suitable for achieving the ulterior object of sharing out development profits in land. "²²

This rational-legal approach of the courts, taken up by many lawyers writing in the field of planning, has been examined in detail elsewhere²³ and it clearly represents only one particular view of the role of planning.²⁴

In submitting his report to the Minister for Local Government and Environmental Services in July 1981, the Chairman of the PAG, Sir

²⁰ See the landmark cases of Hall & Co Ltd v Shoreham-by-the-Sea UDC [1964] 1 All ER 1; R v Hillingdon LBC ex parte Royco Homes Ltd [1974] 1 QB 720; Newbury DC v SSE [1980] 1 All ER 731.

²¹ Pyx Granite Co.Ltd. v Minister of Housing and Local Government [1958] 1 QB 554 per Lord Denning MR at 572.

²² Heap & Ward (1980) op.cit. supra note 2 at 637.

²³ See eg., McAuslan P. *The Ideologies of Planning Law*, 1980, Oxford: Pergamon Press, Urban & Regional Planning Series, Volume 22, and Loughlin, M. "The Scope and Importance of 'material considerations'" (1980) 3 *Urban Law and Policy* 171.

²⁴ McAuslan (1980) cited *ibid.* recognises this narrow approach as indicative of the courts' concern with protecting private property rights from interference by the state which runs counter to the increase in widely-drawn legislation to assist a managerial form of government. See chapters 6 & 9. A similar argument appears in Jowell (1977) op.cit. supra note 1.

Jack W. Hughes made this view of planning explicit when he described planning gain as 'arrangements whereby local authorities in granting planning permission achieve planning or other community gains at the expense of the developers' and concluded that, except in certain limited circumstances, planning gain had no part to play in the system of planning control. His views were not shared by any of the professional bodies consulted, who found not only the approach but also the proposed controls unsuitable and inadequate.

" ...it seems untimely, especially when the Government policy to reduce local authorities' capital expenditure, to propose that local authorities should not negotiate in cases where it would be reasonable for the developer to make capital and other contributions to facilitate development. The consequence of such a decision would be to discourage development at a time when there is a general acceptance of the need to stimulate it. Although attitudes of developers to the practice of seeking planning gain vary widely there are many who accept the principle and are willing to provide gains if they are seen to be related to the development and negotiated in a reasonable way ... The problem thus appears to be one of deciding what is reasonable in all the circumstances ... We do not think that the brief guidelines in paragraph 9.01 of the PAG Report will be adequate for this purpose. " ²⁵

Revising the definition of planning gain on the lines suggested by RTPI was advanced by all of the professional bodies, as was the adoption or incorporation of the RTPI Memorandum and Code of Practice produced by their Planning Gain Guidelines Working Party. This working party was composed of RTPI members with architectural, surveying and legal backgrounds plus two members of RIBA. Early in 1983 the Code of Practice, slightly amended, was adopted, after several lively debates and with collaboration from the LBA and the

²⁵ RICS submission on the PAG Report dated 10 February 1982.

professional bodies, as RTPI policy in the form of a Practice Advice Note.

The circular definition attempts to deal with the issues raised by the RTPI by recognising that the method of achieving gains should not be confused with the concept of planning gain and thus does not relate it to the issue of what amounts to a valid condition. Yet it immediately falls into the trap of restricting the valid use of planning powers to 'changes intended to reduce the scale or intensity of the proposed development, or to improve its layout or its impact on the local environment.' This was added to the original draft circular distributed for consultation. The other change made was to omit the word 'positive' from the type of obligation which the authority seeks to impose and to add the word 'extraneous' to the types of rights or benefits conferred. The potential effect of this latter addition could be severely limited by a narrow interpretation of the final sentence.

The overall effect of this definition seems to be potentially to address the circular to almost all requirements or obligations on the developer made in connection with the grant of planning permission even if the application as submitted is deficient in a material way if compared with the objectives set out in a development plan or other published policy. It is ambiguous in that elsewhere in the circular there is an acceptance of the principle that applications should be considered on their merits and in the light of a development plan and other material considerations.

By looking at each of these definitions in turn a number of unacknowledged assumptions can be recognised. First, there is the assumption that local authority action must be restricted and defined by mechanisms other than the operation of the market: that they

perform only a limited function within government and those limits should be prescribed. Secondly, many of the definitions assume that the law has a part to play in determining what amounts to planning considerations. This is allied with the problem of having no definition of the scope of planning itself, thus it becomes the role of the law to determine not only questions relating to limitation of powers, but also as to the reasonableness of planning considerations. Thirdly, there is an assumption that there is overall benefit to some party (the community) and loss to another (the developer) by planning authorities operating a policy of planning gain. Inherent in this is the further assumption that there is a community whom the local planning authority or its officers can identify and whose shared interests they can represent.

All of these assumptions recur in similar form in other areas of planning law and public law generally. They are symptomatic of the problems inherent in a system which allows for the substitution of discretion exercised by an elected body with that of the judiciary in the determination of questions which involve the distribution of resources. Whether the decision is made by the local authority or by the judiciary it is still a political question determinable not through the simple application of a set of rules but through the interpretation of such terms as 'reasonable', 'proper (planning) considerations' and 'public interest'. Any definition will then necessarily involve a standpoint on these interpretations and cannot be apolitical or neutral. Without some recognition of the position of planning and local government within the structure and within the political, economic system any given definition will merely reflect a view of the distribution of power.

Martin Loughlin²⁶ has made the most developed attempt to define planning gain by stating the definition and discussing each element seriatim. The result is still not acceptable because the process of forming this definition is wholly dependant upon unacknowledged assumptions of a practice which is undeniably political and value-laden. His definition does not refer to 'community benefit' (but does refer to 'material benefit' without identifying the intended beneficiary) but still suggests that the process is detrimental to the developer and falls outside of the scope of local government and normal planning practice in which the law has a valid role to play.

" planning gain is the achievement of a material benefit or advantage by the local authority, which may be ultra vires if achieved by imposing a condition on a grant of planning permission, but which is nevertheless provided by the developer, although not commercially advantageous, in the expectation that the planning application will, as a result, receive more favourable treatment ".²⁷

Certainly as far as the practice in Tower Hamlets is concerned much of this definition is superfluous and a statement to the effect that the object of the process is to secure a balanced mix of uses would probably be included. The method of enforcing that gain would not be included in the definition itself and the overall impression would be of allowing permission to develop only where the planning objectives for an area were achieved. As a suggestion

" planning gain is the achievement of a balanced mix of uses in accordance with published planning policies through the provision of such a mix by a developer in anticipation of a grant of consent. "

²⁶ Loughlin, M. "Planning Gain: Law, Policy and Practice" (1981) 1 Oxford Journal of Legal Studies, 61/97.

²⁷ *ibid.* p.61.

The political platform upon which this is based may be to provide the 'community' with some 'benefit' in return for the benefit of consent given to the developer, but its administration is based upon the aim of realising that objective through the exercise of proper planning criteria. Another successful London borough operating a policy of planning gain, the City of Westminster, has quite different political affiliations but used it to allow developers to obtain their consents in the most efficient manner. Consequently, what was achieved was essentially the same mixture of uses but the motivation was different. The definition would hold in both instances, but it ascribes a role to planning authorities which the courts and central government would not espouse, as it limits their scope to intervene in pursuit of their own (political) objectives.

Any definition of planning gain will, therefore, represent the interests of the group or individual asserting it. The aim in the following chapters of this thesis is not to produce a universal definition of planning gain, but to present a view of how the practice operates in reality whilst taking account of the competing ideologies acting upon it. The central concern is not the lawfulness of the practice of planning gain but its legitimacy in the socio-political context in which it occurs. That context necessarily involves a consideration of the nature of the social system and the existence of power within it. By 'power' is meant not simply the formal relationships which bestow little autonomy on the local authority, but includes the mechanisms created within broad areas of policy-making which facilitate the growth of alternative power structures.

To explain this more clearly it is necessary to make reference to two opposing views of analysing power which are explored more fully in the following chapters. In the first view, power is a right which is given up by the population of the state to a sovereign body, and the sovereign body, in accordance with this social contract, exercises that power in the interests of the state within limits imposed so as to avoid oppression. In classical theory this is checked by the courts. In the second view, the exercise of power does not stem from contractual obligations but from struggle: power is exercised on the basis of an historically determined structure which resulted from struggle between different interests. It continues to be exercised within that framework, but also in accordance with the result of continual struggle to uphold and perpetuate existing inequalities, distributions, language and so.

Limitations are imposed under this latter model through formal rules, but also through mechanisms which arise out of necessity to reproduce the formal divisions of power. According to Foucault²⁸, the superstructure of power constantly requires the production and circulation of 'discourses of truth' so as to allow society to function along the lines intended by the superstructure. Power institutionalises and professionalises this process so that its exercise will reproduce the status quo. On this analysis the exercise of power is not an abuse of the system but a result of it and supportive to it. Thus what is interesting is not to assess whether any exercise of power is lawful but to examine the occasions where it steps outside of the formal

²⁸ See especially 'Two Lectures' IN: Foucault, M. Power/Knowledge: Selected Interviews and Other Writings 1972-1977. ed. Colin Gordon, 1980, New York: Pantheon. He uses this approach in examining historically sexuality, the growth of prisons and mental asylums.

rules, develops its own techniques and professionalism, but continues within the confines of the superstructure perpetuating the same relationships and distributions. It follows from this that whatever definition is ascribed to the practice of planning gain, the purpose for which that definition is made, the context in which it is advanced, and the standpoint of the protagonist are as relevant as the words themselves.

Added to this are the problems of language which any definition must encapsulate. Many of the terms used within the fields of law, politics, planning, social policy are capable of several meanings. Thus the form of the definition is complicated in that its use by persons coming from different standpoints may interpret it in different ways. While it is possible to assert that some words do have a definitive meaning this assertion cannot be maintained with respect to such examples as 'reasonable', 'planning', 'planning purpose' and 'lawful'. Any definition, therefore, should be approached not as an embodiment of neutrality, but as a prompt to explore whose interests are being denied by its formulation.

The following part of this thesis explores the contextual concerns surrounding planning gain and includes a discussion of power relationships generally and in the specific area of negotiation in planning. The formal structures through which the product of those negotiations may be implemented, and the reactions by lawyers and planners to those structures, are also examined.

PART II: THE GENERAL PART

CHAPTER 3: THE WIDER CONTEXT OF PLANNING LAW: ISSUES IN THEORY

At the heart of the Rule of Law lies a distinction between the public and private spheres of life¹ and between law and politics² which a number of writers on public law³ and legal theory doubt still exist. Certainly studies made on the distinction between private law and public law⁴ have affirmed that the division is not well-defined; that the public sphere does not operate on democratic principles alone but is influenced by the traditional domain of private law, that is the market. The assumptions of a separation between the realms of the law, the executive and parliament and the effective role of each have been brought into question as the machinery of government has expanded in size and into areas traditionally considered private.

" In the modern world the social and political realms are much less distinct... The functionalization (of politics) makes it impossible to perceive any serious gulf between the two realms; and this is not a matter of a theory or an ideology, since with the rise of society, that is, the rise of the 'household' or of economic activities to the public realm, housekeeping and all matters pertaining formerly to the private sphere of the family have become a 'collective' concern. In the modern world the two realms indeed constantly flow into each other like the waves in the never-resting stream of the life process itself. "⁵

¹ See Austin, R. "The Problem of Legitimacy in the Welfare State " (1982) *Pennsylvania Law Review* 130 pp.1510-1517.

² See Dicey, A.V. *Introduction to the Study of the Law of the Constitution*, 1885. London: Macmillan.

³ See for example K.C. Davies *Administrative Law Text* 1958, especially pages 1-43.

⁴ See Atiyah, P.S. *The Rise and Fall of the Freedom of Contract*. 1979 Oxford: Clarendon Press; Also Thompson, E.P. *Whigs and Hunters* 1977 and Hay, D. et.al. *Albions Fatal Tree* 1977 both Harmondsworth: Penguin, show how legislation was used in the 18th Century to alter the basis of property relations and the social framework.

⁵ Arendt, H. *The Human Condition*, 1958. Chicago: University of Chicago Press, cited by J. Habermas " Hannah Arendt's Communications Concept of Power " IN: Lukes, S. (ed.) *Power*, 1986, at 75/93. Oxford: Basil Blackwell.

The well-documented growth of 'the state' in the nineteenth and twentieth centuries produced a myriad of government departments, local authorities, tribunals, corporations, governmental and non-governmental agencies. Powers of ministers increased and there appeared a growth in negotiation between departments and their client groups to strike mutually beneficial bargains.⁶ Alongside this was a change in the form of much public legislation so as to lay down broad guidelines and delegate powers rather than to impose specific rules. The Franks Committee⁷ reported in 1957 that there was a lack of safeguards in the exercise of administrative power and that 'openness, fairness and impartiality' were attributes no longer encouraged.

This same report did go on to treat policy as distinct from its implementation and its effect and maintained the idea of tribunals as impartial adjudicators reviewing questions which could be divorced from the political choice they in fact represented. This insistence on reinforcing the theoretical divisions under the Rule of Law is normal as the State is still viewed as operating under the beliefs of nineteenth century liberalism. Controls on the system, under this analysis, exist in the election of representatives to parliament, which is the body responsible for the formulation of policy, and in the court system.

Taking each of these bodies in turn it is possible to demonstrate that the system of control is no longer directed towards legitimating

⁶ Barker, A. (ed) *Quangos In Britain*. 1982, London: Macmillan.

⁷ *Report on Administrative Tribunals and Enquiries*. 1957 Cmnd.218

the exercise of administrative power.⁸ The developments in government outlined above have revealed the fallacies in the system as described in the Rule of Law so as to produce a discordance between the exercise of power and the system intended to control it.

" One of the least important parts of the British political system is the chamber of the House of Commons, and it is in very real danger of becoming an irrelevance. "⁹

PARLIAMENT

Under nineteenth century liberalism it is assumed that parliament is at the top of a hierarchical government; it is the body responsible for formulating policies as goals and those policies result from meaningful debate open to public scrutiny in which the views of the opposition are heard. The members elected to the House are there to represent the interests of the state rather than those of the individual electors¹⁰ (although they may overlap) and thus constitute an impartial body distinct from the executive.¹¹

⁸ See Bagehot, W. *The English Constitution*, 1963. London: Fontana.

⁹ Marsh, R. *Off the Rails*, 1978 cited by Harlow, C. "Power From the People ? Representation and Constitutional Theory " IN: McAuslan, P. and McEldowney, J.F. *Law, Legitimacy and the Constitution*, 1985. London: Sweet & Maxwell. Modern Legal Studies Series, at p.78.

¹⁰ There has been a lengthy debate on this point which is summarised by C. Harlow in " Power from the People ? Representation and Constitutional Theory " IN: McAuslan & McEldowney (1985) eds. cited *ibid*.pp.62-81.

¹¹ This view was expressed by Lord Diplock in relation to local government in *Bromley Borough Council v GLC* [1982] 2 WLR 62 at 107 "a council member once elected is not the delegate of those who voted in his favour only: he is the representative of all electors."

Habermas¹² among others has recognised that changes in the mechanisms of politics has taken away this controlling function.¹³ What he is referring to is the much discussed rise of corporatism¹⁴ together with concentration of responsibility for policy formation in the hands of a few. The latter has been chronicled by Ashford¹⁵ who concluded that this power was concentrated in a consensus elite of so few ministers and senior civil servants that policy formulation is devoid of both accountability and critical input. Under Thatcherism the numbers with such responsibility have if anything contracted as her power has increased.¹⁶ By comparison, the departments of state have progressively grown¹⁷ as too has the importance of party politics and the party whips.

The other half of the picture is the post-war increased involvement in policy issues of bodies who are participants in the market. The government itself is such a body¹⁸ and has involved quasi-autonomous governmental and non-governmental agencies (Quagos

¹² Habermas, J. "The Public Sphere - An Encyclopedia Article" (1974) 1 *New German Critique* 49-55.

¹³ That is not to say that parliament ever operated in more than a limited way as a control on administrative power. See Lewis, N. & Harden, J. *The Rule of Law and the British Constitution*, 1986. London: Hutchinson.

¹⁴ Lewis, N. and Wiles, P. "The Post-Corporatist State?" (1984) 11 *Journal of Law & Society*.

¹⁵ *Policy and Politics in Britain: The Limits of Consensus*, 1981. Oxford: Blackwell.

¹⁶ See Harlow, C. *op.cit.* supra note 10

¹⁷ Benn, A. "Manifesto and Mandarins" IN: *Policy and Practice: the Experience of Government*, 1980. London: Royal Institute of Public Administration.

¹⁸ See Jessop, B. *The Capitalist State*, 1982. Oxford: Martin Robertson.

and Quangos) in secretive negotiations to deliver policies to the members of those agencies and others having relationships with those agencies. This process is based on bargaining and the agencies themselves, such as nationalised industries and the Trades Union Congress, have significant power within the market with which to negotiate. Quangos also usually have no rule-making procedures, no grievance procedures and no independent appeal structure against decisions they make¹⁹ all of which goes to confirm the lack of accountability.

It has been acknowledged, at least in the field of political science, that these 'networks of conviviality'²⁰ do play a role in government and although the influence of the Trades Union Congress and a number of other powerful consultative agencies has declined, their position has been filled by others which have continued to exist or by those which have recently appeared.²¹ Parliament therefore continues to play a peripheral role in policy formulation and the legislation it produces has bestowed wide discretion on all levels of the bureaucracy.²²

This 'corporatism' can be described as a form of government in which the state is not endeavouring to expropriate the private sector, nor to impose a collection of narrowly defined procedural rules in the form of legislation on its operation. The state is rather seeking to

¹⁹ Lewis, N. "Who Controls Quangos and the Nationalised Industries?" IN: Jowell, J. (ed) *The Changing Constitution*, 1985. London: OUP.

²⁰ Lewis & Harden (1986) *op.cit. supra* note 13

²¹ Lewis & Wiles (1984) *op.cit. supra* note 14

²² This is evident in the history of the Planning Acts, discussed below in chapter 4.

'work with' the private sector to enable it to evolve policies which are responsive to this flexible and pragmatic relationship.²³ The state can retain the flexibility to do this by enacting general enabling legislation rather than legislation which aims to guarantee individual rights.²⁴ This has been perceived as a necessary result of government through corporatism.

" It seems fairly obvious that where government merely imposes procedural rules, as in the classic case of nineteenth century parliamentary democracy, an explanation of those rules, comprehensible to the informed public, is generally perceived as necessary. Where the various agencies of government 'work with' their private sector counterparts, by contrast, the understandings and practices which develop within each particular field of policy tend to become tacit rather than explicit, and the purpose served by governmental involvement tends increasingly to be seen as a technical and professional matter, rather than as a matter of legitimate public and political scrutiny. "²⁵

This pattern may be changing as a result of Thatcher's declared centralist ambitions,²⁶ evidenced by a concerted move to restrict local authority spending since 1979 and to give Secretaries of State broad powers of intervention,²⁷ but the enabling legislation remains. Moreover this move further restricts the power of parliament by

²³ See Harrison, R.J. *Pluralism and Corporatism: The Political Evolution of Modern Democracies*, 1980 and Winkler, J. "Corporatism" (1976) 19 *European Journal of Sociology* pp.100-136.

²⁴ Pahl, R. and Winkler, J.T. "Corporatism in Britain: Why Protecting Industry Need Not Mean More Bureaucracy" (1976) *The Times*, March 26, p.7; Winkler, J.T. "Law, State and Economy: The Industry Act 1975 In Context" (1976) *British Journal of Law and Society* 103.

²⁵ Reade, E.J. "Section 52 and Corporatism in Planning" (1982) *JPL* pp.8-16.

²⁶ See Loughlin, M. *Local Government and the Modern State*, 1986 London: Sweet & Maxwell, Modern Legal Studies Series.

²⁷ Loughlin, M. *Half a Century of Municipal Decline 1935-1985*, 1985. London: Allen & Unwin.

continuing to concentrate policy decisions in the hands of a consensual elite.²⁸

There are however major definitional problems in much of the work by lawyers which relies upon a model of corporatism in government. The word involves a denial of conflict which is not necessarily supported in the political science literature. Corporatism is not another word to describe power bargaining but includes within it an element of class harmony. Schmitter, in his history of corporatism²⁹ explains that it arose as a reaction to the competition and individualism inherent within the development of capitalism. It is this individualism which Thatcher has claimed to return to. Consultation with labour and with capital was intended to identify the underlying common interest of both groups so as to produce government by consensus (this does not exclude disagreements but does require fundamental agreement on ultimate goals) rather than through conflict (where the most powerful group or groups prevail) or through rationally and objectively weighing competing interests.

" Society is seen as consisting of diverse elements unified into one body, forming one corpus, hence the word corporatism. These elements are united because they are reciprocally interdependent, each performs tasks which the other requires. "³⁰

²⁸ What this means is that the formulation of policy is seen to be moved down the hierarchy to the level of individual ministers. This is not contrary to the rule of law in itself nor does it offend the dirigiste organisational model discussed below, but it does add to the problem of control. On another level it enforces a bargaining model of organisations because in reality the minister uses these powers as a tool to negotiate with bodies coming under his department.

²⁹ Schmitter, P.C. "Still the Century of Corporatism?" (1974) 36 *Review of Politics*, 85-131.

³⁰ Pahl, R.E. and Winkler, J.D. "Corporatism in Britain" (1976) *The Times*, 26 March, p.7.

He goes on to identify a crucial distinction in how that consensus is achieved : under 'state corporatism' the state is active in establishing the unity and stands above the agencies representing the various economic interests ; with 'liberal corporatism' however the agencies are autonomous and co-operate because of the mutual interdependence between them and the state. It is this latter type which identifies most closely with tripartism, where the government, the TUC and the CBI are viewed as mutually responsible for policy formulation. There is an assumption within this that the 3 elements are equally powerful in instituting changes in policy and can influence their respective electorate.

Studies made of this tripartite arrangement,³¹ however, have concluded that the relationship is not one of consensus and that the degree of power to effect change has not been consistent or equal. It is true that these same studies show an influence over policy by these and other agencies but an equality of power and agreement on long-term goals is absent.

" If we accept that there is a close identity between tripartism and liberal corporatism our evidence seems to throw considerable doubt on the idea that Britain is, or in future will develop into, a liberal corporate state ... However this does not mean that Britain approximates to a system of state corporatism. Indeed we have shown that the government's decisions are influenced by the CBI and the TUC. In addition the government's autonomy is constrained by other British interests, notably the City and by actors external to the system. "³²

³¹ See for example the work of Marsh, D. and Grant, W. which includes "Tripartism: Reality or Myth ?" (1977) 12 Government and Opposition, 194-211 and "The Politics of the CBI: 1974 and After" (1975) 10 Government and Opposition 90-104.

³² Grant and Marsh (1977) *ibid.* p.211.

Ultimately the government has responsibility and is the element which remains accountable to the wider electorate in that re-election is at stake. Also there are clearly many factors affecting economic policy not least of which include international finance and party ideology.³³ It is important therefore not to consider corporatism as a phenomenon to explain changes in government so as to give inadequate consideration to the broader social and economic context.

The most relevant development here is the increasing role of the state in the management of economic and social conditions which has been taking place since the First World War. This has necessarily involved the participation in decision making of the major functional agencies (which grew as a response to the increased intervention) in those spheres, further smudging the standard divisions of politics, economics and society. As the state required a greater degree of professional advice in order to maintain ^{control} the market economy's less powerful groups, that is those which did not represent major economic interests, became marginalised and those with economic power became formalised.

What a description of this does not determine is the form of that participation or the distribution of power within it. There has been a long standing debate within political science on the distribution of power within 'liberal democracies'. The choice mooted is between a pluralist model in which many interest groups compete and an elitist model in which an elite or a number of elite groups hold the bulk of power. As a variant on the latter is the idea that pluralist methods

³³ Although it should be acknowledged that some writers have shown that party ideologies have tended to converge making this a less significant influence.

are used to conceal control by an elite, the most clearly empirically explained method of this appears in the literature on committees which suggests that manipulation of agendas can remove decisions from the public arena.³⁴

Cawson³⁵ has suggested that the effect of corporatism has been felt in land use planning and the introduction of official levels of public participation is a device to legitimate state intervention in that area and to encourage public support. In his argument he acknowledges the decline in the power of parliament as opposed to the increased powers of technocrats employed in local government, but goes on to suggest that rational policy-making methodologies laying down the form of participation facilitate corporate forms of representation. In order to do this legislation is used to bestow discretion on the technocrats so that they may respond to official participation rather than participation from all sources.

This is not to say, however, that the process of negotiation at all levels of the planning process is a manifestation of corporatism even when it is taken as defined by Cawson³⁶

" Corporatism is a politico-economic system in which the state directs the activities of predominantly privately-owned industry in partnership with the representatives of a limited number of singular, compulsory, noncompetitive,

³⁴ See Bachrach, P. and Baratz, M.S. "The Two Faces of Power" (1962) 56 *American Political Science Review*, 947-952 and "Decisions and Non-Decisions: An Analytical Framework" (1963) 57 *American Political Science Review*, 641-651. Also Lukes, S. *Power: A Radical View*, 1974 London: Macmillan.

³⁵ Cawson, A. "Environmental Planning and the Politics of Corporatism", 1977, *Working Papers in Urban and Regional Studies*, No. 7, University of Sussex.

³⁶ Cawson, A. "Pluralism, Corporatism and the Role of the State." (1978) 13 *Government and Opposition*, 178-198.

hierarchically ordered and functionally differentiated interest groups. "

Negotiations may take place outside of this system and although facilitated by the conditions described as necessary for corporatism to develop are conducted in response to economic and social conditions and on the basis of power differentials, rather than on underlying consensus values.³⁷ Indeed there has been an increasing amount of literature on the decline of corporatism (some question whether it ever existed³⁸) and the continued lack of mechanisms to legitimate the decisions of public bodies.³⁹

THE COURTS

As far as the courts are concerned, judicial interference with the administration is, in the words of Professor de Smith, 'sporadic and peripheral'. Where they have interfered their choice has been selective and political⁴⁰ and the strict test introduced in Associated Provincial Picture Houses Ltd v Wednesbury Corporation⁴¹ has ensured that the exercise of discretionary powers will only be reviewed in very exceptional circumstances.⁴² Where judicial review has taken place

³⁷ This point is taken up below, see Section 3.

³⁸ See Marsh & Grant op.cit.

³⁹ See for example the discussion in Lewis, N. and Wiles, P " The Post-Corporatist State? " (1984) 11 J. of Law & Society 65-90.

⁴⁰ See Davis, K. C. (1958) op.cit. supra note 3.

⁴¹ [1948] 1 KB 223

⁴² This approach was affirmed in Bromley London Borough Council v Greater London Council [1982] 1 all ER 129.

the Divisional Court has preserved the distinction between law and politics, while delivering judgments which have been analysed as protecting property interests.⁴³

This approach by the courts can be explained in terms of law as ideology, in that by agreeing to interfere in only limited circumstances and in refusing to act in others they are enforcing the belief that politics and law can be distinguished and treated separately. As E. P. Thompson points out, for law to be successful as an ideology it must appear as fair and indeed independant.⁴⁴ If the courts were to subject the administration to regular review the ideology could be lost. This was presented by Douglas Hay as an explanation for the continued introduction in the 18th century of penal legislation imposing the death penalty for property offences even though the courts rarely made use of that sentence.

" An ideology endures by not being wholly enforced and rigidly defined. Its effectiveness lies first in its elasticity, the fact that men are not required to make it a credo, that it seems to them a product of their own minds and their own experience...The second strength of an ideology is its generality. Provided its depths are not explored too often or by too many, it remains a reservoir of belief throughout society. " ⁴⁵

Through concepts of majesty, mercy and justice the courts were able to enforce the authority of the ruling order by seeming to stand apart from it.

" The punctilious attention to forms, the dispassionate and legalistic exchanges between counsel and the judge, argued

⁴³ For example see McAuslan, P. Ideologies of Planning Law, 1980. London: Pergamon Press.

⁴⁴ Whigs and Hunters, 1977. Harmondsworth: Penguin. p.25.

⁴⁵ Hay, D. (ed.) Albion's Fatal Tree, 1977. Harmondsworth: Penguin. p.55.

that those administering and using the laws submitted to its rules. The law thereby became something more than the creature of a ruling class - it became a power with its own claims, higher than those of prosecutor, lawyers, and even the great scarlet-robed assize judge himself. To them, too, of course, the law was The Law. The fact that they reified it, that they shut their eyes to its daily enactment in Parliament by men of their own class, heightened the illusion. When the ruling class acquitted men on technicalities they helped instil a belief in the disembodied justice of the law in the minds of all who watched. In short, its very inefficiency, its absurd formalism, was part of its strength as ideology. "⁴⁶

So by refusing to deal with the politics of a decision the integrity of a system based on the separation of powers is preserved and the gap between the process of law and control of that process continues to be concealed. At the same time the ad hoc approach to review of the exercise of discretion which results while helping to conceal the values behind that exercise (if the courts were to explain general principles on the exercise of discretion the values would be difficult to obscure) amounts to a denial of the hortatory function behind the rule of law.⁴⁷ This denial however is a mundane occurrence: as Atiyah explains there is an established move towards pragmatism and away from principle by the courts exercising their own discretion on the basis of the circumstances of the individual case, rather than in accordance with principle.

My argument here is that law, in its reluctance to interfere in the making of administrative decisions, is performing an essential function at two levels. One is in terms of the symbolic effect of their inaction and the second is the internal logic it precipitates. It performs a function within the social order as impartial adjudicator

⁴⁶ *ibid.* p.33.

⁴⁷ Atiyah, P.S. *From Principle to Pragmatism*, 1978. Oxford: OUP.

and at the same time reasserts the validity of that order by symbolically affirming it.⁴⁸

PARALLELS IN ORGANISATION THEORY⁴⁹

The conflicting pictures of democracy discussed above can be analysed through useful models familiar to organisational theory but generally unknown in legal literature. They have occasionally been used to clarify the apparently competing features of a system operating on the basis of rationality and accountability and one on the basis of bargaining. However, the majority of studies in this area have neglected to acknowledge the existence of power bargaining and those that have failed to go on to explore prescriptions. The usefulness of these theories is, therefore, essentially descriptive but also instructive as to the mismatch between reality and the traditional control mechanisms.

Under the Dirigiste paradigm (based on classical organisation theory) as with the Rule of law, it is assumed that rationality is not only desirable but can be achieved through a hierarchical system of organisation. That hierarchy contains clearly separate divisions with policies as goals of the organisation decided upon by the top level for the good of the organisation. They have the authority to make policy

⁴⁸ Why the law should act in this way is discussed in Kairys, D. *The Politics of Law*, 1983. Pantheon Books.

⁴⁹ This section draws heavily upon the various works of McMahon, L., Barrett, S. and Hill, M. especially Barrett, S. and Fudge, C. (eds) *Policy and Action*, 1981 London: Methuen; McMahon, L. *Paradigms within Policy Analysis*, 1981 Bristol SAUS unpublished paper; McMahon, L., Barrett, S. and Hill, M. "Power Bargaining Models in Policy Analysis ... What Prescriptions for Practitioners ?" (1983) *Public Administration Bulletin* No. 43, *Prescriptives on Policy Analysis*.

and to pass it to the next level for its administration. This level is itself divided as a pyramid of responsibility concentrating discretion in a small number at its peak and leaving a large number simply to apply rules and procedures at its base. As a policy passes from the apex to the base it is converted into a system of rules which require no discretion and can be mechanistically applied without personal interest or political motivation by the personnel. These are the Weberian ideal-type bureaucrats, administering the system 'without hatred, passion, affection or enthusiasm'. Included in the organisation are mechanisms to ensure objectivity by detecting and preventing any biases.

Much of this is familiar to the above discussion. The process of law-making is regarded as something distinct from its implementation and it is assumed that laws are the product of rationality : problems are simply identified, alternatives for remedying them are considered and the best solution is adopted and becomes law. There is relatively little literature which points out that the identification of a state of affairs as 'a problem' and the use of law to address it is in itself a political act. The problem will usually have many causes and to remove them could be impractical, politically undesirable or too fundamental to the existing system of government. So the choice of passing a law may represent the cheapest, most politically acceptable, least disruptive action rather than the best in terms of remedying the problem.⁵⁰ Moreover the choice in formulating the law in a particular

⁵⁰ See Bankowski, Z. and Mungham, G. *Images of Law*, 1976 for a criticism of lawyers and their tendency to define problems too narrowly and Twining, W. and Meirs, D. *How To Do Things With Rules*, 2nd ed. 1982. London: Weidenfeld & Nicolson for a discussion of the use and formulation of rules generally.

way, for example as a narrow rule or as a principle, may also be made for reasons other than for 'the good of society' or for maximum effect.

The reduction of policies and the application of rules assumed under this paradigm has long been questioned by legal theory and has been clearly articulated by the realist movement in jurisprudence. The discussion on the need to interpret rules and the impossibility of reducing policy to a mechanistic exercise is now well-developed and will not be reassessed here.⁵¹ This debate however has not meant that the division between the political nature of policy formation and the objective nature of implementation to achieve defined goals and rationality⁵² has been effectively eroded.

An alternative paradigm is that of organisations operated through power bargaining. This paradigm regards it as a necessity to acknowledge the existence of power and conflict within the organisation so as to understand and resolve problems that occur. It draws upon the empirical studies done in the fields of political science and sociology which show that policy implementation and formulation are highly political exercises.⁵³ In doing this there is a recognition of the conflicts, coalitions, bargaining and compromises which are

⁵¹ See Hart, H.L.A. *The Concept of Law*, 1961. Oxford: OUP; Gottlieb, G. *The Logic of Choice*, 1968. London: Allen & Unwin; Llewellyn, K. *The Common Law Tradition*, 1960 New York: Little, Brown.

⁵² This distinction is made by Weber in "Politics as a Vocation" reproduced in Gerth, H. and Mills, C.W.(eds) *From Max Weber*, 1948 London: RKP. No discussion of Weber's work is included here, suffice it say that he does go on to recognise the problems inherent in such a distinction.

⁵³ See for example Rex, J. *Social Conflict*, 1981. New York: Longman; Vickers, G., *Value Systems and the Social Process*, 1970. Harmondsworth: Penguin. Other references appear in Barrett & Fudge (ed.) *Policy and Action*, 1981. London: Methuen.

bound to exist and the formulation and implementation of policy are seen as one reactive process rather than two separate ones.⁵⁴ So in this case the individuals wanting a policy to be put into effect and those who actually implement it are 'almost Hobbesian' in their pursuit of self interest⁵⁵ and it is the distribution of power, both formal and informal, which determines the outcome. Informal distributions of power arise from groupings and allegiances within the organisation which may vary as formal positions are taken over by different personnel, and as conditions inside and outside the organisation change.

" ... no matter how permanent organisational structures may appear, they are dynamic ideofacts rather than static artefacts, and as such are constantly being modified and adjusted through the bargaining process. "⁵⁶

According to the latter model policy does not come from above but is a product of negotiation and may represent the interests of any individual or group of individuals who possess sufficient power to prevail over the others. Administrators are not passive creatures without political motivation or personal interests, but are actively pursuing their own goals. It may be that these goals are given the same name as those espoused by those who made the policy, but their

⁵⁴ See Barrett and Fudge (1981) *ibid.* p.25 which states the view that policy making and implementation is "an interactive and negotiative process ... taking place over time, between those seeking to put policy into effect and those upon whom action depends".

⁵⁵ This self-interest may be the product of socialisation, as explained by McMahon et.al. "Power Bargaining Models in Policy Analysis ... What Prescriptions for Practitioners " (1983) *Public Administration Bulletin No.43, Perspectives on Policy Analysis.* p.54. I would add that socialisation here must be read in its widest sense to include the expectations of one's profession, the influence of persons with whom one regularly interacts and the perception of self.

⁵⁶ McMahon et.al.(1983) *op.cit.* supra note 40, p55.

interpretation of those goals may be significantly different. Thus there is the recognition of power and politics at all levels. Rationality, access to information and the arrangement of that information become bargaining tools and tactics which may be used legitimately within the process of conflict.

Clearly these two organisational models would experience problems in implementation of policies for different reasons. Under the dirigiste model lack of communication down the hierarchy, unforeseen effects on implementation or breakdown in the implementation process could possibly be remedied by improving communications, research, the organisational structure itself. Requiring the personnel to adhere to strict rules or guidelines could also be helpful. These measures however would make no sense if the organisation were in fact based upon the power bargaining model, where problems are likely to result from the distribution of power and conflicts in the values, interests and goals of the participants.⁵⁷

Studies on policy analysis which have revealed as a problem the perceived imbalance between what ought to be (the dirigiste model) and what is (the power bargaining model) have not produced any suggestions on how to remedy it beyond falling back on managerial controls. There are other studies which have pointed out the imbalance but see it as a necessary (and possibly desirable) product of economic developments in society.⁵⁸ This approach has the benefit

⁵⁷ The argument that there is an imbalance between reality and prescription is succinctly stated by McMahon, L. et.al.(1983) op.cit. supra note 40.

⁵⁸ See Braybrooke, D. and Lindblom, C.E. A Strategy of Decision, 1970. New York: Free Press who identify this as political incrementalism

of implying that the reality should be overt rather than covert but carries with it blanket approval of private government, discretionary legislation and lack of political accountability.⁵⁹ It also tends to assume that the parties active in the process are representative or their appearance of being representative is not something which can be improved upon.⁶⁰ All in all it fails to deal with issues raised by inequalities of power and in access to that power,⁶¹ on the assertion that comparatively this system of government is no worse than the alternatives.

CONCLUSIONS

In order to assess the possible approaches which can be taken it is necessary to clarify what can be expected of law and what law is. This entails a reassessment of the rule of law to take into account the realities of the law-making process so as to acknowledge the inextricable links between law and politics (which in turn necessarily

⁵⁹ In Lindblom's analysis he deals with representation as an issue within "partisan mutual adjustment" ie. the process of fragmented decision making through which the autonomous participants effect each other so as to produce policies. He states that the objection to this based upon lack of adequate representation of interested parties is not persuasive " unless it can be shown that more centralised political decision making represents a fuller array of interests and does so more consistently with principles of democratic equality. In many cases it does not." "Still Muddling, Not yet Through" (1979) 39 Public Administration Review, 517-526.

⁶⁰ Lindblom (1979) op.cit. supra note 58.

⁶¹ See Pateman, C. Participation and Democratic Theory, 1970. Cambridge University Press.

includes social and economic conditions⁶²). Until this step is taken proposed measures for reform will not address the true nature of perceived problems, but will merely deflect attention from the fallacy of the rule of law.

Law is contingent on history and on culture; it is active in shaping values as well as reactive to them. Although formal laws and institutions (*gesellschaft*) have been emphasised they do not alone explain the function and forms of law. Such a limited view may have been appropriate to the nineteenth century but is patently inappropriate to modern society. Habermas⁶³ made a valid distinction between law as 'medium' (substantive law through which social life is regulated so as to produce certain required results in the distribution of value in the economy) and law as 'institution' (procedural law through which the institutions of the state are arranged and inter-related with other public and private entities). The latter has been identified⁶⁴ as the most appropriate to modern states where under prevailing economic conditions it is necessary for the state to intervene in existing arrangements so as to facilitate efficiency within the state and avoid crises in rationalisation and legitimation of public power. It would include the redesign of the framework of institutions

⁶² This assertion is well-documented but see for example Habermas, J. *Reason and Rationalisation of Society*, 1984, London: Heinemann and Weber, M. *Economy and Society*, 1978. Berkeley: University of California Press.

⁶³ *Reason and Rationalisation in Society* *ibid.*

⁶⁴ See for example Teubner, G. "Substantive and Reflexive Elements in Modern Law" (1983) 17 *Law and Society Review* 239.

so as to encompass self-regulating systems⁶⁵ which presently are seen as falling outside of law because of their 'informal', 'political' or 'private' nature.

Tony Prosser has taken this model to suggest changes to the theoretical base of public law⁶⁶ so as to bring accountability and participation back into the arena. He argues that law will only provide an adequate 'social learning framework' if policy is publicly considered and debated in the light of opposing suggestions. The reference to social learning⁶⁷ is also from Habermas who takes the view that there is an evolution in the ability to make decisions and to cope with social developments, both in terms of conceptual talents and institutional framework. Without meaningful participation this evolution will not take place.

" It is a question of finding arrangements which can ground the presumption that the basic institutions of the society and basic political decisions would meet with the unforced agreement of all those involved, if they could participate, as free and equal, in discursive will-formation. Democratization cannot mean an a priori preference for a specific type of organisation. "⁶⁸

⁶⁵ In this would be included planning gain as a process facilitated by discretionary legislation which diffuses responsibility and power throughout the levels of bureaucracy while largely containing accountability to a committee system. This point is taken up below in chapter 4.

⁶⁶ "Towards a Critical Public Law" (1982) 9 Journal of Law & Society 1-19.

⁶⁷ Other writers including Rousseau and Mill have referred to democracy as a learning process. See Pateman, C. Participation and Democratic Theory, 1970. Cambridge UP. for a discussion.

⁶⁸ Communication and the Evolution of Society, p.186 1979 London: Heinemann. Quoted by Prosser, T. " Democratisation, Accountability and Institutional Design: Reflections on Public Law " IN: McAuslan & McEldowney (1985) eds.pp.170-190.

This post-Marxist approach to the state addresses the issue of power at all levels by allowing state action to intercede where capitalism leads to conflict. That conflict may be between classes or within a class and is the product of a failure in the market to recognise legitimate needs. In order to avoid a crisis in legitimation (where the state does not have popular support) or in rationality (through administrative decisions) the state has to adapt the system and this may involve taking action which will not benefit all or part of 'the ruling class'. Such adaptations are performed to preserve the system of distribution of wealth and to allow the market to continue to function.⁶⁹

By recognising that such reorganisation is possible and necessary to the existing economic order Habermas acknowledges the scope of law as being much broader than legislation, judge-made law and existing institutions. He also removes the distinction between law and other social sciences while envisaging a system of accountability and control of public decision making by creating structures to shape social development.

There are some very clear problems with applying this type of analysis, not least the difficulties of implementing a system of effective public participation in decision-making when those who are in a position to participate are usually a selective group. Research done in this area⁷⁰ highlights this by pointing out that objectors who

⁶⁹ For a discussion of how this theory compares with other theories on state action in the context of the city see Badcock, B. *Unfairly Structured Cities*, 1984, Oxford: Basil Blackwell.

⁷⁰ See for example, Simmie, J. *Power, Property and Corporatism: The Political Sociology of Planning*, 1981 London: Macmillan, *Sociology, Politics and Cities Series*. He states the characteristics of a group which are necessary for it to exert power are (1) formal organisation;

voice their opposition to planning applications are small in number, usually members of some organised group which has resources and access to information, and sufficiently educated, self-confident and eloquent to articulate their views. They are also in the large part people who are personally affected in some way by the proposals being made. Overcoming these obstacles so as to produce a meaningful debate seems to be at least beyond the public purse.

A further difficulty is that changing the institutions responsible for monitoring so as to produce a more democratic system could well fall into the trap outlined in the section on organisational theory, above. That is, changes in the structure are normative, managerial measures which will only treat the symptoms rather than the causes. The government has progressively interfered with local government discretion by taking ad hoc measures to limit their spending power⁷¹ and has exerted other internal controls to reduce autonomy. This has been done within the existing structure regardless of declared intentions to localise government and legislation which bestows discretion. The government has gone so far as to abolish a duly elected Council to enforce its political will.

My point here is that Prosser's suggestion to move towards a critical public law based on restructuring institutions and redefining

(2) command over resources; (3) some incorporation into the decision making process of either central or local government. Other groups had little or no influence and sometimes suffered material and uncompensated loss. See pp.300 ff.

⁷¹ See Loughlin, M. "Municipal Socialism in a Unitary State" IN: McAuslan & McEldowney (1985) pp.82-106.

law so as to take account of the 'jobs'⁷² which fall within its range but have been consistently denied by replicating a proclaimed adherence to the rule of law, is both desirable and inadequate. It involves the admission of the political nature of the system, but it is no guarantee of an improved methodology of control. As with much work in this area the presumption underlying it is that the dirigiste model and the power bargaining model are parallel forms of government. It is thus argued that the reality is kept secret and operates at a level below that of legitimate exercise of power and what is needed is a new structure tailored to legitimising the reality.

This view, however, ignores the relationship which exists between the two levels. The bargaining level is a product of, and also a vehicle of, the level of legitimate power. Power is not something which is possessed by individuals or groups but something which circulates to be used by those individuals or groups and also to produce those same entities. It is not a question of power then being wielded by groups against other groups in an underhand way and in a way the formal structure disallows. It is rather that the formal structure acts as a superstructure within which power is circulated in such a way as to reinforce and replicate the superstructure. Changing

⁷² Karl Llewellyn has defined the appropriate jobs for law to undertake. See Llewellyn, K. "The Normative, the Legal and Law Jobs" (1940) 49 Yale Law Journal 1355. Lewis has summarised this as "a series of socially necessary tasks to be performed in any given organisational framework. Procedures for the resolution of grievances, for planning and monitoring, for describing the legitimate anatomy of groups (their constitutions) are necessary conditions of social intercourse." Lewis, N. "Delegislation in Britain in the 1980's" IN: McAuslan & McEldowney (1985) eds. 107/127. See also Lewis, N. "Towards a Sociology of Lawyering in Public Administration" (1981) Northern Ireland Legal Quarterly 32 at p.89; Summers, R. "The Technique Element in Law" (1971) 59 California Law Review, 733.

the institutions of power will not change its operation into so-called 'legitimate' power because the ideology, the discourse, will continue.

Foucault discusses the redundancy of analysing the way in which power is distributed in the framework of state by the example of sovereignty. By looking at the ideology of liberal democracy it would seem that power is concentrated at the top and the way in which it filters down the system has been the subject of minute study. The fact that reality bears little relationship to the structure should prompt investigation of where the power in reality lies and how it continues to operate by producing its own ideology, institutions, rationalisations. On this basis Foucault encourages bottom-up analysis rather than top-down.

" The system of right, the domain of law, are permanent agents of these relations of domination, these polymorphous techniques of subjugation. Right should be viewed, I believe, not in terms of a legitimacy to be established, but in terms of the methods of subjugation that it instigates. "73

He goes on to clarify the issues involved in conducting a meaningful analysis into this area of conflict, and I will quote him at some length so as to cover the methodological precautions he believes necessary to show how the whole complex of laws and the institutions and apparatus for bringing them into effect mobilises 'relations of domination'.

" ... it seemed important to accept that the analysis in question should not concern itself with the regulated and legitimate forms of power in their central locations, with the general mechanisms through which they operate, and the continuous effect of these. On the contrary it should be concerned with power at its extremities, in its ultimate destinations, with those points where power surmounts the

⁷³ Foucault, M. "Disciplinary Power and Subjection" IN: LUKES, S. (ed) Power, 1986. London: Basil Blackwell 229-242 at 232.

rules of right which organise and delimit it and extends itself beyond them, invests itself in institutions, becomes embodied in techniques ... In other words, one should try to locate power at the extreme points of its exercise, where it is always less legal in character ... it is a case of studying power at the point where its intention, if it has one, is completely invested in its real and effective practices. What is needed is a study of power in its external visage, at the point where it is in direct and immediate relationship with that which we can provisionally call its object ... power, if we do not take too distant a view of it, is not that which makes a difference between those who exclusively possess and retain it, and those who do not have it and submit to it. Power must be analysed as something which circulates ... individuals are the vehicles of power, not its point of application ... One needs to investigate historically, and beginning from the lowest level, how mechanisms of power have been able to function ... We need to see how these mechanisms of power, at a given moment, in a precise conjuncture and by means of a certain number of transformations, have begun to become economically advantageous and politically useful ... power, when it is exercised through these subtle mechanisms, cannot but evolve, organise and put into circulation a knowledge, or rather apparatuses of knowledge, which are not ideological constructs. "74

Foucault, in stressing the need for analysis at this level, is building on the belief that power operates not on one level of right and one of obscure shadows, but that both are a part of the system, both have their own discourse but they are of a different kind, and both represent a type of normality although one is represented as 'sovereignty' while the other is a 'disciplinary power'. The conclusion he draws on one level is that by changing the form of sovereignty the parallel form of power will not disappear although it may change in form.

All of this is said in the light of his theory⁷⁵ that all fields of knowledge and practice are 'discursive formations'. In this common

⁷⁴ *ibid.* at 232-233.

⁷⁵ See *The Archaeology of Knowledge*, 1972. Trans. A. Sheridan. Harmondsworth:Penguin.

modes of thought are carried through the social, economic, institutional and technical elements in any one discipline : their practices are not organised around the objects addressed but produce those objects. In viewing knowledge in this way Foucault explains that 'objectivity' is a construct of the discipline itself and 'truth' can only be assessed in the historical context and in light of the particular practical concerns of that discipline. It is the discourse of the discipline itself which consolidates practices.⁷⁶ In looking at law and the social sciences as a knowledge-field he specifically states that its form is moulded by its close relationship with power and knowledge, and that this affects the rules both governing and crystallised by practices within that field.⁷⁷ It is therefore necessary to examine the concealed practices and hidden rules to reveal the actual structure of that discipline. Law can only find its integrity through these practices and not through imposing a structure from above.

Another major difficulty with accepting Habermas outright is brought out by this. That is, while dealing with the politics of law, he elevates the technocratic development of law to the extent of excluding moral choice.⁷⁸ In his analysis law is responsive to the economic and political climate and he, like a number of post-marxists, gives no weight to the ideology of the discipline itself.

⁷⁶ A lucid discussion of this appears in Cotterell, R. B. M. "Law and Sociology: Notes on the Constitution and Confrontations of Disciplines." 13 *Journal of Law and Society*, No.1, Spring 1986 9-33.

⁷⁷ See "Two Lectures" in Foucault, M. *Power/Knowledge, Selected Interviews and Other Writings 1972/1977*, ed. C.Gordon, 1980. New York: Pantheon Books.

⁷⁸ See Habermas, J. *Communication and the Evolution of Society*, 1979. London: Heinemann.

**CHAPTER 4: THE CONTEXT OF THE PLANNING ACTS: ISSUES OF
DISCRETION**

INTRODUCTION

Recent literature has emerged from a number of different perspectives which has illustrated changes in the way law exists and operates. In government, rules and discretion are used as mechanisms to order the distribution of power so as to place the responsibility for decision-making at different levels of the system.¹ Bureaucratic-administrative documents (some introducing mechanistic controls while others delegate wide discretion) regulating behaviour within government are in abundance and their selective form and relationship with other types of law have been questioned.² The concerted effort within government to distinguish legal principles from other policies or aims has also been a central concern of legal philosophy³, and the move from principle to pragmatism⁴ has also attracted growing interest.

These factors, together with the issues raised in the previous chapter, have generally produced a system of government which is more diverse than classical theory would suggest. As a specific example of this, the framework of planning provides rules of varying levels of generality and allows for the regulation of planning

¹ For a discussion of the texture of rules see Twining & Meirs *How To Do Things With Rules*, 2nd ed. 1982. London: Weidenfeld & Nicolson.

² See Kamenka, E. & Tay, A.E-S. " Beyond Bourgeoise Individualism: The Contemporary Crisis in Law and Legal Ideology " IN: Kamenka, E. & Neale, R.S.(eds) *Feudalism, Capitalism and Beyond*, 1975.

³ See Dworkin, R. *Taking Rights Seriously*, 1977, London: Duckworth.

⁴ Atiyah, P. *From Principle to Pragmatism*, 1978. Oxford: OUP.

authorities by various types of ministerial measures. This framework has been amply described in the planning texts and all that will be presented here is an indication of those parts of the system which facilitate or encourage negotiation. The aim here is to take account of the context of the particular type of bargaining involved in the subject of this paper rather than to explain the reasons for this context or to ascribe a causal connection between the legal structure and the operation of planning gain.⁵

HISTORICAL DEVELOPMENTS IN THE PLANNING ACTS

Although it is often stated that planning legislation resulted from the need to improve the living conditions of the working class after the industrial revolution, public control over the use of land was evident on the statute books long before the industrial revolution. This early legislation was generally confined to matters affecting public health rather than the interference with private property rights⁶ introduced in the mid-nineteenth century. At this time it directed its much needed attentions towards the improvement of sanitary conditions particularly of working class housing.

" The cottages are very small, old and dirty, while the streets are uneven, partly unpowered, not properly drained and full

⁵ As indicated above, it is necessary to consider the issue of planning gain in its context so as to be able to analyse it as part of a discourse with its own meaning. The intention is briefly to introduce the legal structure as distinct from seeking to explain the bargaining process simply as a product of this framework.

⁶ eg. An Act for Them Which Cause Corruption Near a City or Great Town to Corrupt the Air, 1388 C.13. 12 Ric.2., Statutes At Large, vol. 2, p.306. See Ashworth, W. The Genesis of Modern Town Planning, 1954 London: RKP; McAuslan, P. Land, Law and Planning, 1975 London: Weidenfeld & Nicolson, Law in Context Series.

of ruts. Heaps of refuse, offal and sickening filth are everywhere interspersed with pools of stagnant liquid. The atmosphere is polluted by the stench and is darkened by the thick smoke of a dozen factory chimneys. A horde of ragged women and children swarm about the streets and they are just as dirty as the pigs which wallow happily in the heaps of garbage and in the pools of filth. "7

The nineteenth century legislation does however also reveal a movement towards more positive powers.⁸ The new wealthy industrialists were building spacious squares and avenues in the cities and various professionals, city officials and social reformers were advocating a more efficient and rational form of development to improve social conditions.⁹ By improving sanitation and restricting disease it was assumed there would be an improvement in the problems caused by vast differences in wealth. In this context grew Howard's ideal of a 'Garden City' for the working class but measures to bring this about were peripheral despite the two cholera epidemics in the 1830's and 40's.

Finally the 1909 Housing, Town Planning etc. Act gave local authorities powers mainly to demolish and build housing by producing planning schemes which they could exercise at their own option. The Act contained strict limitations, required the approval of central

⁷ Engels, F. *The Condition of the Working Class in England*. Trans. and edited, W.O. Henderson & W.H. Chalour, 1958 Oxford: Basil Blackwell, on working class housing in Manchester. Cited in Gracey, H. *Urban Sociology and Planning: Sociology of Planning and Urban Growth*. 1969, London: CES, University Working Papers, No.7.

⁸ These Acts were really forerunners of the 1909 Act. See McAuslan, P. *op.cit. supra* note 6 for discussion.

⁹ This was not necessarily for philanthropic reasons as present conditions brought congestion, disease, economic burdens on city administration, shortage of labour and fear of revolution. See Gracey (1969) *op.cit. supra* note 7.

government and applied to only a small proportion of land. All of this seems to have discouraged use of the Act except for a few garden suburbs. Some of these limitations were relaxed¹⁰ in 1919 but it was not until after the war that local authorities were required to perform development control functions to effect the necessary reconstruction of towns and cities.

The early twentieth century legislation had also introduced a form of betterment tax, under which any person who owned land which increased in value as a result of a scheme would be taxed to the extent of 50% of that increase (this was raised in 1932 to 75%) and there were also provisions made to compensate anyone who suffered a reduction in value. In 1932 lapsing provisions were introduced which had the potential effect of slowing down development, and the system was abolished in 1939. There was clearly an intention in these early stages to restrict the effect of locally administered planning on the market and also to restrict the financial benefits it could have for landowners.

The 1947 Act, which followed three government Reports on aspects of planning¹¹, introduced a system designed to take account of social and economic conditions and to move towards a 'broad brush' approach to planning. The assumption in the earlier legislation that social conditions could be improved merely by reorganising the spatial arrangement of cities was removed from the legislation. It was

¹⁰ For example The Town and Country Planning Act 1932 allowed schemes to be produced for any land rather than land likely to be developed. Ashworth (1954) op.cit. supra note 6.

¹¹ Royal Commission on the Distribution of Industrial Population 1937 (Cmd.6135) (The Barlow Report); Committee on Land Utilisation in Rural Areas (Cmd.6378) (The Scott Report); Expert Committee on Compensation and Betterment (cmd.6386) (Uthwatt Report).

anticipated that planning schemes under the 1932 Act which had consisted of zoning layouts would be replaced by plans which covered other broader social and economic considerations.¹²

The Act created a national system of planning authorities (which coincided with the jurisdiction of local authorities) and brought all development, not only that included in a local authority scheme, under their control. Applications had to be made for any development and the planning authority could grant or refuse permission and impose any conditions 'it thinks fit'. There was also broad discretion in the legitimate criteria that the local planning authorities could take into account when reaching their decision. Not only must they consider the development plan but also 'other material considerations'.

This legislation set up a system of discretion within a network of rules. The local authorities were not now merely allowed to draw up plans, they were required to do so. These plans would not be the only basis of decisions, but a major one. The previous system of mandatory rules in the form of zoning plans had met with little success; few authorities had actually produced plans. Yet development plans produced under the 1945 Act were map-like, with rigid zones and plot ratios to reproduce the physical determinism which underlay the previous legislation.¹³ Jowell¹⁴ explains this with reference to the ideology of local authority planning and the formalised criteria which

¹² The 1947 Act defined a development plan as a plan "indicating the manner in which the local planning authority propose that land in their area should be used."

¹³ Planning Advisory Group Report *The Future of Development Plans*, 1965 London: HMSO.

¹⁴ Jowell, J. "The Limits of Law in Urban Planning" (1977) 30 CLP 63.

required certainty for developers, accountability to the 'public interest', predictability and protection for the bureaucracy against public pressure.

The complaints made against legal formalism, 'the tyranny of rules' were all mirrored against this approach to planning. The rigid maps could not accommodate 'individualised justice'¹⁵, were unable to deal with environmental problems, made no contribution to urban design and were rapidly out of date. Consequently in 1968 a further Act was passed in which further rules required local authorities to produce plans after conducting a survey of land uses and major economic and social forces operating in the area. These plans were to contain a written statement of policy and must set standards, only using diagrams as illustrative with no maps at all.

The plans produced after this piece of legislation were less specific and included a broader scope of policies, often drawn in wide terms putting them high up on a ladder of abstraction.¹⁶ The 1971 Act added a second tier to the system so that the newly formed county authorities¹⁷ produced generalised policy statements while the new district authorities were responsible for local plans to deal with the detailed needs of their areas.¹⁸ There were many practical

¹⁵ Davis, K.C. *Discretionary Justice*, 1971. Chicago: University of Illinois Press. Quoted by Jowell *ibid*.

¹⁶ See Twining & Miers (1982) *op.cit.* supra note 1.

¹⁷ Under the Local Government Act 1972.

¹⁸ There is an inherent simplicity in this division which is lacking in reality and there is a plethora of circulars which seem to endeavour to clarify the respective responsibilities with unsatisfactory results. For a discussion see McAuslan (1975) *op.cit.* supra note 6, pp.142-244.

difficulties associated with this and there have been long delays, particularly in the production of local plans.¹⁹

The system of betterment tax referred to above reappeared in the 1947 Act but under the administration of central government and without provision for compensation on refusal of consent. The Act made it a levy on the increased value produced by the grant of consent. The provisions were imposed as a part of the aims of the Act, that is to make the right to develop subject to government control and to protect the market from the effect of such control. The Uthwatt Report preceding the Act put forward proposals which were intended to keep the benefits of a public act within the public purse. This was done in the context of considering a system of nationalised land holding, and their proposals went hand in hand with increased powers of compulsory purchase. The theory was that if 'development value' were vested in the government before it was realised all profits which arose as a result of the consent would remain public.

Problems arose in the application of the levy because of the basic assumption that land changed hands at existing use value, rather than market value. It met with severe political party opposition and when the Conservatives took over in 1951 the levy was abolished, leaving the rest of the 1947 vision of development control intact. The Labour Party returned to power in 1966 and the following year set up the Land Commission which subjected development gains to a flat rate of tax, 40%. It was intended that this body would have powers to acquire land in pursuit of a policy of nationalisation, but change of

¹⁹ The position in Tower Hamlets provides an example, see Operational Issues, below.

government in 1970 brought about the repeal of the Act creating it before those powers were effected.

The toing and froing between the two political parties was based upon an opposing ideology of private property rights : Labour firmly advocating the inequity of private interests benefitting through public acts from the ownership of land and the Conservatives equally firmly defending the 'right' to profit from ownership as a necessary base to the economy.²⁰ In the early 1970's the rise in land values was so rapid, with profits accruing to a small number of people that it seemed possible that a compromise would be reached between these two opposing stands. Capital Gains Tax introduced in 1971 did catch increased land values on disposal and Development Land Tax was brought in five years later also to levy on increases in value.²¹

This legislative framework since the 1909 Act has also provided for public participation. The terms of that participation have become increasingly formalised and in the early days it represented a justification for continued centralised control. The principle that a person should be heard before his interest in property is interfered

²⁰ This reflects the different ideologies in planning law recognised by McAuslan (See McAuslan, P. *The Ideologies of Planning Law*, 1980, Oxford: Pergamon, Introduction) as the 'Traditional Common Law Approach' (based on John Locke, seeing law as a vehicle for protecting private property rights) and the 'Orthodox Public Administration and Planning Approach' (based on Bentham, seeing the law as protecting the public interest even at the expense of private property).

²¹ These taxes are not explored here as their complexity and exclusions provide subjects of study in their own right. See Joseph, C. 1980, *Development Land Tax: A Practical Guide*. 2nd ed. 1980 London: Oyez Publishing Ltd and Pinson, B. *On Revenue Law*. 14th ed. London: Sweet & Maxwell.

with was a strong basis for this²², but it must be seen in the context of other moves for increased public involvement such as local government, industrial relations, 'minority' interest groups and so on. It has concentrated mainly at the local level of planning and is at its most evident at public local inquiries and in consultation exercises in the preparation of local and structure plans. There is also input from local amenity groups on an ad hoc basis and from certain groups who must be consulted before certain applications for planning permission are decided upon, for example in the case of historic buildings.

At a micro level persons in the immediate vicinity of a development must be asked for objections and planning committees are open to the public. The planning framework does provide the possibility for public input, it is heralded as the most successful example of participation in government²³, but difficult questions arise as to its effect.²⁴ How representative is it? Is it necessary in a system of elected local councils? Is the present position satisfactory?

As far as planning gain is concerned public participation plays little direct part in the process. The policies of the council and the statutory plans are open to public scrutiny and in consulting the public on particular schemes there is some input, but there is no

²² There is a long line of cases confirming this (even where the legislation does not make provision) which is generally thought to start with Cooper v Wandsworth Board of Works (1863) 143 E.R. 414. See McAuslan, P. *The Ideologies of Planning Law*, 1980 Oxford: Pergamon Press for discussion.

²³ See McAuslan (1980) *ibid.*; Harlow, G. and Rawlins, R. *Law and Administration*, 1984 as cited in Harlow, C. "Power from the People? Representation and Constitutional Theory" IN: McAuslan, P. & McEldowney, J.F. (1985).

²⁴ See MHLG *People and Planning*, The Skeffington Report, 1969 HMSO; Pateman, C. *Participation and Democratic Theory*, 1970, Cambridge UP.

involvement at the stage of negotiation other than through the elected members of Council who consider the proposals in development committees. Tower Hamlets officers have made some effort to involve local community groups in planning gain schemes by voluntarily consulting them generally on planning gain policies. But this is not formalised and such consultations are limited to the most active groups in the area, namely Spitalfields Housing and Planning Service and Spitalfields Local Group.

Both of these organisations have a management committee and a well-established organisational structure. There is an active membership with charismatic figures who are well known in the Borough. They both receive funding from the GLC and have articulate and educated members who are prepared to put the views of their membership to the Council both in meetings and by written submissions.

OPERATIONAL ISSUES

Under the English system of Planning law the local authority in reaching its decision on a development application must take into account the development plan and any other material consideration. The local authority is legally bound to produce a plan but the plan itself is not a legally binding document but a consideration to be taken into account with others considered to be 'material'. The decision as to what is and is not 'material' is made at first instance by the local authority itself and is subject to the possibility of review by the courts. At the same time each case must be considered 'on its

own merits' and the legal framework provides the possibility of appeal against that decision if it is not an unconditional consent.

What this amounts to is a framework of flexibility capable of taking account of changing circumstances and different localities while encouraging a movement away from the strict application of rules. This carries with it, *inter alia*, the 'problem' of uncertainty and also a division of responsibility which confers decision-making powers on local authorities and, through delegation and professionalism, on their officers. The potential extent of governmental power is not clearly defined and, while the state retains administrative discretion the rules are not strict and are capable of being questioned and interpreted differently when they are judged as encroaching upon individual rights. This necessarily affects the attitude of the various actors within the development control process to central control. Local authorities have a measure, albeit increasingly limited, of financial independence from central government²⁵ but they are clearly not autonomous²⁶, having a right of access to central government and a duty to make reference to them under certain circumstances.

Also relevant to the context of planning decisions is the profession of planning, both in terms of its personnel and its own aims which may conflict with those of the local authority. There has existed a professional body responsible for the supervision and training

²⁵ For an account of this decline see Loughlin, M. *Local Government in the Modern State*, chapter 2. 1986, London: Sweet & Maxwell, Modern Legal Studies Series.

²⁶ See, for example, the findings of Barrell, D. et. al. (Five Project Papers on a Comparative Study of Planning in the Netherlands and England, 1975. Unpublished, Oxford Polytechnic, Department of Town Planning) on a comparative empirical study of planning in Oxford and Leiden which concluded that Oxford local authority was far less independent.

of planners since the first Town Planning Act of 1909 and a Town Planning Institute was formed in 1912.²⁷ The membership was concentrated within the professions of civil engineers, architects and surveyors which corresponded to the dominant ideology of physical determinism. The strength of the RTPI has increased and it takes an active part in shaping planning practice in the U.K. The importance of this is to make it plain that local authority planners are members of an identifiable group in their own right as well as being officers of the Council concerned.

The relevance of this is supported by the suggestion²⁸ that a distinction may be made between policies and other statements of aims or intentions that remain in force for a period of time and 'operational decisions'. The latter may be defined as a decision or 'an act which passes into history once carried out'²⁹ but has the additional characteristic of implying 'a tendency to create a firm commitment to a course of action'.³⁰ Those persons concerned with issuing planning permissions are then primarily involved in making operational decisions when they consider that particular development (in the light of policies) and the possible impact it will have on the policies themselves and on other areas of choice. As an example ,

²⁷ The School of Civic Design was formed in 1909 to train planners and in 1910 the RIBA convened the first town planning conference. In 1911 the RIBA published a guide to town planning procedures including a section on development plans and surveys to be conducted by planning authorities. See Gracey, H. *Urban Sociology and Planning : Sociology of Planning and Urban Growth*, 1969 London: CES, University Working Papers, No.7.

²⁸. Barrell et. al. (1975) op.cit. supra note 26 Project Paper V, Section 3.2.

²⁹ Friend (1974), cited by the above work.

³⁰ *ibid.*

before a planning policy is applied to a development there is consideration of the daylighting effect it will have on other properties, the alternative uses that site could be put to which may be lost because of land shortage, the effect on neighbouring sites if the development leads to increased land values, and so on.

In order to ascertain how the system operates it is helpful, indeed necessary, to examine the detail of how decisions (which may be defined as 'a choice among alternative modes of action'³¹) and non-decisions ('a decision that results in suppression or thwarting of a latent or manifest challenge to the values or interests of the decision-maker'³²) are made.³³ The sum total of conduct at this level ultimately affects the openness and accountability of the system of government as a whole as channels of appeal and political accountability are dependant upon these decisions. The content of a report to a committee, the wording of that report, the professional opinions stated as authoritative, or the absence of such opinions, are influential and may (like committee agendas) shape the discussion of issues and the outcome of the meeting. The actual impact of these factors largely depends upon the personality of the committee itself but the potential is undeniably there.

This takes the analysis into a broader field than pure decision making and conscious non-decision making by looking at the

³¹ Bachrach, P. and Baratz, M.S. Power and Poverty. Theory and Practice, 1970 New York: O.U.P. p.39.

³² *ibid.* p.44.

³³ This approach to study of power structures is largely influenced by the work of Michel Foucault. See *The Archaeology of Knowledge*, 1972. Harmondsworth: Penguin Books and *Power/Knowledge*, 1980, ed. C. Gordon. New York: Pantheon.

mechanisms which feed the process and also feed off it. The organisational structure allows for the mobilisation of bias by members of that organisation both consciously and unconsciously. By producing plans and policies the local authority not only strengthens its bargaining position in conflicts over the content of any given scheme but it also allows that position to be projected in several different ways. The developer coming to the local authority faced with a policy which requires him to do something he would prefer not to do will create choices as to how to deal with the issues raised by the policy. Those choices will be fed by his own concerns and by his future interests. The local authority similarly has its interests to protect and it will perceive those interests as being satisfied if the policy is fulfilled. There may be several different gradations within which the policy can be taken as having been fulfilled and the officers make a decision as to that fulfillment which may or may not accord with the views of the members of the Council. However, in reaching that decision the officer will not necessarily be brought into conflict with the developer but may present the policy in such a way as to appear reasonable to the developer. He may be affected by the role he considers he plays in the system, the expectations of his profession, his view of what the public interest is, which may also be coloured by constant exposure to the development industry.

When this decision is presented in a committee report a number of the factors influencing it may not be documented, not as a deliberate act of deception but as an unconscious part of the process. The language used in the report, the interpretation of the policy and the presentation of the facts can all effectively limit the basis of the ultimate decision which lies with the members themselves. The

members themselves are also part of the process and of the organisation and have their own interests and perceptions which they bring to the committee room and they may choose, consciously or unconsciously to make or not to make an issue out of the information they receive.

According to this view, power does not come from a single source, nor is it wielded by one party against another, nor is it restricted to conscious action. Active non-decision taking has been put forward as an alternative view on the exercise of power, but it still does not take into account the intricacies of the process or the effect of ideologies of the actors in unconsciously as well as consciously mobilising bias. The avoidance of conflict is a central issue but so too is the recognition of the part played by factors and issues feeding and being reproduced by the system and process itself. An oft-quoted extract from Marx is a useful reminder of this.

" Men make their own history but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past. "³⁴

The other significant element here is the absence of conflict, what Bachrach and Baratz refer to as 'agreement based on reason'.³⁵ Bachrach and Baratz in their seminal work on non-decisions limit themselves to an image of power based only on conflict, but this is too restrictive. The absence of conflict does not mean that there is necessarily a consensus of views between the public and the developers, or even between the planners and the developers, but that

³⁴ Marx, K. and Engels, F. Selected Works, Volume 1, p.247. 1962, Moscow: Foreign Languages Publishing House.

³⁵ op.cit. supra note 31, p.20.

the possibility of conflict has to a large extent been written out by latent and overt mechanisms for the ordering of priorities and perceptions.³⁶ Plans produced in the form of statements of policy provide a framework for this process to take place.

THE PLANS

Town planning is geared towards producing plans in the form of written statements, maps and diagrams which represent a set of rules to govern human conduct.³⁷ This 'enterprise of subjecting human conduct to the governance of rules'³⁸ has produced both specific rules, such as zoning provisions, and standards, such as those of amenity and of producing social mix. The plan also lays down procedures and criteria to achieve particular objectives such as improving housing, increasing employment and preserving the character of an area. This latter category of standard is what Dworkin defines as a 'policy', that is a type of standard 'that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community'.³⁹

Overall this system of planning produces a mixture of types of rules and consequently involves allocating power and discretion to

³⁶ See Lukes, S. *Power: A Radical View*, 1974 London: Macmillan for an explanation and critique of Bachrach and Baratz's work.

³⁷ This is plainly stated by Jowell, J. in "The Limits of the Law in Urban Planning" (1977) 30 C.L.P. 63.

³⁸ Fuller, L. *The Morality of Law*, 1969.

³⁹ Dworkin (1977) *op.cit. supra* note 3, p22.

different levels of the system.⁴⁰ This paper does not adopt Dworkin's strict division between rules, principles (or standards which guide but do not determine outcomes) and policies (as defined above) but treats all three as forming part of the planning framework and as bestowing different levels of discretion. It is not assumed that each type of rule (in its broader sense⁴¹) will affect outcomes in a particular way but that all types may be drawn in different levels of generality so that differences become questions of degree rather than of fact.

THE OFFICE POLICY FRAMEWORK in TOWER HAMLETS

The Greater London Development Plan

For the period in which this study was carried out the statutory local plan for Tower Hamlets was the Initial Development Plan, produced under the powers of the 1947 TCPA for the whole of London, as approved with amendments in 1962. One of the stated principles of that plan was 'to restrain further office development, particularly in the centre of London'.⁴² The IDP used a broad system of zoning to designate the development control aims for each area. It was not legally binding and neither the designations nor the stated principles and policies were intended to be defensible rules, but rather

⁴⁰ For a discussion of the effect of the different levels of specificity in rule making see R. Dworkin (1977) *op.cit. supra* note 3 and Twining, W. & Meirs, D. *How to do Things with Rules*, especially chapter 3. 1982, 2nd ed. London: Weidenfeld & Nicolson.

⁴¹ This accords more with the definition given by Twining & Miers cited *ibid.*(at p.127) of rules as a general norm guiding conduct or action in a given type of situation.

⁴² IDP Section 5 (iv).

were guidelines for development. Having said that, the designations were still used as a firm basis for considering applications.

The Greater London Development Plan, however, supersedes the IDP where the two conflict and is the strategic Plan for Greater London approved in 1976, following the changes made in planning law in 1968 and 1971. The recommendations of the PAG in 1965 were to move away from zoning as a form of control and to substitute strategic policies in a Structure Plan and leave Local Plans to deal with the more specific requirements of each area. This means in effect that the policies contained in the GLDP have been given more weight⁴³ than the zoning provisions contained in the earlier style plan while the restrictive approach to offices has been retained as a local policy.

The GLDP itself contains the policies on office development within the context of employment policy and states that in restricting and encouraging growth of offices the characteristics of the location, the supply of labour available and the type of employment created are all relevant factors.⁴⁴ It then goes on to identify specific locations within Greater London where it considers office development can be approved 'with benefit' and lists two such areas for Tower Hamlets namely Liverpool Street/ Spitalfields and Gardiners Corner/Aldgate East.⁴⁵ The notes following this table point out that the locations are given as a point of reference and the extent of those area and the

⁴³ For example, in the appeal statement on Fairholt House the Council states in relation to office policy "the IDP is now nearly 20 years old and it perhaps is more useful to take cognizance of the policies expressed in the GLDP"

⁴⁴ GLDP para. 4.11.

⁴⁵ para 4.14.

'exact spots where development may be allowed' are to be decided by the local plan for each Borough.

The plan goes on to say that office developments should be encouraged to locate in these areas only subject to account being taken of environmental conditions, capacity of public transport, the attainment of planning advantages and the availability of labour. Provided these conditions are considered offices may be located outside of the identified areas if there are significant facilities for passenger interchange or if the traffic generated can be accommodated by the capacity of existing roads while complying with traffic flow requirements. Examples of planning advantages are given as

- " (1) Improvement of the public transport system at railway termini and interchanges;
- (2) Provision of special benefits in the form of buildings, open space, pedestrian access and other facilities for the use of the public;
- (3) Redevelopment of areas of poor layout or design;
- (4) Conservation of buildings or places of historic or architectural interest;
- (5) Provision of residential accommodation in conjunction with the development;
- (6) Provision of small suites of offices, particularly if available on a rental basis. " ⁴⁶

Tower Hamlets' Office Policy Document

To follow up the GLDP the Council introduced its own office policy⁴⁷ which sets out specific guidelines for office development in the Borough. This is a statement intended to bridge the gap between the GLDP and the IDP pending the introduction of the Borough Plan.

⁴⁶ para 4.15.

⁴⁷ It was first approved in March 1972 but later framed in the context of the G.L.D.P. and the public consultation over the Spitalfields Interim Report 1977.

It is based upon the locations identified above but goes on to define those areas and the requirement of planning advantages in more detail. This was done on the basis of the relationship between a strategic plan and local policy documents so that the former merely provides a framework for the latter, which is the view put forward in the note to the table of preferred locations mentioned above.

In interpreting the use of locational criteria the Council's view as expressed in their office policy is that outside of the stipulated locations office development is to be refused unless the application is one of exceptional merit, a somewhat more discretionary proviso than the one contained in the GLDP. Inside the locations cited office development should be encouraged but this does not mean that all applications for offices in those areas will be allowed, they must at least meet the other requirements of the GLDP.

What has resulted is a policy expressed⁴⁸ to be based on established town planning practice and on the same considerations underlying the GLDP approach to office development. That is to say the Borough seeks to achieve a balanced and varied pattern of land uses, prevention of speculative increases in land values and will consider each application on its merits in the light of the policies appropriate to the area concerned. All of these are assisted by the GLDP's inclusion of the requirement to take account of the attainment of planning advantages. In the case of mixed use of land the development should contain a balance of uses so as to avoid exclusive concentration on those which provide the greatest financial returns

⁴⁸ These considerations behind the office policy appear in a number of appeal statements made by the Council, for example see Results of Study (chapter 7) : Fairholt House and the discussion of this appeal in chapter 11.

and this is mirrored in the Secretary of State's action of making Office Development Permits subject to the condition of a certain amount of residential use forming a part of the scheme.⁴⁹ Such emphasis on mixed use is justified not only as an accepted approach to 'good planning' but also as perpetuating traditional patterns particularly in Spitalfields. As far as speculative increases in land values are concerned, allowing office permissions inevitably raises land values and this in turn restricts the possibility of other sites in the vicinity being put to less profitable uses. By requiring those type of uses to be put into the scheme itself, the Council argues, there will be more diverse land patterns and lower land values overall. Consequently the policy not only ensures new mixes of use but allows existing industrial and residential uses to remain by restricting competition on land use.

In considering each application on its merits the role of the Council is seen as weighing up the potential benefits and disbenefits of the scheme in relation to policies relevant to that area and site. If planning advantages in the form of say housing forms part of the scheme they will help tip the scales in the direction of consent because of the benefits it represents. The policy stresses, however, that by putting forward a planning advantage a scheme which is in breach of existing policies will not be made acceptable. The example given is of an application for offices in a location not suitable for that use, consent will not be forthcoming merely by the addition of some residential use or restoration works being included.

⁴⁹ See, for example Results of Study (chapter 7): 1/4 Blossom Street.

On these bases the inclusion of planning advantages in an office development is elevated to a requirement

" This Council requires office proposals, except for offices ancillary to other uses, and small local service offices, such as solicitors and banks, to include the benefits of housing, industrial accommodation, sports and leisure facilities or other non-office employment activities. "

An additional proviso is added that change of use from industrial to residential is generally discouraged unless that use is relocated elsewhere or that use is an inappropriate one to the site. By way of a guideline where the proposed benefit is housing, the office policy suggests that schemes involving the restoration of listed buildings should include 50% new residential use and 50% new office floorspace; where no restoration is included the ratio of office space to planning advantage should be 45 : 55. Where the proposed benefit is other than residential the Council can take into account the particular costs involved.⁵⁰

The office policy includes a brief description of the preferred locations and of the planning aims to be achieved in each :

(a) Gardiners Corner/Aldgate East

Within the area bounded by Braham Street, Maansell Street, Whitechapel High Street and Whitechurch Lane, the Council aims to achieve comprehensive office development with a Borough shopping centre, sport and leisure facilities and single person residential accommodation. To the south between Braham Street and Alie Street, selective infill and conversion of office development will be encouraged. Within this area, it is intended to retain the mix of light industrial and residential uses. The restoration of listed buildings will be encouraged and existing community buildings, such as Camperdown House, should remain in their present uses.

⁵⁰ Such considerations were generally taken account of. For example, the costs of providing a sports hall at Gardiner's Corner in the Sedgwick-Forbes development. It is evident even on residential schemes. See for example Results of Study (chapter 7) Brushfield St No.s 16/18.

(b) Liverpool Street/Spitalfields

Within the three Conservation Areas in Spitalfields- Elder Street, Fashion Strret and Artillery Passage, office development with restoration of listed buildings and creation of residential accomodation will be encouraged, and within the Artillery Passage any existing shops should be retained.

The emphasis of development should be on conversion and restoration of listed buildings. However, there is scope for suitable infill development. In the Whitechapel Station Area the Council aims to achieve office development which also includes improvements to the underground station, single person residential accommodation, industrial development and the retention of existing shopping frontage.

(c) London Docks

Office development will be encouraged within the north-west part of the former London Docks between Thomas More Street and the alignment of the proposed Pool of London Route and a riverside site in Wapping High Street. Office development in this area could be linked to the provision of community facilities in Wapping.

The Borough Plan

A planning report was prepared on West Spitalfields in 1977⁵¹, following a programme of consultation, which, as well as providing factual information, summarised the main problems (as they appeared from the consultation exercise) and suggested policies and guidelines for development control. The Council expressed in that report a commitment to preserving the character of the area in terms of its mixed uses and its buildings and stated two main objectives on office policy which recognised that an area so close to the City would attract development interests.

" (19) To designate areas for office development where such development will meet local and/or Borough wide needs...

⁵¹ Towards a Local Plan for Spitalfields - Interim Report, Volume 1 (February 1977) LBTH.

(28) To accept the present levels of General Rates accruing from this area, rather than exploit the area for the purposes of the Borough's rate income. "52

Other objectives related to such matters as encouraging refurbishment of listed building, improving the residential environment and protecting industrial uses from disturbance. The report explains that this policy of balancing mixed uses was particularly relevant to Spitalfields because of its geographical location making it so attractive to pressures of high land values generated by office development and went on to recommend that new offices should be linked to new housing and conservation wherever possible.

This specific study of West Spitalfields was a part of a programme of consultation and research to produce a draft local plan for Spitalfields which in turn was a forerunner to the Borough wide local plan. As it was designated as a draft local plan it took account of Borough policies and GLC policies likely to be applicable during the period of the plan and encouraged formalised participation of local people. Lengthy reports were prepared and detailed strategies for the improvement of the area were set out, first in the form of issues raised by the studies and secondly as objectives to be achieved.

A network of studies and reports to produce draft local plans were carried out in the areas surrounding Spitalfields and similar consultation studies were instituted in 1977. These draft local plans then were used as a basis for the draft Borough Plan. It was this latter plan which was regarded as the formal Local Plan for the Borough and it went through statutory procedures for consultation. A draft was published in February 1982 for public consultation and the

⁵². para 4.2.1 - 4.2.4.

revised draft which resulted was placed on deposit with the Secretary of State the following year and a Public Inquiry was subsequently held in 1984. The Borough Plan and the GLDP were then the statutory basis of planning decisions within the Borough and the tasks of the Borough Plan were expressed as being to :

- " (a) formulate the Council's proposals for the development and other use of land in the borough over the next 10 to 15 years;
- (b) elaborate in detail the relevant policies and general proposals of the Greater London Development Plan;
- (c) form a detailed basis for development control and for the co-ordination of development; and
- (d) bring local and detailed planning issues before the public. "⁵³

In explaining and setting out those policies and proposals the Plan necessarily referred to matters falling outside of the planning functions of the Council but which generated the need for planning control in the form detailed in the Plan. In this category the Plan included housing, education and recreation and explained in the introductory section that these 'related but non-planning activities' would be included in reasoned justifications as 'Complementary Policies' where they supported planning policies but would not have the statutory force of those policies once the Plan had been adopted. The Plan was produced in such a way as to detail 'Planning Policies' in capital letters so as to distinguish them from 'Complementary Policies'.

The Plan expresses the role of the Council in dealing with office development in the Western part of the Borough as a balancing of

⁵³ Borough Plan para. 1.4 LBTH.

benefits and disbenefits. On the benefit side complying with the GLDP preferred locations criteria the Council could extend London's commercial and business core to produce increased employment, a broader rate base and an opportunity to replace old and cramped buildings. The disbenefits would include the threat to an area characterised by mixed uses, a reduction in residential space, cheap manufacturing and retail accommodation and not necessarily increased employment of borough residents.

" The Plan attempts to reconcile these two themes by identifying what is valuable and worth protecting, so that development can be encouraged in and guided to those places where it will not undermine the existing character or drive out activities which have a long association with the area. So the policies make explicit where, and what kind of, commercial development will be appropriate, refining the general indications of the preferred office location policy to ensure that the scale, pace and siting of change respect the things of value : residential communities and the services that support them; the built heritage and its overall scale; existing activities and linkages. " ⁵⁴

Within this context the Plan goes on to re-affirm the published office policy and the specific requirement for planning advantages to ensure the retention and improvement of facilities in the area so as to avoid the loss of the 'characteristic range of activities' present in many parts of the borough. Other stated objectives of the policy are to safeguard the environmental amenities of residential areas, to protect industrial areas from threat of displacement and to widen the range of job opportunities, all to ensure a mix of uses.

ALL OFFICE DEVELOPMENTS OVER 200s/m MUST BE
ACCOMPANIED BY SOME FORM OF PLANNING

⁵⁴ Para 3.16.

ADVANTAGE, AS OUTLINED IN PLANNING GUIDELINE No
3, 'PLANNING ADVANTAGES'⁵⁵

Planning Guideline No.3 includes a table setting out the type of benefit regarded as planning advantages in each location but states that other suggestions from developers will be considered. It also stresses that by providing planning advantages the developer will not be exempt from other requirements of the Plan nor from statutory obligations, such as the proper maintenance of listed buildings.

The Plan changed the basis of the location requirements by restricting office development only to sites within 400m. of a public transport interchange. In addition there could be no loss of housing, industry or good shopping facilities. All applications meeting these criteria also had to provide planning benefits unless they were small offices providing a local service. In addition to the written statement of policy the plan annexed the RTPI guidelines which included provision for public consultation on the type and extent of planning advantages that should be required.

PUBLIC REACTION TO THE OFFICE POLICY

As a result of the publication of the Borough Plan, some 10 years after the publication of the office policy document, responses from the public were received on planning gain policy and are interesting because they reflect on past Council practice as well as future expectations. Twenty six objections were received on the office policy, ten of which were made generally, two of these from

⁵⁵ Para 4.88. This policy appears in the draft plan before revisions in substantially the same form at para 4.79.

individuals and the remainder from organised groups. Most objections were to allowing any office development rather than specifically addressing themselves to the desirability or otherwise of a planning gain policy.

For ease of reference the objectors and objections appear in Table 1 below. The objectors are listed in descending order, with those objecting on most grounds at the top. The objections are also listed in order of support. The Council at the Inquiry did accept most of these objections but took the view that the restrictions included in the plan were sufficient to reduce the impact of office development to a minimum, whilst protecting housing, industry and existing community facilities. The requirement of substantial planning advantages was put forward as a means of controlling increases in land values and the exclusion of other uses, and the locational criteria were cited as a method of ensuring certainty for developers and the electorate. The Council also explained that a policy of complete exclusion of office development would be unsupportable on appeal, resulting in loss of control over office development and nothing to compensate for the disadvantages involved.

	A	B	C	D	E	F	G	H	I	J	K
SHPRS	*		*	*		*	*	*	*	*	*
SLC		*	*	*	*			*			*
GLC	*	*			*	*			*	*	
CHGL	*	*	*		*						
A.M. Fletcher	*			*		*	*				
SLP	*		*	*							
JDAG	*				*		*				
Docklands Forum		*									
THET		*									
Graham Allen		*									
TOTALS	6	6	4	4	4	3	3	2	2	2	2

Key : objectors

objections

CECL	Campaign for Homes in Central London	A	Offices mean few extra employment opportunities
DF	Docklands Forum	B	Oversupply of offices in Tower Hamlets
GLC	Greater London Council	C	Forces out other uses, especially housing & industry
JDAG	Joint Docklands Action Group	D	Forces up land uses, making other uses uneconomic
SHPRS	Spitalfields Housing Planning Rights Service	E	Conflicts with GLC's Community Areas Policy
SLC	Spitalfields Local Committee	F	Encourages offices within 400m of interchange
SLP	Spitalfields Labour Party	G	Results in loss of population and reduced services
THET	Tower Hamlets Environmental Trust	H	Causes blight
		I	Planning gain is no compensation for the disadvantages of offices
		J	Policy extends area available for office use
		K	No substantial gains have been achieved

Table 1: Objections to the Office Policy within the Borough Plan, by Identity of Objectors and Nature of Objections.

This view was supported with examples where, in the early 1970's, the GLC had refused all office development and had lost on appeal. Southwark had a similar problem in the 1980's.⁵⁶

" A policy of arbitrary total refusal of planning permission for offices would be extremely difficult to justify on appeal. Landowners and developers would be encouraged to appeal against planning decisions and discouraged from attempting to reach agreements with the Council which would involve planning advantages. It is highly likely that a high proportion of appeals would be successful. The Council would lose control over office development and planning permissions would be granted in an ad hoc and almost random fashion across an extensive area of the Borough. This would create problems of inflated 'hope values ' of property and resulting blight would seriously affect much of the Borough. "⁵⁷

By insisting on planning advantages within a development the Council can ensure mix of land use and minimise speculative increases in land values and such development will be contained by the locational requirements. The Council argued that it is not a function of planning to fine tune the market by allowing fewer office developments in times of oversupply and that the measure included in the borough plan must be justifiable on land use grounds to ensure their enforceability.

The Council denied some of the objections raised, such as the conflict with the GLC Community Areas Policy when planning advantages in fact provided housing in the areas concerned and the

⁵⁶ As a matter of interest Southwark Council changed its policy in 1985 from one of refusing all office permissions to one of requiring planning gain and since that time have been involved with a number of large developments including substantial housing and community facility gains. In 1983 they had 5 appeals against refusals for office developments and all were allowed.

⁵⁷ Proof of Evidence of Ian Draper, Chief Planner for development control, local plans and implementation in the western part of the Borough 1975-1984, May 1984 prepared for the Borough Plan Inquiry. para. 6.3.

low level of local employment created by office developments. Most significantly the Council demonstrated that the policy as operated until 1984 had produced 'substantial planning gains' in the form of 340 residential units and 9,847m² of industrial floorspace and other advantages including the partial restoration of Christ Church, Spitalfields, a leisure centre at Gardiners Corner and work to the Half Moon Theatre at Mile End. These figures actually relate to implemented schemes, there were more permissions but many had not reached fruition by 1984.

None of the unimplemented schemes were referred to in the evidence submitted to the Inquiry and the amount of money paid by the developer towards the restoration of listed buildings was also omitted. This latter point however could merely reflect the Council's deliberate attempts to disassociate itself from actual payments made.⁵⁸ What is perhaps more interesting is that not all of the implemented schemes are detailed on the list submitted to the Inquiry. For example, those schemes including the payment of money to homeowners for the renovation of their listed houses are not detailed,⁵⁹ nor are the Wearwell schemes where the planning gain was put to the committee as the large amount of floorspace acquired in the Borough by the developer. The schemes upon which the Council relied are detailed at the end of this section.

⁵⁸ For example, in all of the Christ Church Schemes the Council would enter into an agreement with the developer whereby the developer undertook to comply with clause one of an agreement executed between the developer and the Friends of Christ Church. The amount of money paid to Christ Church was stipulated in that latter clause, together with a requirement for the Friends to use it for restoration purposes. Refer to chapter 7.

⁵⁹ See note 61 below.

The Council also produced figures to show that there had been no reduction in the population in the western part of the Borough (Spitalfields and St.Katherines Wards) since a planning gain policy had been in operation. In fact there had been a marked increase on the electoral register figures between 1971 and 1983, mainly as a result of flats built for the Guinness Trust on the border of Tower Hamlets and the City. These flats negotiated as planning gain for the Wingate Centre which lies mainly on the City side of the border accounted for 295 of the 387 new residents in both of these wards. A total of 71 people were displaced by office developments on previous residential sites.

There are of course problems in relying on electoral roll entries to determine movements in population especially when the areas involved have large numbers of immigrants who may be unfamiliar with the electoral registration system, have language problems or be alienated from official process. There also problems in assessing the impact of these increases without appreciating something of the character of the areas involved.

The studies conducted in 1977 in Spitalfields using census data collected in 1971 reveal a declining population, with a large number of single men and a large proportion of non-family accomodation.⁶⁰ It also indicated a mobile population and a disproportionate share of the Borough's institutional population, including those living in hostels and sleeping rough. In Spitalfields as a whole in 1971 60% of households did not have a bath, 34% had no exclusive use of an inside toilet and

⁶⁰ Towards a Local Plan for Spitalfields, Interim Report, Volume 2: Detailed Studies, Section B Population, Housing and Environment. 1977: LBTH.

almost 50% had no exclusive use or no hot water. When compared with figures for London as a whole (9 have no bath, 18% lack or share an inside toilet and 13% share or lack hot water) the standards are very low.

Taking a closer look at the residential gains implemented by May 1984 most of the residential floorspace was built or acquired by housing associations and was comprised of mainly bedsitters, one-bedroom flats and hostel accommodation. Perhaps the most notable exception to this is the 50 flats built on Mansell Street (Goodmans Yard scheme) for the private market which were offered for sale in 1983 at a price of £85,000 for a studio. The Peabody development was also for the private market but aimed at the lower end of that market. Assistance was also given to some individual home-owners for the restoration of their listed homes as part of planning gain schemes.⁶¹ On the other hand most of the housing displaced by offices was private accommodation.

One major problem with communication was made clear at the Inquiry in that many of the objectors were unaware that the larger housing developments were in fact built as planning gain. Spitalfields Housing and Planning Rights Service (SHPRS) objected absolutely to any further office development on the western side of the Borough largely on the grounds that it destroys the environment of an area with mixed residential and industrial uses. They advanced the view that the only way to protect the residential communities was by

⁶¹ For example Eric Elstob received money from Central & City under the Congo Scheme to renovate his home at 14 Fournier Street. Central & City did another such scheme with the owner of 31 Fournier Street in connection with offices at 16/18 Brushfield Street. See chapter 7 for details.

outlawing office development completely and cited housing developments which were themselves built as planning gain for nearby offices.⁶²

Specific objections were also raised about the new locational criteria which essentially made other sites, those around the specified transport interchanges at Whitechapel, Mile End and Bethnal Green, into preferred locations. Some groups were radically opposed to any extension, while others suggested that it would be preferable to indicate precise sites for office development, leaving all other sites available for other uses. The Council justified its position on the grounds that their approach was responsive and would allow each application to be viewed on its merits and so retain flexibility.

To identify specific sites would be outside of the function of a Borough Plan and would tend to be prescriptive in that those sites would have to be used for office development. This would be problematic if the market was not such as to encourage further office growth in the city fringe area. The Council also argued that as the site now had to be within 400m of the designated interchanges it would in effect limit the number of sites available rather than extend it.

⁶² For example, the Guinness flats built as a part of the Wingate Scheme. Refer to chapter 7.

<u>Scheme</u> ⁶³	<u>Offices</u> ⁶⁴	<u>Planning Gain</u>
5/7 Folgate St	888m ²	Refurbishment for residential use for housing association 7225m ²
1/4 Blossom St	1253m ²	as above 1076m ²
13/17 Folgate St	903m ²	as above 232m ²
Christ Church Schemes		
a) OCL	6865m ²	Restoration works at Christ Church
b) FABS scheme	5156m ²	
c) 87/95 Mansell St.	4645m ²	
10/14 Folgate St	1006m ²	Refurbishment for residential flats 1006m ²
Black Lion Yard	7432m ²	Construction of modern industrial units, ran by GLC as new technology centre. 4645m ²
Police Station Site Commercial St	2787m ² not implemented	Refurbishment of 7 listed houses and construction of 32 flats for a housing association.
238/40 Whitechapel Rd	1393m ²	Refurbishment as industrial workshops 464m ²
36 Paradise Row	390m ²	Restoration of 2 listed buildings
485/7 Bethnal Green Rd	371m ²	as above
Wingate Centre	6540m ²	195 flats for a housing association
Nat. West. Scheme	56,700m ²	Land acquired by GLC for housing development: not built
63 Mansell St	719m ²	Refurbishment as 5 residential flats
Sedgwick-Forbes	31,201m ²	leisure centre, including sports hall, theatre, squash courts; multi-storey car park; shopping centre 4645m ²
Goodmans Yard	25,547m ²	50 flats and 4 squash courts
CWS Schemes		

⁶³ Refer to Results of Study section for more detail.

⁶⁴ There are some differences in floorspace figures given here and those appearing in the Results of Study section due to changes in the details of the development during construction.

a) 75/89 Leman St	7432m ²	small industrial units managed by LBTH, 7432m ²
CHAMPS scheme	11,629m ²	land purchased and 1/3 of a 400 seat auditorium
Buck & Hickman site	5634m ²	new industrial units 4413m ²
Peabody Scheme	1672m ²	Refurbishment of 80 Peabody flats
Camperdown House	5866m ²	Refurbishment of Whitechapel Art Gallery
30 Alie St	120m ²	Refurbishment as industrial workshop 93m ²

Table 2: Tower Hamlets' Implemented Planning Gain Schemes at May 1984.

CONCLUSIONS

The involvement of public authorities in planning is itself justified by the requirement to perform this type of balancing of choices. Land in London, and especially on the City fringe, is certainly in short supply and the use of a site for one purpose will of course make it unavailable for another, thus reducing the possibility of that other use being available within the area in question. Some uses are necessarily more profitable than others and thus more likely to be built, and if built can have a carry on effect so as to increase land values and further reduce the possibility of other sites being developed for less profitable uses.

In addition local authorities have limited resources and in encouraging one or other type of development must also be aware of the spending or saving of public funds which will result if permission is given. All of this puts a heavy burden on those persons directly involved in the process of weighing up these competing demands: they must establish a base of knowledge and be able to form an overview of the different areas of choice in order to be in a position to make the operational decisions required of them. The plans and policies are there so as to simplify this process and to act as rules and guidelines to build up a body of precedent.

In putting the plans and policies into effect there may be organisational problems in communication of information and how that information is deciphered and co-ordinated. The procedures which are established within the organisation become part of the process of piloting any intention to develop through the development control process.

The plans and published policies are also intended to produce some certainty and guidance to developers and to the communities affected. They are documents of accountability of the elected representatives to their electorate and of planners to the members. Written into the expectations of this system is a series of assumptions which have parallels in the rule of law: all sectors of the community are safeguarded through the process of public participation and through the election process; policies and plans are capable of being applied systematically and objectively; the committee process is a valid system of accountability and it is possible to fit together competing interests and planning criteria to reach a consensus.

These expectations however must also be read subject to the status of the plans and policies concerned. Structure plans and local plans are statutory documents, but they are not legally binding and are intended to be frameworks and not strict rules. Thus, there is an interdependence between plan-making and development control which provides the operators of the latter process with a discretion, which they exercise subject to the possibility of an appeal if the decision conflicts with the development plan. Some planning research has viewed this discretion as an essential to an effective development control process.

" ...a planning system which does not allow for flexibility in the handling of complex and uncertain situations will experience stress within its organization and procedures. "⁶⁵

To impose a system of strict rules on the operation of a discretion is not an alternative available to government, as they each

⁶⁵ Barrell D. et. al. (1975) op.cit. supra note 26, Project Paper V, p.21.

represent contradictory approaches. The history of planning legislation indicates a move from rules to discretion and that discretion appears throughout the character of the system of development control. Consequently in viewing the practice of planning gain within this structure it must be seen as a particular exercise of discretion bestowed by the legislative framework and which has arisen within a particular political context of restraint on local autonomy.

CHAPTER 5: NEGOTIATION

INTRODUCTION

This chapter draws upon the findings of the Tower Hamlets study and the available literature to present a view of negotiations for planning gain. As indicated above, the planning process facilitates negotiation by the form the legislation takes and by the position of local government within the system. Negotiation clearly exists in the form of discussions over the design, content, plot ratio and other physical features of the proposals. It has, however, become controversial in the area of planning gain where it is considered that local planning authorities have overstepped the boundaries of physical planning. In discussing the issues involved reference is regularly made to the data obtained from Tower Hamlets and the reader is referred to chapter 7 where the case studies appear in alphabetical order.

For negotiation to take place it is not only necessary for there to be a discretionary framework and an organisational system that supports it there must also be a relationship between the parties which is conducive to the process. Both sides must have something of value to offer. Outside of metropolitan areas local authorities trying to encourage development¹ have seen any commercial or industrial development as planning gain in itself² whereas, it is argued, in London negotiations are generally over the extent and type of gain

¹ Main, S. The Role of Negotiation in Development Control, 1979. Unpublished student dissertation, Department of Civic Design, University of Liverpool.

² Jowell, J. "Bargaining in Development Control" (1977) JPL 414-433.

rather than over providing it at all.³ Certainly this is so in the Boroughs which have a published office policy calling for planning gains, although other Boroughs still view the process with some scepticism mainly because of unfamiliarity and lack of knowledge⁴.

In central London land is at a premium and commercial developments are profitable ventures. A developer, in accordance with classic economic theory, will be anxious to maximise profits and minimise expenses. To obtain a grant of permission is in itself a valuable exercise. Delays naturally mean reduction in profitability; the value of a development cannot be realised and capital is tied up which in turn means payment of interest on loans and/or other missed opportunities for want of investment capital. The developer therefore may not be able to calculate an actual maximum return on a development because of market imperfections and limited knowledge of actual costs over the development period, but he does have a certain rate of return which he requires on each development and is not prepared to go below.

Delays in obtaining a permission are costly and so are planning appeals which have an inbuilt wait factor⁵ as well as uncertain

³ Caddy, C. "Implementation: When the Development Control Officer Meets the Developer." (1978) 64 The Planner No.3 (May) 86-87.

⁴ This was evident in meetings between Tower Hamlets planners and those from Hackney and other Boroughs who regarded the work on planning gain in Tower Hamlets as exceptionally well developed and organised.

⁵ It is interesting that the Minister has recently (May 1988) informally indicated to London Boroughs that he wants to reduce the waiting period for an appeal to a maximum of 3 months. A number of planners (from Southwark and Tower Hamlets) have verbally expressed the view that if this is done their bargaining power will be dramatically reduced so as to diminish the chance of negotiating planning gain at all. In fact it is suspected that this is the reason for the Ministers approach.

outcomes. The approach of developers to this can be summed up in the minimax principle under which the risk of maximal loss is minimised. In other words the developer will prefer to negotiate even if it means some loss of profit, rather than risk a refusal of planning permission or wasted time and expenditure by taking it to appeal.

The present system therefore does not only provide a legal framework which allows planning gain to operate, it also provides procedural restraints which give the planners bargaining power. By the system is meant not only the law, but the political environment which necessarily includes social and economic conditions. These conditions do not simply mean market forces (which are an important but not the only manifestation of economic considerations) but also encompass community considerations and the myriad other effects of the distribution of wealth.

Negotiations for planning gain are generally conducted in private, are unstructured and ad hoc. As far as Tower Hamlets is concerned there is a consistency of approach to the negotiations in that planning gain is a mandatory requirement on office development applications and the policy is applied consistently. This fact, and the policy itself, is introduced at the earliest stage of any proposals for commercial developments. In this way the policy acts as a basis for what the Council will be prepared to accept, but is itself negotiable and not always considered appropriate to the particular circumstances of the application.⁶ Moreover, the terms of the policy allow manoevrability in interpretation of such terms as 'community benefit'. It is difficult, therefore, to quantify not only the value of the gains

⁶ See, for example, the Wearwell schemes in chapter 7.

achieved in terms of actual 'benefit' to the local authority and 'disbenefit' to the developer, but also the balance of bargaining power between the parties during negotiation.

It is often assumed that negotiations to produce planning gain are the same as any other form of negotiation leading to a contractual relationship and, within this, is an assumption of some equality in bargaining power. Yet this type of equality of status is difficult to prove. Some have suggested⁷ that it patently is not there and the process holds developers to ransom by preventing them from conducting their business without acceding to the imposed wishes of the council. On the other hand, developers have in the past used planning gain to reduce their liability to pay development land tax and may gain themselves from the 'community benefit',⁸ as well as, in theory at least,⁹ obtain consent without unnecessary delay or expense.

The form of negotiations and the status of the parties is important as it is directly relevant to any proposed system of control. To proceed by stated requirements and to proceed by negotiation are antithetical modes of operating; even mutually exclusive. The remedy of structural control will not, therefore, be necessarily effective when

⁷ See Heap and Ward, "Planning Bargaining - the Pros and Cons: or How Much Can the System Stand?" (1980) JPL 631-637.

⁸ For example the leisure centre at Gardiners Corner is restricted for use by employees of the company occupying the offices during certain hours, this has obvious benefits in terms of potentially more productive staff as well as higher rental values for the complex as a whole. Also in Mansell Street the housing built was luxury apartments and the squash courts were attached to this housing, making them sellable at a profit. Refer to chapter 7.

⁹ See chapter 7: many of the schemes in fact took a considerable amount of time to settle either because of problems at the stage of negotiation or during the drafting of the section 52 agreement.

applied to a system based upon negotiation. For example, the introduction of an arbiter between the interests of the developer and the council as a form of control assumes that the parties are in dispute and that the dispute can be equitably mediated. If, however, the parties possess unequal bargaining power the process of arbitration will not improve that distribution and will not necessarily produce results.¹⁰ This has been amply explored not only in the literature on the law of contract and monopolies but also in the public law field which is plagued by the problems of substituting political discretion with judicial discretion, while leaving the position of the parties intact.

The idea of competing structures in the decision-making process has been explained by Aubert through the use of models. He identifies a 'triadic model' which involves an external and independent arbiter between the two parties in conflict who weighs the arguments to decide the issue on their behalf and so resolve a dispute. In opposition to this he places the 'dyadic model' where there is no third party and the parties must negotiate and compromise to reach a decision. In this latter model the forum is not one of antagonism but of the avoidance of conflict. The parties are concerned to reach a compromise position so as to facilitate a continuing relationship and to obtain mutual benefits. The two models, therefore, are based on different views of decision making.¹¹ If the parties to a dyadic relationship cannot avoid or compromise their conflict they may have

¹⁰ See chapter 10 for a discussion of these issues in the context of the structural reforms introduced in New South Wales.

¹¹ These models are discussed in McMahon, L. et al "Power Bargaining Models in Policy Analysis ... What Prescriptions for Practitioners" (1983) Public Administration Bulletin No.43.

to refer to the triadic system when the process of negotiation fails.¹² To do that, however, involves a movement from one phase to the next, they are not parallel or interchangeable but different levels of decision making.

It is clear from the data that the parties are concerned not to move into a triadic forum. There is a continuity in the relationship between developer and planner and there is often an element of establishing good relations for future contact with the Council. A number of the developers in Tower Hamlets were not merely interested in submitting one successful application but had a whole series in mind.¹³ The geographical location of the borough on the city fringe added to this by making future development in the area likely and thus continued interest by developers was sustained. Thus by simplifying the negotiation stage and by assisting in the drawing up of an agreement a developer could expedite the process, avoid delays and maintain an ongoing relationship with the council. This involved the developer in initiating negotiations by presenting proposals for gains at a very early stage, and a number of the planning agreements were drafted by developers' solicitors and submitted to the Council, rather than *vica versa*.¹⁴

There is a strong indication in the correspondence between the Council and developers that time is the all important factor and that

¹² On the techniques for keeping negotiation alive see Fisher, R. & Ury, W. *Getting to Yes: Negotiating Agreement Without Giving In*, 1981, Boston: Houghton Mifflin.

¹³ Obvious examples of this are Central & City, O.C.L., Tarn & Tarn and Wingate. See chapter 7.

¹⁴ Linklaters & Paines appear as the solicitors for a number of the developers active in Tower Hamlets and they normally did submit drafts, on occasion before the sub-committee met. Refer to chapter 7.

delays must be avoided and compromises reached. This extends to the formation of the agenda for committee meetings, with the developer anxious for nothing to prejudice the possibility of approval. The views of the Members, therefore, become part of the negotiations giving force to the planner's argument. For example, on one particular scheme ('BAGS')¹⁵ there was a dispute as to the content of the planning agreement and Central & City's solicitors, Linklaters & Paines, wrote to the Council suggesting that the clauses of the draft agreement be given effect by attaching conditions to the consent rather than being included in a separate voluntary agreement. The letter in response pointed out that the Council members themselves were concerned with issues of enforcement, suggesting that the scheme was unlikely to be approved without a voluntary agreement.

" ...Although you state that a planning condition, such as draft condition 1 enclosed with your letter, is easily enforceable I regret that I do not agree with you. In the event of a breach of the condition, leading to occupation of the offices before the completion of the residential works, the Council would be faced with a most difficult situation in attempting to take enforcement action. If such a condition, however, is also the subject of voluntary agreement between the parties, the Council has a number of other options open to it which would give a much better chance of ensuring the completion of the development as originally envisaged. I might add that members of the Council are themselves very concerned that schemes of this sort should not be approved unless there is a high prospect of their being able to enforce necessary conditions. " ¹⁶

¹⁵ Refer to chapter 7 for details.

¹⁶ Letter from the Solicitor to the Council to Linklaters & Paines dated 10 September 1985.

THE PROCESS OF NEGOTIATION IN TOWER HAMLETS¹⁷

The planning officers usually became involved in a scheme at a very early stage. Developers approached the Council both to gauge the likely reaction to a particular proposal and to submit a particular scheme. They also made inquiries to discover what Council policy was on a particular type of scheme or to obtain information on criteria they should meet in submitting a scheme. Since 1971 the standard practice on receipt of any application or enquiry, whether verbal or written, which involved the change of use to, or the construction of, offices was to provide a copy or explain the content of the published office policy. The intention was to establish a systematic approach to planning gain and to form a body of precedent which would convey the message to developers that if you want to build offices in Tower Hamlets you must provide planning advantages.

There developed, since this time, an increasingly close working relationship between certain planning officers and certain legal officers of the Council. Most of the planning gain opportunities naturally arose on the western side of the Borough where the boundary met the City and the responsible planners were allocated by area. Thus the same planners would deal with the bulk of the planning gain schemes. It was this part of the Borough that was defined in the GLDP as a preferred office location and was under some pressure from developers

¹⁷ The attitudes and intentions of the planning department expressed in this chapter reflect as accurately as possible the approaches conveyed to the writer during the course of conversations and meetings with various officers of the Council. As such the authoritative worth of these expressions is an obvious target for criticism except in so far as these views are reflected in Council policy. The limitations of this are well documented and accepted and are discussed above in chapter 1.

anxious in the early 1970's to invest in office development on the city fringe. The state of the market at this time was such that property development, particularly London office development, was the most desirable form of investment.¹⁸ Interest rates were low and offices were in high demand which, in turn, put Tower Hamlets in an ideal bargaining position so as to bring back to the constituency some of the profits the boom was endowing on a small number of individuals.

In those early days the influence of this argument was undoubtedly strong. The membership of the Council was strongly left-wing with a number of communist party representatives and the redistribution ethic was not far below the surface. The Borough itself was deprived. That same western fringe had historically been the home of wave after wave of newly arrived immigrants¹⁹ and was characterised by high concentrations of mixed uses of land, multiple occupancy of buildings, street markets, and hostels for the drunk and the homeless. This was the area graphically portrayed in, amongst others, Arthur Morrison's *Child of the Jago*, Bernard Shaw's *Major Barbara* and Charles Dickens's *Bleak House*. It had hosted Oswald Moseley's Black Shirt riots, had suffered from intensive bombing during World War 2 and, more recently, befriended National Front violence.

¹⁸ See Marriott, O. *The Property Boom*, 1967, London: Pan Books, for a discussion of the background to this period.

¹⁹ Which included Huguenots, the Irish fleeing from the potato famines, the Maltese, the Jews escaping the Pogroms and Asians from Uganda. One building on the corner of Fournier Street, Spitalfields embodied these changes by being used as a church, then a synagogue and finally a mosque. See Kerrigan, C. *A History of Tower Hamlets*, 1982, London: LBTH.

Architecturally Spitalfields claims unique pockets of seventeenth and eighteenth century heritage. Hawksmoor's church at its centre, Huguenot terraces and Victorian tenements spreading outwards, with reminders of the paternalistic movement following the Industrial Revolution in workers' estates and almshouses dotted around. An area ripe for gentrification but also teeming with sweat shops, small businesses, a growing clothing industry inherited from the mass Jewish immigration following the Russian pogroms and again after the war began. Half of the population of Spitalfields were born outside of the United Kingdom and by the 1970's most of that percentage were from Pakistan and Bangladesh. Housing standards were low and the proportion of homeless was far above the average for London.

Tower Hamlets for many years had the longest housing list in the country. On the other side of the coin, local government by the 1930's had become critically involved in social welfare. Government reorganisation in the 1960's and 1970's dramatically decreased its social welfare policy role as there was increased centralisation of government functions, but it continued to provide social welfare services on a growing scale. This effectively turned local government into a redistributive mechanism with little or no power to innovate redistributive change.²⁰

Alongside these developments were increasing restrictions on the finances of local government. Since 1976, certainly, there had been a central government policy of encouraging restraint in local expenditure. The effect of this has been felt most severely since 1979 when the Conservative government drew express correlations between

²⁰ See Foster, C., Jackman, R. and Perlman, M. *Local Government Finance in a Unitary State*, 1980 London: Allen & Unwin.

the economic crisis and the level of public spending. From that time on, local government has been perceived as a bastion of inefficiency and a whole series of measures, culminating in rate capping²¹, have been introduced to severely limit local government coffers.²² In the early 1970's, however, the property market appeared to be booming and the opportunity was there for the planning authorities to return some of the profit of a public act back to the electorate.

In the western part of the Borough the original intention was to include a residential element in every scheme on the same site as the office development. The overwhelming problem with this was financial, in that developers could not obtain finance for the offices if the scheme was for mixed use. To avoid this difficulty the officers would negotiate for off-site residential gains conscious of the problem of keeping a relationship between both elements. The legal requirement for conditions on a consent covering the gain element to be related to the office element was translated into a distance calculation, in that they asked for a residential element within one quarter of a mile of the office element, wherever possible. This distance requirement was not always met. For example, in the 'CHAMPS' scheme, where the relocation of the Half Moon Theatre appears as planning gain, the relocation took place a long way from the office development.²³

²¹ See Local Government and Planning Act 1980, Local Government Finance Act 1982 and Rates Act 1984.

²² See Loughlin, M. *Local Government and the Modern State*, 1986 London: Sweet & Maxwell, Modern Legal Studies Series for a discussion.

²³ See chapter 7 for details. As this did involve a relocation the Council considered the departure to be nevertheless justifiable on planning grounds.

Another major restraint on bargaining was that the Council should not, and should not be seen to, benefit directly from gain negotiations. This was interpreted as meaning that no direct payment should be made and no Council member should receive benefit in kind. Officers would not negotiate so as to have a lump sum paid into the Council coffers even if it was to be used for community benefit purposes. These criteria set Tower Hamlets apart from neighbouring boroughs, some of which did not seem to realise the importance of either relating the two elements of a scheme or of maintaining a detached role.²⁴

As a result of these criteria every gain was expressed in physical terms even if it was to be implemented by a third party. The clearest examples of this are the Christ Church Schemes, CHAMPS scheme and Camperdown House.²⁵ All of these involved the payment of money to refurbish or renovate property. The first group of schemes were to provide sufficient funds to renovate the Hawksmoor church in Spitalfields.²⁶ The Friends of Spitalfields who were responsible for fund raising for this purpose were a charitable organisation and they restructured themselves so as to be in a position to manage the sums of money they received from developers. Most significantly they

²⁴ For example, in February 1983 a neighbouring borough council asked a chief planner from Tower Hamlets to give them guidance on planning gain. An informal meeting was held attended by representatives of this council's Valuers Department, Planning Department and the Borough Solicitor. The planning gain schemes they had been involved in by that date included one in which the developer funded a swimming pool on the other side of the borough from the office development. The others involved payments into the general account of the council, the intention being to use the monies received for an industrial scheme nowhere near the development sites.

²⁵ Refer to chapter 7.

²⁶ This is discussed in more detail in chapter 8.

found themselves in the position of having a substantial bank balance after three payments were received and they wished to use the interest for the maintenance of the church as well as for its restoration. Consequently, the terms of their agreements with developers were amended so as to allow for this, as was their own constitution.

The planning gain arrangements were structured so that the developer entered into an agreement with the Council to contribute to the restoration and refurbishment of Christ Church. Each agreement contained recitals which explained the provisions in paragraph 4.15 of the GLDP and the Council policy to achieve planning gain on all office developments. Restoration of listed buildings was considered by the Council to be a valid form of planning advantage and this was supported by the GLDP provisions encouraging such works. This agreement would go on to provide for the Council to issue a planning permission in the form attached to the agreement, on completion of a restoration agreement between the developer and the Friends. After clause 1 of that agreement had been complied with the developer could then apply the internal finishes to the office building.

The restoration agreements made reference to the Council office policy and to the fact that the developer was contributing to restoration works for that purpose. Clause 1 would provide for the payment to be made of a stated sum within a stated period of time and the Friends for their part agreed to hold the money on trust to use the same towards a schedule of works. Thus the agreements were related in terms of office policy and the physical product of planning gain, but the payment of money was between the developer and the Friends of Christ Church.

A similar format was applied with regard to refurbishment works at Whitechapel Art Gallery and the relocating and extension of the Half Moon Theatre. A number of other schemes had involved the provision of housing and again the Council did not benefit directly. The agreements would provide for the developer to build housing or dispose of the residential content to the Council, the GLC, a housing association or some other body approved by the Council by way of long lease or sale. The developer would either have to complete the residential element, or dispose of it before applying internal finishes to the offices, and often the disposal was more convenient to the developer. Again, the agreement would be to provide housing as planning gain and the details of any disposal were between the developer and the body concerned with the Council's approval.

This had not always led to a successful result, particularly as many of these residential works had been put in the hands of housing associations, some of which were connected to the developer, which in the late 1970's were no longer guaranteed enough resources to implement the scheme. They would have acquired the land from the developer for a small nominal amount but would not be able to fund the building works²⁷ because of the lack of finance from the Department of the Environment.

Another way of achieving this detachment had been through negotiating for industrial space which was later put under the management of the GLC.²⁸ In one case Tower Hamlets did agree to

²⁷ This happened with the BAGS (West) scheme and the site earmarked for residential use later became the subject of an office application. See also 37/41 Artillery Lane, both discussed in chapter 7.

²⁸ Whitechapel Industrial Centre. See chapter 7.

manage industrial units built as planning gain, but nothing of this appears on the planning files and was conducted through separate and distinct negotiations. In no case did planning gain take the form of a building in which the freehold or leasehold was handed over to the Council. At the end of the study period the Council were negotiating for a Council library and sports centre in Whitechapel High Street which involved representatives of the Council being appointed onto a management committee and the Council itself would issue identity cards to those wishing to use the facilities. The officers of the Council considered this to be a problem in that the Council could be seen as using its planning powers to achieve 'ulterior purposes', that is providing services attributable to other Council departments.

In order to avoid this possible problem of legality by the Council's act being regarded as falling outside of 'planning', the Borough solicitor advised the planning department to simply purchase the library at its market value (which was anticipated to be less than the construction costs) and to also buy, at market value, the sports centre after it had been built. The land on which it was to be built was owned by the Council and the developer would have to purchase the land before construction began. The sum total of these latter two transactions were anticipated to cancel out any overall cost to the Council. The effect, therefore, would have been the same as if the developer allowed Tower Hamlets to manage the facilities which had no commercial worth to the developer, but the part played by the planning gain policy in the transaction was very much simplified as the agreement could merely provide for the construction of these buildings as part of the development scheme. The sales would be at market value and at arms length and thus safe from criticism.

In the early days of the policy the Council had taken a technical²⁹ and financial approach to their role as negotiators. Valuers had been used to assess the likely profit accruing to the developer on any given office scheme and the planners would use this profit margin as a negotiating tool. The officers went to the Committee with very optimistic schemes³⁰ based on taking a large proportion of the developers profits and these were negotiated downwards in order to reach a compromise. Many of the earlier bargains were never implemented as developers were not prepared to sacrifice a dictated level of profit and what resulted was an ad hoc implementation of office schemes dependant on the committment of individual planning officers to the bargaining process.³¹

This type of bargaining occurred during a period of boom and at a time when the GLC were adamantly opposed to any office development. They operated a restrictive policy in the Community Development Areas ('CDA's') where they were the local planning authority. In the early 1970's such an area existed within the western part of the borough, namely the Stepney-Poplar CDA, and the GLC refused two large office schemes (Minet's development in Leman Street

²⁹ The Tarn & Tarn schemes set out in chapter 7 involve intricate calculations of square feet carried over as credit from one scheme to the next.

³⁰ For example, the Tarn & Tarn Schemes in the early 1970's refer to a level of 60% residential to 40% offices in any scheme. This has since been scaled down to 50:50 where the renovation of listed buildings is concerned.

³¹ This was a view expressed by a planner involved in negotiations in the western part of the borough throughout the study period and before and was supported by the solicitor responsible for planning agreements and consents. No data was available on file to either support or deny such a view as these early negotiations either took place before the policy was published or were not recorded.

and Beagle House in Braham Street) on a policy of no more offices in London. Both were granted on appeal on economic grounds in that the offices brought employment to the borough and contributed to national export figures. This restrictive policy was also operated by some of the London Boroughs, perhaps most consistently, until 1985, by Southwark, and it raised speculation as to obtaining consents on appeal.

These developments prompted Tower Hamlets to produce and implement a policy on justifiable planning grounds, specifically the attainment of mixed land use in an area where such a mix had traditionally existed. By using planning ideology to support the desirability of perpetuating such a mix of use the operation of a planning gain policy was firmly grounded within what the planners (and indeed the lawyers and politicians) advocate to be the legitimate role of planning.³²

It also appeared to remove the role of the planner from what was perceived as a 'political' role (trying to syphon off development profits to deprive the entrepreneur and return them to the community which created them) to the neutral 'professional' (objectively weighing the competing land uses and deciding upon an appropriate mix in the best interests of the community). Both of these words have many meanings and connotations and evoke at times opposing impressions and reactions, seated in the context in which they are used and the ideologies which support them and which they support. They clearly are capable of possessing a meaning which embodies a judgement as to the potential merit of any resulting act. When a person is said to act

³² The issue of planning ideology is considered in greater depth in the following section.

in a political way, or as a political animal, there is a sense of distrust, that the person is acting out of self-interest or for ulterior motives. Yet when a person acts in a professional manner the action takes on a neutrality, it becomes the act of a person acting in 'a proper way' and in accordance with the rules and standards appropriate to such an act.³³

In this way by relying upon a published policy which places planning gain in the context of the pursuit of what is recognised as legitimate objectives of planning it does not merely signify the creation of a guideline upon which to build a body of precedent. It does far more than this. It evokes and reproduces the ideology of planning, of professionalism and of law. The planners have a rule, created within the legal framework of planning, which can be put forward as a justification for their negotiating position. The rule is a flexible one and capable of interpretation and reinterpretation depending upon the circumstances presented and the aims of the planner. Nevertheless it stands as a symbol of the range of what the planner can legitimately ask for.

Clearly, however, the actual effect of the policy was still recognised by the planners as involving the redistribution of resources and the methods of describing the operation of the policy almost invariably encompassed more than what many would regard as 'pure planning grounds'. This goes some way to indicate, not that the planners slip up, but that it is indeed impossible to isolate planning functions from the political.

³³ For an insight into semiotics see White, J.B. *When Words Lose Their Meaning: Constitutions and Reconstitution of Language, Character and Community*, 1984 Chicago: University of Chicago Press.

" The Council, through its office policy, is concerned to ensure that office development makes a positive contribution in the Borough by offering direct community benefits in this socially deprived area - particularly in relation to improvements in housing and the expansion of job and leisure opportunities that can be taken up by local people.

To this end and to assist developers in the preparation of schemes, the Council has adopted what it feels is an appropriate ratio to aim for. This mix of uses is based upon valuation advice, and has proved to be achievable in practice. Judging from the amount of new building activity, the policy is obviously no bar to investment. "³⁴

Thus the position here goes beyond what Tucker has identified as a distinction between councils whose central concern is financial viability of the scheme, and those who direct themselves towards planning objectives. He concludes that in the former case planning objectives are blurred by financial considerations but this does not give adequate weight to the inter-relationship between planning objectives and economic considerations. That is, the science of planning is not blurred by economic considerations but planning is fed by and feeds the economic.

The planners must also inevitably be affected by the political ideology of the council membership as it is they to whom they report and who must accept their proposals, but the personality of the Membership also has an influence.³⁵ The planners at Tower Hamlets have recognised that the Council members are concerned about office development in the Borough, as it increases the rates revenue and there has been some direct interference in negotiation by the members themselves who are aware of what the developers are likely to agree

³⁴ Statement by the London Borough of Tower Hamlets in the Appeal by Daxmay Properties re Fairholt House, Whitechapel High Street, E.1. May 1982. Paragraphs 7.6 - 7.7. This appeal is discussed in chapter 11.

³⁵ Refer to the section on planners below.

to because of the precedents set. Some of the schemes have been specifically aimed towards satisfying the interests of the political leadership. For example, with the CHAMPS scheme the developer knew that the leader of the Council was strongly supportive of the Arts and opposed to the Half Moon Theatre leaving Tower Hamlets. Also with Camperdown House the Whitechapel Art Gallery approached an individual Member to explain their need for funding and the Member referred it to the planners to use as a planning gain scheme.³⁶

The planner as a professional is perceived to be the best person to judge what is an adequate mix of land use. The validity of the existence of town planning and its benefit to the public is assumed and replicated in the rule itself. The existence of a policy indeed affirms the value of planning, particularly as it carries with it the framework of the law. The policy also is intended to achieve benefits for the community, and there is with this the assumption that the planner can determine what it is that 'benefits', can recognise a 'community', and that such a community exists. Thus the planner appears as objective, professional and altruistic acting only in the public interest and on established principles.

The policy then acts as a starting position for negotiation, as do any development briefs that have been produced for certain sites. For example, the brief prepared for the site at Gardiners Corner was for

³⁶ There may also be indirect interference which is more difficult to monitor. For example a Member of the Council worked for Wearwell at the time their schemes were approved. Some of the Wearwell schemes infact provide no tangible planning gain as such although the fact that they recently acquired industrial space elsewhere in the Borough and were an important local employee was put forward as a planning benefit. For details see chapter 7.

200,000 square feet of offices and a leisure centre.³⁷ Sedgwick Forbes, who successfully tendered a scheme, in fact required 300,000 square feet and added shops and a theatre as additional gains. Another example was Goodman's Yard where there was no brief but the anticipated amount of office space was around 200,000 square feet. Oversea's Containers Limited (OCL), the developer, were not prepared to build offices below 300,000 square feet as they needed the space for expansion, but they were prepared to build fifty residential flats and four squash courts and this scheme was accepted subject to the occupation of the offices being limited to OCL for five years. The increase was justified to the Committee on the basis of keeping OCL, a valuable employer and exporter, in Tower Hamlets as well as the residential element. In fact, the residential flats which were built were of high quality destined for the private market and OCL did not occupy the offices.

THE PLANNERS

The system of development control relies upon professional judgements made by the actors within it, who use previous decisions as precedents but have the task of interpreting and reinterpreting standards and policies to assess the acceptability of each application on its merits. Planning assumptions play a large part in this as does the political ideology of the Membership of the council.³⁸ The

³⁷ Refer to chapter 7.

³⁸ See Loughlin, M. "Municipal Socialism and A Unitary State" IN: McAuslan & McEldowney (1985) eds. 82/106 at p.92.

planner must be able to justify his attitude to a scheme on the basis not only of the criteria he has been educated to espouse but also on his knowledge of what the committee he serves will be prepared to accept.

The planning process puts the planner in the position of objective arbiter between competing uses for the scarce resource of land. In making his choice he has certain tools which may be made use of, some of which are espoused in statutory and/or public documents and others which come from the profession and ideology of planning itself. These sources endow the planner with a neutrality; he is an adviser to a duly elected Council and that advice is given in the public interest with political ideals being filtered into the system at committee level.

This view of the role of planners is enforced by the ideology of the discipline itself. The purpose of town planning at its simplest level is to produce an arrangement of uses which produces an orderly balance in the best interests of the public. To produce such a balance is an unquestioned good, the only criticism comes in whether or not it is being achieved by the policies adopted by the council. In other words the purpose of planning takes on a 'common sense' value, it becomes a tradition, a self-evident and self-justifying truth. This is also the case with the social benefit aspect of planning. That is, town planning is taken as producing a better and healthier society. By aiming to reduce overcrowding and congestion, to provide more open space and gardens, to encourage neighbourhoods and community living, to restore our architectural heritage and to avoid blight are all viewed as attractive aims which will help improve the standard of living.

This goes hand in hand with physical determinism, that by controlling plot ratios and restricting development in some ways, while encouraging it in others, will help to remedy problems created by unequal distributions of wealth. Included in this is a view of planning which takes on a definite social significance in that it provides the physical framework for an improved way of life, and that improvement will result from controlling urban growth, from encouraging low density housing and from promoting a community lifestyle.³⁹ The social effects of this have become a part of the ideology of planning. Almost unconscious aims espoused by individual planners and promoted by their professional body, they take on a neutrality which reinforces the arbitral role of their decision making.

The truth of these precepts has in turn shaped, and been shaped by, the law and the institutions of planning. The achieved status of 'truth' has provided a mechanism for the production of knowledge and technologies to affirm the expertise of planners so that the objectivity of their role is validated. The profession of planning has its own terminology, its own techniques, its own self-justifying values; all of which sets its members apart from non-planners but also invests the profession with a trust, reinforced by law, that it operates on the basis of true values exercised in the public interest. Other writers⁴⁰ have examined the way in which the mechanism of public participation serves to validate the functions of planners. That is, by formally

³⁹ See Foley, D.L. "British Town Planning: One Ideology or Three ?" (1960) 2 British Journal of Sociology 211 for a classic statement of these differing levels of planning ideology.

⁴⁰ See, for example, Simmie, J. Power, Property and Corporatism: The Political Sociology of Planning, 1981. London: Macmillan Press.

including the public in the process, planning is seen to be sympathetic to the wishes of the community, yet the views expressed through the participation exercise only reflect certain articulate interest groups. By inverting this, participation appears as part of the mechanism for affirming the validity of the planning process in that it is seen to be operating in the public interest, whereas it continues to have a limited definition of what the public interest is.⁴¹

The ideologies of planning, then, are not merely constructs invented to provide for the growth of a profession; they provide an apparatus of knowledge and of power.⁴² They are not ideologies in the traditional sense of that term but are capable of producing a form of truth on which the persistence of the mechanism depends, what Foucault refers to as discourse. This puts planning into the network of power, as an apparatus which operates alongside the law and often in conflict with it. The two cannot be separated, but at the same time have a degree of independence as they are involved in the business of producing their own discourse as well as supporting each others'. Both are concerned with ensuring the functioning of society and with concealing domination and, as such, are necessary elements of the network of power, yet the discipline of planning has the freedom to develop its own mechanisms for supporting the system as a

⁴¹ On this see McAuslan, *The Ideologies of Planning Law*, 1980 Oxford: Pergamon Press, Urban & Regional Planning Series, Volume 22, esp. Part 1.

⁴² This analysis views power not as something which is possessed by a group or an individual to be used against another, but rather as Foucault perceives it as something more than repression in that it can positively create knowledge and discourse so that power becomes a network throughout the social body which is mobilised and reproduced by its exercise. See *Power/Knowledge*, C. Gordon (ed), 1980. New York: Pantheon.

whole. In creating and implementing those mechanisms planners are constrained by their own discourse and the structure of the state but are also dedicated to realising the truth upon which society can function. What results is a complex system which cannot be reduced to economic determinism and which must be analysed in the context of individual apparatus' of power rather than simply legitimacy of action.

The self-evident precepts upon which planning operates must, therefore, be seen not only as attractive ideals but as a vehicle for making value laden choices as well as representing such a choice. Planning decisions inevitably involve the allocation of value between competing claimants. Land is a limited commodity and thus its use for one purpose denies its use for another and restricts the amount of land available for that other use. The decision will also affect the value of land in that vicinity and will deny or encourage hope value for the potential of that land. The decision will have economic effects for the council through the rate base and for landowners and developers through the opportunity to make profit. It has carry on effects for the public in the area and, potentially, in the wider population by affecting availability of types of property available to the market and the level of amenities and services.⁴³

To contend, therefore, that planning decisions are made through a balancing of land use requires a balancing not simply of technical criteria but of political variables. Planning, however, has no patent political nature in that both political parties have both not questioned the usefulness of planning and the same planners serve successive

⁴³ See Koegh, G. *Planning Gain: An Economic Analysis*. 1982, unpublished discussion Paper in Urban and Regional Economics, Series C. No.12, Department of Economics, Faculty of Urban & Regional Studies, University of Reading.

council members. Yet the ideology of planning does stand for a political choice to confirm the importance of neighbourhood concerns and to centre their attention on the physical result of planning.⁴⁴ As Simmie points out 'So far, nobody has taken a radical political view of physical planning'⁴⁵ and he goes on to illustrate the upper class values inherent in the failure of planners to be active in recognising and redistributing social inequalities.

It could be argued that planning gain represents the radical planning that Simmie has been calling for for over 25 years, in that it involves an attempt to return development profits to the community.

" Upper class ideology is exemplified in planning by the garden city, garden suburb, new town thinking of the twentieth century ... A second aspect of upper class ideology in physical planning is the failure to recognize that to be in favour of planning is to be in favour of either ensuring that market forces produce a specified set of results or of interfering with those forces so that goals are obtained. This physical planning has failed to do. There are three examples of this failure :

- (i) over-reliance on the private sector in housing;
- (ii) insufficient resistance to development lobbies;
- (iii) the failure to appropriate communally increased land values... "⁴⁶

Yet the process is still couched in the terms of development control. The policy is not proclaimed as a revolution, but as an everyday application of the aim to achieve a balanced mix of uses. Negotiations take place so as to ease contributions from developers with guidelines

⁴⁴ It is interesting that there is little evidence of input from other social sciences into the area of planning. See Musil, J. *Urban Sociology and Planning: Examples of Sociological Research Relevant to Planning Problems in Some European Countries*. 1969, London: Centre for Environmental Studies, University Working Paper, 5.

⁴⁵ Simmie, J.F. "Physical Planning and Social Policy " (1971) *Journal of the Royal Town Planning Institute*, 450-453.

⁴⁶ Simmie (1971) *ibid.*

flexible enough to accomodate what the developer is prepared to do. It is marginal and ad hoc with results that fall far short of the expectations behind the Community Land Act or the 1947 Planning Act.

Nevertheless it is a patently political process. Planners are exercising power which leads to a determination of who gets what, when and how.⁴⁷ They are involved in the authoritative allocation of values⁴⁸ through making routine decisions which have a high policy content and through structuring the agenda upon which policy making takes place.⁴⁹ The expertise of the planner will be relied upon by local politicians who are reluctant to make decisions in the early stages of a scheme. Altshuler⁵⁰, in his empirical work, has concluded that this is done so as to reduce the number of controversial decisions the politician has to make, which can also be posited as the reason for recruiting expertise or professionals into the system. The Members do not have to accept the advice they are given by their officers but, at the same time, the status of an expert is such as to engender trust and to give authority to that person's views.

Significant planning problems are never simply a question of applying technical criteria to a set of facts. The balancing act must go on by prioritising one aspect of an application against another, one

⁴⁷ Lasswell, H.D. *Politics: Who Gets What, When, How*, 1958, New York: Meridian Books.

⁴⁸ Easton, D. *The Political System*, 1953, New York: Alfred A. Knopf.

⁴⁹ See Vasu, M.L. *Planning and Politics: A National Study of American Planners*, 1979 Chapel Hill: University of North Carolina Press, who makes this point in an empirical study on planners' attitudes.

⁵⁰ Altshuler, A. *The City Planning Process: A Political Analysis*. 1965, Ithaca, New York: Cornell University Press.

policy in a plan against another. In negotiating a planning gain the planner has to decide what should be given priority and what amounts to a sufficient gain. For example, in negotiating an office development and housing in Mansell Street the planner decided that the housing in the scheme was sufficiently important to allow the developer to build even more office space than originally anticipated for the site.⁵¹ In ordering priorities the planner may have the support of precedent, valuations on profitability and land use patterns to guide him, but he is not simply applying a fixed rule, but using those concepts to justify the value laden decision he makes.

That decision will be fed by his professional background and the guidance to practice given by his professional body. It is also coloured by anticipating the reaction of his political leadership and his own approach to the implementation of the policy in question. There is also a conscious consideration of the legitimacy of the process. In other words, the planner in his negotiations will be aware of what is likely to be enforceable against the developer and, particularly where the scheme under consideration is innovative, the planner will use his knowledge of the law to limit what he is prepared to accept or suggest. He will consult with lawyers as he consults with valuers, if not more so, to determine the limits of an enforceable bargain.

The influence of the law, which is often portrayed as minimal in the literature, is also felt in that the planner as well as the developer does not want a scheme to go to appeal. This is for two reasons. Firstly, the validity of the policy and its strength as a negotiating tool will remain intact as long as it is untested. Although Tower

⁵¹ See chapter 7.

Hamlets is confident in the office policy they have no control over an Inspector and, thus, the possibility of an appeal makes them vulnerable. Second, an appeal is publicity for the policy and attracts academic and public scrutiny in a forum of antagonists. While the council and its officers do consult with the public through formal and informal channels there is a paternalism in this type of participation which sets that process apart from an appeal.

The planner is also influenced in his standpoint by the Ministerial directions he receives from central government. The issue of a circular on planning gain following the PAG report was viewed with trepidation. The planners and lawyers at the Council analysed its contents to see if it placed restrictions on the operation of the policy. It was interpreted by them, and an information report was made to the planning committee indicating that although there were problems with the document it did not prevent the policy from continuing to operate.⁵² The planners then do not negotiate planning gain in the belief that they are acting in an illegitimate way, or in disregard for what the courts and central government indicate is lawful. Rather they are anxious to build a strong position from which they can defend the legitimacy of their actions on planning grounds.

The decision of the planner is also influenced by the wider context of planning gain. In the history of the Borough there have been refusals on office applications which have succeeded on appeal. As a result of this there is an acknowledged belief, in the Council and among the officers, that office development cannot be avoided and planning gain represents a compromise to help compensate for the

⁵² See chapter 11 on official responses to planning gain.

disbenefits of development. The planners often put this into the context of lack of public funds to provide the gains which the developer will provide and the problems of unemployment, housing, community facilities elsewhere in the Borough.

It has been suggested⁵³ that the negotiations in planning gain schemes depend upon the desirability of the scheme and the confidence and ability of the officer. Certainly these are both influential factors⁵⁴ and can lead to differences in result. Some planners were anxious to adhere strictly to policy guidelines, whereas others were prepared to be more pragmatic in their approach. Some were eager to secure a scheme⁵⁵ which had some element of gain attached to it even if the extent of that gain was less than anticipated so as to make it an economically feasible compromise for the developer. Yet such an analysis is too simplistic in that it fails to recognise the political

⁵³ See for example, Main, S. The Role of Negotiation in Development Control, 1979. Unpublished student dissertation, Department of Civic Design, University of Liverpool.

⁵⁴ At the end of the study period there was a change in personnel at Tower Hamlets as a result of reorganisation. Following this the Borough Solicitor was annoyed to receive a letter from Central & City which informed him that the planning department had told him they were no longer prepared to negotiate off-site gains even though the council had made no resolution to that effect. See chapter 11, below.

⁵⁵ During the Inquiry into an appeal on 36/40 Artillery Lane in 1983 a planner was examined as to why a 6-storey glass-clad office building (FABS Scheme) had been approved in 1979 when it was completely out of character with the area. He responded by saying approval was recommended by another officer and he would not have done the same. He considered the renovation of Christ Church as planning gain had nothing to do with ensuring a mix of uses and represented a contradiction of Tower Hamlets policy although the report on the scheme justified the gain as according with that same policy. He went on to suggest that the scheme would not be approved since the reorganisation of officers.

nature of the negotiations and the influence of professionalism and knowledge on the planner. Vasu's conclusions are more satisfactory⁵⁶

" In reality, the basis of any recommendations made by a planner or any professional is probably the result of an interaction of his own values with the values of his profession, his expertise, and the situation in which he finds himself. "

The expectations this places on a planner are considerably high. He is an employee of the council and only answerable to its Members. His decisions, if adopted by the committee, become a precedent for future decisions. He is not appointed because of any affiliations to a political party and has no formal training in sociology, economics or political science. He has a great deal of contact with the development industry and does form strong working relationships with some individual developers⁵⁷ which may consciously or subconsciously affect his perceptions.⁵⁸

⁵⁶ Supra note 49 at p.21.

⁵⁷ The most glaring example of this in the data collected was Central & City who entered into several planning gain schemes, including those involving the payment of money to third parties for the restoration of listed buildings and were responsible for the relocation of the Half Moon Theatre.

⁵⁸ By way of anecdote on this point, a Tower Hamlets planner was heard to remark after being told the details of one scheme "Why did [the developer] get all of that office space anyway ?". The planner who had negotiated it replied "I don't know. I think that he just kept increasing it bit by bit and we kept agreeing."

THE BENEFITS DEFINED

Utilitarianism brought to public law the problem of determining the public interest by making the legislature responsible for creating legislation which was a reflection of it.

" ...The happiness of the individuals, of whom a community is composed, that is their pleasures and their security, is the end and the sole end which the legislator ought to have in view. " ⁵⁹

Bentham to an extent recognised the problems of definition this approach to government created

" The interest of the community is one of the most general expressions that can occur in the phraseology of morals: no wonder that the meaning of it is often lost. When it has a meaning, it is this. The community is a fictitious body, composed of the individual persons who are considered as constituting as it were its members. The interest of the community then is, what? - the sum of the interests of the several members who compose it. " ⁶⁰

He adds a footnote to this passage which reads 'interest is one of those words, which not having any superior genus, cannot in the ordinary way be defined'.

By the early twentieth century the courts had accepted the relevance of public interest to administration⁶¹, together with the separation of the legality of the decision and the political choice it represented. Administrators being accountable to the courts on issues of legality (were they acting in accordance with their powers under

⁵⁹ Bentham, J. *An Introduction to the Principles of Morals and Legislation*, edited by Burns, J.H. and Hart, H.L.A. 1970, Reprinted in Lloyd, *Introduction to Jurisprudence*, 3rd edition, 1972 pp.185/186.

⁶⁰ Ibid.

⁶¹ See the landmark cases of Board of Education v Rice [1911] AC 179 and Local Government Board v Arlidge [1915] AC 120.

the law? were the right procedures observed? the principles of natural justice met and so on) and to parliament on issues of policy. The enforcement of this division has presented obvious problems to public lawyers, many of which are illustrated in the area of planning⁶² and even more minutely in the area of planning gain.

The Town Planning Acts have reflected this commitment to public interest by incorporating wide discretion into this system. By allowing local government to impose whatever conditions it thinks fit on a planning permission⁶³, there is an assumption that that discretion will be exercised in accordance with the public interest. Similar observations can be made about the provision allowing local planning authorities to take account of other material considerations in its deliberations on the application.⁶⁴ The courts in overseeing the exercise of discretion inherent in those sections have taken a restrictive approach⁶⁵ and McAuslan⁶⁶ has explained this in terms of the differing ideologies upon which the planners and the courts make their decisions; the former concerned with the protection of private property rights, and the latter with the ideology of public interest.

Research in the United States has gone some way to showing that planners themselves are aware of some of the problems inherent

⁶² For a discussion see McAuslan, *supra* note 41.

⁶³ Section 29 (1)(a) TCPA 1972.

⁶⁴ Section 29(1) TCPA 1971.

⁶⁵ For a detailed discussion of this see Loughlin, M. *Development Control: The Importance of Social and Economic Considerations*, 1977, LL.M. Dissertation, University of Warwick; Loughlin, M. "The Scope and Importance of 'material considerations'" (1980) 3 *Urban Law and Policy* 171.

⁶⁶ *Supra* note 41.

in the concept of public interest. Vasu⁶⁷ distributed 1145 questionnaires to public and private planners and obtained an almost 70% response rate. Two of the statements made, to which they either agreed or disagreed, were 'There is a solitary public interest in which all social and political groups hold a share' and 'Urban Planners by virtue of their professional training, are in the best position to be neutral judges of public interest'. While 45% of public planners and 40% of private planners were prepared to agree with the first statement only 28% of public and 25% of private planners saw themselves as being in the best position to judge what it was.

In the context of planning gain the local planning authority is called upon to assess the public interest in a particular way in that it is the arbiter of what does or does not amount to a community benefit. At grass roots level this task falls on the individual planner in his private negotiations with the developer. This puts the planner in the position of protagonist for an 'adequate community benefit' while he has one eye on what his members are likely to accept and the other on what the developer is prepared to do.

The concept of community benefit is, like the term public interest, not something with a clear objective meaning and can only be judged in the light of perceptions based upon knowledge and experience which in turn brings into play the whole framework in which the process takes place, as well as the personal and professional values of the planner and his members. It is necessary to examine what feeds that knowledge and experience to assess whether the

⁶⁷ Supra note 49.

interpretation of the term community benefit is one which is representative of that so-called community.⁶⁸

As a preliminary observation the term carries with it the sense of acting on behalf of an identifiable group who themselves have a consensual base. That is they operate as 'a community' with 'community values'. The role of the planner and the council seems to be to identify what those community needs and values are. The assumption that the community exists is not questioned and the planning gain policy speaks of the community in non-specific terms. That is, community benefit is in the singular and is not related to any particular geographic area, socio-economic class or racial or ethnic group. There seems to be a presumption that a collection of land uses or types of development can be identified which all, or possibly the majority, will view as a benefit to them.

Along with this is the presumptions that these 'community benefits' can be identified by the local authority and that this identification can effectively take place through existing methods of enquiry and institutionalised forms of participation.⁶⁹ It also assumes

⁶⁸ The planners at Tower Hamlets have acknowledged this in their call for information through the publication in 1976 and 1977 of 9 Topic Papers on the Borough Plan. For example, the Topic Paper on Leisure & Recreation points out that the Council must choose between different options so as to prioritise spending on one form of leisure activity over another and this raises questions as to the importance of leisure facilities as opposed to other services and the ranking of those facilities. The Paper concludes "These are difficult questions, because it all depends upon personal values, and people are bound to disagree with each other. This Council cannot decide on priorities without knowing what people who live in the borough think. It is vitally important, therefore, that you help the Council make the right choice." Similar statements appear in each Topic Paper.

⁶⁹ There is a paradox here in that the Council is aware that only limited interests are in fact represented but as they are the only views they have they are taken as the views of the community. This is evident from the consultation exercises preceding the local plan for

that planners and council members are equipped to perform this identification process and will take steps to ensure that they effectively balance the interests of the electorate.

The starting point for the assessment of what amounts to a community benefit lies in the documents which exist as guidelines, that is the GLDP, the office policy itself and previous agreements reached with developers. All are public documents and have gone through a system of participation either in the form of consultation exercises and an Inquiry or adoption in a public forum. These documents represent the products of a legitimate pattern of interaction between pressure groups and the council in making policy through which all pressure groups are theoretically accorded access. It is clear, however, that the pluralist dream does not function along the lines of the ideal.⁷⁰ Those groups which are organised, articulate and have some relationship with the decision-making process are the most likely to participate in this forum⁷¹, and many people remain unrepresented.

As a documented example of the problem⁷² is the consultation exercise conducted in 1976 preceeding a local plan for Spitalfields in which ten meetings were held between the planning department and various interested groups. Two of those were held for local residents, the second at the request of those attending the first. Fourteen

Spitalfields and the Borough Plan.

⁷⁰ See eg., Pateman, *Participation and Democratic Theory*, 1970 Cambridge UP.

⁷¹ See Simmie, J. Power, *Property and Corporatism: The Political Sociology of Planning*. 1981, London: MacMillan Press Ltd. Sociology, Politics and Cities Series.

⁷² *Towards a Local Plan for Spitalfields, Interim Report, Volume 1 Consultation Report and Volume 2 Detailed Studies*, 1977 London: LBTH.

groups were represented at that meeting as members of the Spitalfields Consultative Committee and the Spitalfields Community Action Group, two highly organised and well-structured pressure groups with internal management committees and funding. Their views appear in the report as 'the community', even though the same report acknowledges the lack of input from the Asian community in Spitalfields which comprised about 50% of the population of the area in the early 1970's.⁷³

" The project Office undertook to assist the Planning Department in arranging a meeting with representatives of the large Asian community in the area and also with the translation of a summary of the Issues raised in the Discussion Paper. Unfortunately little interest developed and in the end neither the meeting nor the translation was achieved. "⁷⁴

The GLDP lists in broad terms what it is that amounts to a planning advantage⁷⁵ and includes 'special benefits in the form of buildings, open space, pedestrian access and other facilities for the use of the public' as well as residential accommodation, conservation of buildings, improvements in public transport and the redevelopment of areas of poor layout and design. Tower Hamlets' office policy used this as a basis for the more specific requirements listed with reference to each of the preferred office locations and included housing, industrial floorspace, leisure facilities, restoration of listed buildings and 'other non-office employment activities'. The type of housing encouraged at Gardiners Corner and in Spitalfields was single person accommodation, a shortage of which was identified by means of surveys

⁷³ Census 1971, extracted in Volume 2 *ibid.*

⁷⁴ Volume 1 *ibid.* p.2.

⁷⁵ See above, *The Context of Decision Making*, chapter 4.

and census data, although clearly even from the groups who did participate in consultation exercises there was no consensus.

" The discussion about housing was a forceful reminder that any determination on the part of local authorities to obtain a public concensus (sic) of opinion om some subjects will be a fruitless task. Local views on housing were as diverse as one would expect from a nation-wide survey and imply that only a range of housing options, both within and outside the area, will meet the needs and aspirations of the community." ⁷⁶

All of the benefits achieved were then justified within this framework, which stood as a reflection of what could amount to a benefit for the community, thus tailoring to some extent the options available.

There are two other possibilities for pressure group interaction with local government which have been identified by LaPalambora in his work on Italian politics⁷⁷ and which appear in Tower Hamlets. Firstly, what he refers to as 'Clientela relationships' which exists when

" an interest group, for whatever reasons, succeeds in becoming in the eyes of a given administrative agency, the natural expression and representative of a given social sector which, in turn, constitutes the natural target or reference point for the activity of the administrative agency. " ⁷⁸

This represents a substantial narrowing of the principles espoused by public participation exercises in that the council comes to regard the views of a single, or a limited number of groups, as representative rather than pursuing or being open to the views of all. Even if the

⁷⁶ Towards a Local Plan for Spitalfields, Interim Report Volume 1, p.12.

⁷⁷ LaPalombara, J. Interest Groups in Italian Politics, 1965 Princeton: Princeton University Press.

⁷⁸ Ibid., p.262.

council continues to be open to diverse views and indeed requests information on a broad base the views of certain of those groups may be given more weight, while those of others diminished. This may not be the result of a conscious choice by the council or the planners but as a result of the visibility and pressure of the groups concerned as opposed to the presumed apathy of the silent majority. This has the effect of replacing the concept of 'public interest' or 'community interest' with that of the limited interests of the organised groups involved.

The second type of interaction is 'Parentela relationships' which exist where a group gains an input into the system not because they are representative of a sector of the population of an area but because of their attachment to the administration. The links between these groups and the administration are usually indirect and are based upon the party politics of the administration so that they are supportive of that policy and at the same time are likely to benefit from it. The administration will accommodate and effectively subsidise the group who in return provides information and a mechanism for control. This is very close to the idea of corporatism; the influence of these groups is pervasive and their relationship with the administration is not one simply of negotiation but of shared interests in regulation and control.

In the context of gains achieved in Tower Hamlets it is not easy to reflect this dichotomy. Clearly, some interest groups stood apart from the others in terms of their involvement with the Council both in the formal participation exercises and informal consultations. Not all were influential, and those who stood opposed to planning gain being used at all maintained a relationship with the Council of conflict

rather than of influence. These groups did have some inevitable effect in that they constituted an opposition causing the Council to justify its policy and to be aware of the possibility of criticism.⁷⁹ Most active among these groups were the Spitalfields Housing and Planning Rights Service ('SHPRS') who opposed any office development in Spitalfields and the stance of the officers of the Council in meetings with them was to weaken this view by illustrating the benefits of planning gain.

At the time of the Borough Plan Inquiry this group, and others⁸⁰, were of the view that planning gain did not provide adequate means of compensation to the community and had failed to ensure a mixture of uses. The main concern of SHPRS was to work towards keeping land values down so that industrial and residential development in Tower Hamlets would not be discouraged and while recognising the benefit of the housing association element in some of the schemes, disputed the actual benefit brought to the local residents by expensive private housing and squash courts.

On the other hand, groups that did accept the practice were consulted on schemes and were provided with information on schemes under negotiation. For example, in 1981 the Spitalfields Local Committee presented the Council with a list of criteria by which planning applications should be considered and called for increased consultation.

⁷⁹ Peters, B.Guy "Insiders and Outsiders: The Politics of Pressure Group Influence on Bureaucracy" (1977) 9 Administration & Society, No.2 191-218.

⁸⁰ See the objections to the Borough Plan discussed above in chapter 4.

- " 1. There should be no further office development in Spitalfields.
2. Where in spite of local committee opposition, office planning permission is granted the developers should provide a housing gain for Spitalfields the size of which should equal or be greater than the square footage of the office development.
3. No consent should be granted for the demolition of listed buildings unless agreed plans already exist for their replacement and these plans are certain to be carried out. In general the listed buildings of the area should be conserved wherever possible.
4. Buildings inside the periphery of the Conservation Areas should all be preserved and rehabilitated.
5. There should be no loss of residential usage whatsoever.
6. New industrial schemes should be judged bearing in mind the following points: number of local jobs created; degree of visual, chemical, noise pollution; degree of traffic generated; whether or not the development is in an existing industrial development zone.
7. Change of use of small business premises and shops should be judged bearing in mind the following points: local jobs created/lost; local need for the new shop/service being proposed; degree of pollution as above.
8. There should be support of all housing schemes which are designed to local housing needs. "⁸¹

There is also evidence of the influence of organisations seeking gains, such as the Whitechapel Art Gallery, the Friends of Christ Church Spitalfields and certain private individuals who owned listed properties in Spitalfields.⁸² All of these were strongly in favour of planning gain and had connections with Council members or the officers themselves. The restoration of listed buildings in Spitalfields

⁸¹ Agreed Criteria for Consideration of Planning Applications, Spitalfields Local Committee, November 18, 1981.

⁸² One of whom was also on the Committee of the Friends of Christ Church.

and the promotion of the Arts were aims espoused by a number of the elected members who also sat on the planning committee.

SUMMARY

In the context of negotiation planners regard themselves principally as professional advisers, conducting themselves in accordance with the policies of the Borough, the expectations of their professional body and the knowledge gleaned from the Borough solicitors on the enforceability of the proposals. Some selected interest groups play a part in the formulation of policy but the views received from organised local interest groups is not automatically treated as the community interest. It is first measured against the professional views of the planner and the relationship of the group to the council. In all, any evidence of a community view on planning gain is lacking and the determination of what amounts to a gain is based upon competing factors which are weighted by the planner in accordance with his values, the values of his profession and organisational demands.

The planner then does not stand as representative of the 'community interest' against the interests of the development industry, but is himself making political decisions which become accountable through the Committee system within which he appears as technical advisor.⁸³ He is open to acquiring knowledge and experience not only

⁸³ It is clear that he does not regard himself as representative of the community, for example in dealing with objections raised by community groups to the Borough Plan where he projects himself as a professional giving advice and opinion based on knowledge of planning. See Draper, I. Proof of Evidence to the Borough Plan Inquiry Relating to Office Policy, May 1984 LBTH.

from his profession and his organisation, but also from the development industry he is regulating⁸⁴ which is itself pursuing its own interests in promoting patterns of urban growth to produce its own financial security and gain.

⁸⁴ The problem of regulation activities resulting in a promotion of the interest of those being regulated has been explored, particularly in the United States, with regard to administrative agencies created to regulate sectors of the economy which become the champions of the regulated. See eg., McConnell, G. *Private Power and American Democracy*, 1969 New York: Knopf. This should be related to the discussion on clientela relationships above.

CHAPTER 6

IMPLEMENTATION:THE USE OF PLANNING AGREEMENTS

INTRODUCTION

This chapter examines the use made of planning agreements in implementing planning gain schemes. As indicated above, formal agreements between the developer and the council are not the only mechanism used to enforce arrangements over planning gain in development schemes. When they are used they represent another phase in the process and the form of the agreement may be the subject of another round of negotiations between the parties. This raises a distinct set of issues as the agreement over the content of the scheme and the level of planning gain must be reduced to a form which is likely to be upheld by the courts. The central concern here is not the role of negotiation in planning, but rather the legitimacy of using this type of mechanism to secure implementation of planning gain schemes.

Alternative methods of implementation which have been used are conditions attached to a planning consent or simply the inclusion of the planning gain element as a part of a revised scheme. The latter, however, does not put the council in the position of being able to require the developer to complete all of the works included in a scheme. The use of conditions is also problematic as the courts have taken a restrictive view of their use. As a result the use of planning agreements has increased to facilitate enforcement of the arrangements made over planning gain and the officers at Tower Hamlets made a diligent effort to ensure that the agreements were in fact enforceable at law.

This chapter concentrates upon the use of these agreements and the issues of legality they raise. The possibility of these agreements

being struck down as ultra vires the local authority or as a fetter on the exercise of discretion is examined. The limited case law and literature on the use of planning agreements is discussed together with the limitations placed on their use by central government. The agreements which were actually used in Tower Hamlets, their form and content, are examined in chapter 8 after the details of schemes have been presented.

ISSUES OF LEGALITY

Since the earliest Town and Country Planning Act in 1932 local planning authorities have had the power to enter into agreements¹ as part of their development control functions and, since 1968, the approval of the Minister has not been required.² In addition, similar powers were included in other pieces of general legislation including s.126 of the Housing Act 1974 (superceded by s.33 Local Government (Miscellaneous Provisions) Act 1982), s.38 of the Highways Act 1959, s.111 of the Local Government Act 1972, and in local legislation such as s.16 of the GLC (General Powers) Act 1974. Planning agreements, therefore, often make reference in their recitals to all, or many, of these instruments in order to take advantage of the often overlapping powers they bestow.

The present powers included in Section 52, TCPA 1971 are as follows:

¹ s.34 TCPA 1932; s.10 TCPA 1943; s.25 TCPA 1947; s.37 TCPA 1962; s.52 TCPA 1971.

² Scedule 9, paragraph 19, TCPA 1968.

" (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 appears to the local planning authority to be necessary or expedient for the purposes of the agreement.

(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. "

In the introduction of a similar clause in the TCPA 1947 the Lord Chancellor stated that agreements under this section could be used to deal with many things including 'gifts of land in consideration to develop other land; for permitting public rights of access to private lands in consideration of permission.'³ Beyond this there has been little government comment⁴ on the scope of the section although the addition of subsection (3) in the 1947 Act has been said to indicate that parliament had contemplated section 52 agreements being used to restrict statutory powers in that it sanctions such a use where the

³ Parliamentary Debates, Lords 1946-7 Vol.149, col.636.

⁴ See below.

subsequent exercise of power accords with the development plan or a direction from the SSE.⁵

The section itself limits the use of agreements to covenants of a restrictive or regulatory nature and does so by equating the position of the planning authority with that of a neighbour who can enforce a restrictive covenant made for the benefit of the land he owns. This has been identified as problematic in itself, as it uses a private law analogy to indicate the powers of a public body and so fails to take due account of the public law restrictions on the exercise of such powers, the public nature of the agreements⁶ and the unsatisfactory nature of the law on restrictive covenants.⁷

The limitation of the section to covenants which restrict and regulate the development or use of land has been largely covered by adding a reference to section 126 of the Housing Act 1974 into the planning agreement. This section allows local authorities to enforce positive and negative covenants against subsequent owners of the land to which the agreement is addressed. It does, however, have its own

⁵ Windsor and Maidenhead Royal Borough Council v Brandrose Investments Ltd. [1983] P&CR 349.

⁶ This problem is compounded by the jurisdiction of the Lands Tribunal to discharge or modify such agreements under the Law of Property Act 1925, section 84(1), as amended by Law of Property Act 1969, section 28, as if they were restrictive covenants. The jurisdiction of the Lands Tribunal was confirmed by Gee v National Trust [1966] 1 WLR 170 and has been exercised to discharge an agreement less than 10 years old even though the planning authority opposed it on the grounds of conflict with planning policy and creating an undesirable precedent for other developers to remove agreements negotiated as a part of the development control process. Re Beecham Group Ltd.'s Application (Reference No. LP/44/1979) [1980] P&CR 369. For a discussion of section 84 see Newsom, G.H. (1972) JPL 62.

⁷ See eg., Alder, J. Development Control, chapter 6, 1979. London: Sweet & Maxwell, Modern Legal Studies Series.

drawbacks in that agreements for works to be done must relate to the development site itself and there is no provision specifically made for the payment of money to the planning authority in lieu of works to be carried out. The scope of section 126 is complicated in that it also allows for agreements for 'facilitating the development of that land [referring to the development site] or of other land in which that person has an interest'. It could be argued that this is sufficient to cover financial arrangements under an agreement provided that the agreement is entered for a valid purpose.

The ability to use section 52 to cover the payment of money has also been denied⁸, although some commentators, such as Loughlin, have pointed out that this is not necessarily the case as section 52 refers to the 'regulation' as well as the 'restriction' of development and includes incidental and consequential provisions 'of a financial character' within its terms.⁹ It seems, therefore, that payments of money and other financial arrangements would fall within its scope provided they appear to the planning authority to be 'necessary or expedient for the purposes of the agreement'.¹⁰ This must refer back to the purpose of restricting and regulating the use or development of land and, within the context of this thesis, raises the question of

⁸ See Heap, D. (ed.) *Encyclopedia of Planning Law and Practice*, London: Sweet & Maxwell, Vol.2 p.2758 who cites Re Nisbet and Potts Contract (1905) 1 Ch. 391 per Farwell LJ at 397 on the impossibility of restrictive covenants to include the payment of money.

⁹ Loughlin, M. *Development Control: The Importance of Social and Economic Considerations*, 1977. University of Warwick, LL.M. thesis, p.62.

¹⁰ See the note on section 52 agreements in DOE circular 22/83 *Planning Gain*, Appendix A.

whether an agreement to secure planning gain is entered into for such a purpose.

Section 52 agreements were originally used to enable local planning authorities to restrict and regulate the use of land before a development plan had been prepared, but since 1968 the number of such agreements has increased dramatically. Also, since 1965 local act powers to enter into positive and negative covenants have spread throughout the country¹¹ and in 1974 the GLC obtained such local powers on behalf of all London boroughs. Under section 16 of the GLC (General Powers) Act 1974 'any undertaking or agreement' made with developers will be binding on successors in title but there must be an underlying requirement here also for it to fall within the powers of a local authority.

Some indication of the scope of section 52 can be gleaned from the debates preceding the Housing Act 1974. In the Sheaf Report published in 1972 the scope of section 52 was specifically considered. It was acknowledged the use of the section included the imposition of obligations on developers to financially contribute towards infrastructure costs, but went on to suggest its amendment to include positive obligations to remove any doubts.¹² The Government White Paper that followed encouraged local authorities to require developers to contribute towards the costs of services which make housing

¹¹ These powers are not standardised but may vary considerably from one area to another. eg. Leicestershire County Council Act, 1970, s.6(1) compared to Coventry Corporation Act 1972, s.15 which details such forms of regulation as the developer conveying an interest to a third party to carry out the works, dedication of public rights of way and open space, carparking and maintenance of open space.

¹² Report of the Working Party on Local Authority/Private Enterprise Partnership Schemes, 1972, paragraphs 49 to 52, London: HMSO.

developements feasible (such as the provision of roads, open space and schools) and which were presently provided through the public purse.¹³ It was further agreed by the government that the provisions of section 52 and section 111 Local Government Act 1972¹⁴ should be augmented to strengthen the powers of local planning authorities to reach such agreements.¹⁵

" Housing development is frequently held up because the public authorities responsible for providing essential services cannot readily finance them as quickly as the developer would wish. The prospect of heavy expenditure on ancillary services often makes local authorities reluctant to give planning permission for housing on land which is otherwise ripe for development. This difficulty can be met by an agreement under section 52 of the TCPA 1971 between the authority and the developer under which the latter agrees to contribute towards the provision of the services made necessary by the development. Authorities are however generally reluctant to make such agreements as these can be evaded where the authority does not have local Act powers to bind successors in title to the positive covenants involved. The Government ... will introduce early legislation empowering all local authorities to make agreements with

¹³ Widening the Choice: the Next Steps in Housing, April 1973, Cmnd. 5280, paragraph 23. London: HMSO.

¹⁴ Which reads "Without prejudice to any powers exercisable apart from the section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure of money or the acquisitions or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions. " In Appendix A to DOE Circular 46/83 "Planning Gain" the use of this section is indicated to "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."

¹⁵ Parliamentary Debates, Commons. Written Answer. Vol. 867 col. 3745, cited in Jowell, "Bargaining in Development Control " (1977) JPL 414-433 at p. 417 and in Loughlin, Development Control: The Importance of Social and Economic Considerations, 1977. University of Warwick, LL.M. Thesis at p. 68.

developers under section 52 binding on successors in title. " ¹⁶

There was, then, at this stage an acceptance and encouragement of the use of the provisions in general legislation to allow local authorities to seek contributions from developers for infrastructure occasioned by the development.¹⁷ Towards the end of the 1970's there was a reasonable amount of academic interest in this area¹⁸ and Hawke carried out a three year research study of the use of 'planning agreements' by 328 local authorities. By this time 'planning agreements' was a term of art used to refer to agreements expressed to be made under all or some of the various pieces of general legislation¹⁹ and the appropriate local legislation and which, as a shorthand expression, carries with it an aura of validity as a legal concept. In fact much of the literature does not define the term at all or question the use of it to describe such agreements.

¹⁶ supra note 13 at paragraph 23.

¹⁷ The Dobry Report also encouraged increased use of section 52 agreements to enable planning permission to be granted where it would otherwise be refused. Review of the Development Control System, Final Report by George Dobry QC, 1975. London: HMSO.

¹⁸ See eg., Grant, M. "Planning By Agreement " (1975) JPL 501; Aves, M. "Enforcing Section 52 Agreements " (1976) JPL 216; Jowell, J. "Bargaining in Development Control " (1977) JPL 414; Suddards, R.W. "Section 52 Agreements: A Case for New Legislation " (1979) JPL 661; Byrne, S. "Conditions and Agreements: The Local Authority's Viewpoint " (1979) JPL Occasional Paper, Development Control: Thirty Years On; Hawke, Dr. J.N., "Section 52 Agreements and the Fettering of Planning Powers " (1980) JPL 386.

¹⁹ In addition to those mentioned above the Highways Act 1959, s.40 allows agreements for the dedication of lands for road purposes and under s.278 Highways Act 1980 a highway authority proposing to do works can enter into an agreement with a developer to do them in a particular manner or complete by a particular date for the benefit of a developer in return for a contribution by the developer towards the costs.

Hawke's study, published in 1981²⁰, concluded that the use of planning agreements fell into eight, at times overlapping, categories²¹, namely occupancy; the abrogation, restriction or modification of land uses; the regulation of the future development of land; the regulation of complex development; sewage and drainage requirements; the attainment of planning gain; pollution control and enforcement. The agreements were sometimes used to reinforce a planning permission condition and at other times to avoid the uncertainty or, less often, the known constraints of the enforceability of conditions.²² Overall the study found that the principle reason for using the agreements was for enforcement and did not go on to question the legality of the agreements.

" Although local planning authorities sometimes use an agreement in order to achieve a measure of development control which would otherwise be clearly impossible, eg. by reference to the legal limits of planning conditions, it seems to be more frequently the case that an agreement is resorted to either in order to avoid the uncertainties of planning law or in order to reinforce development control: particularly conditions. Furthermore, there seems to be a feeling in practice that there is a greater likelihood that a developer will comply with an element of development

²⁰ Hawke, Dr. J.N. "Planning Agreements in Practice " (1981) JPL, 5-14 & 86-97.

²¹ Jowell (1977) op.cit. supra note 15 divides agreements to secure planning gain into 9 categories namely specification of use; public rights of way on the developer's land; dedication of land for public use; extinguishing existing user; provision of community buildings; rehabilitation of property; provision of infrastructure; gift of site or building for residential use; commuted payments for carparking.

²² Jowell, in his research, cited supra note 15, involving postal questionnaires sent to 106 of the 370 local authorities (including all London Boroughs) in 1975 and interviews with 20 of the sample randomly selected, found a similar split in the use of the agreements, although he does not state whether more or less were used to avoid uncertainty or to cover situations where conditions would be clearly unenforceable.

control which is incorporated in a formal, legal agreement. "23

The courts have not adequately clarified the relationship between section 52 agreements and the imposition of conditions. In Tarmac Properties Ltd. v Secretary of State for Wales and Another²⁴ Douglas Frank QC, sitting as a deputy judge, did not explore this issue on an application under section 245 TCPA 1971 which raised the relationship between conditions and section 52. The Secretary of State had confirmed a refusal of consent for a development following an Inquiry at which the Inspector had indicated the grant of permission if a section 52 agreement was entered into to secure potential rights of access over part of the site. He had indicated that a section 52 agreement was the appropriate way to secure such a right and no evidence was presented on imposing a condition to reach the same result. The parties did negotiate on such an agreement but it was not executed and the Secretary of State issued a decision agreeing with the Inspector, and dismissing the appeal as no section 52 agreement was forthcoming.

" The Inspector recommended that, in the absence of a section 52 agreement, the appeal be dismissed. The Secretary of State agrees generally with the Inspector's conclusions and accepts his recommendation. He makes no comment however on the question of a section 52 agreement since this, and the details of any condition which may be imposed on any subsequent issue of planning consent, would be matters for consideration by the local planning authority in the first instance ... the Secretary of State hereby dismisses your client's appeal. "25

²³ *idid.* p.96 (emphasis in the original).

²⁴ [1976] P&CR 103.

²⁵ Quoted *ibid.* at 106-107.

Douglas Frank QC refused to quash the decision of the Secretary of State, saying that there was no evidence that he had failed to take account of his powers to impose conditions.

A similar situation came before Sir Douglas Frank QC two years later in Brittania (Cheltenham) Ltd. v SSE and Tewkesbury Council²⁶, where, between an appeal being lodged and the Secretary of State making his decision, section 52 agreements were entered into for a children's play area and a social/shopping centre, thus making the housing development proposals acceptable to the planning authority. The Secretary of State refused to take account of the agreements as their content could not, in his view, be included as valid planning conditions as they did not form a part of the application submitted. Sir Douglas stated that this view was too narrow and that the content of the agreements amounted, under the factual circumstances, to ancillary development and therefore relevant to the application. He went on to find that most aspects of the agreements could be contained in conditions, distinguishing Hall & Co. v Shoreham-by-Sea UDC²⁷ on the basis that the conditions included no aspect^{of} public dedication.²⁸ The right to public access was dealt with in the

²⁶ [1978] JPL 554.

²⁷ [1964]1 All ER 1; [1964]1 WLR 240.

²⁸ Distinguishing Hall & Co v Shoreham-by-Sea in this way is not very convincing as to divorce public use from the facilities being provided would make the conditions meaningless. Also there were cases - eg. Penwith DC v SSE [1977] JPL 371 - to indicate a movement away from using the extent of interference with private property rights as an indicator of validity, preferring a test of whether the interference was so gross as to make the condition totally unreasonable and outside the scope of planning. See (1968) JPL 558 for discussion.

agreement, without which there would have been a condition to provide 'public' space with no way of ensuring public access.

In a later case Sir Douglas Frank QC did state that a planning authority should still impose conditions even if they are difficult to enforce, but he did not go on to comment on unenforceable conditions or the alternative of using a section 52 agreement.

" It was said that, at the inquiry, the Board [as local planning authority] had averred that the disputed conditions would be difficult to enforce and that the matters would be better dealt with by an agreement under section 52 of the Act of 1971. I think it important to draw a distinction between conditions that are unenforceable (they will usually also be difficult or impossible to comply with) and those that are difficult to enforce; I do not think it anything to the point that a condition otherwise desirable should not be imposed because it may be difficult to enforce. As to the point on a section 52 agreement, the short answer is that no such agreement has been made. "²⁹

The Court of Appeal³⁰ has recognised the use of section 52 agreements as a method of enforcement to cover the gap between the imposition of conditions and the local planning authority's lack of power to enforce them. However, the extent to which this could be taken was not explored. For example, the Court of Appeal did not examine whether a local authority could enforce the content of conditions through this device where those conditions, if attached to a planning permission would have been considered ultra vires . Such an interpretation is probably still possible, particularly as the courts and

²⁹ Peak Park Joint Planning Board v SSE and Another [1979] P&CR 361 at 385.

³⁰ Windsor and Maidenhead Royal Borough Council v Brandrose Investments Ltd [1983] P&CR; [1983] JPL 574.

the Department³¹ have reasserted the standard freedom of contract arguments as to the choice of a developer to enter into such a contract.³²

In Bradford City Metropolitan Council v SSE and Another³³, however, the Court of Appeal did attempt to narrow the gap between a valid condition and a valid section 52 agreement. The case concerned an application to build a development of 200 house on the outskirts of Bradford. The planning authority was prepared to give consent but the highways department objected on the grounds that the road adjacent to the site was inadequate and required widening. The Council then entered into negotiations with the developer ('as is not unusual'³⁴) and the plans were amended to allow for the widening to take place. A permission was issued with a condition requiring the houses not to be occupied until the road widening was complete to the satisfaction of the Council. Shortly afterwards the Highway Authority turned down proposals by the developer for the road to be widened at

³¹ In Circular 22/83 the DOE make the point that a condition cannot be used to require a section 52 to be entered into; it must be done out of choice.

³² This argument is given more force if the general trend of the courts to reassert freedom of contract over other considerations is taken into account. For example, the recent case of D & F Estates v Church Commissioners (1988) The Times LR, July 19th, where freedom of contract challenged the extended use of tort to impose liability. Support for this approach could also come from the more restrictive use of equitable concepts to mitigate the effect of contracts, such as penalties and forfeiture. See eg. The Scaptrade [1983] 1 ALL ER 301; Sport International Bussum BV v Inter-Footwear Ltd [1984] 2 All ER 301; Hyundai Heavy Industries Co Ltd v Panapadopoulos [1980] 2 All ER 29. The government has also legislated towards privatisation and, therefore, against state interference with freedom of contract in areas such as landlord and tenant and the control of women's working hours.

³³ [1986] 1 EGLR 199.

³⁴ *idid.* per Lloyd, LJ at 200.

the expense of the authority and the developer appealed against the condition on the consent.

The Court of Appeal, dismissing the appeal by the Council against the decision of the Secretary of State who found the condition invalid (upheld in the Queen's Bench Division), held that the condition was ultra vires as part of the land upon which the road was to be widened was not under the control of the developer and the remainder would require cession of land by the developer, and so fell foul of circular 1/85, paragraph 63:

" No payment of money or other consideration can be required when granting a permission or any other kind of consent required by a statute, except where there is specific statutory authority. Conditions requiring, for instance, the cession of land for road improvements or for open space, or requiring the developer to contribute money towards the provision of public car parking facilities, should accordingly not be attached to planning permissions. Similarly, permission cannot be granted subject to a condition that the applicants enter into an agreement under section 52 of the Act or other powers. However, conditions may in some cases reasonably be imposed to oblige developers to carry out works, eg. provision of an access road, which are directly designed to facilitate the development. "

The Secretary had gone on to state that the condition was unlawful and the planning authority should have either refused the development outright or negotiated a section 52 agreement. This was taken up by counsel for the planning authority who argued, inter alia, that the developers had voluntarily agreed to the condition, as they would under a section 52 agreement, and thus they were not being required to do anything. Counsel for the Secretary of State asked the Court of Appeal to say that a condition requiring the developer to carry out or fund a public function is always unlawful, regardless of the degree of acquiescence of the developer.

Consequently, the Court of Appeal addressed itself primarily to the effect of acquiescence to a condition, but also remarked on the possible alternative use of a section 52 agreement by putting them both in the context of 'manifest unreasonableness' as used in Newbury District Council v SSE.³⁵ As far as the condition was concerned, they held that a manifestly unreasonable condition, which by applying Hall & Co. v Shoreham-by-Sea UDC³⁶ they considered this one to be, remains ultra vires even if it is suggested or agreed to by the applicant.³⁷ Lloyd LJ (with whom Connor and Croom-Johnson LJJ agreed) went on to state that in the case of a commercial transaction the parties themselves are the best judge of what is reasonable, but in the case of a planning decision the 'public interest' was also concerned, thus taking the applicant and the planning authority out of the usual situation produced by a commercial contract.

" ... the analogy with an ordinary commercial transaction is not complete. The 'parties' to a planning application are not in the same position as the parties to a commercial contract. For in addition to the interests of the 'parties', there is the public interest in securing the fair imposition of planning control as between one developer and another. "³⁸

³⁵ [1978] 1 WLR 1241; [1979] 1 All ER 243 (CA); [1981] AC 578 (HL).

³⁶ [1964] 1 All ER 1; [1964] 1 WLR 240. It is interesting to compare this finding with that of Sir Douglas Frank QC in Brittania (Cheltenham) Limited v SSE discussed above, where a condition requiring provision for open space was considered valid and Hall & Co was distinguished on the grounds of there being no reference to its dedication to the public within the condition. The present case could be distinguished on the basis that the planning authority acknowledged the need for the road to be widened as it was below standard, rather than purely as a result of the housing development approved.

³⁷ This principle has also been incorporated in Circular 1/85, paragraph 35.

³⁸ [1986] 1 EGLR 199 at 202H.

Having made this point the Court of Appeal were free to suggest constraints on the use of section 52 agreements, although they did so only after making clear that their comments were obiter dicta and without the benefit of extensive argument and after describing the subject as raising questions 'of considerable difficulty and importance'. In their view, a section 52 agreement would also be invalid if its terms were manifestly unreasonable. This was interpreted to mean that if the section 52 agreement imposed an obligation similar to that included in a manifestly unreasonable condition, it too would be invalid, but if it satisfied the requirements of circular 22/83 on Planning Gain³⁹ it would be reasonable.

" I propose to confine myself to two observations, one general and one particular. The general observation is that the practice under section 52, convenient and beneficial though it undoubtedly is, may have gone beyond what the strict language of the section justifies. We were told that such agreements are now very common, much commoner than they used to be. It may be that in some future case it will be necessary for the court to consider the extent of powers of planning authorities to enter into agreements under section 52. I am aware of course that such agreements are frequently entered into under combined powers ...

The particular observation is that I do not accept ... that the present condition would have been lawful if incorporated in a section 52 agreement. If the condition was manifestly unreasonable, and so beyond the powers of the planning authority to impose it, whether or not the developers consented, it must follow that it was also beyond the powers of the planning authority to include the condition as 'an incidental or consequential provision' of an agreement restricting or regulating land under section 52.

That is not to say that this might not have been a case for a more limited agreement under section 52. A contribution towards the cost of widening [the road] might well have been reasonable, due to the increased use of the road resulting from the development, and the benefit to the occupiers of the residential development: see Circular 22/33 ... But I need not pursue that consideration further. For there is all the difference in the world between a provision of a section 52 agreement requiring a contribution from a developer towards the cost of widening the highway and a

³⁹ Discussed above under Official Responses to Planning Gain.

provision which requires the entire works to be carried out at his risk and expense. "⁴⁰

Thus the suggestion by Lloyd LJ is that the central issue in determining the validity of an agreement is not the nature or the quality of the covenants, but its reasonableness, and that should be judged with reference to the circular on Planning Gain. This approach is different from that taken in the Queen's Bench Division by Farquharson J. on this point who considered that if the content of the condition had been included in a section 52 agreement, that agreement would probably have been valid as the terms of the section are specifically addressed to expenditure on associated works. After hearing argument on the use of section 52, in which it was argued by counsel for the Secretary of State that any sale of planning permission however disguised should be unlawful, Farquharson J. resolved that different considerations apply where the developer makes a commercial decision to enter into an agreement with the planning authority.

" It is repugnant to any lawyer that money or indeed any other consideration should be extracted from an applicant or a developer as a price for granting planning permission, a task which is entrusted throughout the country to local authorities to be given or withheld according to the intrinsic merits of the application itself. Particularly is this so, of course, when the consideration required would be for the benefit of the authority which is vested with the right to grant or withhold planning permission.

Put like that, of course, it sounds like a statement of high principle, but the principle in the context of this legislation adopts a rather battered look when one is referred, as I have been, to the terms of section 52 of the 1971 Act. That section, as was noted by the minister in his decision, makes provision whereby in circumstances akin to the present the developer and the planning authority can come to some agreement whereby the expenditure involved in what one might describe as associated works can be apportioned. In fact I am told ... that as a matter of practice the effect of such an agreement almost invariably

⁴⁰ [1986] 1 EGLR 199, 202L-203B.

is that the developer is required to do just that which he was required to do by the condition imposed in the present case. So although it is contended that the principle would exclude a condition being imposed under section 29 of the Act, one arrives at precisely the same position when the parties come to an arrangement within the terms of section 52. "⁴¹

The difference in approach essentially lies in an opposing view of the role of a local planning authority. The Court of Appeal concentrated upon the duty of a planning authority to act in the interests of the public and presented the role of the court as controlling and confining its operations to those justifiable as reasonable under the Wednesbury principles. It also reasserted that the court is the appropriate body to decide the application of those principles to the question 'of considerable difficulty and importance' presented by the use of section 52 agreements. The effect of this being not to allow the authority to impose 'public' obligations on a private developer, as they interpret 'public interest' as a duty to ensure that conditions are imposed fairly from one developer to the next.⁴² They extend this approach to support a restrictive use of section 52 by distinguishing the position from that of an ordinary commercial transaction, thus enabling the court to intervene in the 'public interest' so defined.

In concentrating on the reasonableness of the obligation upon the developer the court did not assess the validity of such an agreement in the context of proper planning objectives, an approach taken by the Court of Appeal in cases where section 52 agreements have been

⁴¹ [1985] 1 EGLR 268, at 270.

⁴² [1986] 1 EGLR at 202H.

specifically considered.⁴³ Rather they were saying that it may be justifiable to enter into an agreement with a developer to do something, but such a weighty obligation as the one suggested here is unfair. Indeed, Lloyd LJ does distinguish a more limited obligation, such as a contribution towards infrastructure, as probably a valid use of section 52. Thus, the approach was not to preclude the developer from entering into an arrangement to achieve a planning consent, but to ensure that the local authority does not seek obligations which would provide too heavy a burden on the developer.

The lower court, however, while accepting that the principle of controlling potential abuse of powers is a valid one in so far as the authority must comply with the legislation and consider each application on its merits, introduced market forces into the equation. Farquharson J. appeared to accept that the commercial realities of the planning process involve a weighing up by the developer of what he can afford to do in order to meet the policies of the planning authority. If, in order to overcome obstacles to his application, the developer is prepared to enter into a contract so as to apportion the costs of works associated with his development, then it is within the scope of section 52 for the authority to make such an agreement.⁴⁴

⁴³ See L.A.H.Ames v North Bedfordshire Borough Council [1980] EGD 895; 253 EG 55, where the Court of Appeal held a section 52 agreement which prevented the developer from commencing a housing development until improvements to the sewerage system were under contract to be valid on this basis; and Abbey Homesteads (Developments) Ltd v Northamptonshire County Council et.al. [1986] JPL 683 where an agreement restricting the use of land to a school as part of a housing development was held to be a permanent restrictive covenant for the purposes of valuation as it was executed to ensure proper planning of the area.

⁴⁴ This approach has been adopted by other decisions in the Queens Bench Division. See eg., R v SSE, John Mowlem and Co.Plc., LDDC ex parte GLC [1986] JPL 32, where Glidewell J, in assessing

He was prepared to take this view, even where the authority benefitted directly, at least partly because that was presented as common practice. The Court of Appeal seemed to be prompted by that same piece of information to try and restrict the use of such agreements.

The practical effect of the Court of Appeal decision is difficult to assess particularly in view of the language used in introducing their opinion as obiter dicta. Lloyd LJ does not deal with other legislative provisions enabling authorities to enter into agreements and does suggest in his judgement that the effect of the condition could possibly have been achieved through negative wording. Consequently, the judgment appears more as a provocative warning than as a weighty precedent, although it certainly does cast doubt upon the scope of the use of section 52 agreements, something which the lower courts have not done and which Ministerial decisions have also left largely open-ended.⁴⁵

whether controls on Air Traffic Movements to and from the Stolport airport under consideration should be included in a condition stated "If these controls are legally acceptable as planning conditions they should be attached to the planning permission granted. If not, planning permission should be withheld until a section 52 agreement is amended accordingly. "

⁴⁵ See eg., Appeals against decision of Cardiff City Council to refuse (1) residential development on land at Merthyr Road, Tongwynlais ... August 22, 1985 [1986] JPL 855 where the SSE permitted development subject to a prior opportunity to allow the developer to complete a section 52 agreement for the provision of public open space (not included as a condition) to ameliorate the effect of the development; Appeal relating to an application for planning permission to erect 6 indoor bowling rinks and associated accomodation at Sun Printers Sports Ground, Bellmont Wood Ave, Watford ... October 31, 1986 [1987] JPL 222 where an agreement to build tennis courts on another site to replace those lost by the development was considered desirable but not essential to the scheme; Note in the Estates Times, June 25 1982 on an appealed housing scheme in the East Midlands where the Secretary of State, contrary to the Inspector's report, concluded that the scheme could be built

Certainly the use of planning agreements has not often been challenged in the courts as being ultra vires the planning authority. As the forerunners to section 52 required ministerial endorsement the likelihood of blatantly ultra vires provisions was unlikely⁴⁶ and so they did not encourage challenge. Also, developers would have been discouraged from challenging a section 52 agreement which was required as a condition because the courts had, in 1969, decided that a planning permission would fail if the nature of an ultra vires condition was such as to show that consent would not have been given without it.⁴⁷ This left the court with a discretion to determine the validity of a consent where a planning agreement was entered into without the use of a condition but as a precondition to that consent. This could be taken as adding an extra (and potentially expensive) element of uncertainty to the outcome of any determination by the courts on the validity of a section 52 agreement.

An alternative course of action for a developer who was dissatisfied with the terms of his consent would be not to appeal against the conditions themselves but to seek a judicial declaration through the Divisional Court as to the validity of the exercise of power of the planning authority in imposing the particular conditions.

provided the developer entered into an agreement to contribute towards the cost of a drainage system for nearby land which would be flooded as a result of the development.

⁴⁶ In this regard Jowell (1977) and Loughlin (1977) op.cit. supra note 15 point out that between 1964 and 1968 only 8 out of 542 agreements were not approved and, according to the DOE, approval was only withheld where there was a technical legal (rather than policy) objection [the categories of objection are made by the works cited].

⁴⁷ Kingsway Investments v Kent County Council [1969] 1 ALL ER 601.

The discretion of the court, however, is framed in such a way as to expect a developer to exercise any remedy available under the relevant legislation. This is indicated very clearly in Ministerial Circular 54/1967 and Development Control Policy Note No.5⁴⁸ which concerned the practice of requiring contributions from developers towards carparking facilities, where on-site standards are impractical. The Ministers did approve the practice provided that it was entirely 'voluntary' on the part of the developer, but added that should the planning authority make unreasonable demands the developer should appeal to the Secretary of State who would grant permission free of the condition requiring payment and without internal carparking standards being met.⁴⁹

However, the courts have allowed parties to a section 52 agreement to pursue remedies for breach of contract before such statutory remedies have been exhausted.⁵⁰ In Avon County Council v Millard and Another⁵¹ a section 52 agreement had been entered into which was conditional on the grant of permission to operate a mine for two years. The agreement stated that the use would not continue beyond the two year period but could do so if the applicant obtained another permission which would not be forthcoming unless they constructed at their own cost a new access road between the mine and the A36 road. The two year period expired but no permission had

⁴⁸ appended to DOE circular 23/1969, later replaced by 26/1979.

⁴⁹ A not dissimilar clause appears in circular 22/83 "Planning Gain".

⁵⁰ See Beaconsfield DC v Gams (1974) 234 EG 749. Discussed at (1976) JPL 732,738; Grant, M. "Planning by Agreement" (1975) JPL 501; Levings, A.P. "Planning by Agreement - the Beaconsfield Case" (1975) JPL 704.

⁵¹ [1985] P&CR 275.

been granted and the access road had not been built. The Council applied to the court for an injunction to restrain the breach of contract occasioned by the continued use of the mine. At first instance the application was refused on the grounds that it was premature as the statutory remedies provided by sections 87 and 88 of the TCPA 1971 (enforcement notice and appeal) had not been exhausted.⁵² No appeal had been lodged against refusals for the continuance of use and an appeal against an enforcement notice issued by the Council was still pending. On appeal Fox and Dillon L.JJ. held that the judge had misdirected himself as nothing in section 52 prevented the parties from pursuing remedies for breach of contract at any time, indeed, in their view, section 52(2) specifically preserved the right to do so.

The central issue on an assessment of the validity of using section 52 agreements for the purposes of enforcing a planning gain arrangement is whether they are *intra vires* the purpose for which they have been used. There is some judicial recognition of the use of section 52 agreements to secure planning gain. In McLaren v SSE and Another⁵³ the court found a decision of the Secretary of State to be inadequate because he failed to take account of planning gains included in a section 52 agreement which may have been sufficient to balance the disadvantages of the proposed development. In that same case it was considered 'perfectly proper' for the Secretary of State to

⁵² Relying upon Stafford Borough Council v Elkenford Ltd. [1977] 1 WLR 324; [1977] 2 All ER 519; 75 LGR 337, CA, a case concerning Sunday trading in breach of the Shops Act 1950.

⁵³ QBD, 10 December 1980 noted 370 SJ 79, transcript: Barnett, Lenton. The facts of this case are given above in Official Responses to Planning Gain.

suggest, after an inquiry, that should a section 52 agreement (in the form of one produced at the inquiry) be entered into within a reasonable time so as to balance the disadvantages of the proposal, permission would be granted. This 'machinery of an administrative nature' would, consequently, allow permission for a development which would otherwise be refused.

The relevant question then seems to be: Is the planning gain included in the agreement there to restrict or regulate the use or development of land? As already established, the GLDP⁵⁴ and various borough office policies refer to the attainment of planning gain in connection with certain aspects of office developments. A local authority is required under the TCPA 1971⁵⁵ to have regard to the development plan when determining applications and to 'other material considerations' which is likely to cover non-statutory policy statements. This has been reinforced by section 86(3) of the Local Government Planning and Land Act 1980 which requires planning authorities to seek to achieve the general objectives of the structure plan for the area in determining applications. Thus it could be argued that in order for the courts to take the view that agreements which relate to such policy objectives fall outside of the ambit of a planning agreement they would have to view the particular gain as something which no reasonable person, properly acquainted with the facts, would regard as a 'gain' or 'advantage'. Alternatively, they would need to demonstrate that agreements for securing the objective of these policies were not for the purpose of restricting or regulating land.

⁵⁴ Paragraph 4.15.

⁵⁵ Section 29.

The first possibility calls for an assessment of the role of planning, who it is who should benefit and a definition of the criteria which must be satisfied in order for any particular provision to amount to a 'gain'. For example, in Tower Hamlets SHPRS regard the only acceptable gain in Spitalfields to be housing, whereas the planning authority regarded the restoration of Christ Church to be a gain as it represents an historic building of national importance which would contribute to the character of the locality and provide the community with self-respect. Both may be justifiable, but the justification relies upon a particular definition of 'gain' which is not provided by the development plan. It is true that the Christ Church agreements did recite policies in the GLDP which encourage the restoration of historic buildings as a basis for treating it as planning gain, and such restoration is listed in the GLDP as an example of gain, but the choice of the actual gain on each application is left to the planning authorities. There is no definition in the GLDP, only a list of six examples of planning gain.

It would also be necessary to show a sufficient nexus between the content of the gain and the development itself: does the gain proposed mitigate or counterbalance the loss, in planning terms, produced by allowing an office block to be built? For example, can the planning authority produce evidence to show that office development within a conservation area is disadvantageous but not fatal to the objectives of the area and can be neutralised by the provision of this particular, or one of these particular, planning gains?

In order to pursue the second possibility it would be necessary to go on to show that the gain involves the restriction or regulation of land. As indicated above the terms of section 52 do cover some

obligations which are positive in nature, where they achieve the purpose of restricting or regulating the use or development of land. Also incidental and consequential provisions considered necessary or expedient for the purposes of the agreement are valid. Again this is a matter of interpretation but it clearly covers physical infrastructure⁵⁶ for the site but also accommodates arrangements which are intended to achieve wider planning objectives. Referring back to the above example, if the office development is, by means of a valid policy, linked with the restoration of Christ Church as compensation for the disadvantages it produces is the planning authority not regulating the use of land ? And is the payment of money to facilitate that restoration not incidental to such regulation ? Or, stated more widely, if the planning authority has a planning objective to balance the mix of uses in an area, is it not regulating the use of land by agreeing that the developer has a responsibility to provide such a mix in that area ? Again the essential elements are what amounts to a valid planning objective and what is included in a balanced mix of use, which can only be assessed in the light of a clear view of what planning is.

Following the Court of Appeal decision in Bradford City Metropolitan Council v SSE discussed above, these considerations must be looked at in the light of 'reasonableness' not only in terms of whether it is reasonable for the authority to require a planning

⁵⁶ See eg. LAH Ames Ltd v North Bedfordshire Borough Council, Court of Appeal, 253 EG 55, [1980] EGD 895, 23 October 1979, where an agreement to prevent commencement of development until improvement works were carried out to the drainage system were under contract was held to be valid. See also DOE Circular 15/84 Land for Housing, Annex A, paragraph 9, which encourages the use of section 52 agreements to avoid refusals for development on the basis of infrastructure inadequacies.

advantage, but also whether the extent of that advantage is itself reasonable. The major difficulty here is in determining the basis for such an assessment, and while the Court of Appeal couched its decision in the language of 'public interest' its interpretation of that phrase was clearly concerned not with the needs of the area as expressed in planning or other policies, nor with the political objectives of an elected local council, but with the uniformity in obligations imposed on developers generally. The centralist approach adopted in this case reinforces the government line on decreasing local autonomy in the public sector and attempts to override the local effects of central economic policies⁵⁷ as well as the professional view of local planning.

THE FETTERING OF DISCRETION

This in turn raises the issue of the ability of the planning authority to fetter its own discretion by using such agreements as well as the purpose of the actual content of the agreement itself⁵⁸, particularly as the most obvious consideration which the planning authority may provide is the grant of permission.⁵⁹ As a general rule

⁵⁷ For a discussion of this relationship see Loughlin, M. "Municipal Socialism in a Unitary State " IN: McAuslan, P. and McEldowney, J.F. (ed) Law, Legitimacy and the Constitution, pp.82/106, 1985, London: Sweet & Maxwell, Modern Legal Studies Series.

⁵⁸ This is explored in relation to Tower Hamlets agreements in chapter 8.

⁵⁹ There has been a longstanding debate as to whether consideration is necessary under section 52, although the point is usually avoided by making the agreement under seal. In Windsor and Maidenhead Royal Borough Council v Brandrose Investments Ltd. [1983] P&CR 349 the Court of Appeal appeared to assume that consideration was required: "It follows that an agreement made pursuant to section

a public body with statutory powers cannot enter into a contract or otherwise act in a way which is incompatible with the exercise of those powers or inhibits the discharge of their duties.⁶⁰ Three cases on planning agreements⁶¹ entered into under legislation which did not include section 52(3)⁶² reaffirmed this approach by making broad pronouncements against the legality of planning authorities entering into any agreement which purports to fetter their powers.⁶³ For example, in Ransom & Luck Ltd. v Surbiton BC Lord Greene, MR asks of section 34, TCPA 1932

" Is it likely that Parliament, in a section falling under the head I have mentioned ['Supplemental Provisions with Respect to Schemes'], and without express words to that effect, would do anything so unusual, so explosive, as to enable a planning authority to do something which all the principles laid down and observed by the courts and the legislature in regard to statutory duties of this kind forbid, namely, to tie its hands and contract itself out of them ? " ⁶⁴

52 before planning permission has been granted, as the relevant agreement in this case was, may become irrelevant if planning permission is not granted or ineffective if conditions are imposed inconsistent with the agreement because circumstances may change before the time when the local planning authority comes to perform its public duty of determining a planning application. " stated at 354.

⁶⁰ See eg., Birkdale District Electricity Supply Company v Southport Corporation [1926] AC 355.

⁶¹ Ransom & Luck v Surbiton BC [1949] 1 All ER 185, [1949] Ch. 180; Triggs v Staines UDC [1969] 1 Ch.10, [1968] 2 WLR 1433; Stringer v MHLG [1970] 1 WLR 1281.

⁶² The first two cases listed in note 61 above concerned s.34 TCPA 1932 and the last concerned local legislation.

⁶³ But see also Attorney General v Barnes Corporation and Ronelagh Club Ltd. [1939] Ch.110 per Luxmoore J. for a statement of the court's reluctance to limit exercise of powers under section 52 and section 126.

⁶⁴ [1949] 1 All ER at 189. For a discussion of Ransom & Luck v Surbiton BC see (1975) JPL 704.

This extreme approach could not be right, as local authorities in order to carry out their duties need to enter into contracts and these contracts will necessarily have some effect on their statutory powers.

" There will often be situations where a public authority must be at liberty to bind itself for the very purpose of exercising its powers effectively " ⁶⁵

Some cases in areas other than town planning have acknowledged some circumstances in which bodies with statutory powers can limit those powers through entering into contracts⁶⁶, but there have emerged no clear guidelines.⁶⁷ Some suggest a test of whether the contract is compatible with the functions of the body in question⁶⁸, whilst others have only found a contractual provision to be invalid where it blatantly conflicts with the policy behind the empowering statute.⁶⁹

The courts have to an extent isolated the situation where there are several related statutory powers so that the exercise of one will necessarily restrict the operation of some, or all, of the others. In

⁶⁵ Wade, H.W.R. *Administrative Law* (4th ed.) p.325.

⁶⁶ The leading case in this area is Ayr Harbour Trustees v Oswald (1883) 8 App.Cas.623;10 R.(HL)85 which has been interpreted as demonstrating the incapacity to fetter the use of powers (eg. York Corporation v Henry Leetham & Sons [1924]1 Ch.557 per Russell J.) but see also Birkdale op.cit.; Paterson v Provost of St Andrews (1881) 6 App.Cas.883; British Transport Commission v Westmorland County Council [1958] AC 126. For discussion see Rogerson, P. "The Fettering of Public Powers " (1971) PL 288.

⁶⁷ See Young, E. and Rowan-Robinson, J. "Section 52 Agreements and the Fettering of Powers " [1982] JPL 673-685 for a discussion of these cases.

⁶⁸ Eg. Birkdale District Electricity Supply Company v Southport Corporation [1926] AC 355.

⁶⁹ Eg. Blake v Hendon Corporation [1962] QB 283.

Dowty Boulton Paul Ltd. v Wolverhampton Corporation⁷⁰ the local authority had granted certain rights over a municipal airfield to a private company. At some later time the local authority wished to develop housing on the airfield and, at first instance, the court allowed the agreement to be overridden as it represented a fetter on their exercise of powers as a housing authority. On appeal the agreement was held to be a valid exercise of powers and Pennycuik V-C distinguished this case from Ayr Harbour Trustees on the grounds that this case was concerned with the position after a valid exercise of another statutory power, rather than the fettering of powers in advance.

" Obviously where a power is exercised in such a manner as to create a right extending over a term of years, the existence of that right pro tanto excludes the exercise of other statutory powers in respect of the same subject matter, but there is no authority and I can see no principle upon which that sort of exercise could be held to be invalid as upon the future exercise of powers. "⁷¹

This approach was applied directly to agreements under section 52 in 1981 by Fox J. in Windsor and Maidenhead Royal Borough Council v Brandrose Investment Ltd.⁷² Under a section 52 agreement Brandrose Investments had been granted planning permission involving the demolition of certain buildings and three years later the planning authority purported to extend an existing conservation area to cover these properties. The local authority sought a declaration from the

⁷⁰ (1971)1 WLR 204. See comment by Evans, J.M. (1972) 35 MLR 88.

⁷¹ Ibid. at 210.

⁷² [1981]1 WLR 1083;[1981] P&CR 327. See Young and Rowan-Robinson (1982) "Section 52 Agreements and the Fettering of Powers " [1982] JPL 673/685 for a discussion.

court to the effect that the buildings could not be demolished and they also sought an injunction to restrain the intended demolition. An ex parte injunction was allowed but lapsed and the court refused to extend it after an inter partes hearing and the buildings were demolished. The declaration was pursued and Fox J. analysed section 52(3) to determine whether parliament had intended to enable a planning authority to limit the future exercise of its powers by entering into a section 52 agreement.

He concluded that they had so intended and, in the absence of a development plan or a direction from the SSE, the section 52 agreement limited the authority's power to prevent demolition and prevented them from extending the conservation area to achieve that end.

" It seems to me that the only sensible construction of the wording of paragraph (a) [of section 52(3)] is that an exercise of the authority's power is not preserved, contrary to provisions of the agreement, save to the extent that the exercise is in accordance with the development plan or a direction of the Secretary of State in relation to the contents of the plan. The language of paragraph (a) seems to me to be quite inconsistent with a general saving of the authority's right to exercise its powers contrary to the provisions of the agreement " ⁷³

Fox J. also interpreted section 52(3)(b) to mean that the planning authority could bind itself, in an agreement, as to the future exercise of its powers provided that any subsequent exercise of powers remains in accordance with the development plan or any direction of the SSE. Consequently, powers could be exercised against a developer entering into a section 52 agreement if that exercise accorded with the development plan for the area.

⁷³ [1981] P&CR at 333.

In construing the section in this way Fox J. allowed a planning authority to fetter its powers quite substantially. Other interpretations of the section have not been so generous; some have regarded section 52(1) as being too narrow to allow the fettering of statutory powers at all and have treated section 52(3) as merely a mechanism for preserving the importance of the development plan.⁷⁴ Even accepting that the section does envisage the planning authority committing itself to a future course of action in exercising its powers by entering into an agreement, there remain ambiguities in section 52(3) as to when such fettering of powers can take place. For example, it refers to the restriction of 'powers' alone and it would be valid to argue that it is unlikely that parliament intended also to include the restriction of positive duties.⁷⁵ Yet the distinction between the two is not always clear⁷⁶ and Fox J. in Brandrose suggests that by implication a planning authority is enabled by section 52(3) to restrict the execution of a duty which is associated with or subordinate to the exercise of power.⁷⁷ Does this mean that by predetermining the grant of planning permission when the agreement is signed the planning authority may disregard representations made by the public at the time of approval or received after the agreement is executed? May the planning authority also disregard the principles

⁷⁴ See eg. the narrower interpretation suggested but not adopted by Hawke, J.N. "Section 52 Agreements and the Fettering of Planning Powers" (1980) JPL 386.

⁷⁵ See Stringer v MHLG [1970]1 WLR 1281;[1971]1 All ER 65.

⁷⁶ See eg., Southend-on-Sea Corporation v Hodgson (Wickford) Ltd. [1961]2 WLR 806;[1962]1 QB 416;[1961]2 All ER 46 where Lord Parker refers to a duty to "exercise a free and unhindered discretion".

⁷⁷ This point is explored by Young and Rowan-Robinson (1982) op.cit. supra note 71.

of natural justice by allowing itself to be biased in reaching decisions related to the agreement⁷⁸ ?

The decision in Brandrose was appealed⁷⁹ and the Court of Appeal, in light of the ambiguities in section 52, took a restricted view and concluded that whatever that section did mean, it was not clear enough to sanction the fettering of statutory powers. Although on that level the decision is understandable (the section is badly drafted), as the comment by Michael Purdue on the case⁸⁰ points out, the section does seem to state that the planning authority can bind itself to grant consent as long as that consent accords with the development plan.

The Court of Appeal to some extent took the opportunity presented by this case to restate the role of a local planning authority in determining applications. Lawton, LJ commenced his judgment by indicating that the planning authority appealed the decision, knowing their claim had no merit, to correct Fox J.'s interpretation of section 52 which would have a serious effect on the administration of the planning legislation if left as a precedent. On this basis the Court agreed to state the limits of the section (although they exercised their

⁷⁸ In Fairmount Investments Ltd v SSE [1976]1 WLR 1255 at 1263 Lord Russell stated that unless the contrary was indicated, parliament intended statutory powers to be exercised in accordance with the principles of natural justice. J.J. Steeples v Derbyshire County Council [1981] JPL 582 quashed a decision of the planning authority, on the application of a group representing local interests, to grant consent in accordance with an agreement on the grounds that it defeated the principles of natural justice and created bias. Brandrose (Chancery Division), cited supra note 71, however suggests that in the case of section 52 agreements the principles of natural justice could be overridden, although this point was not explored in depth.

⁷⁹ [1983] P&CR 349; noted [1983] JPL 574.

⁸⁰ [1983] JPL 376.

discretion not to make a declaration), and they did so on the basis of it providing an enforcement device, and as such could not be used to impede the public duty performed by planning authorities under the legislation when they decided upon an application.

" Section 29 is the linchpin of this part of the Act. When exercising their powers under it a local planning authority are performing a public duty. They cannot bind themselves in advance as to how they will perform it, nor can they do more than what the Act says they can do. They can impose conditions upon the grant of planning permission but they have no power under section 29, nor any other section, to make an applicant comply with their conditions: but if he fails to do so his planning permission will lapse. An applicant, however, may be willing to undertake to comply with the conditions. He may indicate his willingness in negotiations with the local planning authority before making an application, as may happen when a large-scale development is being planned; or he may do so when he learns what conditions the local planning authority intend to impose. Section 52(1) empowers a local planning authority to make agreements to achieve ends which it could not achieve without the consent of an applicant for planning permission. It does not empower a local planning authority to grant permission otherwise than as provided by sections 26 to 29 of the Act. "81

The decision is an important one as it not only restates the restrictive approach to the ability of a body with statutory powers to fetter itself in the future, but also gives an account of the development control system in which section 52 agreements play an integral part. No distinction is made between valid and invalid conditions and the only prerequisite of the contract is that the developer is willing to enter into it. The role of negotiation is acknowledged to extend to pre-application discussions and, as long as the local planning authority does not grant permission without regard to the development plan and other material considerations, they have

81 [1983] P&CR 349 at 354.

the ability to use agreements under section 52 to enforce their requirements on the development once permission has been granted.⁸²

The overall result appears to be a licence to the local planning authority to enter into contracts to enforce conditions it wishes to impose, with the proviso that the court will not enforce such contracts against the planning authority if they amount to a fettering of powers. This, it seems, puts the developer in the position of contracting with a body who can enforce the contract, but which can breach that contract if it interferes with its statutory powers or duties⁸³ even if they are exercised contrary to the development plan.⁸⁴ By reiterating principles of freedom of contract in relation to section 52 agreements, the court takes no account of the fact that one party is a body with statutory powers; whilst in considering the effect of the agreement so entered the court is emphatic that such a body cannot fetter its exercise of power. Thus, while the above extract seems a realistic account of the development control system, Lawton L.J. takes no regard of the ramifications of his public law

⁸² The practical effect of this must be to phrase the section 52 agreement as being conditional upon the grant of permission, rather than covenanting in return for a grant of permission.

⁸³ The situation has been further complicated in the New Zealand case of Devonport Borough Council v Robbins [1979]1 NZLR 1, where the planning authority's powers were not fettered by an agreement with the respondent but damages were awarded against the planning authority as the development plan was amended with the ulterior motive of repudiating that agreement.

⁸⁴ Fox J. in the Chancery Division had adopted the judgment of Walton J. on the hearing of the injunction proceedings on this point: "the situation now is, when a developer enters into a section 52 agreement, he must be taken to know that any powers ... may properly be exercised against him, provided that they are in accordance with the provisions of the development plan." See [1981] P&CR at 334. The judgment of the Court of Appeal does not refer to such a proviso.

decision for the private law concepts within which he frames his judgment.

Consequently, rather than clarifying the meaning of a section which is said to 'bemuse' the Court of Appeal⁸⁵, this decision perpetuates the confusion by failing to acknowledge the effect of the overlap between public and private law. The court could have taken the opportunity to explore the particular considerations which should apply to such administrative contracts as these, but instead it uses freedom of contract to explain entering into agreements⁸⁶ and concepts of administrative law on their effect.

Clearly local planning authorities cannot fetter their discretion in an open-ended way, but on the other hand 'within certain general limits' it is 'highly desirable' that a local planning authority can 'first of all, contract not to exercise its statutory powers in the future, or secondly, contract as to the manner in which it will exercise its statutory powers in the future'.⁸⁷ For example, although it would be unacceptable to allow a local planning authority to bind itself to grant future planning permissions in uncertain terms, it would be completely artificial to suggest that an agreement to secure planning gain

⁸⁵ [1981] P&CR at 355.

⁸⁶ This is not novel: the courts have often used principles of freedom of contract to explain their non-interference with discretion. For discussion see Gabel, P. & Feinman, J.M. "Contract Law as Ideology" IN: Kairys, ed. *The Politics of Law*, 1982 Pantheon. For the courts unwillingness to interfere with discretion under section 52 and section 126 see Attorney General v Barnes Corporation and Ronelagh Club Ltd. [1939] Ch.110, per Luxmoore J.

⁸⁷ Walton J. in Windsor and Maidenhead Royal Borough Council v Brandrose Investments Ltd at the inter partes hearing of the injunction, quoted by Fox J., [1981] P&CR at 334.

provisions did not envisage the permission which was the subject matter under negotiation.

The Court of Appeal in New Zealand has taken a broad and realistic view of these issues. In the 1979 case Devonport Borough Corporation v Robbins⁸⁸ they were faced with an agreement between a developer and a local authority made in 1971 which was politically unacceptable to the subsequent council membership following elections in 1974. The agreement was made under a section in an Act passed to facilitate the reclamation and development of the harbour site which enabled councils to enter into deeds to provide for the carrying out of the development and it was accepted that this agreement fell within those terms. The agreement itself indicated that the Council regarded development of the harbour site involved to be in the public interest and they had a policy to promote that development, together with the sanction of the abovementioned Act. The content of the agreement provided for the grant of a development licence if the developer fulfilled a list of conditions which would make the content of the scheme for the site acceptable to the aims of the council. The list included the provision of public amenities within the site.

The Court of Appeal held that the developer had a right to a development licence if the conditions in the contract were fulfilled and the Council could not escape the terms of the agreement simply because the newly elected membership were against development of the site.

" As no one now suggests that the deed is outside the powers conferred by the 1970 Act, it must follow that the Council of 1971 acting on behalf of the Borough Corporation, entered into a contract lawfully fettering the discretion of

⁸⁸ [1979] 1 NZLR 1.

their successors, a result inevitable from time to time when contracts are validly made by Governments, local bodies or other corporations. After all it was the Corporation of the Borough of Devonport, not the Council for the time being, that was the contracting party. "⁸⁹

The Court implied into the agreement a term that there would be reasonable co-operation and discussion between the parties, as it would be impossible for them to decide upon a scheme acceptable to both parties in the absence of negotiation. Thus the Council were under an obligation to consult with the developer before making major decisions affecting his scheme. The Council were clearly in breach of their contractual obligations when they rejected the scheme because they were opposed in principle to the development of the site, but were also in breach when they adopted policies affecting the density of the development site and took other steps to obstruct finalisation of the scheme.

This case was an unusual one in that the development of the site involved was, according to statute, in the 'public interest'. The agreement was also unusual as it essentially amounted to giving the developer preferential treatment by insuring that his investment of time, effort and finances in pursuing a scheme for the site would not go to waste, provided the scheme covered certain points the Council regarded fundamental. This business element of the agreement was influential on the Court of Appeal.

The developer would be totally at the mercy of the Council of the day if they were free to say that, although he might have designed as good a housing development as reasonably possible, with admirable provision for a boat harbour, reserves and other public facilities, they rejected the basic concept of alienating public land and abandoned any idea of such a project. A developer could well have been

⁸⁹ *ibid* at 22.

discouraged from the expenditure and effort needed to satisfy the specific conditions if the deed had left everything at large. The 'business sense' of the contract may be a helpful guide to its true meaning "90

It is nevertheless instructive. The Court was prepared under these circumstances to allow the Council to lawfully fetter its powers within prescribed limits. The agreement was not interpreted as fettering discretion so as to prevent the Council from taking into account the merits of the scheme in deciding upon the application, and the Council were still free to impose any necessary conditions on the consent. What is interesting is that the developer's interest was the one being protected and, the 'public interest' was regarded as being reflected in the statute rather than in the local preference for councillors who were opposed to such a scheme. Thus in relying more on the private law concept of freedom of contract the Court effectively excluded the influence ^{of} local opposition. The issue was decided for the purpose of awarding damages for breach of contract and, while the decision did not mean that an unapproved scheme was forced to go ahead, it did have an impact on local government coffers, probably making them less able to supply the facilities envisaged by the agreement.

A useful test for evaluating the relationship between section 52 agreements and the fettering of local powers has been suggested by Young and Rowan-Robinson.⁹¹ They suggest that the validity of a section 52 agreement could be examined from the point of view of whether 'there is a real likelihood that the contract would seriously conflict with some essential function of the contracting authority'.

⁹⁰ *ibid.* at 22.

⁹¹ (1982) *op.cit.* *supra* note 71.

Under this test a 'mere possibility' of conflict is not enough⁹² and the appropriate time for evaluating the question would be when the matter was litigated rather than at the time of contract. Consequently, if the agreement incorporated the grant of planning permission in precise terms at a time after the local planning authority had approved the grant subject to an agreement, it would certainly be valid and enforceable. The authority would not have tied its hands before objections to the application were heard and would not have precluded consideration of the development plan and other material considerations.⁹³

This type of test, however, while allowing the planning authority to fetter its discretion within reasonably narrow confines, does not answer many of the broader problems raised by the Court of Appeal decision in Brandrose. Most specifically, neither approach attempts to interfere with 'freedom to contract', but rather accepts that the content of the agreements only require scrutiny at the point of litigation, as opposed to the time of creation. Inherent in this is a decision not to scrutinise the context of the agreement: only the isolated issue of whether the form of agreement represents a fetter on powers and duties to be exercised at a future date. This decision not to control, or attempt to control, this mechanism of enforcement at

⁹² They cite British Transport Commission v Westmorland County Council op.cit. in support.

⁹³ In McLaren v SSE and Another unreported QBD noted [1979] SJ 370/9 (transcript Barnett, Lenton) the developer, acting on the advice of leading counsel, suggested entering into a section 52 agreement and included within it a package of gains to counter-balance the Council's objections to the scheme. The Council were persuaded and accepted the agreement in principle, passing a resolution to have it executed, but when they came to consider the application itself local residents objected on several grounds. As a result permission was refused and the agreement was not signed.

the stage of inception allows the networks of power and secrecy operating at grass roots level to continue.

It could be argued that this represents a recognition of the role of bargaining in the development control system, and of the role of planning as something concerned with broader considerations than physical land use. Certainly there is an acceptance within the case law of the use of agreements to secure planning gain, and to make developments, which would otherwise be refused, acceptable. The courts have gone so far as to declare such an agreement to be 'in the public interest' where it was used to preserve an accepted policy⁹⁴ and have referred favourably to their use as part of an administrative machinery to enforce requirements outside of formal conditions.⁹⁵ As a result of this type of approach the relative autonomy of planning by agreement is left intact as the domain of planners and of politics.

However the strength of this argument has been brought into question by more recent developments in the Court of Appeal, as exemplified by the case of Bradford City Municipal Council v SSE discussed above. By suggesting in this case that the reasonableness of an obligation imposed on a developer is the essential factor in determining whether an agreement is 'incidental and consequential' to the development, the court has intimated a willingness to interfere

⁹⁴ Beaconsfield District Council v Gams (1974) 234 EG 749; see for discussion Grant, M. "Planning By Agreement" (1975) JPL 501; Levings, A.P. "Planning By Agreement-The Beaconsfield Case" (1975) JPL 704; and (1976) JPL 732 and 738 for comment. In this case the policy in question was the protection of a green belt: See McAuslan, P. *The Ideologies of Planning Law*, 1980, Oxford: Pergamon Press at pp.163/4 for discussion of judicial attitudes towards green belt policies, as an amenity consideration which may accommodate both public interest and private property ideologies.

⁹⁵ See McLaren v SSE and Another supra.

with the extent of obligation considered to be valid. It seems from this case that the desire to interfere has been prompted by the growth in the use of agreements as perceived by the court, and the purpose of the interference is to ensure that local authorities are controlled to the extent of avoiding encroachments upon the development industry. That is, as long as the agreements are acceptable to the developer they may be upheld, but where the 'risk and expense' goes beyond what the court considers reasonable to expect they will not be upheld. What is clear from this judgment is that the assessment of what is reasonable is not a matter for the parties alone, but, by recognising the inappropriateness of using concepts of freedom of contract where a public body is involved, the 'public interest' is also at stake. Interestingly, although not surprisingly⁹⁶, the Court of Appeal in assessing the 'public interest' did not address itself to the needs of the area as expressed in local policies and conditions or as affected by national economic policies, but expressed it in terms of ensuring the like treatment in the development process from one developer to the next. The Court of Appeal thus indicates the central concern to be fairness to the developer, rather than to the recipients of central and local policies.

⁹⁶ See McAuslan, *The Ideologies of Planning Law*, 1980 Oxford: Pergamon Press, *Urban & Regional Planning Series*, Volume 22.

PART III : TOWER HAMLETS' STUDY

CHAPTER 7: RESULTS OF STUDY

INTRODUCTION

This chapter presents the data obtained in Tower Hamlets on schemes attracting planning gain before the policy became part of the Borough Plan. They are presented alphabetically for the purpose of allowing the reader to access readily the material in this chapter from other parts of the thesis. The details which appear here are drawn upon throughout the thesis and are regularly referred to in footnotes. This type of arrangement was also chosen to help minimise the effect of my subjective view of the material. The reader is provided with the data in this form so that the arguments which are made drawing upon it in other chapters can be scrutinised from alternative standpoints. For example, it would have been possible to present the schemes within a framework of those attracting minimal gains, substantial gains or no gain at all. To do this, however, would have involved organising the schemes in accordance with my perception of gain. It may be that my perception arguably possesses more objectivity than the perceptions of a person actively involved in the process, but is also sure to differ from other equally detached views of those approaching the issue from a different standpoint.

In view of the arguments stated above on methodology¹ there are problems in taking this approach, and certainly biases which may have crept in at the stage of collecting and synthesising the data cannot be eradicated. It could be argued that as a researcher my purpose should be rather to commit myself to the underdog and argue for the less powerful interests in society and thus turn my partisan perceptions to

¹ chapter 1.

good use. However, I have taken the view that this data should appear in its purest possible form so that it may be drawn upon by others interested in the field and may be analysed from other standpoints. The other chapters in this thesis perform a different function as they draw upon this bank of information in the context of my own theoretical framework.

Thus, the information which follows is largely descriptive and detailed and aims to give a precise picture of the process of planning gain by highlighting the effect of negotiation on the content of the schemes. The headings for each scheme include an indication of the actual location of each scheme within the Borough so that the reader has an idea of which of them fall within the same ward. There is also an indication of those schemes where an appeal was lodged or heard and the amount of time the file on any scheme was active before the scheme was fulfilled or abandoned. By fulfilled is meant that building commenced or any planning agreement was discharged. The overall result is a valuable and unique collection of material which may be readily accessed and should assist in understanding the aims and the practical impact of conducting a planning gain policy. Chapter 8 then discusses the use of planning agreements in Tower Hamlets, their form and their content.

THE CASE STUDIES

ALIE STREET, No. 24WHITECHAPEL1974/1982Appeal to the Secretary of State, July 1975

An Application in respect of a derelict 3 storey building to be converted to 3 floors of offices (2970f²) with a basement flat (850f²) below was made in October 1974 and refused in the following October. Previous to this, a scheme involving this building was agreed upon in which it was linked to the renovation of a house in Princelet Street for residential use. This scheme would have been approved but the developers decided it was uneconomic and submitted the revised application to keep the matter alive. A further application by a different developer was submitted for the building with larger floorspaces, 2970f² for offices and again a basement flat (905f²). This application was also refused (November 11, 1975) on the grounds of insufficient planning advantages : the ratio being only 7:2 rather than 1:1. It was also argued that the residential element would certainly be used as ancillary to the offices rather than providing housing for the Borough.

This refusal was successfully appealed to the Secretary of State on the basis that the scheme represented an environmental improvement by converting a derelict building using a design sympathetic to the adjacent properties. The Secretary of State considered this to be sufficient to satisfy the office policy of requiring planning advantages. A permission was issued in March 1976 but was not implemented. A further scheme was approved in December 1982 for the building to be used in a similar way, 3228f² for offices and 968f² for a basement flat. The report to the Planning Committee recommended approval in view of the previous decision of the Secretary of State and the one residential unit provided.

ARTILLERY LANE, No.s 36/40SPITALFIELDS : ARTILLERY PASSAGE CONSERVATION AREA1980/1983Appeal to the Secretary of State, August 1982

Applications for listed building consent to demolish these mainly industrial premises and to erect a mixed office (8,866f²) and residential (2108f²) building were refused by the Development Sub-Committee on April 13, 1982. The recommendations for refusal were made on a number of grounds : (i) loss of industrial floorspace, (ii) contrary to Tower Hamlets Office Policy and the GLDP to allow office use which does not improve the area and has insufficient planning advantages, (iii) unacceptable design, (iv) it involves the demolition of unlisted but attractive buildings in the Artillery Lane Conservation Area and (v) it would set a precedent for redevelopment in that Conservation Area.

As far as the planning advantages are concerned, the scheme would demolish structurally sound buildings, forming part of an attractive 19th century terrace (presently used for 60% industrial and 40% warehousing uses) and replace them with a 6 or 7 storey glass and metal clad building to be used for 81% office purposes and 19% non-self contained residential use. Thus not providing a substantial residential or other 'beneficial' element and at the same time representing a loss of industrial space and loss of buildings which could be renovated.

The appeal was dismissed in July 1983, after a local inquiry, on the basis of failure to conform to office policy, loss of industrial floorspace and a presumption of conservation as against redevelopment. The Inspector considered evidence on the economic viability of schemes which would renovate the buildings for use as offices but with a substantial residential element and concluded that demolition on economic grounds was not justified. He did not comment on the acceptability of the Council's requirement of planning benefits.

ARTILLERY LANE, No.s 37-41 AND GUN STREET, No.s 51-53
SPITALFIELDS : ARTILLERY PASSAGE CONSERVATION AREA

1979/1983

Application for Appeal to the Secretary of State, dated August 2, 1983

In 1979 Royal Insurance Company Ltd applied to demolish No. 41 and to erect a 5 storey office building (17,500f²) on the complete corner site that this demolition would produce. In 1976 they had entered into a planning agreement for a mixed office and residential scheme which identified this site, except for No.41, for the residential element. This part of the scheme was never completed.² The developers now refused to negotiate and a development refusal was issued on January 19, 1983 on the grounds of non-compliance with Tower Hamlets Office Policy and the GLDP. Listed building consent to demolish an unlisted building in a conservation area was also refused. No. 41 had previously been used for retail use (it still has its shuttered shopfront) with residential above, but had stood vacant since 1976 and was, by 1983, delapidated. The residential part had been unoccupied for 25 years and not fit for human habitation. A permission had been issued in 1979 to use the lower 2 floors as offices with light industrial use above but this was not taken up. The Council were then endeavouring to get this 18th century building listed³ and made efforts on behalf of the third party who owned it, who was willing to sell to the highest bidder, to find a buyer willing to do the required renovation work. An inquiry was scheduled to be heard in October 1983 and was to deal specifically with the issue of the legality of refusing permission on the grounds of insufficient planning advantages but the appeal was withdrawn.

² This was the only case where by the end of the study period a developer entered into a S.52 agreement and categorically failed to realise the gain element : see below under B.A.G.S. Scheme (West).

³ A number of the consultative organisations on historic buildings, such as the Georgian Group and London Archaeological Society, supported the Council in their application to the Department of the Environment.

ARTILLERY LANE, No.s 52 & 54SPITALFIELDS : ARTILLERY PASSAGE CONSERVATION AREA1971/1973

In November 1971 the Council approved a scheme on No 54 alone for mixed office (3061f², later increased to 3320f²) and residential (473f²) use. The bottom 2 floors were already in use as offices and this consent added a 3rd floor of office accommodation and a 4th of residential. The resulting building exceeded the plot ratio for the site by 1,252f² of offices, but the planning officer recommended approval because it conformed with office policy, the additional storeys made the building match the neighbouring property and the actual plot ratio was close to the neighbouring zone of 5:1.

This scheme was not implemented but was followed by one which included No 52. In November 1972 a consent was issued for 3,520f² of offices and 2 self-contained flats (337 and 384f²) plus a shop and showroom (not ancillary to the offices). This consent was taken up, although slightly modified in May 1973 to include a basement for storage for the shop.

No agreement was entered into and the details of both elements were included on the planning permission issued.

ARTILLERY LANE, No.s 56 & 58ARTILLERY PASSAGE CONSERVATION AREA1971/1974

In November 1971 agreement was reached with the developer to renovate and improve these two Grade I listed buildings as planning gain together with the improvement of three residential units. The scheme included No.s 20/24 Frying Pan Alley and the existing uses of all the buildings amounted to 6,200f² residential, 2,200f² commercial and 3,000f² light industrial. No.s 56 & 58 occupy an important position on Artillery Lane on a corner site, set back from the road at a point where the road narrows. The buildings are of significant architectural and historic interest and the Council considered the extensive renovation of these dilapidated buildings to be of primary importance in any scheme in which they were included. The use of the premises was to be mainly offices (13,606f² in total) although the improved residential units amounted to 2088f² and the ground floor of No.58 was restricted to light industrial use by a scalemaker (428f²) in accordance with its original usage. There was further agreement with the Council for the developer to rehouse existing tenants and to give the Council options on the residential units. The tenant of the offices was also specified on the planning consent, and this name was later changed by a further consent in late 1973. A further amendment was made in January 1974 to extend the amount of office space to 17,412f².

ARTILLERY LANE, COSMART HOUSESPITALFIELDS : ARTILLERY PASSAGE CONSERVATION AREA1981/1983

This was an unusual scheme for this area as it involved no requirement for residential space to be included (seen as an inappropriate use in this building) and the planning agreement was designed to ensure that the developer relocated the existing industrial occupier, a printer. The application was for 2,500f² of offices and a shop of 1,700f². The gain was described as the renovation for retail use, the relocation of the printer and environmental improvement in the Artillery Lane area. The decision notice was issued 11 months after the Committee approved the scheme partly because of delays over the planning agreement and problems with finding suitable relocation premises. During the interim the shop space was increased to 2,200f² making it more like a 50:50 split between the uses.

ARTILLERY PASSAGE, No.s 1-4 & 9ASPITALFIELDS : ARTILLERY PASSAGE CONSERVATION AREA1973/1975

This was a mixed use scheme permitted in August 1973, involving the renovation of listed buildings and the replacement of a modern building with one more in keeping with the surrounding properties. The upper floors of No.s 1, 2 and 3 were for office use (2977f²) and the remaining developments were classified as gains. These were the provision of shop and restaurant on the ground floor and basement of No.s 1,2 and 3; residential and landscaped garden at No.4 and residential at No.9A with an extension. Also included in the calculations was the renovation of buildings of special architectural and historic interest (No.s 2,3,4 & 9A) and the replacement of No.1. In floorspace terms the scheme involved an increase over the existing office use of 1040f², increased residential of 575f² and an extra 1180f² of open space.

The content of uses at No.s 1-4 was revised in March 1975 on the grounds of viability of the scheme. No. 4 was changed so that the ground floor and basement would be used as a shop with storage. No.1 would now have the ground floor and basement used as a showroom with storage and No.s 2 & 3 had a restaurant/wine bar on the ground floor and basement. The alteration in floorspace as a result was not dramatic, although the residential element was increased, but the individual properties became more marketable as commercial premises with ancillary housing. This latter scheme was implemented.

B.A.G.S. SCHEME (EAST)SPITALFIELDS :PROPOSED EXTENSION TO ARTILLERY PASSAGECONSERVATION AREA1974/1977

All of the B.A.G.S. Schemes were negotiated with the same developer, Central & City Holdings Ltd, who owned all of the properties involved (and were financially associated with the Royal Insurance Group) and the schemes were interconnected through the balancing of gains against office space. This element included properties on Gun Street: No.s 46-50 to be used for offices (727m², including 252m² existing use) and No.10, a warehouse, extended and refurbished for use as a homeless women's hostel (591m² accomodating 48 women in dormitories). The ratio of office to residential use on B.A.G..S. (West) and (East) together was 36% (1386m²) to 64% (2316m²). Taken individually they did not reflect this same ratio. The Committee gave approval in November 1975 and a consent was issued in June 1976 after a planning agreement relating to B.A.G.S. Schemes (East) and (West) had been signed. This consent recited a condition, mirrored in the agreement, prohibiting the developers from applying internal finishes to the office building until either the residential element was complete or a contract was entered into for the freehold or leasehold (of at least 10 years) of No.10 to be transferred to Tower Hamlets, the GLC, a housing authority or other body approved by the Council. At an early stage, September 1975, the planners suggested a lease on No.10 be offered at low cost to the Providence Row Centre, a housing association active in Spitalfields catering for single homeless men and women. The intention was to convert the warehouse into bedsitter accommodation for single women so that their other adjoining centre could be used purely for single men. In 1976 No.10 was sold to Providence Row at low cost and they were given permission to demolish the warehouse to erect a five storey building containing 24 bedsitters for single women. The basis of this being the financial constraints on Providence Row in refurbishing the warehouse. The work at No.s 46-50 was completed to produce 9000f² of office space.

B.A.G.S. SCHEME (NORTH)SPITALFIELDS : ARTILLERY PASSAGE & FASHION STREETA.s1975/1977

This scheme was not finally implemented but illustrates another potential scheme emerging from negotiations with Central & City who were trying to develop their landholdings in Spitalfields. It relates to a proposed four storey office development at Brushfield Street, No.s 28/38 and 6 Steward Street (a corner site, opposite Spitalfields Market) which would also require listed building consent to demolish the unlisted buildings at 6 Steward Street (vacant storage building) and No.s 28/32 (storage shed for fruit and vegetables). Originally the application for this development included no element of gain and was refused for non-compliance with office policy in December 1976. This seems to be the result of a failure to manipulate all of the uses within the proposals on the (East) and (West) schemes so as to produce a surplus of gain. From the correspondence it was originally intended to treat all three together but the (East) and (West) schemes were agreed before the Brushfield site was finalised. 6 Steward Street was originally destined for renovation works costing the developer £60,000 and lease or sale to a housing association or other body approved by the Council but was finally deleted from the (West) scheme⁴ by adding additional residential floorspace at 10 Gun Street. Following the refusal the Council wrote to the developers saying 'the scheme would be acceptable if a there was a suitable level of planning benefit tied to the offices by legal agreement'. The developers then entered into further negotiations to produce an acceptable scheme outside of the (East) and (West) parts, expressing a willingness to enter into another planning agreement. The final scheme which was approved by the Council in May 1977 (only 2 months after the application was submitted) was for a building with wholesale uses on the ground floor (233m²), so as to accomodate traders using Spitalfields Market, with 3 floors of offices above (912m²). This was linked with the renovation for residential use of the vacant industrial building at 13 Princelet Street (374m²), a Grade II listed building in

⁴ The S.52 Agreement was amended accordingly on November 2, 1977

Fashion Street Conservation Area. The gains in floorspace terms only represented 30% of the development but the planners saw the proposal as acceptable because development was needed in Brushfield Street as was renovation in Princelet Street, even though the demolition of buildings in Brushfield and Steward Streets required listed building consents. The scheme was to be subject to a planning agreement but the developers were unable to negotiate the purchase of 13 Princelet Street and the consent was never issued, although the developer intended to find a substitute gain. The draft consent included the same formulation in the conditions as appear in other Central & City schemes with regard to implementing both elements of the proposals.⁵

⁵. See B.A.G.S. (East) and (West).

B.A.G.S. SCHEME (WEST)SPITALFIELDS : EXTENSION OF ARTILLERY PASSAGE C.A.1974/1981

In June 1975 Central & City applied for permission to develop a negotiated scheme involving the renovation of a largely vacant fur traders warehouse at 1/2 Steward Street (including 35 Artillery Lane) as offices (909m²) with a new seven storey infill building (1377m²) for residential use at 51/53 Gun Street (including 37-39 Artillery Lane) and the renovation of 6 Steward Street as residential (348m²). This, together with B.A.G.S. (East), would lead to mainly renovation of several warehouses close to Spitalfields Market for either office or residential use, the former being confined to 1/2 Steward Street and 46/50 Gun Street (a fruit store with some office use). The single storey fruit warehouse at 51/53 Gun Street was to be demolished and the site leased for 80 years to the Peabody Housing Association (at low cost) who would build 24 flats.⁶ Steward Street was considered unsuitable for family use because of its size and design and several possibilities were investigated including its use as bedsitters for single Bangladeshi men or as an Asian community centre by the Spitalfields Project (estimated cost to the developer being £60,000). The most concrete proposal was to use the property as flats for young Asian women, to be ran and paid for by the Wayhome Project. In November 1975 the Committee approved the scheme and consent was issued on June 18, 1976 subject to a planning agreement signed the same day. Both of these documents contained a provision to prevent the internal finishes for the office development from being applied before the residential development was completed or, in effect, before the developers had disposed of the sites to organisations in a position to complete the residential content. A Supplemental Agreement in November 1977 removed 6 Steward Street from the scheme because of difficulties in finding a user and proposed increases in floorspace on the Peabody development.⁷ On June 1, 1978 Royal Insurance Company entered into a Building Agreement with Peabody which gave them a

⁶ Later reduced to 16 one & two bedroom flats

⁷ Overall there was still a shortfall of 67.22 s/m at this stage, even though 10 Gun St was estimated at 872 s/m

licence to enter the site and construct flats within 3 years, unless that period was extended by the Royal, at which time Royal would grant Peabody an 80 year lease on a £10,000 premium and at peppercorn rent. The Council approved Peabody as an appropriate body, but due to financial constraints they were unable to complete. The Council had issued 3 further consents for the site on the application of Peabody because of problems they were having in obtaining finance for the project from the Department of the Environment. In December 1976 the number of flats was reduced to 14 (947m²) and office permission was given for the ground floor (167m²) as the DoE had a policy against financing ground floor residential use. Use of the offices was restricted to academic, educational, social ... charitable use and the consent continued to link it with the rest of the scheme. The restrictions on this consent as to user and the links with the rest of the scheme were deleted in March 1977. These changes were again necessary to obtain finance. The office use was extended to the ground and first floor in August 1979, with the original restriction on user reinstated, and the number of flats reduced to 11 again to raise further loans. On Counsel's advice the Council agreed, in October 1981, that the requirements of the planning agreement had been satisfied. By this time Peabody had abandoned the development and this site then became the subject of an application for a new office building.⁸ Central and City completed the offices at Steward Street.

⁸. See ARTILLERY LANE, No.s 37-41 and GUN STREET, No.s 51-53 above

BETHNAL GREEN ROAD, NO.s 455/463BETHNAL GREEN1976/1977

This was an important scheme for the Council as it represented the only possible route for providing a community and sports centre in the northern part of the Borough. The application (dated September 10, 1976) involved the rehabilitation of a large vacant building, formerly used as a bakery, as speculative offices (88,000f²) and sports and community facilities. The development committee agreed to grant permission on October 27, 1976 subject to a planning agreement. The developer submitted a draft planning agreement which restricted the application of internal finishes to the offices until works on the community centre were complete, and provided that the developer would be released from this once a contract was entered into with the Council. The Consent was issued on February 17, 1977 and a planning agreement was signed the same day. The release was to be given if the community centre was disposed of at any stage of its construction to a body approved by the Council. This covered the situation feared by the Finance Department that the developer would not be able to fully equip the centre and the Council would need to step in. The report of the Director of Development to the committee on July 13, 1977 states that the developer proposed the following terms: to carry out the works at his expense in accordance with specifications to be agreed and, on completion, to give the Council a lease for 125 years at a peppercorn rent. The same report indicated the agreement of the legal, community services and finance departments and asked the committee to give its formal approval so negotiations between the developer and all departments on the lease and specifications could be finalised. The developer was unable to find a tenant for the proposed offices and two further schemes were considered in July 1982: one, refused, for offices (87,963f²) and a 31,204f² community centre, the other, permitted, for offices (29,939f²) and 21,500f² of industrial units.

BLACK LION YARDSPITALFIELDS : 31-95 WHITECHAPEL ROAD1977/1979

The proposal to redevelop this site for office and industrial use was approved in principle in September 1977 and in April 1978 the development sub-committee deferred the scheme to the main committee recommending its approval subject to conditions and a planning agreement. The scheme was for a seven storey (7,432m²) office building and a four storey light industrial and (1161m²) and warehousing (3485m²) building for occupation by small firms (15 small firms were already occupying the premises and would be displaced). There was also provision for a public walkway between Old Montague Street and Whitechapel Road. The main committee gave its approval and a decision notice was issued when the planning agreement was executed on April 11th, 1979. The agreement required the development to be fully completed and the industrial building could only be used for non-industrial purposes with the consent of the Council. It went on to require the industrial building to be completed first, although a release would be given as soon as the developer entered into a binding contract for the development of the industrial/warehousing element. The consent made no reference to the planning agreement nor to the order of completion of works, although it did require the pedestrian walkway to be a part of the development. This was implemented with one slight amendment and that was the provision of a betting office on the ground floor for the use of an existing tenant. The planning agreement had to be amended (October 10, 1980) as it only allowed for industrial units on the ground floor. The GLC took over the management of the industrial/warehousing building when it was completed under the name of the Technology Centre.

BLOSSOM ST, NO.s 1-4 & 19-27 FOLGATE STSPITALFIELDS : ELDER STREET CONSERVATION AREA1976/1977

A new office building (2230f²) was proposed by Central & City (with Royal Insurance) for the sites on Blossom Street and this was linked in an application made in June 1986 (after several meetings) with a basement sports, recreation and restaurant area, plus renovation and refurbishment for residential use of the offices and workshops in a partly listed terrace at 19-27 Folgate Street (1246m²). The developer was also to clear the unlisted buildings at the rear of the offices and Folgate Street and provide landscaped gardens. The Office Development Permit issued for Blossom Street on June 28, 1986 required the residential works at Folgate Street and the basement recreational facilities totalling not less than 13,407f² to form part of the scheme for office space of not more than 24,000f². A planning agreement was executed on February 18, 1977 which required the development to be completed and for the developer not to apply internal finishes to the offices until either the residential and garden element was complete or the developer disposed of the Folgate Street properties, by sale or at least 10 year lease, to a body approved by the Council. The consent, on the other hand, required the residential works, landscaped gardens and the basement recreational facilities to be completed before the application of internal finishes to the offices. This scheme was implemented to produce 11,589f² (1075m²) residential floorspace in the form of flats and 13,487f² (1250m²) of officespace.

BRUSHFIELD STREET NO.s 16/18 & FOURNIER STREET NO. 31SPITALFIELDS : FASHION STREET CONSERVATION AREA1981/1982

An application was submitted by Central & City in October 1981 to change the use of the Brushfield Street properties from a cafe and industrial use to offices, and to renovate and convert 31 Fournier Street for residential use. The Council approved the scheme subject to a planning agreement which was signed on March 23 1982. The consent required the Schedule of Works on Fournier Street to be completed before the internal finishes to the offices were applied and under the planning agreement the developer was to enter into an agreement with the owner of 31 Fournier Street before the Consent was issued. Thereafter the agreed works of restoration and conversion would be completed before the application of internal finishes, unless the Council was satisfied that completion was prevented by reasons outside the developer's control. This proviso was added at the request of the developer who was concerned that the internal finishes clause threatened the viability of the project by requiring building work to stop in the event of delays at Fournier Street, including those beyond his control. The 'Fournier Agreement' was signed the same day as the planning agreement and involved the payment of £10,000 to be made to the owner towards the costs of the scheduled renovation works (costed at £9736.32) and the owner agreed to hold the money on trust for that purpose.

BUCK & HICKMAN SITE
WHITECHAPEL : NON-ADJACENT SITES

1978/1983

The content of this scheme really falls into two parts. Firstly, a change of use and extension of a warehouse at 60/66 East Smithfield and 42/42A Dock Street for offices (2630m²), which was linked to a partly refurbished and partly new industrial unit development (5200m²) in Dock Street and Royal Mint Street. Secondly, a conversion of a warehouse to offices (5630m²) in Mulberry Street (known as Buck & Hickman site). The first part was concentrated around Dock Street, close to the Tower of London, and the second part was on a site bounded by Whitechapel Road and Adler Street, over 600m away. The industrial element included the refurbishment of 16, 18, 24 and 30 Dock Street and 63 Royal Mint Street and there seems to have been some existing industrial uses in these buildings. The two parts of the scheme were owned by different companies, one the subsidiary of the other and both of them were parties to the planning agreement. The application in respect of the Buck & Hickman site was made in August 1978, followed two months later by separate applications for the office and industrial developments and the refurbishment around Dock Street. All of these were later referred to together as 'the development'. The agreement merely states that the development will be carried out and will be in accordance with a schedule of works approved by the Council and includes no specific covenant to complete the industrial part first. The schedule of works was approved by the Council on September 1, 1983 and allowed completion of the Buck & Hickman offices after most of the refurbishing and building work had been done on the industrial element but only allowed completion of the Dock Street/East Smithfield offices after completion of the industrial works. This plan was not adhered to by the developer as work on the Buck & Hickman offices commenced before the industrial element was started. The developers ran into difficulty with the demolition of buildings standing on part of the site intended for the new industrial building because of legal action commenced against them by one of the tenants. Meanwhile, they had tenants waiting for the office buildings and none for the industrial elements. At the time the study was complete no enforcement action had been taken by the Council.

CAMPERDOWN HOUSE, BRAHM STREET
WHITECHAPEL : ART GALLERY RESTORATION

1980/1982

In relation to an application made by Wingate Investments in January 1981 to construct a new glass-clad office building (8058m² including storage of 1206m²) the developers agreed to finance the modernisation and extension of the nearby Whitechapel Art Gallery. The Committee, in April 1981, gave its approval subject to a planning agreement to ensure that £500,000 was paid to the Trustees of the Gallery as community benefit. A draft of planning agreement was sent to the Legal Department by Wingate's solicitors (Linklaters & Paines) in March 1981 and was finally executed on October 30th. During this period the form of the agreement was revised so as to make the aims of the Council, as expressed in their office and other policies, the subject of the document while relegating the details of achieving them to arrangements between the developer and the Trustees. Thus the payment of £500,000, which in the original draft activated the planning permission, was replaced with a requirement on the developer to comply with the Gallery Agreement. The clause then goes on to explain that under that agreement the developer will make a payment which will enable the Trustees to carry out certain works of improvement and extension to the Gallery on the developer's behalf. The recitals having previously set out the office policy and the Council's acknowledgement of the developer's participation in improvement works on the Gallery as constituting a planning advantage. The concern of the Council appears to be ensuring that the works can be carried out rather than that money changes hands. On the other hand, from the correspondence the concern of the developer appears to be to get an acceptable consent at an acceptable cost.

" Our clients must be quite clear before they sign the Gallery Agreement that they are going to get a planning permission for the development of the site subject only to conditions which make the proposal viable. It is not acceptable to them for the Agreement to state that the planning permission, when granted, will be 'subject to whatever conditions (the Council) deem

appropriate'. Could you please let us have a copy of the proposed planning permission as soon as possible. "9

The Council agreed to attach a copy of the permission to the planning agreement and to grant it on execution of that agreement, with the developer covenanting not to implement until the Gallery agreement was complied with.

This scheme was further complicated by the fact that the developer was negotiating to buy some land from the GLC on which part of the development was to be built, and was also making a payment to the English National Opera, the tenants of Camperdown House, to terminate the tenancy and relocate. All of these agreements had to be exchanged on the same day as all parties were not prepared to commit themselves until the stage was fixed for the scheme to go ahead. At the end of November the £500,000 was paid and the consent activated. The Gallery Agreement provided for works to be done in accordance with plans for extension and renovation first conceived in 1977 but there had been no available finance. Works on this and the office development were both implemented.

The office policy had earmarked Camperdown House as a community building which would remain in use as such and not be displaced by office development. The agreement, therefore, had to provide a gain which satisfied those likely to object to the removal of the English National Opera. Interestingly, the Chairman of the Development Committee was personally interested in the Arts and had been approached by the Whitechapel Art Gallery for funding. The question arises, however, whether the renovation of an Art Gallery provided a 'community benefit'; clearly it may be beneficial to the

⁹ Letter dated 10th September, 1981 from Linklaters & Paines

borough generally to have a successful gallery within its boundaries to attract tourists and other gallery visitors into the area, it may also be beneficial if the 'community' is one which is comprised of a high proportion of gallery visitors. Otherwise, it could be argued that it plays an educational function in that it encourages those living in the vicinity to learn to appreciate Art. This, however, is a far more political issue and raises problems as to the purpose and function of Art in a society. As an example, if the Art displayed amounted to a form of propaganda for or against the government or some particular class or interest group, then to say that local residents 'benefit' from it, is too simplistic. Even if the Art in question is not of any particular type and reflects a diversity of views it is still not clear that exposure to it is necessarily beneficial, unless it is argued that a knowledge and appreciation of Art is in itself beneficial. An alternative construction is that Art largely represents the status quo or an organised reaction to the status quo, and consequently affirms distributions within society. Even if it is argued that Art represents revolution, it still does not follow that it is a 'benefit'. Rather in order to ascertain its real significance it must be assessed in the context in which it arises, which necessarily includes the nature of the local population and the priorities of needs within that population. For example, is funding of the Arts a benefit when funding could have been provided for housing instead ? This type of question cannot attract a meaningful response without an assessment of the complex relationships and economic considerations which play upon the Council's determination of what amounts to a 'gain'.

CARRON'S WHARFST.KATHERINES : DOCKLANDS JOINT COMMITTEE1976/1982

This application was originally made to the Council before the London Docklands Development Corporation took over as planning authority. The first application for development submitted for the site was in 1976 for 111,000f² of office space, showrooms and warehousing. This consent lapsed and in 1978 a further scheme was negotiated which included 57,673f² of offices, 56,048f² of residential in the form of 46 flats and maisonettes (partly housing association, 50% of which (probably 12 one bedroom flats) would be for Council nomination, and partly luxury private use), carparking, a riverside walkway, refurbishment of the jetty and a communal hall or lounge. The developer stressed the need for the quantity of officespace to make the entire scheme commercially viable and the Office Development Permit allowed 65,000f² with a restriction that the scheme includes at least 54,824f² of residential space. The Council gave its broad approval of this scheme to the Docklands Joint Committee but called for further details regarding the communal hall and required a planning agreement. In doing this the Council considered the fact that the area was not identified as a Preferred Office Location, was zoned for residential use and would considerably block the view of the Thames currently enjoyed by the GLC estate on St Katherines Way. They also took account of objections received from GLC tenants and The Employment Working Group to such a scheme. The DJC resolved to grant permission but as negotiations continued the developers reassessed the commercial viability of the scheme and found it both unfundable and unprofitable to retain the housing association element

and any S.52 requirement to complete the residential part first. Amended applications were submitted in June and July 1980 deleting the housing association element but maintaining the provision of a clubroom for neighbouring GLC estates residents (250m²) and a public walkway. The Council did consider suggesting refusal purely on office policy grounds but on the basis of residential content, albeit private, and the clubroom the scheme was agreed. There followed protracted negotiations between the Council, the GLC, tenants associations and the developers over the siting of the clubroom and finally, in August 1981 the Consent was issued and required the completion of the residential and clubroom elements ahead of the offices. The planning agreement then required completion of the clubroom ahead of both the offices and residential and a further agreement to be entered into with the Council within 12 months as to the construction of the clubroom. This period of time was extended but the company went into receivership in September 1982.

C.H.A.M.P.S. SCHEMEWHITECHAPEL : CAMPERDOWN STREET, HALF MOON PASSAGE,ALIE STREET & MILE END ROAD1973/1982

This Central & City scheme was discussed for many years and was under negotiation at the same time as BAGS and the Folgate Street developments. A permission was first given in respect of No.25 Camperdown Street (#25) in May 1975, following an enquiry from Central & City over two years earlier. This Consent allowed for the reconstruction of the existing vacant and derelict office building (190m²)¹⁰ to match and enhance the listed buildings on nearby Alie Street, plus an additional floor of light industrial use as planning gain. Following this, several schemes were drawn up for discussion with the Council and a Consent was issued in December 1976 for the erection of a building at #9/25 Camperdown Street, with a frontage in traditional materials and style, comprised of 1,167m² offices (including 190m² existing office use) and 305m² light industrial use. This was modified in early 1977 to take account of the landowner's need for direct access to the rear of 31/37 Alie Street which had become known during negotiations to acquire the site. The result was a building with reduced floorspace (1,375m²) and thus the industrial element was deleted (it was considered contrary to 'good planning sense' by the GLC and the Council planners¹¹) and the renovation of two Grade II listed residential buildings (496m²) in Alie Street (#17 &

¹⁰ This represented only a 10% increase in office space over that stated on a S.53 determination.

¹¹ Refer however to the scheme later approved for Marshall Walker which included mixed office and industrial use on this site

19), together with the incorporation of some vacant land at the rear (#19 & 42 Half Moon Passage), was substituted as the gain. The provision of a loading bay for 31/37 Alie Street and the consequent reduction in traffic congestion on Alie Street was also put forward as a benefit and the consent required its completion, together with that of the residential renovation, before the application of internal finishes to the offices. The consent did not require a planning agreement. None of these schemes were implemented and discussions continued until a further application was made in January 1979 for the construction of an office building (21,303f²) at 9/15 Alie street with some external restoration works to Iberia House (38 Half Moon Passage) change of use of 27 Alie Street to storage and the use of #25 as a carpark. The Committee approved the scheme subject to a planning agreement requiring the developer to assist in the acquisition of a Chapel at 213 Mile End Road and to construct a new building both to relocate the Half Moon Theatre who were occupying 27 Alie Street. The proposed development would have led to the closure of that theatre without these arrangements being made. At this stage the developers owned #25 and 9/15 Alie Street. On November 9, 1979 the developer signed an agreement with The Half Moon Theatre which recited details of the above permission, Council policy on office development and GLDP policy on recognising the importance of promoting and preserving theatres before providing for the payment of £40,000 (within 12 months or on the day development started, whichever was earlier) towards the cost of purchasing, renovating and reconstructing the chapel as a theatre to a standard approved by the Council. On November 14th a planning agreement was signed between the developers and the Council which contained similar recitals and

recognised the participation in the renovation and re- construction of the chapel (as agreed between the developer and the Theatre), and thus its rescue from closure, as a valid planning advantage. The developer agreed to enter into an agreement with the Theatre on or before signing the planning agreement under which they would covenant to participate in the works described. They went on to covenant with the Council not to implement the 1975 and 1976 consents on #25 and 9/25, not to commence the development until an agreement with the Theatre was executed and not to occupy the offices until restoration work at Iberia House was completed to the satisfaction of the Council. The consent was issued on November 20th and £40,000 was paid to the Theatre early in 1980, but the offices did not go ahead because a fire substantially damaged Iberia House which was to be restored as part of the development. Consequently a further application was submitted in June 1981¹² to do certain refurbishment works at 17/19 (listed buildings),²³ & 27 Alie Street, to construct office buildings with ancillary storage and retail use and carparking on the rest of the site (9/15,25,29 & 31/37 Alie Street, Iberia House and 9/25 Camperdown Street) and to do works on the chapel, including the construction of an auditorium on the adjacent vacant site. At this stage the Theatre still occupied 23, 25 & 27 Alie Street but had purchased the chapel and were doing reconstruction works. It was anticipated that Central & City would enter into another planning agreement containing essentially the same recitals and clauses as the previous one, plus an agreement to use their best endeavours to

¹² In October 1980 an application by another developer to convert 17/19 Alie St. and 19 & 42 Half Moon Passage to offices (5,060s/f) was refused.

complete 17/19 within 2 years. It was also to contain recitals as to the developer conforming with the previous Half Moon agreement and the account taken of this in agreeing to grant permission on this larger development. The counterpart agreement with the Theatre detailed two payments: £40,000 against the architect's certificates issued in respect of a schedule of works on the chapel (First Works), and £220,000 (to be paid 12 months after the consent was issued or on commencement of the development) again against certificates in respect of a second schedule of works to construct the auditorium. These agreements were not executed following a request by Central & City to divide up the development into different elements which could be hived off under the name of another company under whose ownership part of the site was held, Western Heritable Land, for the purpose of saving on Development Land Tax.¹³ Consequently separate Theatre agreements, planning agreements and planning permissions were drawn up, details of which appear below. The development also entailed the closure of Half Moon Passage, an historic public walkway and the developers further agreed to provide limited public access to the courtyard and passage to Alie Street, which was part of the design of the new development, before a closure order was made.¹⁴

¹³ Letter dated March 24, 1982 from Central & City's solicitors to Mr Dempsey of the Legal Department reads : " ...my clients have now received a Report from their DLT Surveyors and some further Advice from Counsel. As you will recall, my clients have always reserved the right to re-jig their proposals in the light of DLT advice. In order to protect their own position and to be in a position to arrange proper funding for the proposed Development, my clients would now like to proceed on the basis that the Development be split into 4 separate recognisable projects. "

¹⁴ Letter to the developers solicitors from the Legal Department dated October 9, 1981 stated " The effect of such an agreement could well be that if objections were received to the closure of Half Moon Passage, the Council would be able to show objectors an agreement

<u>Definition of Site</u>	<u>Development</u>	<u>Consent attached</u>	<u>Theatre Agreement</u>
<u>Western Heritable Land Company (125,175f² offices)</u>			
Part of 23,25,27,29, 31/37 Alie St. & 9/25 Camperdown St.	construction of offices;carpark (East Block)	17&19 Half Moon Pa. 9/25 Camperdown St.	£220000
Part of 23,25,27,29, 31/37 Alie St.	construction of offices;public house & offices; wine bar,offices; Demolition of listed building (South Block)	29/37,25 Alie St 23 Alie St. 27 Alie St. 25 Alie St.	£ 40000
<u>Central & City Properties (123,173f² offices)</u>			
9/15 and part of 17/ 19 Alie St. & Iberia House	construction of offices (West Block) Restoration of 17/19 Alie St.	9/15 Alie St. 42 Half Moon Pa. Iberia House	£ 40000 paid re 9.11.79 agreemt

The agreements were executed in July 1982 (13 months after the application was submitted) and were intended to ensure that the money was paid and restoration work within the development completed before the offices were occupied. Consents were issued in August 1982 and this scheme was fully implemented.

which had been reached which would enable the public to have access during these limited periods and this may well make all the difference to the matter of whether the road closure would be agreed. "

CHRIST CHURCH HALLSPITALFIELDS : HANBURY STREET,NO.22A AND BUXTON STREET NO.s 31-331975/1979

In March 1975 outline permission was given to build a youth club at 31/33 Buxton Street. It was anticipated that this, together with monies paid towards the restoration of Christ Church, Spitalfields, would be planning gain for office development at 22A Hanbury Street, the existing church hall and youth club and a consent was issued to this effect in May 1976. The covenant of the hall required its proceeds of sale to be used for 'christian purposes' and the Church Council intended to sell it and relocate the club elsewhere: a new building at Buxton Street would have fulfilled this intention. No planning agreement was executed as it was discovered that Christ Church itself was not in need of further renovation monies. In 1978 interest in developing the church hall revived and a further consent was issued in July for 7,900f² of offices with a youth club and recreation facilities (9,500f²) at Buxton Street. Again the intention was for the Church Council to apply the sale proceeds of the hall to the new development. The developer interested in the church hall failed to go ahead with the purchase after the consent was issued so the youth club did not go ahead.

CHRIST CHURCH, SPITALFIELDS SCHEMES1977/1979

A number of schemes were negotiated with different developers to raise money for the restoration of the Grade I Listed Hawksmoor church which stands on the corner of Commercial Street and Fournier Street in the centre of the conservation areas of Spitalfields. It is considered to be of national historical importance and a major example of European Baroque architecture as well as the obvious community facility and focus of certain community events in East London (such as an annual music festival). In 1977 the cost of restoring the church was estimated to be £675,000 for works alone, excluding maintenance and upkeep. The following schemes produced £415,000 for this work, excluding interest, over a period of 14 months :

<u>Address</u>	<u>developer</u>	<u>appxf²</u>	<u>amount</u>	<u>date paid</u>
1/5 Frying Pan Alley 15/17 Sandys Row Rear 9A Artillery Pa.	Chaselea	30,000	£130,000	1. 3.1979
87/93 Mansell Street	Hill Samuel	25,000	£ 30,000	27.11.1979
38,39,40 Prescott St.	Providence		£ 30,000	27.11.1979
60 Commercial Rd	O.C.L.	25,100	£100,000	31.12.1979
27/33 Artillery Lane 2/6 Fort Street	Western Heritable	19,000	£125,000	9. 5.1980

1. CHASELEA

In 1975 two schemes had been approved linking this site with renovation of buildings for residential use but neither had been implemented. An application was made for a six storey office building in the Artillery Passage Conservation Area in January 1978, the proposed planning gain being a shop on part of the ground floor and a contribution to restoration works on Christ Church. On May 31st the consent was issued and a planning agreement executed which stated the office policy and that participating in the restoration of Christ Church or any other Hawksmoor church in the Borough was a planning advantage. Under this agreement compliance with clause 1 of a Conservation Agreement entered into with the Friends of Christ Church was as a prerequisite to implementing the office consent. The Conservation Agreement of the same date in turn provided for the payment of £120,000 in connection with an attached schedule of works within six months, failing which the developer would pay an additional £10,000. £130,000 was paid 10 months later. In March 1979 the development was taken over by Reeshurst Ltd and the Conservation

Agreement was assigned to them. In January 1981 a further document was executed to vary the agreement so as to allow The Friends to invest the money paid and use the interest to establish a fund for the general repair and upkeep of the church. The variation also allowed the Friends to substitute other works, if necessary, for those originally scheduled.

2. HILL SAMUEL LIFE & PROVIDENCE LIFE ASSURANCE

Appeal lodged against a section 53 determination in 1979

In 1964 a permission had been issued in respect of Eastgate House, 87/93 Mansell Street to erect an eight storey building with mixed retail, office, factory and warehouse uses. In 1973 there was an application to extend office use but the Council refused to grant permission and the ensuing appeal was withdrawn in 1976. In November 1978 an application was made for a Section 53 determination on the uses within the building as Hill Samuel had taken a lease to use the whole area as offices to which the Council objected. The Council refused to carry out such a determination as it is only relevant where development is contemplated and Hill Samuel issued a writ requiring a declaration as to existing uses. The Council's position was that only half the floorspace could be used for offices without further permission, and any further use would require compliance with office policy. Hill Samuel also appealed to the Secretary of State. Since the writ was issued the plaintiff's solicitors (Gouldens) instituted settlement negotiations. They first suggested that the Council grant a personal consent to Hill Samuel to allow them to use the premises for the purposes they took on a lease without conferring the benefit of an office consent on the freeholders. The Council later suggested that Hill Samuel could provide some planning gain on other land owned by them in the same area and consent would then be forthcoming. During the course of this dispute the Council had received advice from Counsel that their case was not a strong one and that any section 52 agreement could be problematic in establishing the planning purpose for entering it if the office use was already valid. Finally agreement was reached between the parties actually at the door to the court on the basis that office use would be granted for all of the building (50,000f²) provided the developer entered into a planning agreement

and a Conservation Agreement with the Friends (the church being over 800m from Eastgate House). Both agreements were executed on November 27, 1979 and the planning agreement contained the same recitals and clauses as above.

3. OVERSEAS CONTAINERS LIMITED (O.C.L.)

Complications arose in this instance because of the form of the scheme, in so far as it involved a payment to a third party. In January 1978 the sub-committee agreed to grant permission for the change of use to offices and one non-ancillary flat subject to a planning agreement for a contribution to the restoration of Christ Church. The draft consent made no reference to a planning agreement nor to planning gain and the planning agreement required compliance with clause 1 of a Conservation Agreement with the Friends. The insurance company who held the lease was suspicious of this arrangement and endeavoured to persuade the Council to accept the payment themselves, pointing to the practice of requiring similar payments in lieu of carparking spaces. The Solicitor to the Council refused to do this on the grounds that the Council would be acting ultra vires. Some further discussions continued but little progress was made and in January 1979 the company appealed to the Secretary of State on the grounds that the application had not been determined within the statutory period. Around this time the company were negotiating a lease to O.C.L. and O.C.L. were prepared to resume discussion on the planning agreement. It was finally agreed that the payment would be made under a Conservation Agreement. That agreement, signed in November 1979 recited the office policy, allowed the Friends to invest the money and use the proceeds to restore the church and stated that the participation of O.C.L. was a material consideration in determining the application. The content of the Agreement was to pay £100,000 to the friends before January 1, 1980, subject to the grant of a planning permission satisfactory O.C.L. and to O.C.L. being granted an underlease on 60 Commercial Road. The payment was made and the appeal withdrawn.

4. WESTERN HERITABLE

See under F.A.B.S. Scheme below.

COMMERCIAL STREET, NO.s 92/96 & PUMA COURT, NO.s 1/6SPITALFIELDS : FASHION STREET CONSERVATION AREA1974/1975

This was a scheme to replace existing delapidated properties with the same distribution of mixed uses over a total of 22,000f². The application included 5,400f² of office space, a commercial building and 16 residential units (only six were occupied because of the poor state of the building) in two almshouses administered by the Norton Folgate Trust¹⁵, the developers in this scheme. The Committee approved the scheme subject to a planning agreement to ensure completion of the residential units before the application of internal finishes to the office building. This agreement was executed on April 7, 1976 and the decision notice contained conditions imposing similar obligations on the developer together with a limit on the office floorspace within the development to that which already existed. Any increase in office floorspace required at least an equal increase in residential content.

¹⁵ The chairman of this Trust is Eric Stride, the Rector of Christ Church.

'CONGO' SCHEMESSPITALFIELDS : PARTLY FASHION STREET & ARTILLERY PASSAGE C. A.'s1973/1981

Another Central & City scheme involving the renovation of listed buildings in the heart of a conservation area, namely 4/6 & 14 Fournier Street and 16 Artillery Passage (all classified as Grade II), as planning advantages for office development at 36 Spital Square and 5/5A Sandy's Row on the fringe of the other two conservation areas in Spitalfields. The immediate background of the buildings was as follows :

14 Fournier Street	17.4.83	Change of use: light industrial to residential refused. Sale to Eric Eslob followed
	20.9.73	Change of use to residential approved
	27.2.74	Listed building consent for rehabilitation
	2.8.74	Details approved
5A Sandy's Row	28.4.74	S.53 determination: Existing office use 100m ² Also commercial and industrial uses
36 Spital Square		Commercial Use
4/6 Fournier Street	27.8.75	Listed building consent for use as 2 dwellings

The negotiated scheme put to the Committee on July 2, 1975 was to provide 1,075m² residential space in the three Fournier Street houses and a flat at 16 Artillery Passage, plus 812m² of offices, a split of 57% residential and 43% offices which reduced to about 50:50 when existing uses were taken into account.¹⁶ The refurbishment of all of the buildings and the demolition of industrial outbuildings behind the Fournier Street properties with replacement landscaped gardens were also identified as gains. The tenant of the shop at Artillery Passage objected to the scheme

" ...It is virtually impossible in these inflatory (sic) days of mad development and crazy rentals to find another premises in this area which would be suitable at a rent I can afford. "

The Committee agreed the recommendation to approve the scheme and a decision notice was issued in April 1976 after a planning agreement was signed with the developer and Mr Elstob. Sandy's Row and Artillery Passage were to be developed as one unit containing offices, showroom and a flat and this was linked to 14 Fournier Street. Spital Square was linked with all of the Fournier Street properties. The internal finishes could not be applied nor the offices occupied until

¹⁶ Planning Report to the Development Sub-Committee July 2, 1975

the residential works were completed, outbuildings demolished and gardens prepared for planting. The novelty of this agreement was Mr Elstob, as the developer was agreeing to fund the work on his property, including damp-proofing, repairing walls, re-wiring, building kitchen and bathrooms, painting the exterior and providing central heating and a refrigerator.

The corresponding condition on the consent linked the properties differently

4. The residential and landscaping works at 4/6 and 14 Fournier Street and 16 Artillery Passage shall be completed prior to the application of internal finishes to, and occupation as offices of 5/5A Sandys Row and 16 Artillery Passage and 36 Spital Square....the meaning of 'internal finishes' shall be as agreed in writing with the Council.

The reason for this was simply given as compliance with office policy. A number of amendments were made to the scheme in October 1977 because of difficulties in completing the residential elements. In the case of No.4 Fournier Street the developers were unable to find a residential occupier even though they offered it to over 40 charities, housing associations, the GLC, Tower Hamlets Council and other bodies on a 99 year lease at peppercorn rent. The reason appears to be that it was too large for single occupancy and had too awkward an interior for conversion into flats. The amendment involved, first its change of use to library, meeting room and book-shop for the Council for British Archaeology plus one unit of residential accommodation and, finally, its sale to the Spitalfields Trust. Both were acceptable as planning gain. No. 6 also was problematic because renovation works were likely to continue over a long period so the restoration requirement was confined to a flat for an existing tenant and the disposal of the house, by way of a 99 year lease, to another tenant who would then complete the restoration was added. This was superseded by the sale to the Spitalfields Trust. Sandys Row had been altered by a permission granted by the planner under delegated powers to move the flat to the third floor (from ground and basement) and the replacement of the showroom with a shop. A revised agreement was signed on October 12, 1977 acknowledging the changes at Sandys Row and the completion of works at No.14. Finally it released the developers from the first agreement upon the transfer of No.s 4/6 to Spitalfields Trust, which was duly done. Both Agreements were discharged from the Land

Registry in December. In November 1979 the Committee agreed to change the use of the basement of 36 Spital Square to offices, subject to a planning agreement. The first agreement had specifically restricted the size of office space at 36 Spital Square until 4/6 Fournier Street was completed and Spitalfields Trust still had not commenced the work, but the later agreement had released the developer from all obligations relating to 4/6 Fournier Street. For this reason the Committee resolved to take no enforcement proceedings against the occupation of Spital Square as offices.

There are various floorspace figures on the file but a comparison can be drawn between those given on the detailed proposals for the 1976 scheme and those appearing around the time of the amendments.

		<u>offices</u>	<u>residential</u>	<u>other use</u>
<u>1976</u>	Sandys Row/Artillery Passage	341	108	112 (store/shop)
<u>(revised)</u>	36 Spital Square	534		124 (store)
	4/6 & 14 Fournier St.		964	

		875(45%)	1072(55%)	236
	Less Existing	101	309	?

	Increased floorspaces (m ²)	774(50%)	763(50%)	

<u>With</u>	Sandys Row/Artillery Passage	359	94	108 (shop)
<u>Amendmts</u>	36 Spital Square	534		? (showroom)
	ancillary offices,apprx.	120		
	4/6 & 14 Fournier Street		964	

		1013(49%)	1058(51%)	
	Less Existing	101	309	

	Increased floorspaces (m ²)	912(55%)	749(45%)	

C.W.S. SCHEMESST. KATHERINES1977/1984

By the late 1970's, as a result of changing patterns in the marketing, demand and competition for consumer goods, CWS had a number of vacant buildings and sites in Tower Hamlets. After going through a period of decline the CWS had approached Tower Hamlets to agree a scheme of comprehensive redevelopment of several of the sites to assist their strategy of regeneration which involved using these sites for the banking and computer parts of their business, while other sites were sold on for development. Resulting planning gains were put into planning agreements and the whole package was considered in the light of potential employment opportunities and the desire to keep the operations of CWS in the Borough. The sites were not in a Preferred Office Location which led to a directed refusal from the GLC on one of the applications made (63-65 Prescott Street), but this was appealed and the approach taken by the Borough was affirmed.

LEMAN STREET, No.s 53/73, 75/89 and 99

In 1977 the National Westminster Bank, the leaseholders from CWS, applied to change the use of part of 53/73 and all of 75/89 Lemman Street from industrial to office use (60,000f²) and the conversion of 99 Lemman Street from office to industrial use and flatted warehouse units (61,000f²). The office use was to be restricted to Centrefile, a subsidiary of CWS. In 1973 the Council had entered into a planning agreement with CWS which had provided that in the event of 53/73 Lemman Street and 33/37 Goodman's Yard being used as offices, 99 Lemman Street and 41/42 Goodman's Yard would only be used for warehousing and the office use at these premises would cease. A new planning agreement was executed in February 1978 reciting the above details and office policy, releasing CWS from the first agreement and requiring the whole development to be carried out in accordance with an agreed schedule of works. It was further agreed that 99 Lemman Street would only be used for light industrial purposes. The consent issued on February 8, 1978 limited the occupation of offices to

Centrefile and also required a schedule of works to be agreed.¹⁷ This agreement was further amended in May 1982, despite objections by National Westminster, so as to allow Ian Mikado M.P. to use Unit 1 of No.99 as offices with use restricted to the Tower Hamlets Centre for Small Businesses. The whole of this scheme was implemented.

PRESCOT STREET, CHAMBER STREET and 2/8 FAIRCLOUGH STREET.

Appeal to the Secretary of State, decision issued March 1985.

CWS undertook to refurbish its old butter store in Fairclough Street for use as small industrial workshops units as planning gain on three separate office schemes, as follows, in Prescott and Chamber Streets (both designated for commercial use) about 325m away.

	<u>offices</u>	<u>Fairclough Street</u>	<u>Approved by LBTH</u>
86/94 Chamber Street ¹⁸	2972	Phase I : 1393	11.10.1982 (consent)
17/19 Prescott Street	2183	Phase II : 4570	21. 7.1982 (sub-c'ee)
63/65 Prescott Street	<u>3900</u>	Phase III : <u>1050</u>	21. 7.1982 (sub-c'ee)
	9065m ²	7013m ²	

The last scheme was referred to the GLC in their capacity as Strategic Planning Authority,¹⁹ and their response was to direct a refusal on

¹⁷ The reason for this was stated as follows: " To ensure the completion of the development including the industrial and warehouse use, because office development alone on these sites would not have been acceptable to the local planning authority and planning permission is granted in view of the inclusion of a substantial planning benefit in the scheme which makes a positive contribution towards the achievement of the planning aims for the area. "

¹⁸ An extension to 110 Leman Street required by CWS to be refurbished to accommodate their expanding banking activities.

¹⁹ Under Regulation 4, Town and Country Planning (Local Planning Authorities in Greater London) Regulations 1980 the GLC had the capacity to give directions on all applications involving over 280m² of office space or a development within 67m of a category A metropolitan road. Where the amount of offices exceeded 2785 m² the GLC became the Strategic Planning Authority for determination of the application.

the grounds of non-compliance with office policy as the site was not within a Preferred Office Location. CWS appealed with the support of the Council and an Inquiry was held in August and November 1984. The GLC argued that the Prescott Street premises should be refurbished for industrial use, that the location was unsuitable for offices and to allow the scheme would lead to an unacceptable increase in office accommodation in this part of the Borough. The Inspector rejected each of these grounds on the basis of renovation in Prescott Street not being viable, the existence of other office developments in the immediate vicinity, the lack of oversupply of offices, the contribution of offices and industrial units to employment opportunities, the existence of a transport interchange barely outside the required distance (440m) and the provision of an 'adequate planning gain' by increasing the overall industrial floorspace. He specifically considered that by allowing the scheme the developer could afford to provide the industrial space but without the offices such a development could not be viable. Some objections were made on the basis of the land being better used for residential purposes but this was considered irrelevant as there was no evidence of such a development taking place. The use of planning agreements linking the schemes was acknowledged and such agreements had been executed requiring the developer to comply with an agreed schedule of works before internal finishes could be applied to the offices.

110/118 LEMAN STREET (CO-OP BANK LONDON S.E. HEADQUARTERS)

In 1980 planning permission was granted for the change of use of part of 110 Lemman Street to offices for the Co-Operative Bank (7200m²) with planning gain in a residential development on South Tenter Street (2800m²). A planning agreement was executed on October 27, 1980 which required the developer not to apply internal finishes to the offices until the residential element was completed or the site was disposed of to an approved body. By this stage the Council were adding an extra sentence to this previously used clause allowing them to check that the body approved was in a position to complete the development. As a result of the financial problems experienced by housing associations at this time no tenant could be found for the site and the Council amended the agreement in August 1981 to allow CWS Bank only to occupy the offices provided the developer continued to

use his best endeavours to find a tenant. The Council continued to remind CWS of this obligation and the Council did receive an application from Oxford House housing association for a loan of £300,000 to carry out the development.

24/26 PRESCOT STREET

See under Prescott Street below.

ELDER STREET : BRITISH LAND SCHEMEELDER ST C.A.: ELDER ST, FLEUR DE LIS ST/FOLGATE ST,
COMMERCIAL ROAD1972/1979

This scheme involved three different elements, all in close proximity to each other: the demolition of an old police station on Commercial Street to be replaced by a new office building; new residential developments in Fleur de Lis Street, Folgate Street and Elder Street; the renovation of existing eighteenth century houses in Elder Street for residential use (including the change of use of two of these houses).

In 1971 the Council agreed a policy for the Elder Street Conservation Area (designated in 1969), including a resolution to seek Building Preservation Notices for any non-listed buildings threatened with demolition. This was done for No.s 1 & 3 Elder Street in 1971 as a proposal for office and residential redevelopment submitted by Armcroft Ltd required their demolition. They were both interesting early eighteenth buildings with later-added timber facades intact, and at this stage were capable of renovation and were listed in May 1972. The remainder of that side of Elder Street was already listed, mostly owned by Armcroft Ltd (together with the vacant site at No.25) and vacant, all except No.s 19, 21 and 23. In July 1973 British Land acquired all the properties owned by Armcroft including 9/10 Fleur de Lis Street and 31/33 Folgate Street, in addition to the police station which they had recently bought from the GLC (and were discussing development of that site for mixed office and residential use with the Council), and effectively took over the negotiations with the Council, merging them with their plans for the police station.

The Armcroft proposal, by 1973, had included the renovation of 1/23 Elder Street for residential use, with new mixed office (16,900f² net) and residential (3,550f²) developments at 9/10 Fleur de Lis Street and 31/33 Folgate Street. In July 1973 Napier Properties, a subsidiary of British Land, submitted a new application for the properties they owned (which excluded 13, 19 & 23 Elder Street) which followed the same model and produced 1870m² of offices, 1925m² of new residential and the renovation for residential use of the properties in Elder Street (1860m²). The development committee in November 1973 received

information on the application for this mixed development and stated that they were very concerned about inadequate protection against fire and vandalism given the listed buildings in Elder Street. A further application was made by British Land to demolish the police station and No.s 9 & 10 Fleur de Lis Street (which had also been listed in September 1973) at the end of 1973 and the report recommended approval in the light of the substantial residential gain to be included in the scheme. Amendments were made following negotiations to join the police station proposals for offices (1860m²) to the scheme and to erect new buildings at Folgate Street and Fleur de Lis Street for residential use alone (1925m²). After receiving no directions from the GLC²⁰, approval was given in November 1975 subject to a planning agreement being agreed. However consent was not given to develop until September 1976 as a result of protracted negotiations over that agreement. When it was issued it covered office development at the police station site, new residential at Fleur de Lis, 25 Elder Street and Folgate Street and renovation at 1-11, 15, 17 & 21 Elder Street. In the interim consent to demolish the police station and the premises in Fleur de Lis Street had been issued even though they were listed buildings because of the 'planning and conservation benefits of the total scheme'.²¹ Various notices were served on the developer as to the deterioration of some of the listed buildings. As a result of non-compliance and continued delays No.s 1 & 3 were demolished by the developer in 1976 shortly ahead of the grant of consent on grounds of their unsafe state. Their demolition weakened the also very delapidated No.s 5 & 7, the roof of the former being removed shortly after the demolition of No.3, and the developers applied for their demolition also. As a result the application for detailed consent, submitted jointly by British Land and Newlon Housing Association in August 1976, was withdrawn at the request of the Council and replaced by one which included new residential buildings at 1/3 Elder Street.

²⁰ Required under section 4(1)(d) & (k) Town & Country Planning (Greater London) Regulations 1965 due to the size of the office development.

²¹ Letter from GLC Historic Buildings Board to LBTH, 11 June 1974.

Finally it was also decided, despite many objections, to allow the demolition of 5/7 Elder Street because of the detrimental effect it was having on No.9. The excessive cost involved prevented the Council itself from renovating the building, and once demolished it was to be replaced by new residential. The Council were strongly criticised for the manner in which this exercise was conducted, particularly as the first meeting to decide the application was held before the statutory notice period had expired. A member of the Tower Hamlets Society noted of this meeting the lack of information given to the Members by the officers.

" No background information was supplied to the Members of the Committee, except the bare fact that a Dangerous Structures Notice had been served. The Committee were not even told that Elder Street was part of a larger development scheme involving the main part of the Conservation Area (the fact that it was in a Conservation Area was not mentioned) or that the statutory period for objections still had nine days to run ... the last fact was announced verbally at the Committee meeting by the Head of Planning, who noted that objections had been received 'today', and so the matter was deferred. Yet when the development sub-committee met a week later on 3 November (two days still left before objections to be received) the application was again pressed forward by the Planning Department with a recommendation for demolition. " ²²

The letter goes on to state that the views of the Conservation Areas Advisory Group against demolition were not made known to the Committee in contradiction of their terms of reference. A new agreement was drawn up and signed to cover the alterations to the scheme produced by the demolition.

The final result was to be a new housing development of flats at each end of Elder Street, acquired by a housing association with funding from the DoE, under section 29 Housing Act 1974 and the renovation of several properties as single dwellings along the east side of Elder Street. The new flats were for one or two persons and built as replica of the architecture of the street with landscaped garden areas and some carparking. Details of the various housing proposals are given overleaf.

²² Letter to Peter Shore dated 4 November 1976.

6.8.76	Full Planning Applic. British Land & Newlon H/A.	29/33 Folgate St 1/3 Elder Street 9/10 Fleur de Lis St	35 new flats
23.9.76	Conditional Consent	Police station site 9/10 Fleur de Lis St 31/33 Folgate St 1/11,15/17,21 Elder St	office building new residential Rehabilitation
26.10.76	Full planning Applic.	1,3,5,7 Elder St 9/10 Fleur de Lis St	32 new flats:in 4 storey b'ing
22.12.76	Conditional Consent	as above	
26.1.77	Details Consent	29/33 Folgate Street land at rear Elder St	15 new flats landscaping
18.3.77	DOE approval to H/A	Fleur de Lis St Elder St Folgate St	47 dwellings Estimated cost: £617,329

Some further revisions did take place in 1977 as a result of the newly formed Spitalfields Trust²³ personally intervening to save No.s 5 & 7²⁴, which they described as eighteenth century silk weavers' houses with delightful interiors surviving almost intact. They purchased these two houses for £4000 to renovate as single family dwellings (after paying British Land and Newlon £16000 for abortive work done on schemes including these premises) and Newlon reduced the number of flats from 47 to 35, with the approval of the DoE. The Trust was largely funded in this exercise by the Historic Buildings Council. The Council made no objection to this move, even though it meant an overall reduction in the amount of housing association accommodation available (No.s 5 and 7 would be sold in the private sector in October

²³ A registered charitable trust incorporated for "the purposes of preserving the architectural heritage of the area by acquiring and repairing buildings and by helping and encouraging others to do so." 3rd Annual Report of Council of Management, Spitalfields Historic Buildings Trust Ltd, June 1980.

²⁴ See "Spitalfields Grace " AJ 17 October 1979, 819; Sunday Telegraph December 2, 1979.

1979 for around £60,000 each) as in planning terms the change was of no consequence.²⁵ - - -

Full consent was approved for the office element in 1979. The Council made representations to the GLC against allowing demolition to go ahead at the end of 1980 until a new owner and development scheme were ready to proceed on the grounds of the noise generated by the loss of this building for the occupiers of the new housing development. At this stage much of the renovation work was still not complete and No.s 9, 11, 15 and 17 were, by late 1978 severely delapidated. Works on No.21 were completed in early 1980, and No.17 was also finished by 1982. Numbers 9/11 and 15 were not completed by the developer, but were transferred to purchasers in 1982 who covenanted to complete the works. The new residential element had been transferred to Newlon in 1978 for £28,000 and was completed.

²⁵ This was the reason given by the chief planner at a meeting with the GLC, DoE, British Land, Newlon, Spitalfields Trust, Housing Corporation, 22nd September 1977. The council infact gave a grant of £250 towards the works (Development Committee decision 22 November 1978)

ELDER STREET, No.6SPITALFIELDS : ELDER STREET CONSERVATION AREA

In November 1981 the Committee refused an application to convert this building from industrial to office use (5,500f²) on the grounds of loss of industrial floorspace and non-compliance with office policy. No appeal was lodged.

ELDER STREET, No.30SPITALFIELDS : ELDER STREET CONSERVATION AREA

Before the area was designated as a conservation area permission had been given, in 1969, to change the use of this building from residential to office use and to add toilet facilities. In 1971 permission had been given to change the use from multiple dwellings to a single dwelling and to carry out repair and reinstatement works. In 1973 an application was made to renew the 1969 consent, which now conflicted with office policy, for a period of 5 years. Following Counsel's opinion to the effect that the 1969 consent had not been displaced so office use did exist on the premises the application was allowed, conditional upon its implementation within nine months.

ELDER STREET, No. 34SPITALFIELDS : ELDER STREET CONSERVATION AREA1969/1982Appeal to the Secretary of State, Decision letter issued September 1981.

In compliance with a policy in existence at the time, consent was given in 1969 to use this property as offices (1800f²), the intention being to ensure the preservation of historic buildings in Elder Street. The property had in fact been renovated for residential use but an application was made in 1976 to renew the office consent. The owner did not want to lose the benefit of the office use, and the consequent enhancement of value, and intended to sell the house for office use if the Council refused to renew. If a renewal was given he would continue to live in the property knowing that it could be sold at some later date as offices. A consent was given in March 1977 for a further 3 years and in 1980 another application was made, with the same reasons given in support. Circumstances had changed, most specifically the east side of the street had been renovated for residential use. A refusal was issued in March 1981 on the grounds of loss of residential space and the proposal being contrary to office policy. An appeal was lodged in June 1981 and another application was submitted but still no planning gain was included. In July 1981 another refusal was issued. In September however the Inspector directed consent to be given. His reasons were that lack of planning gain was not a valid ground for refusal and moreover planning gain had been provided in the form of restoration of the property in 1969. He added that the circumstances were exceptional as the grant of an office consent would prolong residential use. The Council appealed to the Divisional Court but were dismissed.

ELDER STREET, No. 35/37SPITALFIELDS : ELDER STREET CONSERVATION AREA1974/1981

Negotiations began in 1974 and the Council issued its first decision, a refusal, in July 1975. This scheme involved 7350f² of office use and eight residential units in a new rear extension to the building with landscaping. The reason given was non-compliance with office policy as the residential element was insufficient, poorly located and had no separate access. A year later a larger scheme (9000f² of offices), which included the rehabilitation of 25 Fournier Street and 13 Princelet Street for residential use (9000f²), was accepted in principle subject to a planning agreement for prior completion of the residential element. No progress was made with this as the developer could not acquire the residential element. Negotiations revived and in July 1978 an application was made for offices on three floors of the property restricted to use in connection with fruit and vegetable wholesaling, the present use of the ground floor. In view of this restriction and previous attempts to comply with office policy a consent was issued. A further attempt was made for an office consent on the whole building without the restriction but this was refused in June 1980 on the grounds of non-compliance with office policy and no provision of planning gain. Five months later the same application was made on the grounds that the restriction made the property unlettable but was again refused on office policy grounds. In the interim the Council had agreed to allow office use on one floor of the building (1250f² with 1250f² storage) so that it could be let to a tea packer and blender. This consent was personal to the applicants and the report refers to the possibility of skilled and semi-skilled non-office employment (estimated at four persons) that would result from the consent being given as making the application exceptional. It was not taken up.

F.A.B.S. SCHEMESPITALFIELDS : ARTILLERY PASSAGE CONSERVATION AREA1971/1981

This scheme relates to a site within the conservation area which was negotiated by one developer, the site was cleared and then further negotiations took place first with the same developer and then with the second developer who finally implemented a different scheme. It was intended that the scheme be put out to tender after the site was cleared but significant changes were made to the amount of office space after the site was sold. To aid the description of events the proposals appear below in tabular form :

<u>Site</u>	<u>developer</u>	<u>offices</u>	<u>'gain'</u>	<u>date</u>
27/33 Artillery La. 36/37 Steward St. 20/26 Brushfield St. 8/12 Fort Street	Northleigh Investments	2100	1250 residential 557 community hall 490 carparking	16.8.72
	net total	<u>1326</u>	<u>1430</u> (55%)	
27/33 Artillery La. 38 Steward St. 2/6 Fort St.	Northleigh	375 375 (warehouse)	1257 residential & carparking (63%)	18.8.72
27/33 Artillery La.	Northleigh	750	882 residential <u>375</u> youth club <u>1257</u> (63%)	29.4.76
27/33 Artillery La.	Northleigh	1754	168 residential <u>518</u> church club	withdrawn in 1977
	net	<u>1495</u>	686	
excess of offices on 60%:40%		466 =	£20,000 restoration of Christ Church	
27/33 Artillery La. 2/6 Fort St.	Northleigh	1754	168 residential 518 church club restoration of Christ Church	25.1.78
Bounded by Fort St, Artillery La., Brushfield St. & Steward St.	Western Heritable	6317 <u>4970</u> net	£100,000 Christ Church £ 20,000 church club	25.4.79

The 1972 consent obtained by Northleigh was amended after the site was cleared to replace the warehousing and basement carparking with offices and a church youth club for the use of young people working in the city. As at this time it was the GLC's policy to discourage

underground parking the revisions were seen as an improvement on the original scheme. The amount of offices was still within the 40%:60% ratio required by the existing office policy guidelines. On April 30, 1976 a planning agreement was executed to provide for the completion of the church youth club and residential elements before internal finishes were applied to the building. The revised scheme submitted in October 1977 for a larger office content was later amended to reorganise the distribution of uses into a 5 storey office building on the site with an adjacent attached building to house the youth club and 2 residential flats. During the negotiations preceding this application the Council pointed out the excess of office space and suggested the shortfall in gain be made up with a contribution to the restoration of either Wilton's Music Hall or Christ Church, using the Half Moon Agreement (see CHAMPS scheme above) as a precedent. Calculations were done on the basis of excess office space in the development and the scheme was agreed²⁶ subject to an amended planning agreement requiring the developer to enter into and comply with a Restoration Agreement to covenant a contribution to Christ Church in respect of an agreed schedule of works. The consent made reference to the completion of the residential and youth club element before application of internal finishes to the offices but did not refer to a planning agreement nor to the restoration works. The development sub-committee considered this application at the same time as two other potential schemes (neither of which were implemented as they were superceded during negotiations) contributing towards the restoration works, and indicates the novelty of three separate developments being connected to one restoration project but explained it in terms of necessity due to the enormity of the project. It also alluded to an article in the Journal of Planning Law which shows other authorities participating in similar projects.

²⁶ Letter from Northleigh's Architects dated attached to the application dated October 11, 1977 states "...this does appear to be a viable scheme and certainly, both from our Clients' and the church's point of view, a more attractive one. It is important for our Clients that we make progress...I know I can count on your co-operation in trying to reach a decision on this revised application as quickly as possible. We are always available for further discussion on details if you so wish."

The other two schemes were as follows :

60 Commercial Rd	Kensington Commercial	2322	Recently built warehouse/ office building with 1 flat	12.7.77
1-5 Frying Pan Al.	Norbilt	2787	6 storey new office block and 4 small shops (203)	23.9.77
15-17 Sandys Row	Homes Ltd.			

The agreements with Northleigh were not completed because of the successful negotiations²⁷ by Western Heritable (subsidiary of Central & City) to build a larger glass-clad block, with a 70 feet atrium and glass wall-climber, on the site without community facilities but with a much larger contribution to Christ Church towards renovation and youth club facilities in the Crypt. Draft copies of the planning and the two Restoration Agreements for Christ Church and the Crypt were sent to the Council by the solicitors of Central & City (at that time Robert Gore & Co) in June 1979 and the latter two were executed on November 30th (payments under them being made in the following May) with the planning agreement following on December 12th. The Restoration Agreements were essentially the same apart from the sum of money concerned and both recited the importance of the GLDP policy on the attainment of planning advantages (contribution to Christ Church having been approved as such by the Council) in discussing the contents of the planning application. The planning agreement contained a similar recital and went on to state that the developer agreed to contribute to the restoration and will, on or before signing the planning agreement, enter into further agreements with the Friends detailing the extent of contributions. On entering those agreements the Council undertook to issue a planning permission in the annexed form and the developer covenanted not to apply internal finishes to the offices until clause 1 (as to the payment of money) of each agreement was complied with. The consent then recited details of the office and crypt developments and required the social centre to be complete prior to the application of internal finishes, no reference being made to the other restoration works. By late 1983 the office building was completed but only one floor was under offer.

²⁷ It was at first intended that Western Heritable would take over the Northleigh scheme and a draft covenant to the Friends was drawn up but not executed

FAIRHOLT HOUSE, WHITECHAPEL HIGH STREET Nos. 102/105SPITALFIELDS1981/1982Appeal to the Secretary of State, decision made September 26, 1982

Since 1974 the first floor of this building had been used as offices ancillary to the student's union activities within the other floors. In September 1981 an application was made for a permanent office use (860m²) of the same area but the Council, while granting an extension until March 1985, refused the application as contrary to office policy. In February 1982 an appeal was lodged which was granted, after consideration of written representations, in September. The bases on which the appellants succeeded were the existing mixed use, the fact that temporary consents had been given for 20 years and there was no loss of industrial, housing or shopping uses. In March a development brief had been approved for the north side of Whitechapel High Street in which the Council earmarked the site for small office suites. The Inspector was not satisfied that there was a shortage of such uses in the area and commented that a larger operation was more likely to provide junior office jobs which could be regarded as a significant planning gain. While agreeing that there are strong reasons for exerting strong control over office developments he also commented that those policies requiring developers to provide other uses such as residential, industrial and leisure as being aimed at the comprehensive development of new sites.

FIELDGATE STREET, NO. 42WHITECHAPEL1979/1982Appeal to the Secretary of State, decisions : June 5, 1981 & April 27, 1982

In June 1979 permission was given to Abbeymade Ltd to build a four storey industrial building on this site with a carparking area alongside. In October the same year the same company applied to build a five storey office building with ground floor parking over the area originally intended as a factory carpark. The company argued that the offices were necessary to their increasing expansion which would create employment and the technical problems on plot ratio (it was 3:1 rather than the usual 2:1), daylighting infringements and traffic hazards were overcome in a revised scheme submitted in January 1980. A consent was issued for a four storey office building (579m²) with ground floor parking after the GLC agreed to give no direction on the application. A condition was attached making the offices ancillary to adjacent factory use to avoid conflict with office policy. In April a further application was lodged for a larger five storey office building (857m²) on the basis of the future needs of the company and consent was given (but not recommended) conditional upon use ancillary to the factory and restricted to Abbeymade. The company appealed against this latter condition and it was deleted by the Inspector on the grounds that making the use ancillary was sufficient to avoid speculation. In September a revised application was made to delete the ancillary use. It was refused in November and the company appealed. The site was not within a preferred office location and was 440m from an underground station in an area designated for industrial and residential use, and the company put forward the Wearwell development at 81/91 Commercial Rd as a precedent to permission being granted to office development in the vicinity. The Inspector allowed the appeal principally on consideration of the fact that if refused Abbeymade would be forced into liquidation and 80/100 jobs would be lost.

FOLGATE STREET, No.s 5/7 AND WHITES ROW, No.5SPITALFIELDS : ALL 3 CONSERVATION AREAS1972/1977

This scheme by Consortium Commercial Developments Ltd involved the renovation of listed buildings, residential space and open space and went through a number of permutations before it was implemented.

The properties involved were as follows :

	<u>Existing Use</u>	<u>Status</u>
5/7 Folgate St.	commercial	unlisted
5 Whites Row	commercial/residential	listed, Artillery Pass.C.A.
29 Fournier St.	shop/store/residential	listed, Fashion St C.A.
69 Brick Lane	shop/store	unlisted, Fashion St. C.A.
36/38 Hanbury St.	commercial/residential	listed
77 Commercial St.	commercial	unlisted

And the following permissions were issued before 1976 (all figures are f²)

1972	5/7 Folgate St.	offices	residential above
1973	5/7 Folgate St.	5145	residential (4095)
	5 Whites Row	-	renovated residential (3218), landscaped garden (948)
6.7.1973	5/7 Folgate St.	6500	residential (1160)
	5 Whites Row	-	renovated for residential use (approx. 1800 increase)
11.12.1973	5/7 Folgate St	4592	(basement commercial use 1710); Residential (1160)
	5 Whites Row	3220	-
	77 Commercial St	1796	-
	29 Fournier St	-	Residential & garden(2580)
	36/38 Hanbury St	-	Residential & garden(4687)
	69 Brick Lane	-	Residential (3873); shop on ground floor (289)
	Overall increases	9083	residential 646, open space 206, renovations
28.3.1973	69 Brick Lane		5 flats, shop & storage, rebuilding walls (4670)

A draft planning agreement was drawn up for the 1973 scheme but was not executed. Negotiations continued and in January 1976 a new scheme was approved which simply re-worked the December 1973

version by changing the uses at 5/7 Folgate St (6672f² offices with 1385f² residential on the 3rd floor and landscaped open space at the rear) and deleting 77 Commercial Rd from the scheme.²⁸ This produced an overall increase of 9562f² of office space and 7225f² of residential, with 450f² increased open space. The consent linked Hanbury Street with Whites Row, and Brick Lane and Fournier Street with Folgate Street so as to require completion of the residential and garden element before the occupation and application of internal finishes to the offices. A planning agreement, completed on February 4, 1976 to bring this into effect, also referred to commercial use in the basement of Folgate Street. The sequence of events avoided the planning problems which this could have created. The agreement provided that the sale of the residential properties to a housing association approved by the Council would release the developer from the restrictions on use and occupation of Folgate Street and Whites Row. A contract for sale was duly executed with Newlon Housing Association stating a purchase price of £1 and making the sale conditional upon the vendors obtaining, on completion, a release from the Council to include an additional 500f² of office use at Folgate Street. The draft agreement did contain a further condition requiring an unconditional planning permission to use the extra 500f² as offices, but this was deleted when a permission was issued in December 1976 allowing conversion of part of the third floor of Folgate Street to offices, linking it to a further residential extension at Hanbury Street. A supplemental planning agreement was drafted but was not executed because of the transfer of Hanbury Street to Newlon. The release was given at completion on March 21, 1977 and it merely recited the removal of restrictions on use and occupation of the two office buildings and an undertaking to remove the agreement from the Land Charges Register. In 1980 Folgate Street was ready for office use before Hanbury Street was completed and this conflicted with the December 1976 consent which included the usual condition on residential completion first. The Council reaffirmed that condition.

²⁸ This was done by Order of Modification dated July 1, 1975

FOLGATE STREET, NO.s 10-14SPITALFIELDS : ELDER STREET OUTSTANDING CONSERVATION AREA1981/1982

The application here was for the erection of an office building (696m²) on the vacant site at No.s 12 and 14 and the conversion and refurbishment of No.10 for residential use. The consent contained conditions requiring the residential works, including the layout of a rear garden, to be completed before internal finishes were applied to the offices and requiring full particulars on materials to be used and elevations at No.s 12 and 14. The design of the offices was to be in sympathy with No.10 and was to include a landscaped area at the rear. A planning agreement was executed on February 17, 1982 which allowed the application of internal finishes either on completion of residential works or on the disposal of No.10 by sale or lease of at least 10 years to the Council, the GLC or a body approved by the Council. That approval not to be unreasonably withheld provided the Council were satisfied that the purchaser could complete the works.

FOLGATE STREET, NO.s 13-17SPITALFIELDS : ELDER STREET OUTSTANDING CONSERVATION AREA.1974/1976

In 1954 permission had been given to erect a four storey office building at No.s 13/15, a site used for private carparking, and since then modifications had been permitted including use of the basement as a restaurant. In 1974 an application was made to enlarge the office space in the building (9720f²), use the basement as a restaurant (2520f²) and renovate the large, vacant and delapidated early 18th century Grade II listed building next door (No.17) for residential use (17 flats). The scheme also included the demolition of a vacant factory building at the rear of No.17 to provide landscaped gardens. The consent required the gain elements to be completed before the application of internal finishes to, and the occupation of, the office building. Listed building consent for No.17 was issued in March 1975 and the developer lodged an appeal against the conditions relating to the details of the renovation works. This appeal was withdrawn in November after a planning agreement was executed October 28th under which the developer agreed to carry out the development at No.s 13/17 in accordance with any consents issued and not to apply the internal finishes to No.s 13/15 until the works at No.17 were complete to the satisfaction of the Council. No permission was annexed and the recitals were merely premised by the phrase 'in the event of permission being granted'. This scheme was later modified to form part of the Newlon Housing Scheme (see below).

GARDINER'S CORNERWHITECHAPEL1978/1982

In 1978 the GLC offered a bombed site on an island at Gardiner's Corner (a preferred office location under GLDP, paragraph 4.14), on the western edge of the Borough, for sale in three parts for redevelopment. This was an important site as it stood at the main traffic entrance to Tower Hamlets and the redevelopment was put up for competition. The Development Committee on July 3, 1978 considered various proposals, and rejected all of them on the grounds that none contained a sufficient shopping content. At that time the island site was designated for a large shopping and leisure complex for the Borough, with a substantial content of single person accommodation. The proposal submitted by Wingate Investments and Wimpey Ltd included offices, shopping, leisure/conference centre and multi-storey car park and the GLC, in January 1979, advised the Borough that they should have accepted this scheme in principle and they should investigate moving plans for a large shopping centre to the north side of Whitechapel High Street. Major road realignment plans produced because of the severe congestion around the Gardiner's Corner site had reduced its size and a consultation report, 'Planning in West Stepney' was published, stating that a new reduced scheme incorporating shopping and leisure facilities, offices and improved subways was the most feasible use.

In August 1979 Wingate submitted an application for outline planning permission for the three sites. The major one closest to the City was to be occupied by an eight storey office development (335,860f², 31,215m²) with lower ground floor shopping facilities (41,490f², 3,855m²) linking the existing pedestrian subways and Aldgate Underground station to the island site. The offices were to be occupied by Bland Payne Insurance Group who had recently amalgamated with Sedgwick Forbes and needed to expand their existing offices opposite the island site, within the City. It was estimated that the company would employ an additional 2000 office workers in the new building. They joined Wingate in the development and the same architect was used to design the new building in sympathy with their existing offices. The air-conditioned shopping mall, modelled on an

American plaza development, was to be the showpiece of the sites. On the adjoining land the developers would build a leisure/conference centre with a multi-purpose sports hall, six squash courts and a conference centre/theatre to accommodate 600 people. The remaining site was for a multi-storey public car park.

The Council concentrated their negotiations on ensuring public access to the sports and theatre facilities and the agreement referred to a 'public' sports hall with concessionary rates and a priority booking system for local residents, a 'public' theatre and a 'public' carpark as planning gain. Arrangements were also made for participation in the management of these facilities by setting out the composition of the management committee to include local and council representatives. This was of primary importance to the Council largely because there was no prospect of them building such facilities because of lack of funds.

" But for a policy of attaining 'community benefits' this area would be developed almost exclusively for offices with leisure facilities being limited to purely commercial facilities such as private squash courts and wine bars. There can be little prospect of local authority expenditure on construction of leisure facilities during a period of economic restraint. Thus the achievement of this Council's planning aims must be based on a close collaboration between the local planning authority and private developers to achieve viable office development with acceptable community benefits. " ²⁹

Although the theatre was originally suggested as planning gain by the developer during negotiations, the mechanisms of ensuring public access took many months to agree, mainly because of the cost to the developer of managing and staffing the arrangements. The developer originally suggested that the Council make an annual payment to the company to cover part of the cost of concessionary rates but this was dropped during negotiations. It was also suggested that if the leisure centre should prove commercially unviable public access should cease but this was rejected by the Council as undermining the purpose of the agreement. Bargaining on this point continued with a suggestion from the Council that facilities could be withdrawn if no reasonable

²⁹ Rule 6 Statement, submitted in respect of appeals against refusal for development at 35/45 Whitechapel High Street, para.36. See below.

local authority would continue to run them without an unreasonably high level of subsidy.³⁰ The issue was finally resolved by including 2 clauses in the agreement, the first allowing use as public facilities to discontinue where use was so low as to make continuance unreasonable taking into account and subsidy received from the Council, and the second enabling the developer to offer the Council at any time a 21 year lease at peppercorn rent. The other major problem area related to the requirement not to apply internal finishes to the offices until the gain elements were complete. The requirement was modified so as to only relate to the sports hall being substantially completed and a release clause was added to the agreement in the event of delays produced as a result of road closure orders affecting the area of the site upon which the leisure centre was to be constructed. In this case construction work on the sports hall must have commenced within twelve months of the road closing orders being issued and before internal finishes could be applied to the office content. If the orders were not issued or were refused the developer would be released from the agreement to build the leisure facilities, as it would be impossible to do so without the road closure. The GLC in its contract of sale with the developer had included a clause requiring an additional payment of a million pounds from the developer for the two sites if the third site became unavailable due to the lack of a road closing order. The Council would then endeavour to seek compensation from the GLC for the resulting lack of planning gain. The details of the agreement³¹ were circulated to the Chairmen of the Development Committee, the Amenities Committee with copies to the Vice-Chairmen, the Leader and Deputy Leader of the Council, and the Chief and Deputy Whips. The road closure orders were made and the scheme was been fully implemented by late 1983.

³⁰ In this regard the Council solicitor pointed out that the developer could claim an abatement of DLT for providing the facilities so economic viability on a commercial scale was not an adequate reason for closure. Letter dated 21 November 1979 to the developer's solicitors.

³¹ It is interesting that the letter originally sent included reference to £1 million but was then substituted with "sum of money " on the report later made to the Development and Amenities Committees on the scheme.

GOODMAN'S YARD SCHEMEST KATHERINES

In October 1978 the development sub-committee approved, subject to a planning agreement, a negotiated scheme with O.C.L. Ltd for a vacant site bordering on The City of London and Mansell Street. The scheme included offices (30,790m²) with ancillary carparking, 48 residential units, four squash courts and a public house. Originally it was to be a condition of the consent that one office building, comprising two-thirds of the office space, be occupied as the headquarters of O.C.L. (a company already resident in the Borough) for at least 5 years and the other let to a London firm. A separate building would house the residential units and the squash courts. The restriction on occupation was later removed and this development formed part of the package for the Wingate Centre (see below). A planning agreement³² was completed in September 1979 providing for the completion of the residential and squash court building, or the entering into of a contract with an approved body for the lease of the residential units for at least ten years as a prerequisite to applying internal finishes to the offices. The Council agreed in July 1982, due to the advanced state of works on the residential units, not to enforce the agreement against the developers and internal finishes were applied to the offices. The residential element was completed in November 1982 and the squash courts early in 1983. By late 1983 around half of the offices were let.

³² Linklaters & Paines were the solicitors for the developers who were referred to in the Agreement as Stellwood Investments, a company comprised of Wingate and Wimpey Property Holdings Ltd.

HAMLET MOTORS SCHEMEWHITECHAPEL : WHITECHAPEL RD., FIELDGATE ST. & PLUMMEROW1979

In June 1978 Hamlet Motors applied to develop this carparking site as a four & five storey building of speculative offices (1653m²) with a vehicle maintenance workshop (2136m²) and car showrooms (920m²). The site was not within a Preferred Office Location and the GLC had twice unsuccessfully advertised the site for sale for industrial development. As the applicants were a local expanding company the application was approved subject to a planning agreement to ensure completion of the industrial element. An agreement was drafted but the scheme was not pursued.

LEMAN STREET, NO.120ST KATHERINES1979/1981

An application was submitted in mid-1979 for the change use of 120 Leman Street to offices (1200m²) with the renovation of that part of the building known as 8/12 Imperial Warehouses for industrial use (800m²). The committee approved the scheme subject to a planning agreement ensuring that a schedule of renovation works on the industrial element was agreed before the development was commenced and that the internal finishes were not applied to the offices until those works were complete. The property was sold in August 1980 and negotiations continued with the new owner. A planning agreement in the above terms was executed on March 30, 1981 but was not implemented.

MARSHALL WALKER SCHEME

WHITECHAPEL : ALIE ST., No.s 31/37, CAMPERDOWN ST, No.s 9/23 &
HALF MOON PASSAGE, No.15

1974/1980

The developers here owned all of the above properties and submitted applications to develop at the same time as the CHAMPS scheme was active with Central & City. In May 1978 they applied to develop 22,500f² of offices at Alie Street (a vacant factory, warehouse and showroom existing and occupying 8,000f²) with an industrial building fronting Camperdown Street (12,000f² factory, with 3,200f² warehouse). At this stage the latter site was vacant, the houses that had stood there having been demolished in 1973 and the workshops in 1976. After further negotiations it was agreed to include 25 Camperdown Street, already owned by Central & City, in the scheme, hoping to exchange that property for the two cottages at 17 & 20 Alie Street. The Committee were prepared to issue a consent subject to a planning agreement to ensure completion of the industrial element. A draft consent and agreement were drawn up but were not executed as the developer failed to acquire #25. Instead a revised application was submitted which was further negotiated to produce 20,500f² (1904m²) of offices and 15,200f² (1412m²) of industrial space. A decision notice was issued in August 1980 with no requirement for a planning agreement.

MIDDLESEX STREET NO.s 96/98 & STRYPE STREET, NO.s 6/8SPITALFIELDS1981/1982Appeal to the Secretary of State lodged in February 1982

This mixed use building (1550m² industrial, 983m² storage, 770m² retail) was the subject of an application for change of use which slightly extended the industrial and retail uses (to 1691m² and 902m² respectively) and converted the remainder to office use (710m²). The Council refused the application for non-compliance with office policy and the developer lodged an appeal which was withdrawn following negotiations to produce a satisfactory scheme. This latter scheme, approved in July 1982, had an increased office content (886m²) but 176m² of office space was in the form of small units for the use of accountants, solicitors and others who could serve the increased industrial component (2061m²) which was to be divided into thirteen small workshops. Some of the retail space was retained (356m²) and a new off-street parking bay was included. The report to the Committee stated that the case on appeal was not strong and the mixed uses proposed were appropriate to that western edge of Spitalfields.

MINORITIES CARPARK & RISING SUN SITEST KATHERINES1979/1982Appeal to the Secretary of State lodged February 20, 1980

This site was partly owned by the GLC and the City of London and occupied a position opposite the Tower of London, which made it an important development site. Most of the area had been used for public coach and lorry parking, a multi-storey carpark, a City engineers depot and Rising Sun public house. Negotiations for developing the site were conducted with Greycourt London Estates Ltd who intended to accommodate existing uses while erecting new office and hotel buildings. Some earlier proposals were made for the site but were not acceptable to the Council:

1969	4 storey carpark and 2 10 storey Halls of Residence for a post-graduate Business Centre on the Rising Sun site	Secretary of State directed refusal after an inquiry following objections by the GLC. Permitted the building on the Rising Sun site(22m high)
1975	Twin towered hospital (42m high)	Development C'ee objected on basis of height,plot ratio, design,traffic increase.

Greycourt put forward a number of schemes and these are listed below:

1979	offices (13157),twin towered hotel (14025, 5 & 7 storeys),public car park (385 spaces + 29 coaches),12 office and 50 hotel parking spaces & public house (446)	Refusal as contrary to office policy, excessive officespace & too dominant hotel towers, hotel development contrary to GDLP, no planning gain.
1980	offices (11503),twin-towered hotel (14025, 4 & 5 storeys),public car park (450 spaces inc. 91 office & hotel use),public house (446),with 400 non-office jobs,improved layout and pedestrian subway as gains	Sub-committee agreed to permit subject to details on design & materials and S.52 agreement for subway.
1981 Feb.3	hotel (24025)	Consent issued in outline
1981 Dec.12	offices (11510, 9544 being in LBTH) and public subway	Consent issued in outline,S52 executed
1982	offices (12077, 25.2m high)	Detailed approval

Negotiations on the scheme were complicated as that part of the site which fell within the City was to be used for the hotel building and the City Council became locked in negotiations with the GLC to apportion the ground rent on the whole development (including the offices) between the two Councils rather than restricting their entitlement to the hotel ground rent alone (a much smaller sum). The City did issue a consent for the hotel in December 1979 and continued to negotiate with the GLC, seeing Tower Hamlets' planning gain discussions as subsequent to the resolution of this issue. Meanwhile the developers wanted to avoid the use of planning agreements in connection with the scheme because of the negative effect they could have on funding for the offices and the hotel (those involved in the funding of the hotel specifically refused to continue if the hotel were linked in any way with the offices). For its part Tower Hamlets required a planning gain on the offices within its Borough and accepted that the employment opportunities created by the hotel and a proposed pedestrian subway between the Minories and Royal Mint (to be constructed by the developer and thereafter maintained by the GLC) constituted adequate gains. The problem faced by the Council was how to secure that the hotel and subway were completed without a planning agreement linking their completion with works on the offices and without the support of the City who were still arguing with the GLC over ground rents. As far as the hotel was concerned the legal department wrote to the City, putting forward a suggestion made by the developers, that the hotel operators enter into a conditional contract with the City to purchase the site subject to funding being made available. In correspondence between the City and Tower Hamlets it could then be made clear that the City understood its neighbour's position on planning gain and, in the event of this hotel development not going ahead, would consult with Tower Hamlets on the future use of the site with a view to producing a scheme which would provide non-office employment or other community benefits. In this way the Members at Tower Hamlets would be satisfied and the City would not be restricting the future development of the site in a legal agreement. As for the subway, additional problems presented themselves as the GLC stated in October 1980 that they did not agree that such a subway was needed at all. At this

stage a draft planning agreement relating to the subway was in circulation and represented what the Council thought was the culmination of difficult negotiation sessions between the developer, themselves, and on some occasions the GLC, following the lodging of an appeal against the refusal issued by Tower Hamlets in September 1979. The developer had agreed to withdraw the appeal in the belief that the subway met the objections on their failure to provide adequate planning advantages. After correspondence between the Council and the GLC which pointed out the delay and other problems an appeal would cause, they agreed that an extension to an existing subway in the area would be acceptable (particularly as they had approved a development brief on the Royal Mint site which required such a subway to be included in any development) provided no costs were incurred by the GLC on its construction and the adaptation of existing public crossing facilities. The developers were willing to enter into a planning agreement on this basis and requested that two separate consents be issued on the hotel and the office and subway elements. They withdrew their appeal in April 1981. The final result was a consent on the hotel which referred to an agreement with the GLC over the subway and an office and subway consent which made no reference to the hotel development. A planning agreement was entered into by the Council, the GLC and the developer on December 10, 1981 which recited the application for office and hotel development and that consent had been issued on the latter whereas the former was to be issued as per the attached draft on completion of the agreement. It went on to explain the content of what had been agreed in the event of the development as a whole being commenced (defined as a 'specified operation' under S.43 TCPA 1971), that is that the subway would be completed to the satisfaction of the GLC, dedicated for public use after the offices are complete and would thereafter be maintained by the GLC. The agreement prohibited the application of internal finishes to the offices before the hotel was commenced (or earlier if the Council was satisfied that arrangements had been made for the future construction of that hotel). In this context 'commenced' was defined as 'the carrying out of any relevant works forming part of or in connection with the construction of the said hotel' and a letter from the Director of Development was stated

to be conclusive that this had taken place. 'Relevant works' was defined so as to include alterations to the existing depot and carparks to allow construction of the hotel as well as works on the foundations and column starters.

By the time the study was completed this scheme had not been implemented.

NEWLON HOUSING SCHEME : FOLGATE ST. NO.s 13/27 & BLOSSOM ST. NO.s 1/4

SPITALFIELDS : ELDER STREET OUTSTANDING CONSERVATION AREA
1975/1980 (See under Blossom Street for details on consents and agreements)

The development sub-committee in November 1975, after informally considering proposals to transfer existing office uses on properties in Folgate Street (No.s 19/27) to a new office building to be erected in Blossom Street and to convert Folgate Street to residential use by a housing association, confirmed such a scheme would conform with office policy and the aims of the conservation area. Calculations done by the Borough Planner produced residential space of 1246m² (including 169m² existing use) and sports facilities in the basement of the office building of 240m² which would allow 2,230m² (including the 957m² existing use) of office space to be built. An application was submitted in early 1976 on these figures together with proposals to demolish outbuildings at the rear of Folgate Street and provide landscaped gardens. The scheme was approved and consent issued in February 1977 after a planning agreement was signed. In July that year the scheme was extended to include a modified version of an office and residential scheme at 13/17 Folgate Street (see above) so as to use 13 and 15 as offices (938m²) with 17 renovated as a house (122m²) with basement sports and recreation facilities (214m²). The details of the scheme went through a number of changes but produced 1250m² of offices and 1076m² of residential space, including two houses, eight flats, five bedsitters and landscaped gardens. The planning agreement allowed the developer to be released from the obligation to complete the residential works if he entered into an agreement with a housing association or other approved body to dispose of the residential element by sale or at least ten year lease. They completed an 80 year lease at peppercorn rent after payment of a £10,000 premium with Newlon Housing Association in September 1979 and the office building was completed shortly afterwards, although it was still unlet at the end of 1980. The housing works were complete in March 1983.

NORTON FOLGATE, NO.s 1-3SPITALFIELDS1974/1976Appeal to the Secretary of State on written representations, March 1976

Offices were proposed for this petrol station site by Philstock Securities in 1974 and the Council attempted to negotiate the inclusion of planning advantages. No changes were made and the Council refused the application for 425m² of offices and showrooms in October 1975 on the grounds of the proposal being contrary to office policy. An appeal against refusal was dismissed in March 1976. The Inspector considered the IDP designation of the area for commercial uses and the modified GLDP (not at this time in force) which identified the site as within the preferred location for offices in the Liverpool Street/Spitalfields area and the Council's view that offices would not be encouraged on the site. The representations in support of the appeal pointed out that the GLC had no policy objections and that planning advantages were provided in small office suites, improved layout and design, employment opportunities and improved traffic flow and, further, other office uses had been permitted in the vicinity. The Inspector concluded that there was no sufficient planning gain within the scheme for it to accord with the Council's office policy.

" ...the principle consideration is thought to be the Council's policy for office development in this area, and whether there are special circumstances, for example by way of any planning advantages that the proposal would bring about, such as to justify an exception to that policy. Having examined the written representations in support of the proposal, including those relating to planning gains which it is claimed to provide, the conclusion formed is that the proposal has no special or unusual features which could be regarded as such substantial planning advantages as to justify setting aside the Council's policy, bearing in mind particularly that the benefits claimed for the development could for the most part be attained by the implementation of the permission granted by the Council, which does not conflict with their planning policy for the area. "

The consent referred to by the Inspector allowed offices as ancillary to showrooms on the site.

PARADISE ROW, NO.s 3-6BETHNAL GREEN GARDENS CONSERVATION AREA

This development involved the conversion of existing vacant houses which were designated as buildings of special architectural interest and last used for residential purposes. No.s 3 and 4 were to be converted to offices and No.s 5 and 6 to be rehabilitated for residential use. Listed building consent and planning consent were issued in October 1975, eleven months after the application was submitted and the latter consent included a condition requiring the residential element to be completed before the offices were occupied. The reason given for this was 'to ensure that the development is carried out within the terms of this permission'. It seems from the file that when this development was first referred to the GLC for directions on listed building consent only the office element was under consideration.

This scheme was implemented.

PEABODY BUILDINGS SCHEMESPITALFIELDS : ELDER STREET OUTSTANDING CONSERVATION AREA1978/1981

This scheme concerned a Grade II listed building in Commercial Street (No.s 135/153) known as the Spitalfields Estate and valued in the Borough as the first of the Peabody Buildings, designed by the Victorian architect H.A.Darbishire (renowned for his work in the East End), to be constructed in 1864. It had stood vacant for eight years and deteriorated to the extent of renovation costs being estimated at £1,200,000 in 1979. The application linked the renovation of this building as forty non-family private residential units and ground floor shops with an adjacent six storey office development (1421m²) at 45 Folgate Street. The retention of retail uses in the Peabody Buildings was for the purpose of servicing the community of residents and was therefore considered as planning gain. The application was made by the Peabody Trust who also owned the unattractive single storey warehouse at 45 Folgate Street which would be demolished to make way for the new building. It was stated in the development report to the sub-committee that any profits made on the scheme would be used for the Trust's 'other philanthropic activities'. The scheme involved no increase in residential floorspace but did bring the Peabody Building back into use and the units would be sold at what was considered by the report to be 'a cheap enough' price of £10,000 per flat. There was loss of industrial floorspace at No.45. A consent was issued in November 1979 (6 months after the application was made) which included a condition not to apply the internal finishes to the office building until either the residential renovation works were completed or the Peabody Buildings had been disposed of (by way of freehold or leasehold of 75 years or more) to a housing association or other body approved by the Council. A planning agreement was signed on the same day and included a similar requirement except that the leasehold term was stipulated as ten years minimum and the Council and the GLC were specifically named as suitable bodies. In January 1980 Pearl Property Ltd was approved by the Council as a body suitable to undertake the residential refurbishment and the scheme was implemented. The consent had suggested that grants may be available from the Council to assist with the works as the building was within

the outstanding conservation area but its not clear whether any such grants were applied for. In spring 1981 a number of permissions were issued in respect of the ground floor retail units changing the use to small offices and wholesale due to problems in finding tenants. One of these was accompanied by a planning agreement requiring the applicant, a Bank, to relocate a grocer within the same parade of shops.

PRESCOT STREET, NO.s 24,25 &26ST KATHERINES1971/1982

In July 1982 permission was given to CWS, subject to a planning agreement, for the demolition of existing buildings to erect new offices (4,900m²) on the site with a community centre (500m²) and some residential space (300m²) for the Oblates of St Mary Immaculate. The GLC, after a Member level meeting, agreed to this, although they were reluctant because of the loss of residential space and failure to comply with office policy. Consent to demolish the Grade II listed buildings was issued in October 1982. Up until this time the planning history of these buildings had been dominated by their preservation, being considered by the GLC to be of historic and architectural importance as representative of housing patterns in the post 1666 fire Tower Hamlets. In 1971 the GLC refused listed building consent for the demolition of No.25 to build increased warehousing space and ancillary offices. In 1980 the Oblates of St Mary applied to convert the vacant No.25 and 26 to offices and construct new offices and a community centre to the rear to be linked by a walkway. This would create 3950m² of offices and walkway, with 500m² of community centre but ensured the restoration of derelict No.25. In 1981 a revised application was submitted, on the grounds that the proposed works were unviable because of the costs of the restoration and conversion, which involved the demolition of No.s 24 (the convent), 25 and 26 (the latter was not listed) and the construction of a new office block (5580m²) and community centre. The viability of this scheme was in terms of it enabling the nuns and the occupants of No.26 to be relocated (to some extent within the development) while providing an income for the adjoining Church of the English Martyrs also run by the applicants. The architectural worth of No.24 was not considered very highly by the groups consulted while most of them did object to the demolition of No.25. The GLC finally offered no direction after CWS had taken over the scheme.

QUAKER ST.,NO.41, GREY EAGLE ST.,NO.S 27-41 & CALVIN ST.,NO.S 20-23

SPITALFIELDS

1971/1975

Appeal to the Secretary of State lodged in June 1972

A number of applications were made on this site during the above period which attempted to bring office use into this light industrial building. The application usually involved office use in conjunction with showrooms or storage uses and the Council issued two refusals in 1972 on this type of scheme as being contrary to land use allocations in the IDP. An appeal was lodged against the first of these and while it was pending an alternative scheme, also for offices(790m²) ancillary to showroom use (2370m²) but including four residential units (372m²), was approved in outline. The reasons for recommending approval were stated in the development report as compliance with the Spitalfields study which encouraged mixed light industrial and commercial uses where the proposal included a residential gain. The earlier appeal was withdrawn and details on the outline approved scheme were also approved in June 1973. In 1975 a revised application was submitted deleting residential use and the sub-committee agreed that such a use was in fact unsuitable on the site, particularly as it would be situated above warehousing. In these circumstances ancillary office uses were allowed but limited to 23% of overall floorspace. Similar consents were given in 1978, 1979 and 1980.

RODWELL HOUSE, MIDDLESEX STREET
SPITALFIELDS : ACTION AREA

1979/1981

Appeal to the Secretary of State lodged in June 1980

In December 1979 a refusal was issued for an application to convert the ground floor carpark in this existing office building (which also had basement parking) to office use (1115m²) on the grounds that the offices were speculative, no planning advantages were included and the proposals involved a loss of carparking space. The developer had submitted that the improvement to the external appearance of Rodwell House, the creation of employment opportunities and the increase in rateable value were adequate benefits. The present users of the carpark, Trumans, had objected to the loss as had Technical Services. Six months later the developer lodged an appeal but negotiations continued and culminated in a revised scheme which included the construction of five single storey shops (235m²) with frontage on Frying Pan Alley (to replace a disused carpark ramp), a private and gated landscaped courtyard with public access during working hours (to replace a featureless paved plaza) and an external carpark for twelve cars (to replace some of the 28 lost). The intended result of these revisions was to improve the external appearance of Rodwell House, complement new developments in Frying Pan Alley and significantly widen that public pedestrian way, as well as to provide the additional retail and public space. The sub-committee approved the scheme on March 18, 1981; the appeal was withdrawn on March 23rd and the Inquiry scheduled for April 28th cancelled; the agreement was then signed on July 17th and the decision notice followed on August 3rd. The consent did not address itself to the enforcement issue but the planning agreement required the developer to enter into binding contracts for the shop construction and landscaping works before the offices were fitted out and to allow public access to the landscaped areas during working hours subject to the developers power to remove anyone causing inconvenience.

SANDYS ROW, NO.7SPITALFIELDS : ARTILERY PASSAGE CONSERVATION AREA1977/1981

The report on the application for office use in this building states that the space involved was too small to warrant the need for planning gain. There already existed 140m² of office space and the application to alter the building did not show an increase greater than about 10m².

SPITAL SQUARE, NO.37SPITALFIELDS1972/1981

In 1972 an application was submitted for a change of use of a rear extension to this Grade III listed building from light industrial and commercial to offices (557m²) and residential use (93m²). Shortly afterwards the application was amended to increase the residential content (to 185m²) and reduce the offices (to 177m²) so as to make it acceptable to the committee. Consent was given but the changes were not implemented. In 1981 an application was submitted for No.37 itself for use as offices (236m² net). It included 93m² of existing office use and the remainder was warehousing space. Consent was given without any requirement of planning gain beyond the internal renovation of a listed building but it was personal to the two charities occupying the building except for one floor (95m²) which was given unrestricted temporary (ten years) office consent to allow those charities some rental income. An alternative scheme was also granted consent later the same year. This transferred the existing office use to one floor thus removing the ten year limit while converting a further 257m² to office use personal to the charities. This was accompanied by the conversion of the basement of the building for use as an archive and library (146m²) and the Council treated this, together with the internal renovations, as sufficient planning gain.

ST. CLARE STREET, NO.9ST KATHERINES1982/1983

Messrs Adlers (solicitors) occupied the four floors of offices (1200m²) in this building and applied in December 1982 to demolish it and construct a new seven storey office building (2000m²) with two residential units (190m²) on the ground floor and basement. Objections were received from tenants of the Guinness Trust Estate adjacent to the proposed development mainly based upon loss of privacy and disturbance during the period of construction. As a result a site visit was made by the Members of the Council at a time when the noise was at its worst. During this meeting with residents of the Estate and representatives of the developers the latter suggested a planning agreement to restrict the hours of construction work and thus minimise disturbance. The sub-committee meeting that followed was extremely animated and the Councillors were 7:1 in favour of granting consent subject to a planning agreement to protect the interests of the tenants. The Chairman requested to see the draft planning agreement as soon as possible.

A number of remarks were made by the tenants present at the meeting referring to that part of the Borough as 'a jungle of ugly office buildings, monsters we are surrounded with'. The Vice-Chairman of the Wingate Centre Tenants Association said that being barraged with building work caused physical and psychological harm and asked 'in the name of humanity' not to approve the development. The Chairman pointed out that the Guinness state was itself built as planning gain and had brought enormous benefit to the Borough. This application was not resolved by the end of the study period.

TARN AND TARN SCHEMES

-- SPITALFIELDS

Tarn & Tarn are a long-established firm of estate agents and surveyors located in Bishopsgate who were responsible for a number of sites and properties in Spitalfields and had been committed to demolishing old properties in Spitalfields. Over a period of several years they engaged in negotiations with the Council over possible schemes in the Fashion Street Conservation Area, none of which were completed. They are considered together as they involved juggling properties warranting restoration as residential units with those which the Council considered could be sacrificed for offices with the aim of renovating and gentrifying this historic part of London. Some of the sites in question were already vacant lots, whereas others had buildings which were either already listed as being of architectural or historic interest or were under consideration for such listing. Some of the sites intended for office developments had buildings on them that did not fall into either of these categories and this is indicated on each individual project.

The area in which these schemes were located was one which the Council was anxious to return to its former glory. In 1979 it was designated by the Council as a Conservation Area and further designated in 1976 as Outstanding. The GLDP also located the area within a proposed Action Area. The area is particularly acclaimed for its early 18th century terraces of four storey buildings, such as those constructed as part of the Michell & Wood Estate on Wilkes Street and Fournier Street. The architectural and historic importance of these houses is enhanced by their proximity to Christ Church, Spitalfields. Many of the houses had been used for multiple occupancy, light industrial uses and the zoning for the area in the IDP for Greater London had been for light industrial use. As the history of Spitalfields shows the area had been the home of the various waves of immigrants to England over the previous two centuries, and there is evidence that the attics of some of the buildings were originally constructed for industrial use. This use however was characterised by the operation of handcraft looms by persons resident in the house rather than by light industry by today's standards. By the time of these applications the area had gone through a number of ethnic changes, from being the home and workplace of huguenot artisans, through to the centre of Jewish clothing industry to the now prominent Bangladeshi sweatshops. Land use surveys carried out by the Council in 1971 show no remaining occupied residential accommodation in Wilkes Street, though vacant accommodation exists

and some houses in Fournier Street, Puma Court and Princelet Street continued to be occupied for at least part residential purposes. However outside of this 18th century core of the Conservation Area there remained a substantial residential population.³¹

As a result of the use to which the properties were put and the lack of money spent on their upkeep, many had deteriorated and a number were subject to Closing Orders as they were unfit for human habitation. The philosophy behind the designation of the area as a Conservation Area was to return the area to its former identity by restoring the 18th century historic buildings to mainly residential use, to reduce the intensity and density of uses in those buildings and their gardens and to disturb as little as possible the 19th century commercial part of the area.³²

" The aims of conservation are to ensure that the listed buildings are repaired and maintained to a high standard so that future generations may continue to enjoy both their individual quality and homogeneous character of the area ... The intensification of light industry in particular has led to the over-use of the properties, the loss of rear gardens, over-loading of floors and severe damage to the interiors. "³³

The Council then linked the policies for this area with those of the GLDP on the limitation of office use, the requirement of planning advantages and the retention of residential accommodation. On the other side was the threat of continued delapidation of the buildings and the vandalising of the interiors of those which were empty due to closure. Also vacant sites in the area provided a further problem as

³¹ In 1971 it was estimated that there were approximately 180 households in the Conservation Area. LBTH Land Use Survey.

³² s.64 Policy for the Fashion Street Conservation Area 1977. This policy document was not intended to represent a change of approach by the Council, but rather clarification and explanation of policies in operation since 1969.

³³ Towards a Local Plan for Spitalfields Interim Report 1976, Volume 1, paragraphs 5.5.6 and 5.5.7. These remarks were made with reference to the Fashion Street Conservation Area and the document was a consultation report setting out the Council's policies as they had developed since 1969 and the problems that still remained. It was based on extensive consultation.

they became used as rubbish dumps and consequently a fire and vermine risk to nearby houses. There was also the problem of unauthorised entry and occupation of a number of these houses and all of these points were raised by Tarn & Tarn as reasons for granting or expediting applications for planning consents for office use.

1. THE FOUR MAIN SCHEMES : A CHRONOLOGY

1973

May

Applications submitted for the following schemes:

A. 9/13 Fournier Street, 1 Wilkes Street, 23/25 Wilkes Street and 25 Fournier Street;

B. Ashford House, 10 Puma Court and 19/31 Fournier Street;

C. 2,5 and 7 Wilkes Street, 8,9 and 11 Puma Court and 12,15 and 19 Wilkes Street.

July

Application submitted for a residential scheme at 7 Fournier Street.

1974

January

The Committee approved schemes A, B and C with 19 Wilkes Street deleted.

The scheme at 7 Fournier Street amended to an office development.

March

Committee approved the scheme at 7 Fournier Street as amended.

1975

7 Fournier Street tied to 19 & 21 Wilkes Street.

1976

January

Listed Building consent to demolish buildings in scheme A and at 7 Fournier Street refused.

1977

July

Schemes B and C amended to delete the residential elements from both.

September

Refusals issued on schemes B and C.

2. PUMA COURT

On May 11, 1973 Tarn & Tarn submitted two planning applications for schemes within the Fashion Street Conservation Area of Spitalfields on sites opposite each other and fronting Wilkes Street, E.1. The accompanying correspondence clearly sets out the office space applied for and the corresponding planning gain in a ratio of 1:1 in terms of square feet. At this stage the two schemes looked like this :

(i) 3,5 & 7 Wilkes Street and 8,9 & 11 Puma Court (the South Site) : an office building of 9,902f² with the rehabilitation of 12,15 and 19 Wilkes Street for residential use (10,469 sq.ft). The excess residential planning gain of 567f² was to be carried over for use on another scheme.

(ii) 10 Puma Court and Ashford House site (the North Site) : an office building of 7,196f² with the rehabilitation of 19 & 31 Fournier Street for residential use (6829f²). The excess office space was to be deducted from one of the later schemes.

From the correspondence it seems that these two applications were the result of negotiations between the Council and Tarn & Tarn over at least the previous twelve months. The first letter on file, dated 24th March 1972 and from Tarn & Tarn to the Council, makes reference to meetings held and suggests a package including planning gain in the form of renovation of listed buildings in the conservation area as residential units. The Borough planning officer responded with the following statement of the Council's policy :

" Although the present zoning of the area is for light industrial use, its designation as a Conservation Area has made the type of scheme involving combined office and residential development more acceptable, as explained in our meeting of 14th March. The erection of a new building on Wilkes Street in the vicinity of Puma Court coupled with the renovation of a number of separate listed buildings, and providing an overall additional residential content equal to the total additional office floorspace, is therefore appropriate in relation to this Council's policies for conservation areas and office development. As you appreciate the exact location of the residential element in the scheme and the extent of true 'residential gain' are matters which will be settled in future discussions with this department. "

Following this correspondence an application made to the Department for the Environment for an Office Development Permit for 33,250f² on

the total area south of Puma Court (which included 1/7 Wilkes Street and 7/13 Fournier Street³⁴) and the Ashford House Site. The Permit was refused and a further offices only scheme was put forward by the developer on the same area. This received further re-statements of office policy from the Council and a suggestion that a number of separate schemes could be put forward for the sites around Puma Court, each having smaller areas of office space (and therefore more in keeping with the office policy) but this would require them to be held under separate freehold ownerships.³⁵

By late 1972 Tarn & Tarn had submitted another application for an Office Development Permit on the basis of a mixed office and residential scheme, again for the same area. The Architect to the GLC in response to a call for comments on the application wrote positively to the Department of the Environment emphasising the importance of restoring architectural continuity to the Fournier Street area even if it involved demolishing some buildings due for listing.

" It is the Council's policy in conjunction with London Borough of Tower Hamlets to secure the return of the best of the listed buildings in Fournier Street and other important groups in the Spitalfields Conservation Area to residential use, extinguishing the existing light use. It is hoped that this will be achieved by offering small scale office uses in other less important buildings within the area or in the locality. Messrs Tarn & Tarn's application is broadly in accordance with this policy and subject to the submission of satisfactorily detailed scheme is in my view to be encouraged. With regard to the proposed demolition of nos 7-13 Fournier Street and No.1 Wilkes Street I note that these buildings are included in the draft statutory list ... The Council would not normally accede to the demolition of statutorily listed buildings but I think that the possibility ought not to be completely excluded in this instance... "

This brings the history of the application for planning permission into perspective and goes some way to explaining how the application came to include the anticipated residential gains. By the time the applications were made the total site intended for offices had been

³⁴ 1 Wilkes Street and 7/13 Fournier Street were later listed as Grade II buildings within the Fashion Street Outstanding Conservation Area.

³⁵ Thus to avoid them being defined as " related developments " under S.75(2) of the Town and Country Planning Act 1971.

divided up as detailed above, with a residential element added. Further schemes were devised for the site occupied by 7/13 Fournier Street and these are discussed below. It is also clear that by submitting the application the relationship of negotiation was not brought to an end. For example, in a letter dated 16th July 1973 Tarn & Tarn write to the Borough Planner

" We would confirm once more, that if the Listed Buildings are to be saved and restored, then the Office Consents, upon which this restoration will depend, must be granted without delay, or there might be nothing left to save, as the properties in question are deteriorating rapidly. "

The Grade II Listed Buildings which were put forward as the residential element for the South Site had themselves been put forward in 1972/3 as a mixed office and residential scheme. After various discussions³⁶ Tarn & Tarn submitted an application, on January 26, 1973 for change of use of the vacant 19 Wilkes Street from industrial to residential purposes together with the conversion of 12 and 15 Wilkes Street from light industrial workrooms to offices. Again the floorspaces were computed to balance office use with residential.³⁷ On July 11, 1973, after receiving the comments from the GLC Historic Buildings Division, the Director of Development wrote to Tarn & Tarn indicating the undesirability of converting No.15 to offices because of the value of its interior and suggesting using No.s 12 and 15 as residential elements in other schemes or being granted only a consent of a limited period. The latter course was clearly of little use and so the application to convert to offices was withdrawn on July 16 and they were attached to the office scheme on the South Site.

³⁶ Referred to in a letter from Tarn & Tarn to LBTH dated 26 January 1973.

³⁷ No.s 12 and 15 were to provide 5,794 s/f of offices minus 1,121 s/f carried over as credit from an application submitted on November 7, 1972 in respect of 24 Hanbury Street and 45/55 Commercial Road. Residential use at No 19 amounted to 3,401 s/f plus Amenity Gain (landscaped garden area) of 1270 s/f at No.s 12 & 15. This produced in total 4,673 s/f office space and 4,671 s/f residential. These figures appear on correspondence from Tarn & Tarn and it is interesting to see that a planning officer has written on the same document " But they owe us 1127 s/f ". This issue is not resolved on the file.

In the Development Committee held on January 30, 1974 both schemes were approved on the recommendation of the planning officer, subject to the signing of a planning agreement. At this stage there had been some revisions to the schemes :

- (i) office space reduced to 8506f² and the residential gain to be limited to 12 and 15 Wilkes Street (7068f²)
- (ii) office space reduced to 6702f² and the residential rehabilitation remaining the same.

Similar suggestions being made to set-off the excess on each scheme against other proposals pending with the Council.

These amendments were the result of changes made to the amount of site area the Council would permit to be covered and a rejigging exercise on matching office space with residential gains. The GLC had raised no observations on the office policy issue and did not consider the schemes to represent a substantial departure. Their views however did reiterate to Tower Hamlets the importance of Spitalfields as an area of historic interest and of this conservation area in particular as containing 'one of the most substantial areas of early eighteenth century domestic estate development now surviving in Greater London.' The letter goes on to remind the Council of the declared policy of both the GLC and Tower Hamlets to end the multiple industrial and other detrimental uses of the old buildings in this area and to restore them for domestic occupation, adding that this is subject to the assumption that 'the office/residential balance achieved between these related applications is considered satisfactory by Tower Hamlets within the terms of their special office policy for Spitalfields'.

Following the decision of the Committee Tarn & Tarn refused to sign the planning agreements. This refusal began by a suggestion that as Tower Hamlets were about to gain from the schemes formalities should not present a problem, and indeed involving lawyers would merely complicate matters. By January 1976 the content of the draft planning permissions and the draft planning agreements were being discussed between the parties in some detail. The office permissions themselves were to include a condition linking them to the residential element. On one of the schemes the condition appeared as follows :

4. The residential accommodation at Nos. 19 and 31 Fournier Street shall be completed suitable for occupation to the satisfaction of the local planning authority before any work on the office development is begun. Thus written permission shall be obtained from the local planning authority before work on the above office development is commenced.

And a similar condition appeared on the draft for the other scheme.

The reasons for the condition being imposed were straightforward :

4. Office development on the above site would not have been acceptable to the local planning authority and planning permission is given due to inclusion of a substantial residential element in the scheme which makes a positive contribution towards the achievement of the planning aims for the area.

The draft planning agreements were brief and simply recited the parties, the ownership and location of the site and the fact that the developer and Council had agreed to make provision for ensuring that the developments were completed. The developer was then to covenant under S.52, S.16 of the Greater London Council (General Powers) ACT 1974 and S.126 of the Housing Act 1974 in the event of planning permission being granted to (a) carry out the development, (b) not commence the office development until the residential element is complete to the satisfaction of the Council and (c) to restrict the use of certain of the buildings to residential only.

The developers endeavoured to persuade the Council (through correspondence and meetings with the Solicitor to the Council and the responsible planning officer) to grant the permission without the prerequisite of an agreement. They argued that Condition 4 should be deleted from the permission and that the objectives of the Council could be realised by then inserting a condition requiring them to enter into a planning agreement before the offices are occupied. The Council would not agree to granting permission in advance of a planning agreement because of the problems of enforcement this would create and this seems to have been the major cause of negotiations breaking down.³⁸

³⁸. The following paragraph appears in a letter dated 26th February 1976 from Tarn & Tarn to the Solicitor to the Council : " Until such times as the Town Planning Consent in respect of the office buildings have been implemented, our clients are not prepared to

As far as the draft agreement was concerned the developer objected to a covenant which required them to carry out the development and to completing the whole development. Clause (c) they argued was superfluous and, more interestingly, they objected to the recital describing the existence of an agreement between the parties : 'This is not correct and this Section 52 Agreement is a condition made by your Council.'

The breakdown in these negotiations led the developer to make an amended application deleting all of the planning gain from the schemes and putting forward the argument that the previous proposal was not practical and that development of the sites alone constituted planning gain to the Council. The sites were both vacant as a result of unauthorised demolition of old buildings and did present a problem to the Council in that they were used as rubbish dumps. They were unsightly and did detract from the image of the vicinity as a conservation area.

The application went before the Committee on 15 September 1977 and the officer's recommendation to refuse was accepted. The reasons for refusal were solely non-compliance with office policy and an appeal was lodged in the following March with regard to both the South Site and the North Site, together with an appeal against a further refusal for office development alone at 14 & 16 Wilkes Street.³⁹ All three appeals were heard together at a public inquiry held in May 1980⁴⁰ and were all refused on the basis that the Council's office policy was not complied with.⁴¹

enter into any agreement to restrict or regulate the development or use of land. Following from [this]... you would appreciate that our clients are not prepared to enter into any agreement that your Council can enforce or register against the title of any property until such time as the Office Consent has been implemented."

³⁹ See below.

⁴⁰ The reasons for the delay came from both sides in that there was industrial action at the Council during 1979 so a proposed date had to be cancelled, joining the 3 appeals together also caused delay and another suggested date had been unacceptable to the appellants.

⁴¹ This appeal is discussed in the section covering the appeals in Tower Hamlets on office policy during the study period.

3. 7,FOURNIER STREET

From the foregoing description 7,Fournier Street was initially proposed as part of a large office development covering the whole corner site of Fournier Street and Wilkes Street. By early 1973 Tarn & Tarn were discussing with the Council a number of smaller office schemes, linking each part with some residential gain. On July 6th 1973 a planning application was submitting proposing the demolition of 7,Fournier Street and the construction of a new house on the site. In December 1973 this application was amended to make the new building offices rather than a house. Initially it was suggested that no additional planning gain was needed because of surplus gains on other schemes which amounted to the requisite number of square feet.⁴²

After further negotiations the scheme was again altered to an office building (2859f²) and the rehabilitation of existing houses at 10, 19, 21 Wilkes Street and 13 Princelet Street for single family residential use. By September 1973 conditional planning permissions to change the use from industrial to single family unit had been approved on all of the residential elements, a number of which had previously been put forward as elements in other schemes.⁴³ Listed Building

⁴² In a letter from Tarn & Tarn dated 10 December 1973 it is set out as follows :

office floor space for planning gain purposes : 2,564 s/f

Surplus on other schemes :

26/28 Hanbury St (letter 25.1.73) 311 s/f

24 Hanbury St & 45/55 Commercial Rd
(letter 7.11.72) 1,121 s/f

24 Hanbury St & 45/55 Commercial Rd
(letter 19.4.73 substituting 21 Wilkes St) 393 s/f

24 Hanbury St & 45/55 Commercial Rd
(letter 19.7.73 substituting 19 Wilkes St) 736 s/f

Available space for offices in Conservation Area 2,561

⁴³ For example, 10 Wilkes Street was the subject of an application to demolish and to an application for change of use to offices in 1971. Both were refused, the latter on the grounds of non-compliance with office policy. The same property was then discussed as part of a scheme including its renovation as an office building and the renovation and conversion of other buildings, either in Spitalfields or elsewhere in the Borough, to residential use. Subsequently it was put forward as a house for residential use in connection with offices at 44/45 Commercial Rd before it reached the scheme presently being discussed. A similar type of history surrounds 19 Wilkes Street.

Consent to demolish 7, Fournier Street had also been applied for in June 1973 and was finally refused on January 13th 1976.

" This Council considers that the building should be retained as it is one of a group of buildings of special architectural and historic interest which makes an important contribution to the character of the Fashion Street Conservation Area "44

There remains on file a draft planning agreement and a draft planning permission for an office building on the site of 7, Fournier Street, linking it with the residential properties listed above.

" 4. The residential accommodation at No's 13 Princelet Street and 10, 19 and 21 Wilkes Street shall be completed suitable for occupation before the office development is begun. Written permission shall be obtained before work on the office development commences "

As for the draft planning agreement, it required the developer to covenant to carry out the development and not to apply internal finishes nor occupy the office building until such time as the residential element was completed. The Council on its part covenanted not to take enforcement action in respect of any breach of planning condition not to commence the office development until the residential accommodation was ready for occupation. This difference between the consent and the agreement was a departure from previous Council policy. Accordingly there is a letter on file from the Solicitor to the Council to the Director of Development indicating that authority for the departure would have to be obtained from the Council members before the agreement was submitted to Tarn & Tarn. The change was brought about by negotiations between the planners and Tarn & Tarn so as to allow work to be done on the offices before the residential work was completed without the threat of the Council taking enforcement action. The new provision prevented the application of internal finishes to the offices and was drafted to ensure that the developer did not fail to complete the residential element.

Once again the agreement was never signed and eventually the refusal for listed building consent to demolish was issued.

44 Reason given for the refusal

4. 9/13 FOURNIER STREET⁴⁵

The intention here was to demolish the buildings at these addresses and construct a new office building (9,592f²) on the site. The planning gain was to be provided by renovating three other houses in the vicinity as single family residences: namely 23 and 25 Wilkes Street (3,360f² and 3,399f² respectively) and 25 Fournier Street (3,872f²). The excess planning gain of 1,039f² was to be used against other schemes contemplated in that same area. Almost all of these buildings had been previously used for commercial purposes, including a small amount of office space. There was also a small amount of residential use at 1 and 25 Wilkes Street but it was derelict and unfit for human habitation at the time of the application and consequently disregarded in the calculations. Planning applications were made in May 1973 to put this scheme into effect, and this included applications for Listed Building Consent to demolish No.s 9 to 13 Fournier Street.

Consequent to other negotiations between the Council and Tarn & Tarn, the latter party also applied in June 1973 to renovate and convert 23 and 25 Wilkes Street for mixed office use, linking this with 25 Fournier Street. The effect of this would have been as follows :

25 Fournier Street	Industrial Use 3,872f ²	to	Residential Use 3,872f ²
23 Wilkes Street	Industrial Use 2,370f ² Residential Use 990f ²	to	Office Use 2,696f ² Amenity Use* 664f ²
25 Wilkes Street	Industrial Use 1,845f ² Residential Use 1,554f ²	to	Office Use 2,717f ² Amenity Use* 682f ²

* refers to landscaped areas

By disregarding the existing residential areas because they were unfit and closed and by treating the 'Amenity Use' areas as gain, the calculations produced 5,413f² of offices and 5,218f² of gain. Further

⁴⁵ 13 Fournier Street is the building on the corner of Wilkes Street and Fournier Street, and includes the building also known as 1 Wilkes Street.

deductions were made for office areas carried over from other schemes (311f²) bringing the office : residential ratio within the office policy.

The Historic Buildings Section of the GLC expressed a preference for residential use at 23 and 25 Wilkes Street and suggested that any office permission on those premises should only be for a fixed time 'until less sensitive premises became available for office use.' In August this scheme was withdrawn on the basis that a limited permission was unacceptable and an office consent on 9/13 Fournier Street would be forthcoming.⁴⁶

Planning permissions for the use of 23 and 25 Wilkes Street and 25 Fournier Street as single family residences were granted on September 20, 1973 and in January 1974 the Committee agreed to grant listed building consent for the demolition of the four listed buildings at 9-13 Fournier Street and 1 Wilkes Street. As it turned out this decision was made without consulting the national organisations concerned with buildings of historic and architectural interest⁴⁷ and when their views were canvassed they objected to the proposed demolition. The Society for the Protection of Ancient Buildings stated its views categorically :

" The Society is strongly opposed to the demolition of these buildings not only because of their charm but also because it would result in a serious loss to the conservation area in which they are situated, and which has already suffered considerable erosion. It is particularly important that this corner should be retained as it is so close to the Church. The Society has no hesitation in saying that these buildings could and should be retained and repaired, and hopes your Council will refuse listed building consent."

The Royal Fine Art Commission, The Tower Hamlets Society and the Georgian Society raised similarly strong objections as did the GLC, whose approval the Committee's consent was subject to. The Royal

⁴⁶ Letter from Tarn & Tarn to the Borough Architect dated 10th August 1973.

⁴⁷ At this time the list of consultees on historic buildings were Ancient Monuments Society, Council for British Archaeology, Georgian Group, Society for the Protection of Ancient Buildings, Victorian Society, Royal Commission on Historical Monuments, The London Society, Metropolitan Public Gardens Association, Tower Hamlets Society, River Thames Society, Greater London Industrial Archaeological Society, Spitalfields Historic Buildings Trust Ltd.

Fine Art Commission went so far as to comment on the Council's approach to historic buildings in the conservation area generally.

" [The Commission] appreciate the trouble that has been taken by your Borough to save this area by balancing conservation against some measure of commercial development; they nevertheless believe that if a serious attempt is to be made to re-establish the original quality of Fournier Street then a more fundamental approach to the solution must be explored. They think, for instance, that the policy of removing existing buildings, particularly when these are not structurally unsound, and replacing them with Georgian pastiches, is an unfortunate one: they also find the proposed new infill buildings well below the quality which they think could be expected in a conservation area." ⁴⁸

In view of all of this, the Committee which met in December 1975 raised no objection to the GLC decision not to approve the consent. Refusals were issued on 13 January 1976.

" This Council considers that the building should be retained as it is one of a group of buildings of special architectural and historic interest which make an important contribution to the character of the Fashion Street Conservation Area "

It is clear from the correspondence that the Director of Development was aware, as early as June 11, 1973 that the demolition of these buildings was unlikely to be approved by the GLC. Earlier in 1973 the buildings at 9/13 Fournier Street had been added to the Statutory List of buildings of special architectural and historic buildings and the GLC were reluctant to continue negotiations with the developer on the basis of their demolition.

" Negotiations have recently taken place on the broad assumption that these buildings (which were not at the time listed) might be demolished and the site redeveloped in connection with a major scheme which envisaged a domestic rehabilitation of most of the houses on the west side of Wilkes Street⁴⁹ and a new office building on the corner of Wilkes and Fournier Streets with a facade appropriate to the generally early 18th century character of these two

⁴⁸ Letter from RFAC to the Director of Development at the Council, dated 10 June 1975

⁴⁹ It seems that this is a reference to this scheme plus the other " live " Tarn & Tarn schemes which appeared to be going ahead, ie. those on either side of Puma Court discussed above. It seems that they were all being dealt with in the same negotiations and would together have led to the rehabilitation of 12, 15, 23 & 25 Wilkes Street and 19, 25 & 31 Fournier Street as single family residences.

streets. The spot listing of these buildings has introduced a new consideration and it can no longer be certain that consent would be forthcoming for demolition. I would wish to seek the views of the Historic Buildings Board on this question before proceeding further with the negotiations but I am sure they would be unwilling to consider an application for demolition which was not related to the scheme for redevelopment and rehabilitation. " 50

Negotiations did continue and at the end of July Tarn & Tarn were under the impression that the only obstacle to consent being granted was the lack of agreement on elevations to the office building proposed.⁵¹ Indeed, they proposed at this stage to have conditional office consents issued so that work could commence on the restoration of the houses in the scheme in order to halt their deterioration and to reduce the danger of damage caused by vandalism.

The development was approved by the Committee on January 30, 1974 subject to the signing of planning agreements and draft decision notices and agreements were drawn up. At this stage three of the main Tarn & Tarn schemes were being dealt with together, namely the ones on either side of Puma Court and this one and all of the drafts are similar. The consent on this scheme recited the details of both the office and residential elements including requirements for landscaped areas and external appearance of all the elements. The individual elements were linked together by condition 4, requiring the works on 23 and 25 Wilkes Street and 25 Fournier Street to be completed before work on the office building could commence. The draft planning agreement took up this point by reiterating that work could not commence until the Director of Development confirmed in writing that the residential work had been completed. The planning agreement also required the developer to complete the whole development once work on any part was commenced.

Tarn & Tarn raised objection to the content of both the draft consent and the draft planning agreement on the same basis as discussed above. The draft agreement was never signed and

⁵⁰ Letter dated 8 June 1973 (received on 11 June) from GLC Department of Architecture to the Director of Development.

⁵¹ Letter from Tarn & Tarn to Director of Development dated 26 July 1973

consequently the permission was never granted and this finally led to the refusal of listed building consent to demolish 23 & 25 Wilkes Street.

In November 1976 Tarn & Tarn applied for a change of use on the then vacant 2nd and 3rd floors of 23 Wilkes Street. The building had been the subject of a Closing Order in June 1972 which allowed restricted use of the basement, ground and first floors only. This application would mean a change of use from residential to the zoned light industrial use, and permission was granted for a period of two years subject to a requirement of some restoration works to prevent further deterioration of the building. Tarn & Tarn appealed the time limit⁵² and the Inspector agreed to extend it to five years while affirming the condition relating to repair works.⁵³

5. 24 HANBURY STREET and 45/55 COMMERCIAL ROAD

The background to this scheme involved some of the earliest negotiations with Tarn & Tarn on planning gain other than the provision of carparking space. The file opens with an application for outline permission on a mixed office and residential scheme, dated October 27, 1971. The covering letter refers to the fact that Tarn & Tarn's clients at that stage could not be certain whether the scheme would be financially viable because of all of the renovation and rebuilding work anticipated, hence the request for outline permission only. The scheme involved four listed buildings at 24 & 26 Hanbury Street (both Grade III), 18 Wilkes Street and 13 Princelet Street (both Grade II) together with 28 Hanbury Street which was unlisted. It was proposed to renovate three of the buildings as residences (8,176f²) and the remaining 26 and 28 Hanbury Street as offices (8,904f²). Previously the properties were mainly used for industrial purposes with a small amount of existing office space at 18 Wilkes Street and 28 Hanbury

⁵² Appeal under S36 and Schedule 9 Town and Country Planning Act 1971 by the Executors of the Estate of L. Tarn deceased, dated 12 April 1978. Application No. TH/4709/8372/AD/MH.

⁵³ This was done on the grounds of a useful period of time to allow industrial use and did not reflect upon the merits of the Council's policy of conservation and retention of residential use in this area.

Street. The final ratio being 7,984f² increased office space and 8,904f² residential. --

This scheme was welcomed by the GLC in view of the Conservation Policy and the provision of planning gains and the Committee in February 1972 approved consent subject to an agreement under S.37 Town & Country Planning Act, the precursor of S.52 TCPA 1971. In June the file was forwarded to the Solicitor to the Council while discussions continued over the actual details of the scheme. It came to light in August that the developer did not own the land and buildings concerned but only the lease and any planning agreement would consequently not be binding on the freeholder as he was not a person deriving title from the developer. Finally, in February 1973, a permission was issued without a planning agreement covering all of the properties involved, with a simple condition that the residential part should be completed suitable for occupation before the offices were occupied.

It seems that this part of the proceedings went ahead without consultation with the Solicitor to the Council and the later problems with the scheme led to some changes in the approach of the Council. Most evidently, the Council became much more concerned about the need for care and precision in drafting the consent and ensuring an agreement was signed before the consent was issued so as to avoid enforceability disputes as far as possible.

TRINITY SQUARE, NO.s 41-42ST KATHERINES : TOWER OUTSTANDING CONSERVATION AREA1981/1983

In 1982 a scheme which involved the demolition of No 41/42, while retaining the facade, and the construction of an office building (2600m²) had been agreed in principle by the sub-committee subject to the agreement of the GLC and a suitable planning gain, such as the replacement of lost residential space. An application made in 1981 had been refused on the grounds of loss of residential hostel space by its conversion to offices. The GLC, however, recommended a refusal for the demolition of this listed building on the grounds that it was an unwarranted loss of 18th century buildings. Other objections were received and a refusal was issued. In 1983 a new proposal was submitted which retained and renovated most the buildings (demolition of a listed rear extension and an unlisted building was required) and converted No.42 into a parish house with a winebar in the basement. The displaced ToCH hostel had been relocated by the developer in premises in Newark Street already refurbished (at the cost of £80/100,000 to the developer) for the purpose and including two social centres. The office element (1824m²) was to be contained in a six storey reflective glass building to be constructed at the rear of No.42 which in turn would be connected to another office building within The City (for which consent had already been obtained) by means of a retained listed passageway. Some objections were received from the Red Cross who would be displaced from No.42, from three occupiers of No.41 on the grounds of loss of daylight and from the City on elevations. The scheme however was agreed subject to details and a planning agreement to ensure the completion of the Parish House and the re-housing of the hostel before the office building was completed by the application of internal finishes. The agreement also provided for the site to be made available for the purposes of archaeological investigations on the Roman Wall before development commenced.

WEARWELL LIMITED SCHEMES
ST KATHERINES & WHITECHAPEL

1978/1982

Wearwell Limited were a public company who had operated in the Borough for many years and were at this period expanding rapidly through the acquisition of two other public companies in the garment industry. Thus they provided the Borough with significant employment opportunities. A major consideration in dealing with their applications was the importance of keeping them in the Borough and the potential loss of jobs involved if they went elsewhere.

1. COMMERCIAL ROAD, NO.s 81/91

Wearwell wished to develop this vacant site designated for residential use as offices. The application made in 1978 contained no specific planning gain element and a later application increased the office floorspace to a six storey building. Negotiations did take place but at sub-committee what was emphasised was the need to keep Wearwell in the Borough. Consequently it was decided to grant consent subject to a condition and a planning agreement to limit the occupation of the offices (4895m²) to Wearwell for the first five years of occupation. Twelve months later an agreement was signed to this effect and a consent issued. Later that year another application was submitted for office use at the same site (4895m²) but with improved design and removal of the condition restricting occupation to Wearwell because of financing difficulties. A further planning agreement was entered into containing the same restriction on occupation. In 1981 a third planning agreement was signed to revoke the 1979 version and revise the 1980 version so as to allow Barclays Bank to use the ground floor and part of the basement for the following five years while reserving the rest of the office use to Wearwell for the same period. No gain requirement was made on this change of occupant.

COMMERCIAL ROAD, NO.s 153/157

As with the above scheme no specific gain was negotiated on the conversion of this industrial building to offices but the company had recently acquired a large amount of industrial floorspace elsewhere in the Borough (see under Prescott Street below) and were considered to be a major local employer. The planning agreement dated February 4, 1982, limited occupation to Wearwell for five years and made a further requirement that any occupier within ten years following the date of

first occupation would have at least 59,976f² (5572m²) of industrial floorspace elsewhere in the Borough. This was done to ensure that the offices would be used to assist the prosperity of the Borough so as to justify the displacement of industrial use.

PRESCOT STREET, NO.s 41/42

The first application on this building was to add four storeys and change its use from industrial to offices without a specific gain. In June 1982 the sub-committee refused the application on the grounds of it being contrary to office policy as it lacked planning advantages and involved loss of industrial floorspace, excessive plot ratio and excessive scale of development. A month later the sub-committee approved an alternative scheme which reduced the scale by adding only a two floor extension, subject to a planning agreement and an application for industrial development elsewhere. By September the scheme involved office use at 41/42 (2331m²) and a new industrial building (10,500m²) in Eastern Dock, Wapping Lane for the manufacture, storage and distribution of textiles and the storage of fresh fruit and vegetables. The loss of industrial floorspace at 41/42 was only 1786m² and the developer also wanted a proposed office development (with loss of 2785m² industrial floorspace) at 38/40 Commercial Road (two floors of which had consent in September for use as a Clothes Marketing Centre) to be linked with Eastern Dock. Wearwell had also agreed to layout and landscape an area of public open space (1800m²) which adjoined a proposed footpath and canal link between Shadwell Basin and Western Dock as part of the Eastern Dock proposals which had been granted permission by the LDDC in September 1982. The concern over this proposal was the precedent that would be created for those with industrial interests in the

Borough to rely on less expensive industrial space in Wapping and other eastern areas to support applications for offices in industrial buildings on the City fringe. This was particularly so as the office policy and draft borough plan specifically discouraged loss of industrial floorspace. It was agreed to grant consent on Prescott Street subject to a planning agreement to ensure completion of the Wapping Lane development, but the Commercial Road proposals were deferred pending further information on the developers plans for the properties owned by the company. The legal department expressed reservations over using a planning agreement in these circumstances particularly as the connection between the two sites was minimal and one of them was outside the Council's planning control. Technical problems also seemed inevitable as the offices were largely change of use while the industrial element involved construction works, so to link the two in terms of completion of the latter would probably be unacceptable to the developer. On further investigation it seemed that the negotiations to purchase the industrial site were only just beginning and the holders of the lease had advanced negotiations with another party. At the time this study was complete no agreement had been drafted.

WHITECHAPEL HIGH STREET, NO.s 35/45 & DRUM ST. NO.s 1/9WHITECHAPEL : TRIANGULAR SITE1979/1981Appeals to the Secretary of State lodged 2 January and 12 August 1980

On October 19, 1979 the liquidator of Gardiner's Corner Property Co. Ltd. applied for planning permission to erect a five storey office building (2300m², 24760f²) on this vacant site. There had been no successful negotiations between them and the Council as they maintained that redevelopment of the site and the provision of ground level landscaping beneath the offices constituted sufficient planning advantages to satisfy paragraph 4.15 of the GLDP. The planner's view was that the level of gain was far too low compared with other schemes in the area and that the site should include public facilities to complement the Gardiner's Corner development on the adjoining site and so advance the planning aims for the area as 'a major focus for leisure and recreational facilities'.⁵⁴ Consent was refused on the basis of non-compliance with the GLDP and the Council's office policy in providing no acceptable planning gain, it was a piecemeal (the site formed part of a larger triangular site bounded by Whitechapel High Street, Drum Street and Commercial Road) development and made no positive contribution to the area. The developer appealed and a public inquiry was due to be heard in October 1980. The Council continued to negotiate and, in June 1980 a revised application was submitted for a five storey office development of similar size with accommodation for use by the Tower Hamlets Centre for Small Businesses (120m², 1300f²) and Tower Hamlets Educational Advice Centre (55m², 600f²).

⁵⁴ Development Sub-Committee Report November 14, 1979.

This was refused on the same grounds, although the wording was that the advantages suggested were inadequate, rather than none that were acceptable. It was indicated at the Sub-Committee, by the planner recommending, refusal that granting consent would prejudice discussions with another developer for comprehensive redevelopment of the larger site, and no mention was made of the fact that this application was intended as the first phase of a comprehensive development if the remaining land became available. This decision was also appealed. Negotiations continued after this decision was made. In October the developers requested the DoE to adjourn the appeal until January 1981 on the basis of agreement having been reached with the Council, and on April 22, 1981 permission was issued for a similar scheme which included accommodation (740m², 8000f²) for the City of London Polytechnic for use as a library for the Fawcett Collection. This collection was described by the Polytechnic as

" an asset to the East End, attracting international scholars and professionals to Tower Hamlets who would otherwise be unlikely to come here and enriching local culture and extending educational opportunities ... The library is a centre for all those who are interested in Women's Studies, and those who visit it not only enjoy access to one of the world's finest collections of source material in the field, but make contact with a lively and interesting group of people, academic and non-academic ... " ⁵⁵

This use was put forward by Tower Hamlets as a community benefit in its appeal statement because of its prestigious character and its use as an information centre on equal employment opportunities and the problems of Asian women. An agreement was entered into to ensure that both parts of the development were completed once construction began. It prevented the developer from applying tenants fitting out works to, or occupying, the offices until they had entered into a

⁵⁵ Letter to the Council in support of the application, dated 3 October 1980.

lease, approved by the Council, with the Polytechnic or other occupier approved by the Council, for the ground floor and basement to be used for educational, academic or other purpose, again approved by the Council. The agreement was purposely drawn in broad terms as, by the time it was executed, it was clear that the Polytechnic would be unable to occupy the premises due to financial constraints. This fact was not included in the Committee report. A few days after the agreement was signed solicitors for prospective purchasers of the site wrote to the Council asking for amendments to be made to the agreement because, as it stood, the offices could not be occupied until the community element was let, rather than simply built. This restriction made the development of the site uneconomical for the developers who were content to build the two floors in question but not to take the risk of being unable to let the offices because of a requirement beyond their control to satisfy. Tower Hamlets on the other hand, while 'always prepared to be flexible to try to help developers'⁵⁶ did not want offices built with an empty shell beneath. An amendment to the agreement was agreed by the Sub-Committee on June 9, 1981 which allowed the developer to apply finishes to the offices if six months after their completion the Council were satisfied that the developers had used their best endeavours to find an occupier. Thereafter the developers would continue to look for a tenant for such a lease as described in the original agreement. It was suggested by another prospective purchaser that he be released from the agreement and be allowed total office use on the site if he paid £250,000 to the Polytechnic so that they could relocate the Fawcett library elsewhere. The planner responsible for the site considered this unacceptable as it would not satisfy the planning aims for the area to make it a centre of recreational and leisure facilities. The Council were also investigating the possibility of using this planning gain as an interim public library by taking out a lease from the developers. This would allow them to sell/lease the existing library building, also in Whitechapel, for redevelopment partly as offices with the provision of a public library within the new building as gain.

⁵⁶ Letter from the Solicitor to the Council to Frere Cholmeley, solicitors for the purchasers, dated 1 May, 1981.

WHITECHAPEL HIGH STREET, NO.s 115-118-- WHITECHAPEL1981

The sub-committee considered a proposal to develop this site as offices (7340m²) with a community centre (240m²) and educational use for the City of London Polytechnic (1345m²) and were prepared to grant consent subject to a planning agreement but the scheme did not proceed.

WHITECHAPEL ROAD, NO.s 238/240MILE END1976/1978

This site was a disused paint factory with existing industrial (625m²), retail (220m²), storage (555m²) and ancillary office (75m²) uses. In 1974 when the property was vacated a scheme had been informally considered by the Council who found it contrary to office policy as it involved a joint enterprise between Barclays Bank, who had occupied the adjacent premises since 1896, and a private developer to build partly speculative offices with no replacement of industrial space lost. In October 1976 an application was lodged by Barclays Bank which involved the construction of a three storey office building (1394m²) on part of the site and refurbishment of one of the existing buildings for industrial use (438m²). The Bank also proposed they enter into an agreement to relinquish existing office use rights at No.234 (790m²) which would free that property for industrial use. The site was considered to be unusable for industrial purposes in its present state and the relinquishment of office uses and the increased employment and public service provided by the Bank were treated as persuasive in the committee report. It was agreed to issue consent subject to a planning agreement. On November 3, 1978 the agreement to relinquish existing office uses on completion of the new building was signed and five days later a consent was issued with conditions to restrict use of the new building to banking purposes and to require the completion of the industrial element prior to the application of internal finishes to the offices. Meanwhile the Bank had applied to replace the restriction on use with a condition limiting use to Barclays Bank for a period of five years. The Council agreed to this and a new consent was issued on June 21, 1979. The Bank had not completed its purchase of the site and signed a planning agreement to enter into a further agreement to restrict the use of the offices once they owned an interest in the site. This was done on September 11, 1979.

WINGATE CENTRE, HEYDON SQUAREWHITECHAPEL

Negotiations first began for this scheme in the early 1970's and Wingate Investments had first taken a lease on the site, previously a British Railways goods yard, in 1968. The project was carried out jointly by Wingate and Wimpey Property Investments. It was approved in 1973 and as planning gain 195 residential units were constructed by Wimpey for the Guinness Trust housing association within the Borough, on a site adjoining the City of London and fronting onto the Minories. This scheme was done in partnership with the City and most of the office space fell within their land. Tower Hamlets, the City and the GLC were all involved in the negotiations and what resulted was a complex of offices (161,000f² total office floorspace) occupied principally by Bain Dawes Insurance Company (6540m²) with housing, landscaped gardens and a bus station almost opposite Aldgate Underground Station.

CHAPTER 8: PLANNING AGREEMENTS IN TOWER HAMLETS

INTRODUCTION

Negotiations for planning gain at Tower Hamlets essentially fell into two quite separate phases: the first to determine the gain and the second to determine the method of achieving the gain through an adequate method of enforcement. This clear distinction is not maintained in most of the literature on planning gain which tends to confuse the content with its enforcement¹ and thus fails to isolate the issues raised by each stage of the process. By the time the latter stage is reached the content of the scheme has been negotiated and the planning sub-committee has been made aware of the proposals and, in many cases, has approved the scheme subject to an agreement to enforce the planning gain element.

This division has been considered by the courts as an acceptable method of dealing with section 52 agreements, particularly as it is not possible for the planning authority to use a condition on a consent to require a planning agreement to be entered into under any of the enabling Acts.² In Stringer v MHLG³ it was held to be ultra vires the local authority to enter into an agreement which discouraged development in certain locations, as it amounted to an agreement to disregard material considerations on future applications. In 1985 the process of finalising the agreement after a development committee had

¹ The arguments are explored in chapter 2: Definition of Planning Gain.

² Circular 1/85 states in paragraph 63 "permission cannot be granted subject to a condition that the applicant enters into an agreement under section 52 of the Act or other powers" and this is reasserted in Appendix A to circular 22/83 on Planning Gain.

³ [1971] 1 All ER 65; [1970] 1 WLR 1281, discussed above in chapter 6.

approved in principle the particular scheme, but before a consent was issued, was litigated in R v West Oxfordshire DC ex parte Pearce Homes Ltd.⁴ Woolf J. held that the development committee, by agreeing to grant consent subject to a section 52 agreement, did not bind itself to issue such a consent unless the agreement was executed. By informing the applicant of the decision the Council were merely indicating that the planning requirements for the scheme would be satisfied provided the agreement was made; without such an agreement they could refuse to issue consent because they had valid planning grounds for doing so.

By thus requiring an agreement as a precondition of the permission, the planning authority can validly achieve the same result as imposing a condition on the consent, although the latter, if done, would be invalid. The Secretary of State has taken a similar approach to his ability to allow a section 52 agreement to overcome the reasons for refusing an application at the appeal stage.⁵ For example, in a decision to refuse an application for a housing development in Cardiff which was remitted back to the Secretary of State by the Divisional Court, the Secretary of State agreed to grant consent subject to an opportunity for the developer to enter into a section 52 agreement to provide public open space.⁶

⁴ QBD, Woolf J. December 6, 1985, noted in [1986] JPL 523.

⁵ This has also met with judicial approval. See Tarmac Properties v SSE [1976] P&CR 103 (QBD, Douglas Frank QC) discussed above.

⁶ Appeals against a decision of Cardiff City Council to refuse (1) residential development on land at Merthyr Road, Tongwynlais ... August 22, 1985 Reference: P/71/834 & 835. Noted at [1986] JPL 855, discussed in the same issue at p.832.

In both of these cases the authority and the Secretary of State avoided issuing a refusal on the potentially invalid⁷ grounds of the development failing to include the content of the agreement, by introducing this additional stage in the process, phrased in positive language. This is interesting when viewed from a 'freedom of contract' perspective, in that the courts have showed themselves willing to overlook the effect on the developer's choice in entering an agreement when faced with an indication by the authority that consent will follow if he does so.

Many planning gain schemes in the Borough were brought about without a planning agreement being entered into at all.⁸ Some involved the imposition of conditions on the permission; others were simply the result of an amended planning application, or, if negotiations took place before any application was submitted, an acceptable planning application. Phasing of the development could be controlled through conditions, as could requirements of landscaping, and restoration of parts, or all, of the development. Thus the use of agreements was limited to instances where the planning objectives of the Council could not be secured through conditions or where a prompt and more effective method of enforcement was required to reinforce appropriate conditions.

The agreement, its form and content, was essentially the responsibility of the legal department, rather than the planning

⁷ See Westminster Renslade Ltd v SSE [1983] 48 P&CR 225 (QBD Forbes, J. May 9, 1983) and London Borough of Richmond upon Thames v SSE and Hutchison Locke and Monk [1984] JPL 24 (QBD Glidewell J. May 9, 1983), both discussed above, under Official Responses to Planning Gain.

⁸ As an example see 3/6 Paradise Row.

department, and although there was a great deal of communication between the two on the types of gain that could be enforced, they operated relatively independently. More precisely, the legal department would normally be sent a memorandum by the planner who had negotiated the scheme which would set out the address of the development site, the office content and the type and location of the gain element. This memorandum would conclude with a request to draw up an appropriate agreement. If the legal department considered that no agreement was necessary, or that the type or extent of gain appeared unenforceable there would be discussion or correspondence between the departments and sometimes with the developer. Usually, however, the legal department would prepare a draft which would then be submitted to the developer or his solicitors and the content would be negotiated between them alone, with the planner being informed of developments.

With some developers⁹ and some solicitors firms,¹⁰ it became the practice for them, rather than the Solicitor to the Council, to draft the agreement. This would then form the basis of the negotiation. Although over the years some clauses within the agreements became standardised, the legal department were prepared to alter the form to accommodate the wishes of the developer, provided they were satisfied that the problem of enforcement was overcome. Other clauses were altered so as to avoid problems which had become apparent through the operation of earlier agreements, and sometimes to strengthen the

⁹ Notably Central & City, Northleigh and Wingate Investments.

¹⁰ Particularly, Linklaters & Paines, who were instructed both by Central & City and Wingate Investments as well as by other developers active in Tower Hamlets.

Council's position in case of appeal. On the more unusual or pragmatic schemes, such as those relating to the conservation of Christ Church, the legal department would obtain Counsel's Opinion on the form of the agreement, again with particular reference to enforceability.

THE FORM AND CONTENT OF THE AGREEMENTS

In examining the form of the agreements developed at Tower Hamlets at least three particular characteristics are apparent overall. Firstly, all of the agreements were made under the several legislative provisions enabling local authorities to enter into agreements with developers: none were expressed to be made under section 52 alone. Second, all of the agreements involving the payment of money specifically spelt out in some detail the policy justifications for entering into the agreement,¹¹ so as to include not only paragraph 4.15 of the GLDP and the office policy itself, but also other policies, within the GLDP particularly, which related to the gain achieved. Third, none of the agreements executed during the period of study involved the receipt by the Council of any direct benefit, in the form of money, local authority housing, dedicated community facilities or land. All of the housing provided was for Housing Association or private use, money which changed hands did so between the developer and a third party as a method of implementation, and land or facilities

¹¹ Some of the other agreements also did this, namely the agreements relating to Gardiner's Corner, the Minorities car park and 14/20 Alie Street: the former two were concerned with ensuring public use of facilities and the latter involved sites some distance apart after the circular was issued.

available to the public may have come under the management of Tower Hamlets at a later stage, but the agreements usually relate only to its provision and maintenance by the developer or a body approved by the Council.

These characteristics of the agreements were developed deliberately by the Council to guard against the possibility of challenge to enforceability of the gains negotiated by striking down the agreement itself. The inclusion of policy justifications was a measure to demonstrate the relevance of the planning advantage to the development proposed, so as to establish a sufficient nexus to amount to a restriction or regulation of the development or use of land which was 'incidental or consequential' to the principal development. The additional provisions under section 126 of the Housing Act 1974, section 16 of the Greater London Council (General Powers) Act 1974 and section 111 of the Local Government Act 1972 were included to act as a saving device should there be any doubt as to the obligation falling within section 52.¹²

By insisting that the Council itself were not seen to benefit from the agreements, other than in achieving proper planning objectives, they hoped to answer objections raised on the grounds of using planning controls to require the private sector to fund or provide public facilities or services. That is, by requiring a particular use or particular works to accompany an office development, the Council were concerned, not with discharging its public duties as housing authority, education authority, community service authority or transport authority, but purely as planning authority by ensuring a balanced land

¹² This is discussed in chapter 6.

use mix according to stated policies. Also by detaching itself from the scheme, and by linking it with such planning objectives, the purpose of the agreement to regulate or restrict the use or development of land was reinforced. This in turn provided a framework flexible enough to allow the Council to link separate sites on the basis of land use mix provided they could be shown to relate to the planning objectives for the same area.

The extent to which these characteristics achieved their aim is difficult to assess on a general basis, as much depends upon the actual nexus established between different sites and the relevant planning objectives. The validity of the gain as a proper purpose for a planning agreement again is dependant upon the actual gain provided, both its character and its extent, in the context of the reasonableness of requiring it. These questions are necessarily political and cannot simply be answered through the application of principle, whether those principles are categorised as 'legal' or 'planning'; rather they require value judgments to be made.

None of these agreements have been tested by the courts,¹³ but the vast majority of them have been implemented successfully: in that the gain element has been built or completed ahead of the offices being occupied. This may represent one possible basis for interpretation of the agreements as being both reasonable and concerned with regulating the development of land. It is also possible,

¹³ In the course of some of the appeals discussed below in chapter 11 planning agreements were produced as examples of the Council's approach to planning gain or, in the case of the CWS schemes, a demonstration of the benefits agreed to by the developer. None of the decisions commented upon the validity of agreements produced in evidence and the CWS decision (63/65 Prescott Street) tacitly approved their use to link sites some distance from each other. See Results of Study, chapter 7.

however, to argue that their implementation merely affirms the purpose of the agreement to be a compromise between the developer aiming to realise an acceptable margin of profits and the planner, who is prepared to moderate competing policies to reach a reconciliation. On this analysis the agreement does not represent the enforcement of a reasonable negotiated community gain approved through the application of policy, but an amalgam of planning losses and gains which may result in an unacceptable use of land producing profits and benefits for some sectors but providing inadequate compensation for many others. In this way, while it may still be concerned with the regulation of land, the purpose of the agreement ceases to be the enforcement of a 'planning gain' for the 'community', or other approved planning purpose but is, overall, an unreasonable exercise of power.

A selection of agreements are discussed below in more detail in order to illustrate their use and what they have actually achieved in Tower Hamlets. Each type of agreement raised different problem areas and consequently they have been divided into categories reflecting the result they were intended to achieve. This form of categorisation has been used partly out of simple convenience, and partly to reinforce the view of planning agreements as means of enforcement to achieve pre-determined ends, rather than as part and parcel of those ends themselves.

Agreements Involving the Payment of Money

All of the agreements under this section followed the same pattern, in that the developer entered into a planning agreement with

the Council which recited the policy justifications for the requirement of an advantage in the form of the conservation, conversion or extension of the building involved, and a further agreement with the body, or individual, responsible for the works for a payment of money towards the cost of necessary works. The agreements were linked by a clause in the planning agreement identifying the execution of a conservation agreement as a method of ensuring that the planning advantage was in fact provided.

The first of these schemes was produced in relation to the conservation of Christ Church, Spitalfields,¹⁴ a Grade 1 listed building by Nicholas Hawksmoor and considered to be of national importance, being one of the most important churches of its class in the country. Its restoration was recommended to the Committee as planning gain because of its national and local significance and as a centrepiece for community activity in Spitalfields. The agreements accordingly state that the Council and the developer in discussing the application had regard, inter alia, to paragraph 4.15 of the GLDP and the attainment of planning advantages through the restoration of listed buildings and through the provision of special benefits in the form of buildings and other facilities for public use. The parties to the agreement then agreed that the restoration of Christ Church or any other Nicholas Hawksmoor church in Tower Hamlets constituted a planning advantage which the Council considered sufficient to justify permission being granted.

This essentially raises two questions: firstly, is the conservation of Christ Church planning gain? And secondly, is an agreement which

¹⁴ See Christ Church Schemes in the Results of Study chapter above.

contains provision to secure that objective an agreement to restrict or regulate the development or use of land ? It is trite planning law to say that individual neighbouring owners do not have the right to enforce planning policy for their own benefit, and this is taken as a basis for maintaining that planning is concerned with the welfare of the community. It also appears acceptable for a local plan to include positive policies directed towards recreating a balanced mix of uses within a geographically and logically defined area. On these two premises it can be argued that the objective to restore a living community environment in Spitalfields, or more particularly, in the Fournier Street Conservation Area in which the church stands, is a 'proper planning objective'. By restoring Christ Church the area would have increased in value,¹⁵ in terms of accommodating one of the most important churches in England (and possibly in Europe) within its boundaries, and in terms of providing a focal point for social life and activity in the area. It could also be seen as an encouragement to regeneration of the area and to promoting 'community life'. In this regard the conservation would be both compatible with planning policy¹⁶ and a gain for the 'community'.

On the other side of the coin, it could also be argued that such a conservation is not a gain, or not a sufficient gain to counter-balance the intrusion of offices into the heart of Spitalfields. SHPRS considered the conservation to be of little or no local significance, but

¹⁵ In real terms as well as in terms of quality.

¹⁶ The Council did officially refer to the restoration of Christ Church as a planning aim and as a conservation aim for the area, even outside of the office policy, eg. in their appeal statements relating to the industrial use appeal on 23 Wilkes Street (DOE Reference T/App/5031/A/77/8194/G6)

only of national concern. That area of Spitalfields was the home for a predominantly Bengali population and suffered extreme housing deprivation problems.¹⁷ There was a movement towards the gentrification of Fournier Street as the 'Covent Garden of the East End'¹⁸ and a number of houses were being renovated and restored as single family units. Consequently, a major concern for the area was loss of low-cost single residential units, and any land or buildings used for offices in the area represented a loss of potential residential floorspace. Increases in the value of land and property in the area, on this view, represented a disbenefit because of the effect it would have on commercially or residentially low-value uses, making them even less likely to be available or affordable.

" Yet the very success of the gentrifiers holds the seeds of its own destruction. The first pioneers in the 1970's were attracted to Spitalfields for its qualities as a bohemian backwater of history. What they now fear is that each new arrival who comes to escape the horrors of suburbia threatens to raise the tone of the area ... with refurbishment pricing property out of the reach of home buyers, tenants buying their homes and cashing them in, and gentrifiers moving on, Spitalfields 300 year role as a refuge for the poor and dispossessed seems to be over. "¹⁹

The aims of the Rector and the Friends of Christ Church were expressed to be the conservation of the church for worship by the local congregation, but also for the use of the church as a centrepiece for the Spitalfields Festival and a venue for music recitals and other cultural activities. This could be interpreted as a 'gain', but the problem here again is for whom the gain is intended; which

¹⁷ See Towards a Local Plan for Spitalfields, London: LBTH.

¹⁸ See Games, S. "The Battle for the Soul of Spitalfields" (1983) The Guardian, June 8th, p.13.

¹⁹ *ibid.*

'community' stands to gain ? The reaction of SHPRS was that it represented another part of the process of gentrification which was increasing property values in Spitalfields and making low-cost residential development less viable.

The opposing arguments here are impossible to reconcile as they are based on differing conceptions of the role of planning and the economics of land use. The officers at Tower Hamlets were convinced that, on the basis of precedents provided elsewhere in the Borough and elsewhere in London,²⁰ office development would be allowed in Spitalfields on appeal. It was within one of the preferred office locations for office development within the GLDP and was under pressure from the City as the natural area for expansion. To the Council, the choice was not between offices or no offices, but offices with gain or offices without gain. Accepting this argument, the issue as to choice of gain remains unresolved: with some groups active in the locality viewing the church as a definite gain,²¹ while others²² regard it of peripheral importance compared to the other demands of the residential population.

²⁰ See chapter 11: Official Responses to Planning Gain, Appeals in Tower Hamlets. The GLC policy of restraint on offices had produced a number of large office blocks in Tower Hamlets unaccompanied by planning gain, by refusing the applications without negotiation. This had occurred on sites for which the GLC had been the planning authority, specifically the Minets Insurance Building and the OCL building on Braham Street. Both had been refused and both appealed successfully on the basis of increased employment and contributing to the export drive. Southwark had also operated a hard policy of restraint and as a result had lost a number of appeals on, amongst others, waterfront sites to office development unaccompanied by gains.

²¹ Such as the Spitalfields Trust and Tower Hamlets Society.

²² Such as SHPRS and JDAG.

The further issue is whether the conservation of Christ Church can be related to the development permitted as a method for compensating or mitigating the disbenefits of the office content. If it cannot then it is at least arguable that the conservation works merely represent the price of the planning permission being sold, making the agreements unlawful. In order to establish that the content of the agreement is such as to relate to the development itself it would be necessary to show that the conservation of the church is incidental or consequential to the permitted development. There is nothing within section 52 which requires this relationship to be purely physical, that is on the same site, or an adjoining site, so as to exclude the relationship being founded on broader planning objectives,²³ at least as long as they remain within the bounds of reasonableness.²⁴

The recitals in the agreements go some way towards establishing a connection, by the Council treating the conservation as a planning advantage as required within the terms of the GLDP to mitigate the effects of office development. The Tower Hamlets office policy document and, later, the Borough Plan could also be prayed in aid to support the concept of balancing the disadvantages of the office content with advantages provided, which in Spitalfields includes

²³ Beaconsfield DC v Gams (1974) 234 EG 749 also goes some way to support this view by holding that a covenant to secure compliance with a planning policy was in the public interest and therefore enforceable. See also Alder, *Development Control* 1979. London: Sweet & Maxwell, Modern Legal Studies Series.,chapter 6. Abbey Homesteads (Developments) Ltd v Northamptonshire CC et.al [1986] JPL 683 is a Court of Appeal decision which confirms the use of section 52 agreements to ensure proper planning of an area, although the actual dispute involved land reserved for a school on the same site as a housing development.

²⁴ See above discussion on the issues of legality in chapter 6: Bradford City Metropolitan Council v SSE, Court of Appeal decision.

conservation and restoration. In addition, the planning applications on these schemes were generally amended or submitted to include reference to the conservation, the aim here being to show that the disadvantages of office development could be compensated for by the developer helping to ensure that other objectives for the area were met.

To successfully establish a sufficient nexus must, to an extent, depend upon the location of the office development in relation to Christ Church. There must be a limit to the area within which the policy objectives can be achieved across sites and the most accessible dividing line is distance or, more generically, the boundaries of a neighbourhood. While two of the office developments were close to the church and within a conservation area within Spitalfields, none were actually within the Fournier Street Conservation Area, and two were in Whitechapel,²⁵ on the opposite side of Whitechapel Road from the church. These latter two schemes would certainly be impossible to justify under the circular on planning gain²⁶ and require a very broad interpretation of concepts of balancing the mix of uses in an area,

²⁵ One of these was Eastgate House. In that scheme the applicant had taken a lease on a property which they believed had a valid office use and, faced with an enforcement notice preventing such a use, they applied for a section 53 determination. The planning history for the site was complex and they wished to settle with the Council ideally by entering a section 52 agreement under which the Council would not issue an enforcement notice until their lease expired. The legal department questioned the vires of such an agreement (see Davy v Spelthorne BC Ch.D. 126 SJ 837 which later found a similar agreement to be ultra vires) and requested a planning gain against an approval for office use, suggesting the applicants provide it on other land they owned in the locality. They were not prepared to do this and the Christ Church scheme represented a compromise for both sides reached literally at the doors of the High Court.

²⁶ See chapter 11 below.

where the physical location of both parts of the agreement are unrelated in terms of neighbourhood. Thus, while it could be argued that the planning authority does regulate the use of land or development by allowing a certain level of offices only on the condition that some other aspect of the locality stands to benefit, and whilst this argument could probably be applied to the office developments in Spitalfields, it would be difficult to establish that the authority can afford to allow offices in one area where the planning objective of restoring the church is being secured in another.

The agreements went on to state that, in order to ensure that the planning advantages are provided, the developer had agreed to enter into an agreement, approved by the Council, with the Friends of Christ Church under which they agree to participate in the conservation of that building in accordance with a schedule of works (the conservation agreement). This agreement to be entered into on or before the execution of the planning agreement. The Council in return agreed to issue planning permission, in the form annexed to the planning agreement, upon the execution of both agreements. The developer then covenanted (1) not to implement that permission until clause 1 of the conservation agreement was complied with and evidence of such compliance had been supplied to the Council and (2) to enforce the covenants in the conservation agreement against the Friends of Christ Church upon the Council indemnifying them as to costs incurred. These covenants were later expanded so as to include a covenant to as far as practicable carry out the development as approved, or as later amended and approved. The first covenant detailed above was also amended to allow the permission to be

implemented but to ensure that the office development was not occupied for office purposes.

This part of the agreement raises a number of issues on enforceability and on the vires of the agreement itself. Firstly, the Council appear to be binding themselves to issue permission in the form annexed to the agreement. Some of the planning agreements did use the safer formula which premises the covenants by the developer with 'in the event of planning permission being issued by the Council', and indeed this was used in the agreement on Christ Church entered into with OCL Ltd in connection with 60 Commercial Road.²⁷ However many developers were not prepared to negotiate on this basis and required to know the content of the permission before any agreement was signed.²⁸ In view of the above remarks as to the circumstances in which these agreements were entered into, that is after the application had been advertised, considered and decided upon

²⁷ There were problems with negotiations on the form of the agreement in this case. The company involved were initially reluctant to pay money to a third party and wished to pay it direct to the Council. The legal department refused to consider this and insisted upon the provision of a planning advantage, explaining that the payment to the trustees was only one method of doing this; the Council would consider any other method which produced a gain rather than a cheque. The company then disputed the vires of the Council agreeing to issue a permission, citing Stringer v MHLG (discussed above) as authority. The legal department disputed the relevance of that case but agreed to an amendment to the form of words. See chapter 7.

²⁸ For example, in correspondence between Linklaters and Paines and the legal department in relation to Camperdown House it was stated "Our client must be quite clear before they sign the Gallery Agreement that they are going to get a planning permission for the development of the site subject only to conditions which make the proposal viable. It is not acceptable to them for the Agreement to state that the planning permission, when granted, will be 'subject to whatever conditions (the Council) deems appropriate'. Could you please let us have a copy of the proposed planning permission as soon as possible." 10th September, 1981.

by the Council, and taking account judicial confirmation that the provision of planning advantages is a material consideration²⁹ it is unlikely that they would be held to be a fetter on discretion.

There remains, however, the problem of the potential bias created by the existence of the negotiated gain before the Council at the time the application is decided upon. It was suggested in J.J. Steeples v Derbyshire CC³⁰ that a Council entering an agreement should do so either after the planning decision had been made, or before provided it was subject to a release from liability if planning permission were not issued or was made subject to the grant of consent. In the case of the Tower Hamlets agreements the Council would argue that the agreement was only entered after the decision had been made subject to the completion of a section 52 agreement, and that the decision itself took into account all material considerations. To establish the existence of bias at the earlier stage when the Council were not under a legal obligation to the developer is difficult and in the Steeples case the Council faced, as a term of the agreement, a payment of damages if no permission was granted. Tower Hamlets on the other hand did not stand to gain anything from the grant of permission nor suffer loss by refusal. Payments accrued for the benefit of the 'community' through the conservation of the church, and even if it was not considered as a benefit the payment still went to a third party unassociated with the Council.

It is trite contract law that a person may not enforce a contract to which he is not a party, nor can he, in practice, claim substantial

²⁹ See Westminster Renslade v SSE QBD 48 P&CR 225; The Times 9 May 1983 discussed below in chapter 11.

³⁰ [1981] JPL 582.

damages for breach of a contract which causes him no loss. Consequently, the planning agreement and the conservation agreement had to be linked so as to allow the Council to enforce an obligation which seemed to benefit a third party. This problem was compounded by the fact that clause 1 of the conservation agreement required the developer to pay a sum of money to the Friends of Christ Church within 12 months or on the date development was commenced, whichever occurred first. A number of techniques were used to overcome the problem. The planning agreement only referred to the participation of the developer in conservation works to the church, and not to the payment of money. This limited the interests of the Council to something which fell clearly into the ambit of planning, and was defined by reference to a schedule of works attached to the conservation agreement.

The conservation works were described in both agreements as planning gain and the justifications were recited. The conservation agreement made reference to the planning agreement in its recitals and put the Friends of Christ Church under an obligation to apply any monies received to those conservation works on behalf of the developer. Furthermore, the Friends received the money as trustees for a charitable trust specifically created to carry out conservation works on the church. The Council in the planning agreement made provision for the developer to enforce performance of the conservation works against that trust if the monies were not applied to the intended purpose. Thus, taken together the agreements provided for the attainment of planning gain, upon which basis permission was given for an office development. The payment to the trust was simply an administrative mechanism for bringing about that gain, and was not

the gain itself. In receiving the payment from the developer the trustees adopted the role of a sub-contractor to perform works³¹ to realise the gain which the developer was obligated to provide.

Copies of the draft planning permission were attached to both agreements, were examined by the developer during negotiations on the form of the section 52 agreement and made no reference to the restoration of Christ Church. Where any reference to a planning gain was made, for example within the FABS scheme where the Crypt to the church was to be restored and converted for use as a social hall³² (in addition to a contribution to restoration of the church itself), its prior completion was required as a condition on the consent. This would be accompanied by a stated reason which included reference to the attainment of planning advantages as a method of achieving the planning aims for the area.

" 5. The social centre shall be completed suitable for occupation to the satisfaction of the local planning authority prior to the application of internal finishes to the office part of the development.

Reasons

...

5. Office development alone would not have been acceptable to the local planning authority and planning permission is granted in view of the inclusion of 'substantial planning advantages' in the scheme including the social

³¹ The agreement provided for the substitution of works other than those listed in the schedule to the agreement with the approval of the Council.

³² This restoration was included in a separate agreement with the Trustees and again involved the payment of money to carry out the agreed works. It was executed the same day as the Conservation Agreement for the church itself and was referred to in the planning agreement with the Council as "participation in the restoration and provision of a social hall within the church in accordance with the schedule of works attached to the 'Crypt agreement' with the Trustees."

centre which make a positive contribution towards the achievement of planning aims in the area. "³³

Conditions were included in this way where the gain formed a part of the development application, and they only related to the prior completion of the gain and sometimes to landscaping or restoration requirements. The reason given for the condition was always stated in terms of achieving planning objectives rather than simply for the purposes of attaining gain, or for some extraneous purpose. The validity of these conditions were never questioned on appeal to the Secretary of State, but should the Council have argued for their enforcement their wording at least make it likely that they would be upheld simply as phasing of development conditions.

The same model of agreement was used to enforce gains negotiated to extend and modernise Whitechapel Art Gallery,³⁴ to relocate and to extend and convert new premises for the Half Moon Theatre³⁵ and to renovate some individual listed buildings for residential use in Spitalfields.³⁶ The same issues were raised by all of these cases, although the Half Moon Theatre is additionally interesting³⁷ as it began as a single office development connected with

³³ Conditional Permission, The crypt of Christ Church Commercial Street and site bounded by Fort Street, Artillery Lane, Steward Street and Brushfield Street, E1., dated 12th December 1979.

³⁴ See Results of Study, chapter 7, Camperdown House.

³⁵ See Results of Study, chapter 7, Champs Scheme.

³⁶ See Results of Study, chapter 7, 16/18 Brushfield Street.

³⁷ It also recited as a policy justification for the gain paragraph 7.9 of the GLDP which states that planning policy in London should continue to recognise the importance of theatres, and their protection and development should be the responsibility of local

various relocation, extension and renovation works and was negotiated as such; yet, at the request of the developer, and in order to create a larger Development Land Tax saving the scheme was divided into four parts. A planning agreement and a planning permission were drawn up for each section and the development was split between two related companies: each permission attracted a planning gain requirement, three in the form of the system described above, and one for renovation works to be carried out by the developer.

These agreements were executed in July 1982 and advice issued to the Board of Inland Revenue³⁸ shortly after the Development Land Tax Act 1976 came into effect, had permitted all expenditure under a section 52 agreement which contributed towards infrastructure to be allowed against Development Land Tax liability.³⁹ Specifically included in this were contributions to off-site roads, off-site sewerage and drains and neighbourhood community facilities. In 1981 amendments to the legislation made a substantial residential component in a development into a tax advantage by allowing the developer to off-set 150% of the costs against the value of the improvements created by the development. Taking these elements of the system into account Grant concludes that the impact of planning gain on a developers overall profit margins was likely to be insignificant on a large office development.

" ... the tax background lends support to the view that planning gain under Development Land Tax may in some

boroughs.

³⁸ Board of the Inland Revenue, Advice, Development Land Tax, DLT 2, paragraph 52. 1976.

³⁹ For an account of Development Land Tax see Pinson, B. On Revenue Law, 1981 (14th ed), pp. 369/394. London: Sweet and Maxwell.

cases have been a comparatively small investment for developers for a substantial return in the form of a planning permission which would not otherwise have been forthcoming. "⁴⁰

Certainly, the developers were sufficiently concerned about the Development Land Tax savings on this, and other,⁴¹ schemes to take tax advice on the most beneficial result which could be obtained from providing a planning gain. The Council showed no objection to reworking the scheme for this purpose, and no attempt was made to alter the content of the gain to take account of this saving by the developer.

The Council in all of these schemes does not seem to have been involved in determining the actual amount paid under the agreements with the respective bodies. The schedule of works and the assessment of costs of those works were discussed between the developer and the body concerned, and the Council did not brief them as to an appropriate amount. Whitechapel Art Gallery certainly, and maybe the others, used 'will the Council think that is sufficient contribution?' as a negotiating tactic to help double an original offer of £1/4 million from the developer.

None of the Reports to the Development Sub-committee on these schemes include the amount of money concerned and all present this type of scheme as a valid planning gain of undoubtable value to the community. On the Christ Church schemes for example, one report

⁴⁰ Grant, M. "Planning and Land Taxation: Development Land Tax and Beyond - 1 & 2" (1986) JPL 4/19; 92/106.

⁴¹ There are some indications on file that developers wished certain obligations to be included in section 52 agreements for this purpose.

minimises the problems raised by the proposals, and presents them as a popular occurrence.

" This Council's office policy is based upon the Greater London Development Plan policy and it is clear the planning advantages do not have to relate to the particular site of the proposed offices.

The Council therefore has for some years operated a policy of permitting offices where developers can rehabilitate some historic building ... It is interesting that a recent survey of the operations of planning gains in the Journal of Planning Law shows many authorities are applying similar principles to the consideration of developments where some balancing of private and public gain is considered necessary. These three schemes are unusual in that they are separate office developments linked to one historic building - Christ Church. However, this is necessary because of the magnitude of the expenditure involved. The building itself is of great importance and in my opinion its restoration will be of great significance to the Borough and provide considerable community benefit. "⁴²

Of course it is impossible to determine the extent of oral information demanded at the committee meetings on these particular schemes, although it does appear from the files that officers were, on occasion, asked for figures. It is also clear that a number of the Members were active in promoting some of these projects both inside and outside the Council chamber.

⁴² Undated Development Subcommittee report Tower Hamlets.

Agreements Involving Community Benefits Without the Payment of Money

The subject of off-site gains was most usually either housing or industrial development, and the sites were linked through the agreements and through the planning permission issued to cover both the office and other development. None of the housing provided was for Council nomination, and most was for housing associations while the remainder served the private market. Examples of each will be examined in turn.

a) Housing

The Council had a firm policy base for requiring housing as a planning advantage, particularly in Spitalfields. Not only did the GLDP list the provision of residential space as an example of a planning advantage in paragraph 4.15, but the office policy and draft Borough Plan also isolated it as a gain. The need for housing in Tower Hamlets was unchallengeable as it had a severe housing shortage⁴³ and all of the interest groups active in the Borough perceived it as an important, if not the only, valid planning objective for the area. The policy of attempting to retain housing in the Borough was longstanding and had been assisted by Government

⁴³ This has been supported by evidence given at appeals in Tower Hamlets, such as in relation to the Tarn & Tarn Appeal discussed below in chapter 11 and in the appeal on 23 Wilkes Street against a limited industrial use permission. See Results of Study, chapter 7 under Tarn & Tarn.

Circular 94/52⁴⁴ in so far as it indicated an acceptance by the Minister that local authorities had the power to take into account current housing needs throughout their area when deciding upon an application for development.

Most Inner London Boroughs had suffered a population decline since the middle of the century and Tower Hamlets, in the period 1961 to 1971 had experienced the second highest losses in all of London⁴⁵ due to the shortage of housing and employment opportunities. The problems in the Borough were exacerbated by the large number of households lacking basic facilities, the number of persons sharing accommodation on the Council waiting list and those living in designated slum clearance areas.⁴⁶ There was a particular need for smaller accommodation with the resident population of largely elderly and single persons resulting from an outmigration of principally young married couples.⁴⁷ Overall the need to retain housing and to increase housing stock was reflected in the GLDP⁴⁸ and in the housing and planning policies of the Borough.⁴⁹

⁴⁴ DOE Circular 94/52 Town & Country Planning (Housing Accommodation) Direction, 1952. London: HMSO.

⁴⁵ The population fell from 206,000 to 165,000, Census Reports, 1971.

⁴⁶ The Council estimated at the end of 1977 that there were 5000 more households than dwellings in the Borough, taking into account vacancies and concealed households as well as shared accommodation. At that time the housing list numbered 5596, increasing by 200 per month, with 4000 more on the transfer list.

⁴⁷ Over half those on the waiting list for housing in 1977 required two or less habitable rooms.

⁴⁸ See, eg. section 3.37, Written Statement.

⁴⁹ See eg., Towards a Local Plan for Spitalfields, 1976.

Consequently, there is a sound basis for arguing that the provision of housing in the borough did represent an advantage to the 'community' but the type of housing provided and its locality must also be taken into account. The need for small, low-priced accommodation was recognised by the Council and was addressed by some of the schemes which involved local housing associations,⁵⁰ but other schemes provided for the renovation of houses in private, one-family ownership⁵¹ and for private prestige housing developments.⁵² Also it could be argued that housing provided in areas predominantly used for commercial purposes, such as the Guinness Trust flats provided as planning gain on the Wingate Centre Scheme, produce undesirable housing conditions⁵³ because of noise and the emptiness of the area after the workers go home.

In addition the conservation area policies for Spitalfields encouraged a return to residential use for listed buildings and

⁵⁰ See eg. Results of Study, chapter 7: BAGS (East), Newlon Housing Scheme. There is an assumption made at the time a number of these schemes were negotiated that housing association accommodation was equivalent to public sector housing, but this has been criticised and the housing associations have been aligned more with private landlords. See eg. Merrett, S. State Housing in Britain, 1979, London: Routledge & Kegan Paul; Hughes, D. Public Sector Housing Law, 1987, London: Butterworths for discussion.

⁵¹ See Results of Study, chapter 7: Congo Schemes.

⁵² See eg. Results of Study, chapter 7: Goodman's Yard.

⁵³ It should be added that the residents of these particular flats have expressed their pleasure in the accommodation they have and any complaints relate only to problems with the environment. eg. the residents strongly objected to a proposal to develop St Clare Street adjacent to their housing because of the building noise as they had already been subjected to over 12 months of such noise from developments in Mansell Street and Goodman's Yard; they also voiced complaint at this time of traffic noise, fumes and general disregard for residents in this essentially non-residential area. See Results of Study chapter 7: 9 Clare Street.

promoted sympathetic infill developments also for residential use. Under this policy the nineteenth century buildings were to remain in commercial use and investment in restoration and rehabilitation programmes was to be encouraged, partly through the planning gain policy. It was acknowledged by the Council that these policies involved a long term, consistent approach in order to bring about the projected restoration and regeneration of the conservation areas. The aim was not only to create housing, but to alter the pattern of land use and promote the character of these areas in pursuance of the traditional planning ideology of the neighbourhood. The underlying assumption being that the preservation of eighteenth and nineteenth century architecture is a an undeniably desirable goal, as is the physical improvement of an area to produce a reasonably low-density 'community'. These 'common sense' assertions form a basic part of the profession of planning⁵⁴ and as such add to the appearance of the political neutrality of these 'planning policies'.

The agreements themselves,⁵⁵ however, did not recite the policy justifications underlying them but simply stated, after detailing the content of the scheme, that the developer and the Council had agreed 'that there should be provision for ensuring that all the constituent parts of the Development should be completed to the reasonable satisfaction of the Council'. Most of them followed the same pattern in that they included covenants by the developer, in the event of

⁵⁴ See above, chapter 5: Negotiation, The Planners.

⁵⁵ They related to the following schemes detailed in chapter 7: Bags Scheme (West), 1/4 Blossom Street, 92/96 Commercial Street, Congo Schemes, Elder Street British Land Scheme, 5/7 Folgate Street, 10/14 Folgate Street, 13/17 Folgate Street, Goodman's Yard Scheme, Peabody Buildings Scheme.

permission being granted, to complete the development in accordance with plans submitted and to complete the residential element (either construction or rehabilitation) before the internal finishes were applied to the offices.⁵⁶ Some of the agreements⁵⁷ went on to provide a release clause operating in the event of disposition of the residential sites, by sale or lease of at least 10 years duration, to a housing association, the GLC, the Council or any body or agency approved by the Council. This clause was developed by the Council as an incentive for private developers to dispose of property into the public sector.

Alterations were made to the drafting of these release clauses in agreements involving residential development by a housing association as a result of the changes in funding patterns between central government and the Housing Corporation. By the late 1970's the grant of an authorisation by the Housing Corporation for a housing association to undertake a project was no longer a guarantee that funding for the works required would be forthcoming. The problems this produced for Tower Hamlets were exemplified by those experienced in Artillery Lane with an office scheme linked to a residential infill building.⁵⁸ The agreement, dated June 18, 1976

⁵⁶ Some of the earlier draft agreements provided for completion of the residential before the offices were commenced, such as the one negotiated with Tarn & Tarn on the Puma Court developments in 1975. The developer however found this completely unacceptable, as he did the clause requiring the development to be completed and negotiations eventually broke down mainly because he refused to sign an agreement before consent was issued. See the discussion of the appeal below in chapter 11: the decision makes no comment on the evidence given on the agreement.

⁵⁷ Eg. BAGS (west), 5/7 Folgate Street, Goodman's Yard, Peabody Buildings Scheme, all of which are detailed in chapter 7.

⁵⁸ See Results of Study, chapter 7: BAGS Scheme (West).

provided, as was usual, for the completion of the residential element prior to the application of internal finishes to the office development but also added a release clause. The developer entered into a building agreement with the housing association giving them a licence to enter the site with an option to build a residential building within three years, unless the period was extended by the developer. By the end of the three years the housing association had withdrawn from the scheme as they had inadequate funding and, despite various amendments made to the content of the residential building to include some offices, were unable to secure a loan. The DOE initially considered advancing funds but would only do so if there was no ground floor residential use. Amendments were made to the permission but the DOE did not produce a sufficient advance.

The developer, for his part, considered that he had fulfilled the agreement by entering into a contract with a body which had been approved by the Council at a time when the problems of housing associations were not visible. They were released from the agreement and, consequently, the residential element was not completed. The clause was amended for future use so as to give the Council more protection. A requirement was added for the Council to be satisfied that the body put forward was in a position to complete the development without undue delay.⁵⁹

These problems with housing association funding has been cited by SHPRS as a major factor militating against the usefulness of a

⁵⁹ Such a clause was included in the 10/14 Folgate Street Scheme and in CWS Scheme: 110/118 Leman Street. See the latter as described in chapter 7 for the stalemate produced by its use.

planning gain policy in the borough when the agreements used to enforce it include release clauses.

" The local authorities have not produced housing. Planning gains, though better than nothing, are not a sufficient guarantee of the supply of rented housing because of the release clauses in the agreements: developers have taken their offices and discharged their duty to provide housing by selling or leasing to housing associations, and many of the expected schemes have not been built. " ⁶⁰

This approach to the issue is muddled in that the merits of planning gain are judged only in the light of the enforcement mechanism which was largely undermined by economic circumstances beyond the control of the Council. It is also inaccurate, as the local authority had produced housing through planning gain schemes⁶¹ and very few schemes were not built because of the release clauses.⁶² There were, however, certainly difficulties with their use which could have frustrated the policy objectives of the Council.

For example, the Council were prepared to negotiate on the release clause in one case where no housing association was involved.⁶³ Central & City had agreed to renovate a listed building in

⁶⁰ Evidence of SHPRS at the public inquiry on appeals by Manwin Properties, Bishopgate Managements and Tarn Estates against refusals issued by LBTH relating to Puma Court held on 12/16 and 20 May 1980, as recorded in the report made by Inspector Stephen Marks. See chapter 11, Tower Hamlets' appeals.

⁶¹ See eg. under Results of Study: Wingate Centre, Elder Street British Land Scheme, Goodman's Yard, Newlon Housing Scheme. However it does not follow that the type of housing produced was of a kind required by local people, eg. there were proposals to convert the housing accommodation built by Newlon in Elder Street into prestige accommodation to serve as second residences for those working in the City. See SHPRS "What's Happening in West Spitalfields ? " May 1980, London: SHPRS.

⁶² But see also Results of Study, chapter 7: CWS Scheme: 110/118 Leman Street.

⁶³ 16/18 Brushfield Street.

private ownership as planning gain on an office development. The usual release clause was not included in the draft agreement submitted by the developer, but was added by the Council. The developer asked for it to be removed on the grounds that the development was small, could be more readily controlled by the Council and, if the clause was required, would threaten the commercial viability of the development because of the possible need to stop work on the offices. The Director of Development was reluctant to approve this, but after meeting with the developer did agree to the addition of a proviso to the release clause which stated that the Council would waive the requirement if it were reasonably satisfied that the works on the residential element could not be completed for reasons wholly outside the developer's control. This was done, at least partly, because of the history of Central & City with the Council in completing planning gain projects elsewhere in the Borough.

A more complicated scheme was included in the agreement for the Elder Street British Land Scheme⁶⁴ dated 22 September 1976. It involved the building of offices and new residential space and the rehabilitation of houses in a conservation area. It did not specifically link the sites, which were in very close proximity to each other, or mention the planning gain policy. The release clause was specific and was negotiated to satisfy both parties respectively on enforceability and economic feasibility of the scheme.

The agreement was related to an application for development which included all aspects of the scheme and was entered into 'in the event of planning permission being granted'. The developer

⁶⁴ See Results of Study, chapter 7.

covenanted under seal to carry out the development in accordance with plans submitted and a construction programme annexed to the agreement which allowed for the completion of all the residential elements before the office development was occupied. A covenant on the conditions of occupation of the offices was included and gave the developer the option of either completing the new residential element first, or entering into a contract for a freehold or leasehold interest in the properties for new residential development with the Council, the GLC, a housing association or other body approved by the Council together with the completion of specified renovation works to the existing houses. It was further provided that the developer after completing specification A (essential works to the external and internal fabric of the building) in respect of the works on these houses could be released from the remainder of the works if he sold his interest to any person who had covenanted to carry out those remaining works (relating to the internal fabric of the building only). This part of the agreement was specifically included in a development sub-committee decision a year before the agreement was actually signed⁶⁵ but after a substantial period of negotiation with the officers of the Council. It was also provided that the developer would provide monthly architects' certificates on the progress of all aspects of the development.

The negotiations over this agreement were protracted, mainly as a result of the initial requirement of the Council for the office development not to be commenced until the residential element was completed. The agreement was to provide that the developer made the

⁶⁵ Development Sub-committee 5 November 1975.

houses 'suitable for occupation' but this was unacceptable to the developer consequently, specifications A and B were drawn up. It was also considered to include phasing provisions within the conditions on the consent⁶⁶ and remove the need of a section 52 agreement, but this was decided against on the grounds of doubtful enforceability and the possible adverse effects on the funding of the development.⁶⁷ The end result⁶⁸ was a planning permission with a condition, inter alia, to carry out the development in accordance with a development programme to be approved by the planning authority⁶⁹ and a section 52 agreement to deal with the mechanics of that schedule of works. No reference was made to the prior completion of the offices in the consent issued, at least partly, because the developer intimated that such a condition which prevented the application of internal finishes

⁶⁶ A suggested condition was "A development programme shall be submitted to and approved by the local planning authority before any work is commenced on the site. The programme should include the completion of the residential part of the scheme prior to the commencement of the office part. The development should be carried out in accordance with the approved programme."

⁶⁷ The developer considered that conditions phasing the development which restricted the building and completion of the office component would discourage investment and so wished such requirements to go into a section 52 agreement. They were prepared to agree to conditions restricting occupation of the offices until the residential element was substantially complete but anything more than this they considered impractical and would make the development uneconomical. Letter from Covell Matthews Partnership, (architects to the developer) to the Council, dated 6 June 1975.

⁶⁸ Various forms of planning conditions were discussed between the parties before a compromise was reached.

⁶⁹ The reason given for this was that office development alone would have been acceptable and the programme was necessary to ensure the completion of residential works included and which made a positive contribution to the authority's planning aims for the Elder Street Conservation Area. Permission dated 23 September 1976, Ref.TH.11900/4549A/ID Application received on 23 March 1973 (as amended 20 December 1973 and 20 October 1975).

to the offices⁷⁰ would require interruption of building works and thus effect the economics of the development.

It is acknowledged in the correspondence between the Council and the developer that the concern of the Council in the negotiations was to ensure they could enforce the gains already agreed, and that this was the cause of the delays. For the developers part, the problem was in ensuring that the permission and the section 52 agreement would not make the development either impractical or uneconomic. Consequently, much of the discussion concerned the use of either a condition on the permission or a section 52 agreement to secure the desired result, as well as the form they would take.

" We appreciate your Council's anxiety to ensure a fully beneficial development for all concerned; indeed part of the planning proposals incorporated a willing acceptance on our part to preserve the heritage of the famous but dilapidated buildings in Elder Street and to ensure their retention for restoration. Furthermore, an additional provision of new housing has been incorporated in our development plans and these two factors represent a considerable planning gain in land use, with social and economic terms to the benefit of the Borough. Equally your Council's willingness to approve a new but limited office development is acknowledged ... we instructed our Architects with regard to our willingness to co-operate further with your Council but, subject only to fair, reasonable and practical limits being incorporated in an agreement with you. "⁷¹

The agreement⁷² reached was complied with by the developer, by using the release clauses within it to dispose of the land for residential

⁷⁰ The Council used this formula because of the difficulties in enforcing and monitoring a condition which related to delayed occupation of premises which had been completed.

⁷¹ Letter from British Land to the Council, dated 23 June 1975.

⁷² As amended by two further agreements altering the description of the development as a result of certain of the houses being demolished, or threatened with demolition, due to their neglect by the developers. See Results of Study, chapter 7.

development to a housing association and by obtaining covenants from the purchasers of the houses within Elder Street after specification A works were complete. This was not, however, complete until 1983 because of problems with the developer completing the works required, at which date offices had not been built on the police station site.

b) Industrial Use

A number of the agreements securing the completion of industrial space followed the same model as the housing agreements.⁷³ The aim of both was essentially the same in that the Council wanted to see the whole development completed and the gain completed ahead of the more lucrative offices. Also, the borough had included in its office policy the provision of industrial space as a gain in certain of the designated areas; the distinguishing feature was that the GLDP did not include industrial development as an example of a planning advantage. This factor is relevant in assessing the purpose of the agreement, particularly on schemes which involved an industrial use some distance from the office development: if the industrial use included in the development did not amount to a gain it would be difficult to establish that the agreement was made for the purpose of regulating or

⁷³ For example see Results of Study section: 120 Leman Street and Buck & Hickman schemes. Both of which required compliance with a schedule of works and completion of the industrial element ahead of the offices; the Black Lion Yard agreement also included a release clause in the event of a binding contract with a third party to develop the industrial element; 56/58 Artillery Lane linked the preservation of a light industrial use of historic significance, the restoration of the premises and the provision of some residential space with office use.

restricting the use or development of land forming the principle part of the application.

As indicated above in relation to Christ Church, the question of assessing what amounts to a gain is a necessarily political question,⁷⁴ largely dependant upon the aims and values of the participants in the process. The decision of the planners and the Council to treat the provision of industrial space as a benefit capable of mitigating the disadvantages of office development did receive ministerial approval in the appeal relating to 63/65 Prescott Street,⁷⁵ on the basis of the employment opportunities it represented. Certainly the borough's topic paper on Employment which preceded the Borough Plan shows an increase in unemployment in the Borough above the national and London averages and a decline in industry. It isolated a shortage of small industrial units and a need to encourage and generate new industrial interest in the borough, while preventing the loss of existing industrial floorspace through redevelopment. SHPRS also supported these findings in its studies in Spitalfields.⁷⁶

Consequently, it is clearly possible to argue, and has been done so successfully, that industrial floorspace amounts to a planning gain. Developers have provided small units or workshops,⁷⁷ have agreed to

⁷⁴ The basis for this assertion is clarified above in chapters 4 & 5 dealing with the Context of Decision Making and Negotiation.

⁷⁵ This is discussed in some depth in chapter 11: Official Responses to Planning Gain. The Inspector stated in his decision letter of 4th March 1985, paragraph 13, "I consider that the refurbishment scheme for industrial units amounts to an adequate planning gain". DoE Ref: T/APP/E5900/A/84/10874/P7.

⁷⁶ See eg. What's Happening in West Siptalfields? London: SHPRS.

⁷⁷ See eg. Black Lion Yard.

abandon existing use rights on office buildings and converted them for industrial use,⁷⁸ and have even agreed to do works not requiring planning permission⁷⁹ 'in the event of permission being granted' for an office development. The opportunity to confirm a nexus is there, by relating the developments through the office policy and the planning objectives for the area (although none of these agreements recite what they are intended to achieve), as is the opportunity for construing their provision as a gain.

There were, however, some schemes in Tower Hamlets which were at least accepted in principle, if not finally pursued by the developer, which would be difficult to justify in planning terms mainly because of the distance between the offices and the gain. The clearest example of this is Wearwell's proposal to change the use of an industrial building close to the City and construct an industrial building in Wapping,⁸⁰ an area outside of the jurisdiction of the planning authority. To lose industrial floorspace close to the City was not only contrary to published policy but also represented a precedent for developers to obtain their offices in the most lucrative part of the borough, while providing residential space in an area with lower land values. The Development Sub-Committee accepted the recommendation to approve this scheme in principle subject to an agreement with the Council (as freeholder of the Wapping site) to complete the industrial

⁷⁸ See CWS Schemes: 99 Leman Street.

⁷⁹ Ibid. eg. converting an industrial building into flatted units and leasing those units. See also 14/20 Alie Street where the developer agreed to let new industrial space to specified persons, that is their industrial tenants displaced by the change of use to offices. In view of the circumstances this requirement could be justified in planning terms.

⁸⁰ Refer to chapter 7 under Wearwell Schemes.

element first, on the grounds that Wearwell were an important employer in the area and had 'close associations' with the borough.

This scheme was not completed and would have created practical problems for the Council and the developer in phasing the two aspects; not to allow the developer to occupy offices requiring only a change of use consent, until a large industrial development was built would almost certainly have been uneconomic and difficult to enforce. Arguments based on achieving a balanced mix of uses could not have been sustained over such a distance, nor could the principle of mitigating the disbenefits of an office development unless a borough-wide view was taken, which tends to conflict with the principles of neighbourhood firmly behind the 'community benefits' policy.

c) Shopping and other 'community facilities'

The basic models presented above were used and adapted to enforce gains in various other forms, both off and on the development site. Some, such as the agreements relating to the pedestrian walkway and hotel in the Minorities Scheme and the leisure centre, theatre and car park in the Gardiner's Corner scheme, did recite the planning justifications for treating part of the development as a planning advantage. Others merely referred to an agreement between the parties to ensure that in event of the development commencing all parts were completed and made available to the public.⁸¹

⁸¹ See, eg. Rodwell House, Carron's Wharf and 35/45 Whitechapel High Street. The agreement relating to 455/463 Bethnal Green Road does not mention any purpose for the agreement.

These schemes present potential difficulties in their use of section 52 agreements and are the easiest to attack as being a misuse of planning powers⁸² in so far as their purpose usually involved enforcing public access, rather than the method or type of development works. One of the clearest examples is provided by the Gardiner's Corner Scheme which required a lengthy agreement relating to the construction of a leisure/sports centre, including a theatre, a shopping mall and a public carpark and to times of access, booking facilities and concessionary rates for local residents. The agreement also detailed the composition of a management committee to include local and Council representatives and a complex release clause allowing the developer to offer the Council a 21 year lease at a peppercorn rent should the facilities prove uneconomic to the developer.⁸³

This agreement does use the GLDP as a justification in planning terms for ensuring the developer includes sufficient planning advantages through the provision of special benefits in the form of buildings or other facilities for public use, although, unlike the agreements involving the payment of money discussed above, it does not go on to state how that requirement has been satisfied in the view of the Council. Thus the question again is whether what is provided does amount to a gain and whether there is a sufficient nexus between the offices and that gain. The additional issue here is one of extent: that is it may be justifiable for a planning authority to require community facilities in an area to ensure sufficient mix of uses

⁸² See eg. Heap D. & Ward A.J. "Planning Bargaining - the Pros and Cons: Or How Much Can the System Stand?" (1980) JPL 631/637 where this approach is taken.

⁸³ The content of this agreement is discussed in some detail in chapter 7 to which the reader is referred.

and to encourage 'community life' but is it also justifiable to detail access to and management of those facilities⁸⁴ in the name of 'planning' ?

This raises the issue of the purpose of planning: if it is the domain of planning to arrange physical form then the consequences of such arrangement of form should also be considered. If planning is also responsible for promoting a 'neighbourhood' or 'community' way of life then it becomes even clearer that the responsibility to control what is built is not enough: it must also include implementation of the scheme in its broader sense. To make the facilities available to the public will not, however, achieve the desired end unless steps are also taken to ensure that the public are in a position to make use of them. Consequently, the progression of planning into the economics and politics of the development seems natural, even essential, premised as it is upon the ideology of planning.

This is certainly not the only view of planning, but it represents an apparently straightforward justification for the use of a section 52 agreement in order to regulate the use or development of land by providing access for local residents to the development. The choice, however, in how to enforce this access involved an economic, political decision as to who constituted the 'local public'. It was suggested by a councillor that persons employed within the borough should be considered as qualifying for access at concessionary rates, but the developers were anxious to avoid the employees of competitors making use of their facilities. Similarly, those attending educational establishments in the borough were not entitled by virtue of that

⁸⁴ For another example of this see Rodwell House.

attendance to priority bookings as if they were local people because the Council feared the Polytechnic students would monopolise the sports hall.

The Council further insisted that a clause be added to the agreement to provide for discussions with the developers to ensure that local residents using the sports hall would be admitted to licensed premises within the complex on the same terms as employees of the company occupying the offices. This was to avoid a two class system and the criticism to which the Council could thereby be subjected. To maintain, therefore, that 'the community' or 'the local public' are in any way objective criteria may suggest that the planning process is value-free, but the reality does not support such a view.

Agreements Relating to the Occupation of Developments

These agreements⁸⁵ are distinct from those above in that they were not concerned with the process of the development, but merely with the occupant of the premises. They recited the content of the scheme including the gain element and made no reference to the completion of all of the elements but restricted the use of the office part to the developer, or other named occupant, usually for a period of five years. In one instance⁸⁶ the agreement was made under section 111 of the Local Government Act 1972 alone as the developer did not at that date own the site involved.

⁸⁵ See 238/240 Whitechapel Rd and the Wearwell Schemes.

⁸⁶ 238/240 Whitechapel Rd. This agreement dated 21 June 1979 was superceded by a further agreement on 11 September 1979 detailing the same terms but under all of the usual legislative provisions.

The Council entered into agreements of this kind with Wearwell Ltd in respect of developments at 81/91 and 153/157 Commercial Road. In both instances the Council referred to the purpose of the agreement as preventing office speculation in accordance with the GLDP and the permissions issued contained no similar restriction on user. The latter agreement not only limited occupation of the offices to Wearwell or a subsidiary for five years, but also required the premises to be let to 'a company or firm occupying industrial buildings within the London Borough of Tower Hamlets totalling not less than 59,976 square feet wherein industrial processes are carried out.'

The basis for this was that consent for office use had only been given because the developer had, recent to the application, expanded his company to acquire a large area of industrial floorspace elsewhere in the borough, thus increasing overall employment opportunities. The Development Sub-Committee therefore justified the consent on the grounds of the developer being an important asset to the borough but did not want to create a precedent detrimental to office policy which could open a floodgate of applications by those already owning industrial space in the borough. No condition was included on the permissions because of the difficulties this would create for the developer in funding the office developments.

CONCLUSIONS

Restraints on public expenditure have made the aims and objectives of local planning authorities impossible to realise from the public purse alone and the courts, in their restrictive attitude to the validity of planning conditions, have failed to recognise the imbalance

between the objectives considered as within the realm of planning by the planning profession and the feasibility of realising those objectives. Section 52 and the other legislative provisions which enable the authority to contract with the private sector provides one mechanism for assisting the implementation of planning policies, particularly as its use has not been comprehensibly circumscribed by the courts or by the Department. This state of affairs is not accidental but is a direct result of the structural interplay between the different parts of the development control system operating within a market economy.

The nature of the process is such that the developer and the planner are left to negotiate a package acceptable to both in economic terms, and the nature of planning law (and indeed rules generally) allows for the result of those negotiations to carry 'the force of law'. By legislating a provision which bestows wide powers on the planning authority, and by drafting that legislation in language which is open to diverse interpretation, a framework is purposely created for local autonomy. The authority is given an additional power to use the threat of enforcement through the courts as a negotiating tool. The legislation, however, does more than simply bestow power, as it reinforces the position of the local planning authority to use public and private law to achieve its objectives. At the same time it seems to reinforce the separation of powers between the courts and the executive by injecting the ideology of law into the development control system and into the negotiation process. This in turn feeds the idea of law as a method of objective control as the enforceability of the agreement ultimately depends upon its legality.

At the operational level, however, the content of the agreement largely depends upon the extent to which the planning authority will moderate its political will and the level of profits insisted upon by the developer. The availability of local authority funds and the state of the property market are crucial factors: both the local planning authority and the developer have objectives they wish to achieve and both have financial constraints upon them. The law represents an additional, though no less economic, restraint by reserving to itself powers of intervention which have no clear limits: what amounts to a 'restriction' on the use or development of land and an 'unreasonable' exercise of power is not, and probably cannot be, clearly defined.

The relationship between the planning authority and the developer is consequently dependant upon maintaining a trust: the authority wants to avoid determinations on its actions as they will clarify the limits of their powers and policies and the developer is concerned to keep costs as low as possible. The responsibility for perpetuating this trust lies firmly with the officers of the Council in their decisions to pursue a scheme and realise its potential without losing the benefit of the financial and political rewards of the development. This is done principally on the basis of professional, fair and objective considerations which, consciously or unconsciously, mask political criteria. Public trust, as well as the trust of the developer, can be largely maintained through this device because professionalism suggests fairness as opposed to the bargaining and compromising according to predisposed views inherent in the status of 'politician'.

By this process, the planning authority and indeed the officers of that authority, are in a position to create and operate their own

microcosm of power which is both dependant upon and supportive of the larger system of control. It is the officers who negotiate the content of the gain and officers who negotiate the form of the enforcement mechanism. They are answerable to their members and are affected by the policies and political aims of that council, but gains and agreements are generally presented to the Development Committee as a completed package. The content may be subject to scrutiny by that Committee but this will largely depend upon the content of the planner's report and the trust of the Committee in the planner's 'professional judgement'. Consequently, there remains an area of control in the hands of individual officers which is necessary to the system and supportive of it.

The legality of the method of enforcement adopted by the council is clearly of importance in perpetuating the various relationships within the system, yet is only one aspect which needs consideration. It is clearly possible to establish that powers to enter agreements under the law do exist, even where the purpose is to achieve planning gain, provided that gain is required to regulate or restrict the use or development of land. The extent of those powers, however, is dependant upon the interpretation of that proviso, which can only be ascertained by an assessment of whether the powers were exercised in a manner which was reasonable and justifiable in the context in which that exercise occurred.

The above discussion illustrates the fact that 'reasonableness' must be measured against the political grounds for exercising the power, and that this necessarily includes economic conditions and the basis upon which each and all actors play their role and make their decisions. It is not simply a question of determining whether the terms

of planning agreements satisfy 'principles' laid down in law; those 'principles' cannot be said to exist in a vacuum and, as far as planning agreements are concerned, are unclear and eminently imprecise. These 'legal principles' effectively play a similar role as 'planning objectives' in that they attempt to remove the political base from an exercise of power. This has the appearance of control through professionalism and serves the system by further justifying the role of that actor within it and does not improve the position of those remaining on the outside. Consequently, judges (like the Secretary of State or planning authorities) by making decisions as to what amounts to a valid condition or whether or not an agreement amounts to one which regulates or restricts the use of land, influence the distribution of uses, and thus the economic (which includes the social) conditions of an area.⁸⁷ They are effectively making decisions of distribution of resources which cannot be decided by the acontextual application of principle, but require a choice between competing demands.⁸⁸

The use of planning agreements is not, then, the 'evasive practice' suggested by Wade⁸⁹ but is a necessary part of the system in that it supports and is a product of the context of development

⁸⁷ Research has been carried out to illustrate the role of the judiciary as "supermanagers" of social distribution in the US through decisions made on the characteristics of an area, schools and services. See Johnston, R.J. "The Management and Autonomy of the Local State: the Role of the Judiciary in the US " (1981) 13 Env. and Pl. A. 1305 and Johnston, R.J. "Texts, Actors and High Managers: Judges, Bureaucrats and the Political Organisation of Space " (1983) 2:1 Political Geography Q. 3.

⁸⁸ See Frug, G.E. "The City as a Legal Concept " (1980) 93 Harvard Law Review 1057.

⁸⁹ Wade, H.W.R. Administrative Law, 1982 (5th ed.) Oxford: Clarendon Press.

control and of the realities of government. The operation of the process does not represent radicalism in local government but is an avenue for preserving the broad welfare responsibilities of local government in the uncondusive climate produced by central government economic policy. It also represents the local operation of market forces and the advance of individualism, with the facility for developers to attain their profits merely through a different, no less efficient, mechanism. The interpretation of those welfare responsibilities remains in the hands of professionals working with the development industry and working within the economic structure rather than against either.

PART IV: A COMPARATIVE APPROACH: THE NEW SOUTH WALES

MODEL OF DEVELOPER CONTRIBUTIONS

INTRODUCTION

While recognising the problems of using examples from comparative jurisdictions in the study of law,¹ a view of the approach taken in New South Wales, Australia to the subject of planning gain is pertinent in so far as it represents one attempt at a solution and also demonstrates the importance of contextual considerations. It is not advocated that this approach is the only one or the most significant, but is perhaps the most accessible in that Australian planning law is an adaptation of the principles underlying the English system, and New South Wales represents one manifestation of that adaptation.

Many jurisdictions have used the English model of town planning as a base, treating it as something readily transportable from one culture to another, but Australia is perhaps politically and environmentally less dissimilar from England than most. The choice of state was largely arbitrary but was also prompted by the experiences of Sydney City Council in their widely publicised and well-documented attempt to consistently apply a policy of planning gain.²

What is intended in this part of the thesis is then not a lesson for England to follow or reject, but an illustration of the problems that can be encountered when structural reforms are instituted from above as a method of control over the operation of a system which is

¹ See the work of Kahn-Freund, O. esp. "On Uses and Misuses of Comparative Law" (1974) 37 MLR 1.

² Building Owners and Managers Association of Australia Limited (BOMA) v Sydney CC (1984) 53 LGRA 54 (Land and Environment Court No. 40084 of 1983, 2 April 1984). Various articles appeared in the Sydney Morning Herald on the operation of this levy system, see eg. 4th, 11th, 21st November 1980, 4th, 24th, 27th February, 4th March, 10th April, 19th, 29th July and 28th, 29th September 1981, 9th, 10th, 11th March, 2nd, 6th, 7th, 11th, 29th December 1982, 14th, 29th January, 29th, 30th April, 6th, 23rd September 1983 and 1st, 3rd, 7th April 1984.

a product of a distribution of power which remains unaltered. A brief overview of the legislative framework of planning law in New South Wales (hereinafter referred to as 'NSW') will be given, followed, in chapter 11, by a commentary on the explicit provisions relating to planning gain and the practical effect of those provisions on councils and developers in two areas of Sydney.

CHAPTER 9: THE LEGISLATIVE FRAMEWORK

The new environmental planning system introduced in September 1980 by the Environmental Planning and Assessment Act 1979³ (hereinafter referred to as 'the EP&A Act 1979') represented a unification of land use planning and environmental protection within the legal and administrative system of NSW. It was accompanied by four other pieces of legislation⁴ dealing with specific aspects of development control and the establishment and jurisdiction of a new court to act as review body and enforcement agency. These reforms were brought in by the Liberal Government and followed on the heels of federal reforms to the administrative law system intended to increase control of the bureaucracy through a sophisticated mechanism of review.⁵

BACKGROUND: PLANNING GAIN IN NSW BEFORE THE ENVIRONMENTAL PLANNING LEGISLATION

Before the EP&A Act 1979 it was possible for a Council to impose conditions on a consent for subdivision⁶ requiring the developer

³ This Act was amended in certain respects in 1984, see below.

⁴ The Land and Environment Court Act 1979, the Miscellaneous Acts (Planning) Repeal and Amendment Act 1979, the Heritage (Amendment) Act 1979 and the Height of Buildings (Amendment) Act 1979.

⁵ For a concise overview of these changes, which fall outside of the scope of this thesis, see Partington, M. "The Reform of Public Law in Britain: Theoretical Problems and Practical Considerations" IN: McAuslan, P. and McEldowney, J.F. Law, Legitimacy and the Constitution, pp.191-211, 1985, London: Sweet and Maxwell.

⁶ This type of consent is required by councils where land is to be divided into plots for development. The purpose of the consent is to ensure that the plots are of the requisite size and adequate arrangements are made for the servicing of those plots. The application will deal with the siting of roads, drains, gas and electricity pipes, overhead or underground cabling etc within the site. Access from external roads onto the site may also be included.

not only to construct, or pay a contribution towards the costs of constructing, drainage and roads necessary to make the land ready for development,⁷ but also to dedicate part of the site as a public reserve.⁸ This power provided the basis for councils to make allowance for social infrastructure on new developments, and was most useful to those areas which had newly released land awaiting subdivision within their jurisdiction. In view of the rapid and extensive growth of Sydney towards the West of the city, these powers together have had a dramatic impact, particularly upon residential developers, and their use has been litigated in the state courts. As they relate specifically to applications for subdivision, they have survived the EP&A Act 1979⁹ which is mainly concerned with rationalising the requirement of developer contributions at the later stage of the development application.¹⁰ These latter requirements

The council has various powers in publishing plans which indicate the size of plots (high, medium and low density) and the positioning of roads and access roads. In addition the legislation recognises social infrastructure requirements for new developments to the limited extent of designating areas for public use. See generally Local Government Act 1919, as amended, Part XII.

⁷ Local Government Act 1919, as amended, sections 328 and 333. See also the Land Contribution Management Act 1970.

⁸ Local Government Act 1919, as amended, section 333(1)(g) provides that the amount of land to be dedicated as public reserve is a relevant consideration to be taken into account in determining an application for sub-division.

⁹ In many cases, under local plans, development consent is not required after a sub-division and thus the EP&A Act will not operate.

¹⁰ Following the enactment of the EP&A Act, the Local Government Act was further amended to take account of the changes wrought by the new legislation (see below). The new section 333 is now in two parts. The first (s.333(1)) refers to the considerations to be taken into account where consent under the EP&A Act is required in respect of a sub-division and includes, inter alia, the proposed drains and roads for the site. The second (s.333(1A)) relates to sub-divisions where no consent is required under the EP&A

were, before the EP&A Act 1979, developed as a part of the councils' discretion to take into account material considerations in determining a development application and to impose conditions upon development consent. The law developed in this area has remained relevant where councils have imposed general conditions requiring developer contributions to social infrastructure without relying upon section 94 of the EP&A Act 1979¹¹ which specifically allows a condition to be imposed where the requirements of that section are fulfilled.¹²

In Ligora Pty Ltd v Leichhardt¹³ the Chief Judge in the Land & Environment Court stated that it was appropriate to deal with the dedication of land at the subdivision, rather than development application, stage in order for a more satisfactory decision to be made as to which area of the land should be dedicated. If left to the development consent stage difficulties would arise as previously subdivided plots would have to be interfered with or, if individual plots were chosen for dedication, the land may have been sold to the

Act, and in this case the council may also consider, inter alia, the amount of land to be provided as public reserve.

¹¹ The EP&A Act 1979, section 91(3)(a) sets out the power to impose conditions which relate to any of the matters which may be taken into account in determining an application. Included in the list of such matters contained in section 90(1) are the provisions contained in plans effecting the locality, the social and economic effects of development, the effect the development has on local amenity, the public interest, the suitability of the land for development and whether adequate provision is made for landscaping, utility services, parking, roads.

¹² This section is discussed in detail below. The court has on a number of occasions refused to allow councils to rely upon section 91 as an alternative to section 94 where the terms and effect of the condition fell squarely within the latter. See Henbury v Parramatta CC (1982) ELR 0003; St George Building Society v Manly CC (1982) ELR 0228.

¹³ (1982) ELR 0185.

house purchaser following subdivision. Thus the powers on subdivision not only provide part of the background to developer contributions under the EP&A Act 1979, but also remain relevant to the whole picture of local council discretion in this area.

In Hornsby S.C v NSW Malting Co Ltd¹⁴ the court considered how the council could exercise its powers in requiring a dedication of land for public reserve on a subdivision and suggested guidelines for making a decision on the sufficiency of such a contribution which would be 'reasonable in all of the circumstances'. Rejecting the view that the council was restricted to assessing merely whether the contribution provided adequately for those who would eventually inhabit the subdivided plots¹⁵, the court held that a council should also take into account more general needs in the community as a whole. These wider considerations included the council's policies on facilities for the area, the availability of existing public land, the suitability of providing public reserve for the area on the site suggested in the application. With regard to the industrial subdivision before the court, they took into account the need for public reserve by the workers who would be employed in the development and the need to make the development itself aesthetically pleasing.

When first enacted in 1919 the Local Government Act had referred to the provision of 'public garden and recreational space' and the

¹⁴ (1963)8 LGRA 386.

¹⁵ This was the view given in earlier cases, such as Forsberg v Warringah SC (1922) 6 LGR 80; Hanly v Hornsby SC (1954) 19 LGR (NSW) 214.

subsequent amendment, in 1964,¹⁶ to replace this phrase with the term 'public reserve' was treated as significant by the courts to further expand the criteria which councils could consider relevant. In Warringah SC v Armour¹⁷ the later phrase was interpreted as not requiring the council to identify any particular need or demand generated by the future development of the subdivided site. Any change in the condition of an area created by the subdivision entitled a council to legitimately require a portion of land, or a monetary contribution in lieu,¹⁸ for new public reserve in the future or to improve existing public reserves. It was considered irrelevant, therefore, that the monetary contribution in this case was to be used for the improvement of existing areas rather than for purchasing land to meet needs generated by the development. The question as to whether dedication of land could also be required without actually identifying an increased need was ultimately left open.

It had, however, been suggested in an earlier case that the requirement of a monetary contribution towards public reserve should be treated with more circumspection than a dedication of land.

" The levy of money as a condition of the exercise of a statutory discretion has always been regarded as suspect because it need not necessarily be

¹⁶ Local Government and Conveyancing (Amendment) Act 1964, section 2(e).

¹⁷ [1972] 2 NSWLR 328.

¹⁸ Local Government Act, as amended, section 332(2) allows a council to require a contribution in lieu of a dedication of land for public reserve on a sub-division provided (1) the amount of the contribution was reasonable; (2) it was paid into a trust fund and (3) it was only used to acquire land for public recreation or in improving existing facilities. The monetary contribution in lieu provision was first added to the Act by the Local Government (Amendment) Act 1960, section 2, amended by the Local Government and Conveyancing (Amendment) Act 1964, section 2(e)(iii).

related to the lawful exercise of the power conferred so that it assumes the character of an exaction or tax. " ¹⁹

Yet the NSW courts had also allowed the requirement of a monetary contribution to be made as a condition where no statutory basis for such existed, that is at the stage of development consent. The Court of Appeal in Rockdale MC v Tandel Corporation²⁰ held that such a requirement fell within a council's discretion in deciding upon a development application, provided the council established, not only a need for public reserve generated by the development, but also that such a contribution would be commercially feasible.

Approving the earlier decision in Granville Developments v Holroyd MC,²¹ the court went on to say that if these provisos were satisfied the Council could issue a conditional consent under which development could only take place after the developer acquired other land adjoining, or near to, the development site for use as public reserve. If this was not practicable, the council could impose a condition requiring a financial contribution from the developer provided (1) the monies received were held on trust so as to prevent them from being expended on anything other than the provision of or improvement to public reserves; and (2) the land used for public reserve was close enough to the site for there to be a reasonable connection with the public reserve needs generated by the development itself.

¹⁹ Jumal Developments v Parramatta CC (1969) 17 LGRA 111 at 113, per Else-Mitchell, J.

²⁰ (1975) 34 LGRA 196.

²¹ (1969) 18 LGRA 34.

It seems, therefore, that the courts were trying to limit the use of conditions to secure a monetary contribution towards public reserves when imposed on a development consent. These limitations, however, far from discouraged the use of conditions to secure a monetary contribution from developers.²² The court considered such use to be within the discretion of local councils and the provisos placed upon it were merely aimed at ensuring that those who were intended to benefit from such a condition, did so benefit. This connection between the contribution required and the needs generated by the development has been clearly illustrated by a large number of development consent cases which arose before the EP&A Act 1979,²³ requiring a physical relationship to be demonstrated.

In Greek Australian Finance Corporation v Sydney CC²⁴, for example, Sydney City Council had a Capital Contributions Account for building car parks which was fed by monies collected from parking meters and contributions from developers in lieu of on-site parking spaces.²⁵ The developer in this case paid a contribution towards parking and applied to the court to have it returned on the ground that there was no nexus between the users of the development and the

²² In Naylor v Bankstown CC [1980] 2 NSWLR 630 approval was given to a requirement of both dedication of land and a monetary contribution, provided the total did not exceed the amount which could legitimately be required under either head.

²³ Culminating in the Court of Appeal case Rockdale MC v Tandel Corporation Pty Ltd (1975) 34 LGRA 196 which held that a contribution for open space must be spent in an area 'proximate enough to the site to present a reasonable connection with the needs generated by the development on it.'

²⁴ (1974) 29 LGRA 130

²⁵ This was part of a system of collecting developer contributions which was operated through published planning policies, discussed below under Sydney City Council.

contribution, as Sydney City Council had no plans to build a car park in the vicinity. The Council explained that under their local plan all parking was to be confined to the edges of the central business district so as to reduce congestion. The court agreed that, in planning terms, the approach of the Council was right, but held themselves to be bound by precedent to require a sufficient connection between the provision of facilities and the parking needs generated by the development.²⁶ This requirement was missing here and the condition was declared void.

The courts, in applying the test formulated in Rockdale MC v Tandel Corporation Pty Ltd²⁷ have required a sufficient nexus to be established between the development and the contribution both in terms of physical proximity and causal relationship. This latter aspect was generally expressed in the negative by the council being obliged to substantiate that the development itself led to a reduction in the amenities for the area. This is clearly referable to the general position under English law, in that a condition must fairly and reasonably relate to the development²⁸ and a number of the NSW cases explicitly refer to that requirement.²⁹ In Bartolo v Botany

²⁶ This approach was echoed in Woolworths v Ku-ring-gai SC 10 LGRA 177 where the car parking was to be 'so situated and defined in such a fashion as to enable a decision to be reached that they are capable of being identified with or restricted to use in connection with the proposed development.'

²⁷ *supra* note 13.

²⁸ See, for example, Newbury v SSE (1980) All ER 731; Fawcett Properties v Buckingham Council (1961) AC 636. Refer to Section 52 Agreements discussed above.

²⁹ For examples see Rockdale v Tandel Corporation Pty Ltd (1975) 34 LGRA 196 at 205; Greek Australian Finance Corporation v Sydney CC (1974) 29 LGRA 130; Granville Developments v Holroyd MC (1969) 18 LGRA 34 at 38; Jumal Developments v Parramatta CC (1969)

MC³⁰ the Land & Environment Court, deciding a case on the old law which was litigated after the EP&A Act 1979 became effective, stated the test in broader terms in finding against the council's requirement for a contribution towards public open space.³¹

" ... the expected increase in resident population in the locality with the expectant resultant demand for increased facilities or open space [will] necessarily result in a decline or depreciation of the amenities in that neighbourhood. "

Through these mechanisms local councils were able to levy developers for the provision of certain services. Under the Local Government Act the type of services involved were restricted to the provision of public open space, roads (usually subdivision roads only), drainage, water, electricity and sewerage, but conditions imposed on development consents were also upheld by the courts as valid, provided the contribution required was demonstrated to be related to the development. In addition, some councils also negotiated contributions which did not meet the criteria of either of the above, but were provided in order to save the time, expense and future animosity created by a dispute with the council.³²

Some evidence of this type of negotiation can be found in the cases which were litigated before the courts where a developer had

17 LGRA 111 at 113; Woolworths v Ku-ring-gai MC 10 LGRA 177.

³⁰ (1981) 2 DEP Digest 20.

³¹ See also Harrison v Leichhardt MC (1981) 2 DEP Digest 17, Land & Environment Court, 5 Feb 1981.

³² This point was made during most of the interviews conducted in Sydney during the course of this research with developers, councillors and planners. See also, Best, G. "Section 94-Current Trends" (1973), Unpublished paper presented at Workshop on Section 94 Contributions, University of New South Wales, Sydney, July 1st 1973.

paid a contribution, obtained an unconditional development consent and then later decided to apply to the court for the contribution to be repaid. This was the situation in Rockdale MC v Tandel Corporation Pty Ltd discussed above, and the developer argued that the contribution was paid as a result of coercion and had been demanded without lawful justification. The developer had submitted an application which was unacceptable to the council. Negotiation took place and the council indicated that the scheme would be acceptable if certain amendments were made and a contribution was paid towards providing public open space. The amendments were made, the contribution was paid and an unconditional consent was issued. The Court of Appeal, in remitting the case back to the trial judge, found that it was open to the lower court to find that the contribution was paid in anticipation of the consent. Consequently, if it would have been valid as a condition the consent could remain, but if it would have been struck down the consent would also fall.

After the EP&A Act 1979 was passed Sydney City Council, in February 1981, passed a resolution to require developers to pay a 2% levy on the granting of all applications for commercial developments valued at A\$200,000. This levy was imposed not as a condition on consent, but was required as a prerequisite to consent as a voluntary contribution to a fund to provide public housing for low-income earners.³³ It became known amongst developers in Sydney that development applications would not be processed unless they were

³³ In the view of both the Liberal and Labour councillors interviewed the levy arose as a revenue raising measure when funds were not forthcoming from the state housing authority to enable the council to fulfill the mandate upon which they had been elected, which included an extensive building programme for public housing. See also eg. Sydney Morning Herald 4 Feb 1981, 27 Feb 1981, 9 April 1981.

accompanied by a letter agreeing to pay the levy. Once the letter was received the development consent would include a condition stating that the developer had agreed to contribute 2% of the value of the development. The council would then not release the building consent necessary for construction work to commence, until the levy was paid. As such it was often paid before the application was determined and, as it also represented an often cheaper alternative to a valid contribution towards open space³⁴ it was not readily challenged.³⁵ Indeed at the outset the media reported favourably on the policy and a number of large development companies publicly pledged their support for the levy.³⁶

The validity of this levy was finally litigated in 1984 by the Building Owners and Managers Association and the court held it to be unlawful.³⁷ Cripps J. considered the contributions to be in no way voluntary in view of the evidence given as to the methods used to secure them. The effect of the council's policy was held to be the imposition of a condition on development consent which precluded the council from considering any individual case on its merits and, accordingly, was invalid. However, the policy was operated for three years, during which time the council collected A\$3.1 million from

³⁴ See Sydney Morning Herald 19 June 1981, 29 June 1981, 28 Sep 1981 and The Australian 11 Sep 1981.

³⁵ 130 relevant applications were made before the levy was challenged before the Land and Environment Court. Building Owners & Managers Association v Sydney County Council (1984) 53 LGRA 54.

³⁶ See, for example, Sydney Morning Herald 23 Oct 1980, 29 Oct 1980, 4 Nov 1980 and The Australian 11 Sep 1981.

³⁷ cited supra note 32.

developers³⁸ and the court did not make any ruling on the return of the contributions paid.

This scope for negotiation has not been directly attacked by the EP&A Act 1979: the legislation remains silent on the prohibition of seeking contributions, leaving section 94 as one method, rather than the only method, of securing payment towards social infrastructure. Certainly there is no evidence to suggest that section 94 of the EP&A Act 1979 was intended to be a panacea for solving all of the problems regarding the funding of urban development. Rather, it was directed towards regularising existing practice so as to give statutory force to contributions sought and to introduce greater certainty and understanding of developer contributions. In doing this it also imposed a requirement on councils to justify the contributions sought by quantifying shifts in demand and by limiting contributions through the criteria of reasonableness, ultimately to be interpreted by the Land and Environment Court.

³⁸ *ibid.* per Cripps J. See also Sydney Morning Herald 6 Sep 1983 and 4 July 1983. Many of the larger contributions were reported in the press and were claimed to include State controlled companies such as Qantas (A\$78,000) and the Rural Bank (A\$600,000) as well as Waltons Bond (A\$1.2 m), Intercontinental Hotels (A\$1 m) and many others. See Sydney Morning Herald 28 Sep 1981, 2 Dec 1982, 29 Jan 1983 and Financial Review 10 April 1981 and 11 March 1982.

THE ENVIRONMENTAL PLANNING & ASSESSMENT ACT 1979: THE STRUCTURE OF CONTROL

The EP&A Act 1979 centralised planning powers by removing land use planning and environmental protection functions from other government portfolios and extended the system conceptually by the introduction of a three-pronged development plan, consisting of local, regional and state documents. The Court was endowed with wide discretionary powers and locus standi before it was specifically extended to 'any person' irrespective of whether 'any right' of that person was or could be infringed as a result of the breach of the Act complained of.³⁹ The Act also included mechanisms for the production and incorporation of Environmental Impact Statements into the process of planning control.

Previous to this legislation, planning control was limited to that contained in town and country planning schemes produced by the local councils.⁴⁰ The stated purpose of these schemes was the regulation and control of the use of land and were based upon the type of zoning maps outlawed by developments in the English system. Developments would only be allowed if they were in accordance with the zoning included in the scheme. As a result thousands of Local Environmental Plans (hereinafter referred to as 'LEPs') covering individual sites within the zones had been introduced by councils to allow them to permit specific conflicting proposals.⁴¹ These LEPs

³⁹ EP&A Act, section 123.

⁴⁰ Local Government Act 1919, section 342(G).

⁴¹ See Environmental Law Newsletter, No. 13, September 1983: Official Opening by Mr Eric Bedford, Minister for Planning Environment of the Environmental Law Association Seminar on the

were so specific that they represented the permission to develop itself and the permit that followed often became a mere formality. The basis upon which development proposals would be assessed was not the individual merit of an application, but whether the application accorded with the zoning requirements of the plan.

Partly to overcome these problems, the EP&A Act 1979 allowed⁴² a local council to draw up a local plan, or local plans, for their area, or parts of it, after carrying out an environmental study of the land to which it was addressed. The Act, however, does not stipulate the form or structure these plans should take, other than to indicate that the Minister may make directions.⁴³ Similarly, in relation to the more specific Development Control Plans nothing is said to preclude reliance on zoning or to encourage the councils to take a broader policy based approach.⁴⁴

The policy underlying the existing approach to planning was stated to be the 'orderly and economic development and use of land'⁴⁵ and this policy was repeated in the EP&A Act 1979 but was put alongside the complementary context of promoting the broader interests of the local population. These were described as the social and economic welfare of the community and the improvement of the

First 100 Days of the EP&A Act - 12 August 1983. Sydney: NSW Environmental Law Association

⁴² The power of the Department of Environment and Planning to require a council to draw up such plans is also included in EP&A Act 1979, section 55.

⁴³ EP&A Act 1979, section 71.

⁴⁴ EP&A Act 1979, section 72.

⁴⁵ State Planning Authority Act 1963 (NSW) section 12, as applied by the New South Wales Planning and Environment Commission Act 1974 (NSW), section 18(3).

environment.⁴⁶ The new system of plans introduced by the EP&A Act 1979 did require each plan to include a statement of the aims, objectives, policies and strategies by which it was to achieve any of the objects of the Act⁴⁷ and stipulated that it must not conflict with other policies relevant to the area. However, the EP&A Act 1979 did not only fail to comment on the use of zones as a method of land use control but also remained silent on the relationship between such plans, which essentially control development,⁴⁸ and the positive objects of the Act.

The responsible Minister did declare that where the two objects of controlling development and promoting the social and economic welfare of the community are in conflict the choice between control or promotion of development is a political one. The provisions in the

⁴⁶ EP&A Act, 1979 section 5 states the objects of the Act to be "(a) to encourage - (i) the proper management, development and conservation of natural and man-made resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment;
(ii) the promotion and co-ordination of the orderly and economic use and development of land;
(iii) the protection, provision and co-ordination of communication and utility services;
(iv) the provision of land for public purposes;
(v) the provision and co-ordination of community services and facilities; and
(vi) the protection of the environment;
(b) to promote the sharing of the responsibility for environmental planning between different levels of government in the State; and
(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment."

⁴⁷ EP&A Act 1979, section 25(1).

⁴⁸ eg. EP&A Act 1979, section 26 refers, inter alia, to an environmental planning instrument as controlling development, controlling the demolition of buildings, controlling advertisements and "controlling any act, matter or thing for or with respect to which provision may be made" for protecting or improving the environment or reserving open space.

EP&A Act 1979 requiring state and regional policies and plans to be taken into account on a development application in his view provided the mechanism for the political control of planning. The Act did not create a hierarchy between local, state and regional instruments, nor did it limit the degree of detail which can be incorporated into a state or regional plan: consequently these documents can require not only the local council to take into account the government's employment or housing policy, but can also change the existing controls on a particular area or site. Their effect does, in these circumstances, provide a direct and effective system of control over local council decision making⁴⁹ particularly as the Act also prohibits permits being issued for subdivision of land which conflict with the Act or any planning instrument relative to the site.⁵⁰ The formula is completed by the inclusion amongst the objects of the Act of one 'to promote the sharing of the responsibility for environmental planning between the different levels of Government in the State'.⁵¹

The purposes to which each of these three types of plan should be addressed are the same, that is any of the objects of the legislation. The objects are drawn in broad terms and it would be necessary to show that the instrument in question neither achieved nor sought to achieve any of them in order to establish its invalidity

⁴⁹ State environmental policies have been used to restrict local council discretion, eg. SEPP 8 (Surplus Public Land) removes all government sponsored development from the control and assessment procedures under the EP&A Act 1979 and makes the minister the planning authority. Thus allowing the development of public land used eg. areas historically reserved for open space, without local control procedures.

⁵⁰ EP&A Act 1979, section 91(2).

⁵¹ EP&A Act 1979, section 5(B).

on this ground.⁵² A failure to state the aims within the instrument does not have any legal consequence and judicial challenge on the grounds of procedural or formal non-compliance with the Act is prohibited after a period of three months from the date of publication.⁵³ Taken together these provisions make the challenge of the instruments difficult and the Act goes on to suggest that the instruments should be applied according to their strict literal meaning⁵⁴, which limits the interpretation of those instruments both at the level of application and on review by the court.

There is a duty placed upon the local council to ensure that in preparing a plan the aims, objectives, policies and strategies included within it do not conflict with the EP&A Act 1979 or with published state or regional instruments, or with any relevant directive of the Minister under section 117. There is also a positive duty to give effect to the aims, objectives, policies and strategies of those instruments.⁵⁵ The local plan does require Ministerial approval as a further check on its contents and the Minister may add such amendments as he considers fit to avoid conflict with State or regional plans or with Ministerial directives.⁵⁶ If, nevertheless, there is any conflict between an LEP and a state or regional policy which becomes apparent on consideration of an application for development

⁵² EP&A Act 1979, section 25.

⁵³ EP&A Act 1979, section 35.

⁵⁴ EP&A Act 1979, section 25.

⁵⁵ EP&A Act 1979, section 61(e).

⁵⁶ EP&A Act 1979, section 70.

there is a presumption that the later instrument prevails, but the decision as to which should prevail rests with the Minister.⁵⁷

Before a local or regional environmental plan can be prepared there must be an 'environmental study' which is put on public exhibition and affected bodies have to be consulted on its content. Any person may make a written submission on the study or the proposed LEP, which must be taken into account by the council,⁵⁸ and the Director of Environment and Planning may specify certain matters which should be considered.⁵⁹ Further, after exhibition of a draft LEP, any person who has made a submission may request an inquiry to be held.⁶⁰ The council are also put under a duty to consider the environmental impact of any application⁶¹ and where the content of it is a 'designated development'⁶² an environmental impact statement must be prepared and a public environmental inquiry held.⁶³ No such

⁵⁷ See EP&A Act 1979, sections 36 and 70.

⁵⁸ EP&A Act 1979, section 60.

⁵⁹ EP&A Act 1979, section 65(3).

⁶⁰ EP&A Act 1979, section 68(1).

⁶¹ There are different levels to which this consideration extends and the EP&A Act 1979 is very precise as to the procedures which must be followed in each case. It is not within the scope of this thesis to consider the detail of this aspect in its complexity. For a summary of the provisions see Fisher, D.E. "Environmental Planning in New South Wales" (1982) 56 *The Australian Law Journal* 399/413.

⁶² There are no substantive criteria for such a designation under sections 29 and 158 of the EP&A Act 1979.

⁶³ EP&A Act 1979, sections 77(3)(d) and 88(3).

requirement is made as a pre-condition for a state environmental policy.⁶⁴

All of this adds up to a system based upon much broader criteria than land use alone and which represents a positive attempt to bring wider considerations directly into planning, particularly through acknowledging the political effect and basis of development control. Section 90 sets out a range of considerations to be taken into account in assessing the merits of a development application, which includes the social, economic and aesthetic aspects of the proposal, traditional planning issues and the public interest in addition to those mentioned above. Whether the application is given consent conditionally or unconditionally the development must then comply with the terms of the relevant instrument(s).

The political nature of development control has been further acknowledged by the use made by the Minister of calling-in provisions included in the Act.⁶⁵ However this acknowledgement has been somewhat less direct (although its effect has been directly felt) in that the Minister has approved proposals for development which have met with substantial objections at local level⁶⁶, and has used the section to terminate appeals before the Land and Environment Court.⁶⁷

⁶⁴ This has been criticised as allowing the use of state environmental policies to over-ride public and environmental objections to developments of a certain type or in certain locations.

⁶⁵ EP&A Act 1979, section 101.

⁶⁶ eg. Gazebo Hotel v Sydney C.C. Land and Environment Court (1981) ELR 8.

⁶⁷ ibid. and see also Gwynville Southpoint v Botany MC Land & Environment Court No. 40075 of 1982, terminated October 1, 1982.

In 1982 the Court specifically ordered the minister not to interfere in local environmental planning,⁶⁸ and rezonings as a result of the call-in mechanism have been declared void by the Court.⁶⁹ The effect of the Court's activity in this area culminated in the Pagewood case⁷⁰ where the government passed an Act of Parliament⁷¹ to allow a particular development, to terminate the appeal proceedings which were underway and prevent the court ordering costs against the council.⁷²

The case⁷³ involved the rezoning of a site for development as high density residential and the Department of Environment and Planning had declared that no environmental assessment was necessary for the proposals which represented the largest single residential development in Australia. 280 objections were received by the council but permission was granted and some of the objectors appealed. The

⁶⁸ Ku-ring-gai MC v Minister for Planning and Environment Land & Environment Court, (1982) ELR 8 (this decision was reversed on appeal but Cripps J.'s comments on this point were not upset: Minister of Planning and Environment v Ku-ring-gai MC Supreme Court, Court of Appeal, (1983) ELR 0416); see also Burns Philp v Wollongong CC (1983) ELR 0347 & 0350 which reinforced this approach.

⁶⁹ See Gazebo Hotel v Sydney C.C. supra note 66.

⁷⁰ Gwynville Southpoint v Botany MC supra note 67.

⁷¹ Botany and Randwick Sites Development Act 1981.

⁷² This procedure did have some precedent as the government had previously passed an Act of Parliament to override decisions of the Court so as to allow development of a government-supported stadium which had been refused following appeals to the Land & Environment Court, one of which was affirmed by the Supreme Court. See Waverley MC v Attorney-General (1978)40 LGRA 419; Hale v Parramatta CC Land & Environment Court (1981) ELR 21, Parramatta CC v Hale Supreme Court, Court of Appeal, (1982) ELR 0082. For comment on the Cumberland Oval Act which was amended so as to exempt proposals from the EP&A Act altogether see The Age, March 12, 1982 and Sydney Morning Herald, December 13, 1982.

⁷³ See Ball, M. "Circumvention of Environmental Law in NSW" (1983) Environmental Law Newsletter, 12 June 1983, pp.21-31. Sydney: Environmental Law Association.

development was linked to an industrial development by W.D. & H.O. Wills, who the government were anxious to keep in NSW because of the employment opportunities they provided. When the appeal was lodged steps were taken to legislate approval of the proposals. The Attorney General (Mr Landa), said of the appeal proceedings 'the EP&A Act 1979 recognises that rezoning decisions should not be the subject of merit review by the court'.⁷⁴

A number of specific remarks may be made at this point about the structure of the EP&A Act 1979 itself. First, it does represent a move to incorporate positive aspects of planning into the system of development control by including environmental and welfare issues into the considerations relevant to a development application. Secondly, there remains a prevailing ideology of physical determinism in that the control of development is seen as a method of complementing or improving the economic and welfare conditions of the 'local community'. Along with this there is a reinforcement of the ideology of the neighbourhood and the intrinsic worth of 'community living'. Finally there is structurally, within the EP&A Act 1979, a reassertion of central control and influence over local decision-making: with a pattern of apparent local autonomy which may be undermined by the channels laid down for interference by State government. The following chapter will go on to discuss the provisions dealing specifically with developer contributions and their impact in practice.

⁷⁴ Legislative Council, September 22, 1982, cited by Ball (1983) *ibid.*

CHAPTER 10: DEVELOPER CONTRIBUTIONS UNDER SECTION 94

THE PROVISIONS RELATING TO DEVELOPER CONTRIBUTIONS

Within the framework described in the previous chapter the legislation dealt specifically with the power of local councils to levy contributions towards social infrastructure, in the form of a monetary payment and/or a donation of land, from the developer. Under section 94 of the EP&A Act 1979 the local council was given the power to require such contributions as a condition of consent for any development which will, or is likely to, create or increase the demand for public services or facilities within the area. The section makes no reference to the location of the land donated or to the services provided in relation to the development site, but does make the identification of the demand by the council in a local environmental plan a pre-condition for exercise of the power. Consequently, the central issue is not whether one site has disadvantages which should be compensated for, but whether any given area will have a need for certain services once development has taken place. This somewhat mirrors the approach of dealing with planning applications through a system of zoning, in that individual merits are not the planning authority's concern as they concentrate rather upon determining whether the application accords with the zoning provisions for the site. Yet this does represent a specific shifting of welfare responsibilities from the public sector to the private in terms of the financing of those responsibilities while leaving their identification and management to local 'specialists' likely to be more capable of assessing and administering needs of residents.

Section 94 does not specify the range of services or facilities that can be required: that is left to the discretion of local councils

when drawing up the Local Environmental Plan. This in effect places an additional burden on the 'expertise' of the councils in that they have to go beyond responding to needs identified by groups active in the area, and develop techniques of predicting need before development has taken place. If that need is not predicted effectively then presumably anyone could apply to the Land and Environment Court on the grounds that the Act has not been complied with. Concern for this has added to the delay, not only in producing LEPs, but also in considering individual applications.

The first part⁷⁵ of section 94 reads as follows:

- " (1) Subject to subsection (2), where a council, being the consent authority, is satisfied that a development application, will or is likely to require the provision of or increase the demand for public amenities and public services within the area, the council may grant consent to that application subject to a condition requiring -
- (a) the dedication of land free of cost; or
 - (b) the payment of a monetary contribution,
- or both.
- (2) A condition referred to in subsection (1) shall be imposed only -
- (a) where an environmental planning instrument identifies a likely increased demand for public amenities and public services as a consequence of the carrying out of development in accordance with that instrument and stipulates that dedication or a contribution under subsection (1) or both may be required as a condition of any consent to that development; and
 - (b) to require a reasonable dedication or contribution for the provision, extension or augmentation of the public amenities and public services mentioned in that subsection. "

The requirement specified in subsection (2) has been met by councils simply including a standard statement in their local environmental plans. A typical example is

⁷⁵ There are eight subsections in all, the remaining ones are dealt with below.

" As a consequence of the carrying out of development in accordance with this plan (as in force at the time the development is carried out), this plan identifies a likely increased demand for public amenities and public services (as specified in schedule 8) and stipulates that dedication or a contribution under section 94(1) of the Act, or both, may be required as a condition of any consent to that development. " ⁷⁶

The remainder of the plan typically stipulates various zoning provisions, including those areas zoned for open space, community facilities, schools and other social facilities. The LEP would the include in a schedule the range of services and facilities⁷⁷ to be provided out of developer contributions. The above example referred to Schedule 8 as providing such a list and not unusually for Blacktown

⁷⁶ Blacktown LEP No. 64, printed by Blacktown City Council, November 1984, approved by the Minister for Planning and Environment, 3 February 1984, section 30.

⁷⁷ Other more central councils still included lists of requirements although they were not always pursued. eg. Draft LEP No.53 for the City of Sydney specified public open space, public car parks and landscaped areas, local roads, stormwater drainage, construction of drainage systems, community facilities and structures and pedestrian facilities but were no more specific than this and, according to the Aldermen interviewed, were rarely required by operating section 94.

and several other suburbs of Sydney⁷⁸, included a wide variety of possible grounds upon which to claim contributions.

- " 1. Community facilities.
 2. Community facilities structures; child care centres; community meeting rooms and halls; community arts centres; community libraries; community health and welfare offices; interim community houses; youth centres; neighbourhood information centres.
 3. Public open space.
 4. Embellishment, landscaping and infrastructure provision for public open space; routes and areas for walkways, cycleways and parking systems, lighting and amenities; active outdoor recreation facilities and structures; sports court facilities, playing fields, swimming facilities, sports grounds and facilities and amenities structures; active indoor recreation structures, facilities and land requirements.
 5. Stormwater drainage purposes.
 6. Construction and landscaping of drainage structures, including drainage swales ...
 7. Roads; construction and landscaping of road works.
 8. Public car parks and landscaped areas in business centres; construction and embellishment of public car parks and landscaped areas. "

Within the local environmental plans the councils would draw up development control plans for individual areas (in the Western suburbs these would often be specific to particular release areas) which would

⁷⁸ The outer suburbs of Sydney which were producing LEPs at the time of this study tended to stipulate long lists of items required. The use of developer contributions was particularly relevant to these councils as the developments in question were usually housing developments on newly released land and the councils mapped out the projected social and physical infrastructure to create a community. These same councils had experienced criticism because of the problems with large housing developments built before the EP&A Act 1979 which lacked schools, community facilities and adequate roads and drainage facilities. If the developer did not provide these, capital and loan monies available to the councils were inadequate to simply produce these facilities at the time the housing was built, if at all. Source: The Western Regional Organisation of Councils, 4th Report on Local Government Finance and Commonwealth Revenue Sharing in Western Sydney: A Submission to the National Inquiry into Local Government Finance, November 1984.

normally specify the method of calculating the contributions.⁷⁹ These calculations would be done by formula relating to the area of land developed (in the case of roads, drainage and other physical infrastructure) or the number of households living within the new development (in the case of community facilities, open space and so on). The council would produce projections on the cost of producing the needs they identified and the land required and calculate a figure depending upon the extent of development and using the Consumer Price Index as an indicator of percentage increase over the period of development.⁸⁰ The valuation figures would be revised every two months or so and made available to potential developers.

Section 94 required any money collected in this way to be held on trust by the council to be used only for the purpose for which it was paid, and any land dedicated was also required to be used for the purpose intended at the time it was acquired.⁸¹ Beyond this the councils were still specifically made subject to a requirement to act

⁷⁹ The development control plans for the City of Sydney did not at the time of the study do this, but different considerations applied as the sites were normally for commercial development and the plan would specify the buildings required as part of the scheme rather than indicating levels to be paid towards the cost of providing facilities to be used by residents of different developments.

⁸⁰ eg. with the provision of community facilities in Blacktown each single allotment was assumed to accommodate 3.5 persons and if the development involved smaller units such as town houses or semi-detached houses, calculations would be done on the basis of the size of the buildings: less than 55m² 1.8 persons, between 55m² and 85 m² 2.5 persons, larger than 85m² 3.5 persons. On this basis calculations would be done for schools, youth facilities, community halls and so on. These would be costed and each developer would pay an amount calculated by the formula
 (total cost of construction + % increase from Consumer Price Index ÷ potential population) + (total area of land for building x estimated valuation of community facility land in \$ per unit ÷ potential population) x the occupancy rate as calculated above.

⁸¹ EP&A Act 1979, section 94(3) and (4).

reasonably in levying for contributions and dedications of land. This provision allowed for the intervention of the courts along the lines of their previous approach to conditions which followed the English model as exemplified in Fawcett Properties Limited v Buckingham County Council⁸² and Pyx Granite Co. Ltd v MHLG⁸³, later expanded in Newbury DC v SSE.⁸⁴

" In accordance with a well-recognised rule, cl.40(1) ought to be understood ... not as giving an unlimited discretion to impose conditions which are reasonably capable of being regarded as related to the purpose for which the function of the authority is being exercised, as ascertained from a consideration of the scheme and of the Act under which it is made. This purpose may be conveniently described, in accordance with the expression used by Lord Jenkins in Fawcett Properties v Buckingham CC ... as being 'implementation of planning policy', provided that it is borne in mind that it is from the Act and from any relevant provisions of the ordinance, and not from preconceived general notion of what constitutes planning, that the scope of planning policy is to be ascertained. "⁸⁵

With regard to developer contributions, the courts have continued to recognise the discretion of local councils to impose conditions requiring a contribution from a developer, but has added that where it is exacted to provide a 'public service', within the meaning of section

⁸² [1961] AC 636 at 684.

⁸³ [1958] 1 QB 554 esp. at 572.

⁸⁴ [1981] AC 578.

⁸⁵ Allen Commercial Constructions Pty.Ltd. v North Sydney MC (1970) 20 LGRA 208 at 216.

94, it must comply with the EP&A Act 1979⁸⁶ and must not amount to a fetter on discretion.

" The ambit of its discretion is, however, to be found in the planning and environmental legislation. Relevantly, it is to be found in s.90, s.91 and s.94. In my opinion, a council may not adopt a rule or policy inconsistent with its statutory obligations and duties. Even if the policy can be said to relate to a subject identified by the relevant legislation, a council may not adopt a rule that that policy is to be applied in every case without regard to individual circumstances. "⁸⁷

The Land and Environment Court has frequently been called upon to assess the validity of conditions imposed and has restricted the ambit of both the type and manner of requiring contributions.⁸⁸ It has stated⁸⁹ that a council may not levy for shortfalls in public services and amenities which existed before a development takes place and that there must be a reasonable method for calculating the level of contribution.⁹⁰ The councils must demonstrate that there is a continuity in local expectations which create the demand for a

⁸⁶ Thus, following Hale v Parramatta (1982) 47 LGRA 269; Kivi v Forestry Commission of NSW (1982) 47 LGRA 38; Kavanagh v Baukham Hills SC (1983) 48 LGRA 370 and Dunlop v Woollahra MC (1978) 40 LGRA 218, adopting a policy or imposing a condition which is not authorised by the Act but is covered by its terms amounts to a breach of the Act even if those powers are exercised with no particular reference to section 94. In this case the contribution was not linked with an increased demand for public services.

⁸⁷ Building Owners and Managers Association of Australia Ltd v Sydney CC (1984) 53 LGRA 54 per Cripps J.

⁸⁸ As a sound example of their approach to assessing contributions see Revay & Scott v Leichhardt MC (1981) 2 ELR 25 September 1981; [1981] DEP Digest 2.

⁸⁹ Revay and Scott v Leichhardt MC *ibid.*

⁹⁰ The above illustration of a method of calculation essentially adopts guidelines prepared by the Department of Environment and Planning produced after this judicial pronouncement. Department of Environment & Planning circular 23, issued under section 117 of the EP&A Act 1979, 14 October 1981.

particular facility and they will not be considered to have acted reasonably if they levy by way of condition for a facility which has no historical precedent in the area, unless they can establish the need by research.⁹¹

In Ligora Pty.Ltd v Leichhardt MC the Land & Environment Court held that in assessing the likelihood of an increased demand for public services or facilities the court, like the council, could take into account all of the circumstances surrounding the development including 'their experience and knowledge of the realities of land development.' The demand must arise from the area in which the development falls, and while the councils decide the boundaries of areas they may not, for example, be able to take into account demands that may arise as a result of an adjoining industrial area development.⁹²

The Department has included these restrictions in circulars and has gone even further by stating that councils may not levy for services or amenities which are the responsibility of other areas of government, such as health and education. Nor may they levy for services which fall within the ambit of federal government responsibilities. Moreover, contributions can only be demanded for capital expenditure, rather than recurring expenses on the basis that section 94 implies this by requiring monies received to be held on trust.

⁹¹ See eg. Daniel Callaghan Pty.Ltd v Leichhardt MC Land & Environment Court, Cripps J. 27 January 1981; Quota Corporation v Leichhardt MC (1981) 45 LGRA 319; Rockdale MC v Tandel Corpn. Pty.Ltd. 34 LGRA 196 per Glass JA; Bartolo v Botany MC Land & Environment Court, 23 January 1981; Harrison v Leichhardt MC Land & Environment Court 5 February 1981; Revay v Leichhardt MC Land & Environment Court, 20 March 1981.

⁹² This seems likely in view of the wording adopted by DEP circular 23 on this point.

" the exact demand for recurrent expenditure rising from a development would be almost impossible to quantify and therefore difficult to justify as 'reasonable '. " ⁹³

This interpretation of section 94 is in fact somewhat tenuous in that monies could equally well be held on trust to be applied to running costs as they could to capital expenditure, and difficulties in calculation could be overcome by limiting the period of projected costs. It is, however, in line with the general approach of limiting local powers under section 94, which the circular itself expresses as a reaction not only to the courts but also to the lobbying of developers as to the excessive levels of contributions required. It was clearly also a part of the Department's concern that demands for contributions were leading to an increase in the market price of housing⁹⁴ as the result of developers simply passing on the additional expenditure on costs.⁹⁵

The validity of these concerns have been questioned⁹⁶, particularly from the point of view of a direct relationship between the costs of development and the price of housing. While the process of development control, building standards, time delays and developer

⁹³ DEP circular 23, paragraph 3.

⁹⁴ DEP Circular 23, paragraph 7: "The implications of the section for development costs and ultimate costs to the consumer need to be carefully evaluated. Any increase in development costs to the consumer as a result of contributions under section 94 must be weighed against the wider community concern about access to housing".

⁹⁵ This was confirmed by the developers interviewed who included a representative from the largest, and quasi-government, housing corporation, Landcom and a representative from BOMA.

⁹⁶ See "Local government and the Costs of Housing " (1982) Local government Bulletin, July, pp.11-14 for a discussion specifically related to Sydney and section 94 contributions.

contributions may be connected with the cost of housing to the consumer, these factors also have to be placed in the context of the market in which they occur. When this is done the extent of the impact of one of those factors, namely developers contributions, is more difficult to assess.

Certainly to insist that a direct relationship can be found between those costs and the ultimate price to the purchaser is too simplistic and there is no grounds for supposing that the removal of those contributions would lead to a reduction in housing costs. In examining the market forces at work the supply and cost of land are inevitably considerations affecting the overall value of land, as are the availability of finance, interest rates, the current demand in the area, the cost and availability of materials and of labour. All of these factors (the list is not intended as exhaustive but merely indicative of the complexities involved) are similarly influenced by, amongst other imponderables, levels of employment, foreign investment, the strength of the dollar and other aspects of government policy. To isolate developers contributions as the cause of increases to housing costs seems somewhat naive and short sighted.⁹⁷

Circular 23 also stated that contributions should not be required for services and facilities not needed for 'a number of years'. This created considerable difficulties for the councils as they must only levy for facilities and services which are likely to result from the development and this necessarily involves projections as to when the need for that facility or service will arise in the context of the area's

⁹⁷ See *ibid.* for a summary of the submissions made to the Committee of Inquiry into the Costs of Housing, 1982, which take a similar approach to the issue.

development. This should determine the timescale of facilities, rather than the time of implementation, particularly as several developments may be making contributions towards the same facility.

The basis of the Department's view of 'reasonable' contributions under section 94 is not dissimilar from the English approach to conditions generally⁹⁸ and closely resembles the approach of the courts before the EP&A Act to conditions requiring a contribution.⁹⁹ The council must demonstrate a relationship between the contribution and the development in terms of physical location, time of implementation and the needs generated. As part of this they suggest that it would be unreasonable to use section 94 for contributions on certain types of development which should be left for individual negotiation.

" ... the section requires that the level of contribution be 'reasonable', and that it be used in a way that satisfies the demand created by that development. This is critical in the location of amenities and services and the timing of their provision. In general, it would be 'unreasonable' if the service or amenity was not provided in a location that was related to the development or its provisions were unduly delayed. ... The section was conceived in the context of conventional development applications, and there has been some question of whether it is the best or only method of dealing with demands for services and facilities generated by major resource based developments. For the time being, these cases will need to be individually negotiated. "¹⁰⁰

The approach by the Department and by the Court to calculate contributions has been to equate the methods used for assessing the need for physical infrastructure with those used to determine responsibility for social planning. Prior to the EP&A Act 1979 local

⁹⁸ See DOE circular 26/1979, London: HMSO.

⁹⁹ See above section on the background to the legislation.

¹⁰⁰ DEP Circular 23, paragraphs 6 and 9.

councils did levy for contributions from developers under certain other statutory provisions, but these contributions were, apart from those levied for public reserve on a subdivision application discussed above, limited to the provision of physical infrastructure such as roads and drainage systems. By including within the group of legislatively approved conditions levies for a wide range of social infrastructure, the legislation has implied that they may all be treated in the same way.

At one level this is correct, but it places a burden upon the councils which they are not necessarily equipped to deal with. Most significantly, the policies and plans which have been produced give no indication of the social planning goals sought to be achieved through section 94 contributions¹⁰¹: the classes and groups of people the council intends to serve, the needs of those classes, how the council will meet those needs and a measure by which to assess whether the goals have been achieved are all absent.

The effect of this is to leave the prediction of social needs to the same mechanisms as have existed for predicting the physical requirements of a development. The cost of building the facilities and contributions towards those costs can be levied in the same way as for physical infrastructure but assessment of those needs remains ad hoc insofar as it represents the views of the councillors, planners, developers and those groups who have a voice in local affairs through active participation. Consequently, those other groups and individuals

¹⁰¹ eg. The Penrith chief town planner's report, given on 18 September 1984, on section 94 contributions for a release area in the western suburbs known as South Werrington referred to an intention to provide "a blend of facilities which will satisfy a large cross section of the population " but no reference was made to the composition of the population or how their needs were expressed or assessed.

who are not represented are in exactly the same position as they were in previously unless there is a decision to target them as persons who should be catered for within community services.

By restricting the types of services and facilities to those which have an historical precedent, unless the council can demonstrate through research that another type of need has been established, a social welfare approach is made financially and technically onerous to the council. Similarly, the framework of local planning has exacerbated this. Local plans in NSW are quite different from their English counterpart in that they usually cover smaller areas and are highly specific on land use details: they are not an expression of policy aims and objectives, but zoning plans with the inclusion of building standards, such as the requirements which must be fulfilled for 'medium density' housing developments. Also, since the early 1970's there has been a policy of transference of state and federal responsibilities for social and community facilities to local government. The commitment of state and federal government to provide local funding for research into these 'new' functions, however, has been limited and intermittent. As a result the planners administering the system are largely inexperienced in making assessments of the needs of an area and the effectiveness of existing services.

Developments in the social sciences have indicated various methodological approaches that could be taken to produce a social profile of an area. These may not necessarily produce accurate recipes for social harmony but they do prompt the effective collection of information. By producing inventories of existing facilities and their use and users, demographic census data, various types of questionnaire and discussion groups with different groups the councils

could amass a database from which to work. Also if this were linked to a definition of the interests intended to be served by the services and facilities and an acknowledgement of those groups who are not participating in the process, some progress would be made. However, the time, expense and skills required for such research is not evident within local council administrations and finance from state government has not been forthcoming. In this context the usefulness of a simple set of calculation guidelines is questionable when they are applied to inadequate assessments of need.

" Much of the argument for developing a set of standards as guidelines has revolved around the need for a convenient and efficient system of calculating the basis of section 94 contributions and an attempt by the state government to limit the dollar value of the contribution devoted to such community facilities. While there is much to be said for a convenient system, there are obvious limitations to its usefulness if it does not reflect the real community needs that it is expected to serve. The desire to arrive at a simple formula before local government and the appropriate state government departments have had sufficient time to ascertain such 'real ' needs, merely undermines the usefulness of section 94. " ¹⁰²

Moreover, the limitations placed upon local councils by circular 23 went some way towards actually undermining the role of the council to provide community and social facilities. For example, by the indication that section 94 could not be used to levy for recurring expenses it placed the financial burden of maintenance and running costs on the council, or an organisation running the facility or in the private sector generally. This would necessarily affect decisions on the extent of services and facilities levied for particularly as circular 23 specifically requires the councils to take into account sources of

¹⁰² Dalton, P. "Developer Contributions under Section 94" (1982) Local Government Bulletin October pp.16-19 and November/December pp.36-40, at p.38.

funding. Also, by opting to restrict councils' discretion the Department has imposed controls in the interests of centralised rather than local concerns, which represents some hypocrisy within the system as a whole.¹⁰³

At the end of 1982 the Department of Environment and Planning issued a further circular on the subject of section 94 contributions, for particular application to contributions towards community amenities and services on the subdivision of broadacres for residential development.¹⁰⁴ These guidelines imposed a maximum limit on the amount which could be required from a developer for these purposes and reasserted that such a contribution must be for capital costs only and for local amenities or services required within five years of initial settlement of the area. The maximum contribution was expressed as \$500 per dwelling towards non-land capital costs plus the local market value, at the date of consent, of 4.8m² per dwelling of serviced land.

The circular went on to encourage the formulation of a Social Plan as part of the environmental study carried out for release areas, and this plan should identify the population, the demographic characteristics, expected amenities and services and the standard to which they should be built (which should be moderated with a view to keeping the level of contributions down so as to lessen their impact

¹⁰³ At the time of the study proposals for the amendment of section 94 were under discussion which gave the minister the power to specify the type and standard of facilities and services which could be funded by contribution, generally or in relation to specific cases or classes of case, which would essentially leave the local councils purely as collection agencies and managers. See Environmental Assessment and Planning (Amendment) Bill 1985, section 94A.

¹⁰⁴ DEP Circular 42, issued November 15, 1982.

on the cost of housing). It also stated that section 94 contributions should be used to avoid perpetuating existing inequalities between areas and could include construction works by the developer as contributions 'in kind'. The circular also provided a list of services and amenities to which contributions could be applied¹⁰⁵, and so specifically isolated the use of section 94 to basic local facilities.

THE IMPACT OF THESE PROVISIONS¹⁰⁶

In order to assess the effect of introducing a system of contributions implemented through the use of conditions and requiring a formalised and public method of assessment and application, two areas of Sydney were chosen for closer study. The basis for selection was the extremes which each council represented in their treatment of section 94 and the results may well not be transferable to other, perhaps more average, areas. The purpose, however, is to examine the actual use of these provisions, not to establish their general usefulness or otherwise, but to suggest their inadequacies in areas with opposing characteristics.

From all the literature produced on section 94 contributions it is clear that the section is not systematically applied in Sydney and that there are wide disparities between the level of contribution and the

¹⁰⁵ DEP circular 42, paragraph 16 which listed community based activities and information, child-care programmes and activities, youth groups and activities, supervised play by young children and sporting activities.

¹⁰⁶ The content of this section is largely the result of a series of interviews conducted in Sydney in March to May 1985 with persons involved in the development industry, including planners, state government representatives, public and private developers and development consultants.

type of services and facilities levied for.¹⁰⁷ It is also clear that 'negotiation' still exists within the system and that the councils experience high levels of uncertainty and financial difficulty. These conditions exist in both the areas¹⁰⁸ selected: namely Blacktown, one of the western suburbs responsible for development in the urban release areas and making extensive use of section 94 contributions, and the City of Sydney where development is mainly commercial, sites are limited and section 94 is basically unused.

BLACKTOWN CITY COUNCIL

The council conducted environmental studies and produced a number of local environmental plans, all requiring developer contributions and including a fairly long list of their demands.¹⁰⁹ The power to levy contributions under section 94 effectively extended the types of infrastructure which could be levied for on a subdivision:

¹⁰⁷ This point is made repeatedly in a study undertaken by Martin Payne for the Local and State Governments Working Party on the Impact of the Urban Development Program on Local Government Finance in March 1985. Unpublished.

¹⁰⁸ Some of the mechanisms for negotiation which exist elsewhere in NSW were not evident in the areas selected. For example, in Gosford, an area to the north of Sydney, the Planning Scheme Ordinance contains a clause which enables the council to enter into agreements with developers for the payment of drainage and sewerage contributions. Consequently, this local mechanism is used, rather than section 94 presumably to avoid the constraints imposed on its operation. Other areas have similar provisions. See unpublished papers presented at the Workshop on Section 94 Contributions, University of NSW, Sydney, July 1983.

¹⁰⁹ A typical example is given above.

previously only drainage and open space¹¹⁰ were covered and by including community facilities, roads and embellishment of open space the council considered their powers had been increased. Consequently details were included in development control powers for the basis of levies on all of these new areas.

By the time the EP&A Act 1979 came into operation local councils had no flexibility to determine their own local rates on property due to rate pegging measures introduced by state government in 1978. Borrowing was also strictly controlled at a high interest rate. In addition the Land Commission of NSW (Landcom), a government agency concerned with the acquisition and development of land to provide a non-profit making housing market¹¹¹, was set-up. Under the legislation creating it¹¹² once Landcom purchases land no local rates are payable on that land until the housing is occupied: consequently it represented a further reduction in local revenue. The extension of contributions represented a direct method of compensating, in part, for the reduction in local government finance at

¹¹⁰ eg. Under section 333, Local Government Act 1919 local councils must take into account, inter alia, provision of open space in assessing development applications: the usual rate to be acceptable was 7 acres per 1000 head of population, assessed on a regional basis and divided for each development within the release areas to dedicate the land or, if impractical, make a monetary contribution.

¹¹¹ Landcom was formed in 1976 under the Labour Party government to try and stabilise the housing market which at that time was subject to dramatic fluctuations. Initially they were intended to have about 30% of the low-cost housing market, but in fact they have around 90%, with very few private developers who can compete. They basically provide 3 levels of housing: low-cost which are sold around cost, middle-level which have a slight profit margin to allow the private sector to compete and full-cost which have the same profit margin as the private sector. Profits on the latter 2 are intended to subsidise and generate development at the lower end of the market.

¹¹² The Land Commission Act (NSW) 1976.

a time when responsibilities for social services and facilities was being shifted from state and federal government to local councils.¹¹³

This balancing system has not worked well in that councils, including Blacktown, have not been able to raise sufficient resources from contributions and state grants to meet their expenditure on release areas, particularly because of the large budget required for sub-arterial roads and district level community facilities, both of which have fallen outside of the realm of developer contributions.¹¹⁴ In addition, Blacktown has interpreted the meaning of 'reasonable' contributions in a broad sense so as to keep costs of maintenance, which would fall on the council, as low as possible. The Department of Environment and Planning on the other hand has taken an increasingly narrow view of the term 'reasonable', as reflected in circular 42.

Much of the release land in Blacktown has been developed by Landcom who do pass on the costs of contributions to the home purchaser as a part of their mandate to provide housing at the lowest practicable price.¹¹⁵ Their interpretation of a 'reasonable' level of contributions has been quite different from Blacktown's in that they

¹¹³ See WSROC 4th Report cited below at note 121 for an analysis of spending and funding patterns in local government. "The changing responsibilities of local government in Western Sydney have not been matched with additional sources of revenue except for Commonwealth revenue sharing. In fact, the last decade has been characterised by an increasingly restrictive financial environment" p.51.

¹¹⁴ Research to establish this was conducted as part of the report by Payne (1985) cited supra note 107.

¹¹⁵ Landcom 1983 Annual Report, p.12 states "Water and sewer contributions and contributions to local government authorities under section 94 of the Environmental Planning and Assessment Act are the major items increasing development costs. It has become readily apparent that the public will have to accept a much higher land purchase price, as a result of the cost increases mentioned above".

were anxious to keep costs to a minimum.¹¹⁶ They provided contributions in accordance with circular 42 but they have also negotiated over the level of dedication of land and by offering to provide work in kind. As a state body Landcom are capable of securing competitive rates from contractors and, consequently, this latter device represented a substantial saving for them. On their part, Blacktown was only concerned with the receiving the benefit of the works rather than imposing a particular cost on the developer.¹¹⁷

The negotiations for these concessions were not, however, usually done directly but through the Department of Environment and Planning¹¹⁸ or through making submissions to the council before a local environmental plan was submitted. Landcom did experience problems with some councils withholding planning consents in response to their failure to pay contributions. In these instances, the delays and expense of litigation dissuaded them from pursuing the matter

¹¹⁶ In 1976 the cost of a housing unit in St Clair in the Western suburbs developed by Landcom was around \$10,000, which included drains, roads and open space: an equivalent unit in 1985 with increased contributions would be \$25,000. Source: Interview at Landcom, 1 May 1985.

¹¹⁷ Source : Interviews with Philip Turner, Technical Assistant to the Chairman of Landcom, on May 1, 1985 and with a planning officer at Blacktown city Council on April 29, 1985.

¹¹⁸ The EP&A Act 1979 brought Landcom under the same procedures as private developers but conditions could not be imposed on a consent for a development by a public body without the approval of the Minister of Planning and Environment. Conditions suggested by Blacktown in the early days of the Act were approved but by 1985 the Minister would not accept any conditions which did not accord with circular 42.

before the Court even though the forty day limit imposed on councils for issuing a decision on applications had expired.¹¹⁹

Landcom had been criticised for building, prior to 1980, large housing developments without adequate provision for social facilities. These wastelands, like Campbelltown and Mount Druitt, were specifically addressed by section 94, but in Landcom's view the cost was too great to the first time buyer onto whom the burden was passed. Clearly the value of property in an area that has facilities is likely to be higher than in an area that does not so additional costs may be recouped on resale¹²⁰, but their view was that section 94 was intended to benefit the community but it was being used by council's to make that same community suffer high housing costs.

The main complaint was against the standard of works being done in that they were considered unnecessarily high to accommodate the financial problems of the councils themselves. For example, overhead power cables are unattractive and require more maintenance than their underground counterparts, but are substantially cheaper. This was put down to the high expectations and ideals of planners within council departments rather than actual preferences expressed by local residents. On the opposite side of the coin, Blacktown planners saw their expectations as realistic¹²¹ and were eager to avoid the problems

¹¹⁹ This was perhaps particular to the time at which the interview was held (May 1985) as Landcom were expecting revised guidelines from the DEP.

¹²⁰ This of course does not address the problem of the level of financing available to the intended purchasers by way of mortgage, although the state did run some home financing schemes.

¹²¹ Between 1979 and 1984 their total expenditure had increased by 69.3% and over the same period expenditure on community services had increased 283%, town planning by 171% and road expenditure by 3.4% suggesting a change in spending patterns said to be the general

created by the backlog on community facilities amassed before section 94 was introduced.¹²²

By 1985 the conditions attached to a Landcom consent (which required approval by the Minister of Environment and Planning) did reflect circular 42, while the level of contributions assessed for other developers would often include matters which took them above the stated limits.¹²³ It does seem that the reasons for this disparity reflect the strong position of Landcom within the development system, rather than any differences in the needs generated by individual developments.

From studies carried out by Blacktown council¹²⁴ it is apparent that the level of contributions has been inadequate to meet the costs of providing community services and facilities. In 1984 they had A\$12.9 million as estimated expenditure over the following 4 years for

trend in the region. See Western Sydney Regional Organisation of Councils, 4th Report on Local Government Finance and Commonwealth revenue Sharing in Western Sydney, A Submission to the National Inquiry into Local Government Finance, November 1984. Sydney:WSROC p.10.

¹²² This was estimated at \$180 million in 1982 at which time Landcom were planning to develop 100,000 lots over the following 5 years so their level of contributions was significant: see "Local Government and the Costs of Housing" (1982) Local Government Bulletin, July, pp.11-14.

¹²³ Payne, M. Blacktown City Council: Finance and Implementation Study for Plumpton, Rooty Hill and Minchinbury Release Areas, July 1982, Sydney: Blacktown City Council. He recognises 3 levels of contributions: Full (sought by the Council in accordance with their assessment of needs), Partial (where council is unsuccessful in levying for drainway land and land for district level community facilities) and Traditional (for land for open space, with basic improvements and drainway improvements plus the normal local subdivision roads, drains and other infrastructure provided separately from s.94).

¹²⁴ Payne (1982) *ibid*; Blacktown City Council Report to the NSW Local Government Grants Commission, 1983/1984, Sydney: Blacktown City Council.

facilities associated with Landcom projects (including roads, drainage, open space and local - not district level - community facilities). \$7.3 million of those costs were internal to sites, and the remainder were external, but considered necessary. After the levy for contributions in accordance with circular 42 there was an expected deficit of \$4 million, and the council studies indicated that rate income would be insufficient to service necessary loans to meet these costs. The problem was exacerbated by the inability to levy for existing needs, making it necessary to build facilities after development due to lack of funds.¹²⁵

From the data collected from the major developer in the area and the planners at the council, it was clear that their perspectives differed significantly and their view of what was reasonable was similarly diverse. The state of the legislation was such as to require contributions to be made but the method of collection and, to a lesser extent, the range of those contributions was determined according to the distribution of power in negotiating the outcome. The restrictive approach of the courts and the DEP affected that distribution and the burden of the contributions was not necessarily borne by the developer but by the home purchaser and the council itself through maintenance costs. The private development sector were also strongly opposed to the extended use of section 94 contributions because it made them even less competitive with Landcom and did not remove the

¹²⁵ Blacktown City Council Report to NSW Local Government Grants Commission, 1983/1984 *ibid*.

uncertainty of development because of the wide variations between different local councils.¹²⁶

The amendments proposed by the Environmental Planning and Assessment (Amendment) Bill 1985 were tabled over a year after they were first proposed and were directed mainly at third party rights of appeal, but did deal with section 94 contributions. The most significant amendment gave the Minister the power to direct local councils on the means of calculating contributions, maximum amounts which may be levied and the types of services and amenities which may be included in the contribution. The councils could not then impose a condition which did not comply with these directions, thus giving them the force of law. The provisions regulating the type of contribution were also altered so as to include dedication of land in lieu or other 'material public benefit'.

These proposed reforms clearly represented a compromise between the Minister of Planning and Environment, the Minister for Housing and the financial demands of local government. By the stage they were tabled the use of section 94 could not be removed without providing increased finance to local councils through other (state or federal) sources, but the Ministers also required increased mechanisms of control over their use to restrain the councils. In all they are a further step towards containing discretion and are addressed not towards the provision of the 'benefit' but towards devising a mechanism of payment and control which will not upset the functioning of the market.

¹²⁶ Interview with James Dean, Chairman of the Urban Development Industry Association, April 1985.

SYDNEY CITY COUNCIL

In 1971 the Conservative Civic Reform Council produced a strategy plan for the City of Sydney which was intended to herald a move away from physical land use planning and towards including other aspects of local government into the planning process. This plan was revised in 1974, 1977 and again in 1980 as a method of updating its provisions although the principles remained the same. The plan included within it a system of incentives to include shopping, residential, social facilities, preservation of historic buildings, pedestrian walkways, open space and other 'benefits' within development schemes and, while the 'benefits' sought fluctuated to some extent depending upon what the Council identified as desirable, the system remained intact.

" Policy 3 - Give incentives for many diverse types of profitable development, while requiring developers to contribute to the provision of public facilities. ...

3B. Prepare and adopt Floor Space Ratio and Development Control Code for each precinct, generally reducing the base ratio, but granting bonus ratios in return for action by developers to :

- * provide a diversity of uses most appropriate for each precinct
- * construct and, if required, maintain, free of cost to Council, specified public facilities or amenities to approved standards of location and design
- * contribute financially to Council funds for the provision of specified public facilities and amenities. " ¹²⁷

These incentives operated through floorspace bonuses: ratio codes were produced¹²⁸ which identified the floorspace ratio on sites in the

¹²⁷ Basis of the code cited *ibid*.

¹²⁸ The Council of the City of Sydney, Development Control and Floorspace Ratio Code, 1981.

city and bonuses available for each site. The developer could earn bonuses by including certain types of development within the scheme and there was a maximum overall, usually of 12:1. Some items could be provided away from the development site, for example in the case of preservation, and the bonus earned attached to the commercial building. Each bonus had its own maximum.

Alongside this system was a car parking code, whereby each development had to provide a level of parking spaces. If it was undesirable to provide them within the building, the developer could pay a contribution to a car parking fund which would then be used by the council to build car parks in the peripheral area around the central business district, identified in the plan for car parking use. The level of contribution was assessed on the basis of a set amount¹²⁹ multiplied by the number of car parking spaces appropriate to the floorspace of development.

Negotiations would take place on these bonuses so as to provide a scheme acceptable to the council. Essentially it was intended that the environmental impact of proposals would be assessed by the Council and any unnecessary addition to the scheme would be deleted, but it seems that this rarely occurred and the developer usually built the maximum floorspace.¹³⁰ The final scheme could also involve the payment of money to the council as contributions to car parking and

¹²⁹ This amount was a subsidised figure which appeared arbitrary but in 1985 calculations were underway to relate this figure to the cost of construction: it would still be a subsidised flat rate figure, but it would be one which had a logical basis.

¹³⁰ A technical unit was established for this purpose and it was used on larger schemes but many recommendations were not adopted. Source: Interview with Martin Halliday of Strategic Planning Unit, Sydney City Council, April 3, 1985.

the maximum floorspace ratio would form part of the planning consent, which would also detail the carparking and other provisions. This form of condition has been successfully challenged where it related to carparking which was provided some distance from the development,¹³¹ but generally the legality has not been litigated because the developer merely paid the required amount and received the consent.¹³²

In the two other cases, both heard in 1983, where the court has been called upon to examine the operation of Sydney City Council's car parking code, the levy was disallowed. In Ilenace v Sydney CC¹³³ the A\$90,000 contribution towards parking paid by the developer of a 24 two-bedroom apartment conversion scheme in 1981 was ordered to be repaid with interest and costs on the ground that its imposition was discriminatory and unreasonable, particularly as the council had no plans to build car parking proximate to the development.¹³⁴ The council had issued development 'on the understanding' that the contribution would be paid but the conduct of the Council had confirmed that this was in fact a condition. In Michael Davies v Sydney CC¹³⁵ the court went further and disallowed a parking

¹³¹ See Greek Australian Finance Corporation v Sydney CC (1974) 29 LGRA 130 discussed above under Background to the Legislation. In a later case under section 94 a council was required to spend the contribution towards car parking within 80 meters of the site. Williams v Blue Mountains (1981) ELR5.

¹³² See Sydney Morning Herald 3 & 5 July, 1983.

¹³³ (1983) ELR 0444.

¹³⁴ This decision follows that of Woolworths v Ku-ring-gai 10 LGRA 177 discussed above. According to the Sydney Morning Herald, 5 July 1983, the decision to allow the consent to fall along with the invalid condition led to the developer later agreeing to pay a contribution in order to obtain a second consent.

¹³⁵ (1983) ELR 0469.

contribution considered meaningless on a development which was some distance from proposed car parking sites,¹³⁶ but allowed the development consent subject to a condition requiring a contribution towards conducting a feasibility study to determine if car parking could be provided. An additional condition was added which required a further contribution to car parking which the Council could retain if they provided car parking facilities to serve the development and other commercial entertainment centres in the vicinity.

In 1980 the council had come under a different political leadership, the Labour Party. They administered the same system of bonuses but added a developer contribution to a low income housing fund. As indicated above,¹³⁷ this was done on a political platform and coincided with boundary changes including residential areas into the City jurisdiction. Until it was held invalid by the Land and Environment Court on the ground that there was no local environmental plan to demonstrate a nexus with the development,¹³⁸ this levy was added to all developments valued at over \$200,000 and was set at a flat rate of 2%.

Within the operation of the bonus system the Council also received direct benefits from developers. For example, on one scheme it was suggested that certain floors within an Art Deco building in Sydney be leased to the Council on a peppercorn rent in return for

¹³⁶ Following Sahben Holdings Pty Ltd v Waverley MC (1982) ELR 0192.

¹³⁷ See section on Background.

¹³⁸ See BOMA v Sydney CC supra note 2.

floorspace bonuses.¹³⁹ It has also been suggested by aldermen from both major parties that the car park fund has been misused in that it has been applied to the Council's general revenue or to maintaining existing car parks, rather than for construction of new ones.

At the time this study was conducted certain reformulations were taking place to tighten up the system of bonuses and incentives, particularly to establish a relationship between development sites and the location of car parks built with the fund contributions and to demonstrate the reasonableness of demands made. Car parking precincts were defined in the Sydney Plan which went on public exhibition in mid-1985 for this purpose, and it was also suggested that section 94 be used for administering the contributions ^{to} the fund. At this stage, however, there was no intention to replace the floorspace bonus system with contributions under section 94, but rather the council would operate them alongside each other. The Council were carrying out environmental studies to help establish the content of the bonus system but it would remain a matter for negotiation of what was actually included within any particular scheme.

The system within the City of Sydney was significantly different from that operated at Blacktown: the usefulness of section 94 contributions to each area was affected by the type of development, the bargaining strength of the council and the historical background to its approach to contributions. On one level there was a degree of certainty in that in both areas the councils produced detailed indications of what would be expected on a development application: however, there was no uniformity between different areas and there

¹³⁹ Source: Interview with Alderman Bonthorne (Civic Reform), March 22 1985.

was an element of negotiation still present even where section 94 was used extensively. The legitimation of planning gain by this method in Sydney presented numerous problems and over the first five years of its operation detailed and restricting guidelines were issued on two occasions and steps were taken to amend the legislation itself so as to more effectively accommodate further restrictions on local discretion.

Although in Sydney the issue of contributions has attracted a great deal of public debate, the focus has not been on the extent or type of facilities provided, but on the aspect of who should pay for them. This is partly the result of the lapse of time between commencing an environmental study, producing a local environmental plan, issuing consents on the basis of contributions and actually amassing sufficient funds for the council to build the facilities involved. Blacktown, considered to be a leader in this area, had not completed any community buildings by 1985. Although the concept of providing these facilities and services seemed to be accepted as a valid purpose for planning control, there was little concern for what they should actually be or what parts of the 'community' they should serve. Certainly concepts of the existence and identity of a 'community' were not developed, nor were the methods for ascertaining their needs.

CONCLUSIONS

The EP&A Act 1979 has to a large extent failed to regularise development contributions and it is still possible for local councils to negotiate a levy with developers which falls outside of the constraints imposed by section 94. There is little consistency between local councils in the range of facilities for which section 94 contributions are sought and this uncertainty is compounded by the obligation on local councils to identify future likely needs of the area. Local disparities in the type and extent of needs, and the cost of satisfying those needs, inevitably adds to uncertainty in the application of section 94. The requirement upon local councils to justify contributions has gone some way towards mitigating this uncertainty, particularly as methods of investigation and computation have become more significant. This, however, has not necessarily led to the fulfillment of actual local needs but has given councils a method of raising revenue within the limits prescribed by state government and the Land and Environment Court.

In interpreting the scope of section 94, and, therefore, the scope of local council discretion, the court has treated it as a particular type of condition which may only be imposed if the requirements of the common law and the statute are met. Despite declarations to the contrary,¹⁴⁰ the court in doing this has built upon pre-EP&A Act cases and its decisions have interlocked with those earlier cases. The

¹⁴⁰ For example, in Ligora Pty Ltd v Leichhardt MC (1982) ELR 0185 the Chief Judge warned against drawing comparisons between the earlier cases and section 94 decisions: "where it is necessary to construe for the first time a section of a new statute which has had no counterpart in past or existing legislation, the authorities provide little guidance .."

result has been not to devise a new approach to local council powers, but to respond with more of the same. Thus, before examining the details of a section 94 condition the court will establish whether the condition imposed is valid and a contribution is warranted. The condition must be imposed for a planning purpose, must relate to the development and be reasonable.¹⁴¹

As far as the first of these requirements is concerned, the development must relate to at least one of the heads of consideration detailed in section 90,¹⁴² which includes any State Environmental Planning Policy. This clearly enables the council to take into account a very broad range of influences upon planning, but it also provides the state with an additional method of exercising control by restricting, or interfering with, local planning decisions. The purposes for which section 94 has in fact been used are mainly confined to contributions towards open space or the dedication of land for a specific use. There have been some examples of more imaginative use of the section, such as upgrading existing infrastructure,¹⁴³ a traffic planning study,¹⁴⁴ the dedication of land above a car park,¹⁴⁵ but such instances are rare.

The court's approach has also been generally conservative when deciding upon the relationship between the development and the

¹⁴¹ See the test laid down in St George Building Society v Manly MC (1982) ELR 0228.

¹⁴² See note 11, above.

¹⁴³ Bryant v Wyong MC (1983) ELR 0227.

¹⁴⁴ Michael Davies v Sydney CC (1983) ELR 0469, discussed above.

¹⁴⁵ Frank Kolos v Wyong SC (1981) No.10540 of 81, unreported.

contribution. The test for a causal nexus under section 94 does concentrate upon an increase in the demand for an amenity or service in the area of the development, but the effect is essentially the same¹⁴⁶ as the pre-EP&A Act test which required a demonstration of a detrimental effect on existing amenities. Indeed, in some new cases the court has included a consideration of decline in amenities¹⁴⁷ and has limited the much looser wording of the section¹⁴⁸ which sets out that the council must be 'satisfied' that the development is 'likely' to increase demand 'in the area'.

The physical nexus, given statutory force by this latter phrase, has in some cases been construed as requiring the contribution to be in the immediate vicinity of the development.¹⁴⁹ The approach of the court has not consistently been so restrictive, but the need to establish a sufficient connection in physical terms has been stressed as a fundamental requirement under section 94. Circular 23 certainly advocated such a close connection by stating that a contribution would not be considered reasonable by the Department of Environment and Planning if it were not in a location related to the development. This clearly represents only one possible interpretation of the section, and largely reiterates the approach taken before the EP&A Act in Greek Australian Finance Corporation v Sydney CC.¹⁵⁰

¹⁴⁶ See, for example, Henbury v Parramatta CC (1982) ELR 0003.

¹⁴⁷ For example, Michael Davies v Sydney CC (1983) ELR 0469 discussed above.

¹⁴⁸ See Ligora Pty Ltd v Leichhardt MC (1982) ELR 0185.

¹⁴⁹ For example, Letola Pty Ltd v Leichhardt MC (1981) Legal Digest 5, ELR11; Henbury v Parramatta CC (1982) ELR 0003.

¹⁵⁰ (1974) 29 LGRA 130 discussed above.

Certainly section 94 does require the development to cause an increased demand on local facilities but it does not follow that the actual amenities provided by the contribution have to serve the particular development. For example, if a new residential development were to place extra demands upon existing recreational space and the most suitable area for providing additional recreational space was some distance from the development the wording of the section could still allow a reasonable levy to be made to ease the extra demand. It seems, however, that the Department and the Court are reluctant to allow section 94 to be used in this way and have preferred to restrict its operation according to distance requirements between the development and the contribution.¹⁵¹

The court has further restricted the operation of the section by requiring a temporal nexus between the development and the contribution. Section 94(3) and (4) require the contribution received to be spent, or the land dedicated to be made available, within a reasonable time so as to ensure that local residents moving into the development will benefit from the amenity provided. It also, however, has a dramatic effect upon councils' expenditure programmes by preventing them from amassing sufficient funds to build the more significant community facilities. By making this requirement, which

¹⁵¹ For example, with regard to the provision of open space the court has imposed distance restrictions on the use of contributions eg. Tomaszewski Associates Pty Ltd v Leichhardt MC (1982) No.10605 Of 81, unreported, noted in EP Case Notes 5 (contribution to be spent within a specified area with defined street boundaries); Morris v Leichhardt MC (1981) ELR2 (where open space contribution had to be spent within 300 metres of the development). The car parking cases also indicate this approach. See Michael Davies v Sydney CC (1983) ELR 0469; Sahben Holdings Lrd v Waverley MC (1982) ELR 0192; Williams v Blue Mountains (1981) ELR5 (where car parking contribution had to be spent within 80 metres of the site) discussed above.

has been fairly restrictively interpreted by the Court,¹⁵² the ambit of section 94 is such that it may be prevented from playing a substantial role in most council's spending programmes.

A trickle of contributions in a newly developed area may be insufficient to make any substantial impact, and this is exacerbated by the Court creating an additional order 'within the spirit of section 94' whereby contributions which remain unspent for a specified period must be returned to the developer.¹⁵³ The effect of this is to limit the use of such funds in the raising of loans. Where the council does not have adequate contributions to build a particular facility, or where there is no land available to be purchased with the contribution, or where the council has no land acquisition programme at all, they will simply run out of time.

On top of this, the level and type of contribution must be reasonable and this point has probably attracted most attention from the Land and Environment Court. The complex test contained in section 94(2)(b) has produced widely divergent results with the assessment of reasonable open space contributions ranging from one hundred¹⁵⁴ to several thousand Australian dollars per flat or townhouse.¹⁵⁵ As a result local assessments for open space have been

¹⁵² The usual period is between three and five years. See Tomaszewski v Leichhardt MC cited *ibid*.

¹⁵³ For examples see Tomaszewski v Leichhardt MC cited *supra* note 151; Mamura v Leichhardt MC (1981) ELR7; Novati Design & Construction v Leichhardt MC (1982) 22 ELR.

¹⁵⁴ Warman v Parramatta (1983) ELR 0326.

¹⁵⁵ One of the highest being A\$3,300 per townhouse assessed in Bartolo, Christian v North Sydney MC (1981) ELR2.

drastically reduced¹⁵⁶ through the application of formula calculations which differ from those applied locally and by the Court allowing discounts for other environmental improvements brought about by the development, such as the replacement of a factory by housing or the inclusion of landscaping works within the site.¹⁵⁷

Looking at the cases overall, it seems that the formula the court uses for assessing open space contributions takes the increase in population created by the development (which may be discounted by the number of persons presently living on the site) and multiplies it by the current ratio of open space per capita and the average land value in the area to arrive at the section 94 contribution (again subject perhaps to a discount for environmental improvement). The overall figure may be further reduced if it fails other 'tests' of reasonableness, one of which is that the contribution resembles a tax or an 'unjustifiable impost'.¹⁵⁸

Moreover, the court has on occasion rejected the formula approach completely and has assessed, on the basis of 'experience' what it considers 'an objective assessment' which seems fair in all the circumstances.¹⁵⁹ In a number of the cases which deal with

¹⁵⁶ In Revay & Scott v Leichhardt (1981) ELR9, DEP Digest 2 the amount sought was A\$194,000 and was reduced to A\$30,000; in Daniel Callaghan v Leichhardt MC (1981) ELR13 A\$387,000 was reduced to A\$30,000.

¹⁵⁷ See, for example Revay & Scott cited *ibid.*; Tomaszewski cited *supra* note 151.

¹⁵⁸ This approach was taken to the car parking contribution in Ilenace v Sydney CC (1983) ELR 0444.

¹⁵⁹ Commercial Freeholds (Sydney) Pty Ltd v Leichhardt MC (1983)No. 10634 of 81, unreported, noted in EP Case Notes 3 (the Assessor considered it difficult 'if not impossible' to accurately determine the appropriate level of contribution by applying a mathematical formula, or to find a formula which could be universally

unreasonable conditions¹⁶⁰ the court has taken the same approach to ultra vires as appears in Hall & Co Ltd v Shoreham-by-Sea UDC¹⁶¹ and R v London Borough of Hillingdon ex parte Royco Homes¹⁶² by viewing the condition as one which no reasonable planning authority would have imposed.

There is undoubtedly some nervousness in the Department of Environment and Planning and in the Land and Environment Court as to the potential impact of section 94. The Department has stated both that the reasonable operation of the section 'is in the councils hands'¹⁶³ and that the Department is concerned as to the overall costs involved. It has then gone on to specify in circulars that contributions should only be levied to cover capital costs and in accordance with the above formula. The court has further held that public reserve contributions cannot exceed the current public reserve ratio per capita for the area, and, consequently, councils in areas with low levels of existing services cannot improve the shortfall with section 94 contributions, but merely preserve the status quo. The end result is an interpretation and application of section 94 which is both restrictive and dependant upon Department circulars and judicial precedent.

applied); See also Cyril Smith & Associates Pty Ltd v Woollahra MC (1983) No.10266 of 83, unreported, noted in EP Case Notes 7.

¹⁶⁰ See especially Henbury v Parramatta CC (1982) ELR 003; St George Building Society v Manly MC (1982) ELR 0228 discussed above.

¹⁶¹ [1964]1 All ER 1.

¹⁶² [1974]2 All ER 643.

¹⁶³ DEP Circular 23, discussed above.

It is true to say that the political and economic nature of the process of obtaining developers contributions through section 94 was far more overt and public in Sydney than the practice of planning gain in London, but this could well be attributable to cultural and system differences rather than to section 94 itself. The section did have the effect of producing detailed information on the financial position of local government and its interplay with the state and federal coffers, and resulted in an active lobbying process between the varying levels. The developers themselves were also very active in this lobbying process and produced reports and literature in support of their case against contributions. This, however, can only be assessed against the background of the form of government in Australia and NSW rather than simply as a product of the enactment of section 94.

Certainly, direct comparisons cannot be made between Tower Hamlets and the Sydney situation, but the similarities between the two are important in illustrating the problems involved with making institutional changes, while leaving the economic situation of the players untouched. The response of the Department of Environment and Planning and of the Land and Environment Court were predictable from the English experience and the model appropriate to both jurisdictions was one of restricting and regulating local autonomy, rather than promoting decentralisation. The financial basis of this was also evident from the reports produced in Sydney and the work done in England on local authority finances: and in both countries local government mobilised mechanisms for promoting self-sufficiency within the structures available to them. The existence of section 94 did not eradicate negotiated planning schemes, nor did it guarantee increased certainty or predictability as to its effect.

PART V : THE CONCLUDING PART

CHAPTER 11: OFFICIAL RESPONSES TO PLANNING GAIN

INTRODUCTION

This chapter critically examines the official responses that planning gain in Tower Hamlets has received, through Ministerial circulars, planning appeals and the courts. The aim is to draw conclusions, in the light of the Tower Hamlets' data, as to the 'system view' of planning gain which may then be put alongside those which may be drawn from this thesis, as briefly set out in chapter 12.

A. MINISTERIAL CIRCULAR 22/83 "PLANNING GAIN"

BACKGROUND: THE PROPERTY ADVISORY GROUP REPORT, 1981.

As indicated above¹ this circular was produced following a report by the Property Advisory Group on planning gain published in October 1981 as a consultative document. That report took the view that planning gain had no part to play in the system of development control and is of 'doubtful legality'. This view emanated from a narrow approach to planning, the underlying assumption of the report being that planning decisions are made by balancing black and white criteria relevant to the particular site without regard to broader considerations. Thus the report draws a distinction between a community facility which is 'essential' to a scheme and one which is 'desirable' and suggests that infrastructure which benefits more than the site itself goes beyond normal planning considerations.

This approach leads the report to conclude that it is difficult to envisage how the conferment of a public benefit could validly

¹ see chapter 2 above.

influence the grant of a planning permission. Applying this to the grant of an office consent, the report proposed that it is beyond the realms of planning to consider the effect the development will have on land values, mix of uses in the area, and so on. Their approach is that the local planning authority should only consider the merits of a proposal in relative isolation² and while the developer may include a community facility to aid the profitability of a scheme, he cannot be required to provide one even if it is necessary to further the aims of the planning authority as set out in a plan or brief. In an article on this report a solicitor and a planner actively involved in planning gain in Tower Hamlets point out (in their personal capacity) the fallacy of this approach.

" ...they talk of planning benefits which go 'beyond the strict consideration of the planning merits of a proposed development'. This misses the point entirely. It is the view of those local authorities who have planning gain policies that consideration of the gain proposed is an integral part of the consideration of the planning merits of the development; only if you take a narrow definition of the word 'strict' - so as to exclude anything which the developer would not propose if his only objective was to maximise his profit - can consideration of the gain not be so regarded. "³

The Report goes on to point out 'exceptions' to their rule against imposing obligations on a developer on the basis of their own definition, that is 'the conferment of public benefit or advantage which cannot be achieved by the imposition of a valid planning

² See the Norton Folgate Appeal discussed below for an opposite view of what amounts to consideration of the planning merits of a scheme.

³ Comment by Mike Dempsey and Adrian Stungo on Planning Gain, Current Topics section (1982) JPL 1-6 at p.4.

condition, or which arguably cannot be so achieved'.⁴ These exceptions cover, first, the situation where the developer must provide infrastructure off the site to avoid a refusal of permission on the grounds of development being premature and second, mixed schemes on a single site which are only acceptable on planning grounds because all elements built together make it so.

These exceptions, as described, essentially make up the core of planning gain schemes in Tower Hamlets if taken together with those schemes falling outside of the definition of planning gain, that is conferring a public benefit or advantage which could be embodied in a valid condition.⁵

" The Group would counsel local authorities to treat these 'mixed' proposals with great caution, whether or not they are preceded by negotiations; and even if they result, wholly or in part, from suggestions made by the planning officers themselves. Although the authority is bound to consider the scheme as a whole, it ought also to examine carefully the planning merits of the separate elements of the application individually. Where the proposed scheme contains an element which is so far contrary to established policy or would be so damaging to amenity that it would, if taken in isolation, be refused outright, the authority should not allow itself to be tempted by the other collateral benefits to grant permission. But where there is no fundamental planning objection and a more even balance between the benefits and the disadvantages it would be legitimate for the local authority to look at the total effect of the scheme as a whole, and grant planning permission if it were satisfied that the proposed advantages outweighed the disadvantages. "⁶

⁴ See discussion on definition of planning gain in the Introduction, above, for comment.

⁵ Such as the requirement to not apply the internal finishes to one element of a development before the completion of another element which forms a valid condition.

⁶ PAG Report para. 7.06

The report does go on to add two conditions on the application of this latter exception: the developer must be in control of the whole site at least until the development is completed and the local planning authority should ensure that the whole scheme is legally enforceable against the developer.

These conditions further illustrate the lack of understanding inherent in the report. Section 52 specifically addresses itself to any person with an interest in land and his/her successors in title⁷ which makes the first condition unnecessary. The second condition merely reinforces the need to use Section 52 agreements rather than conditions on the permission itself to cover the problem of enforcement.

The report, however, clearly is opposed to mixed development covering more than one site and any payment of money to a third party. The logic of this is not clear from the report itself. The restriction on mixed development to a single site (which is not defined) is not justified other than by the fear that 'if the exception goes beyond what is legally inescapable it will be impossible to prevent it from becoming the rule'. There is also an assumption that physical infrastructure can and should be distinguished from social infrastructure.

As long as the sites are related in planning terms there is in fact nothing to prevent the Council from considering the merits of the whole scheme.⁸ In Tower Hamlets it could be argued that the complex

⁷ Section 52 (2) TCPA 1971

⁸ Although it is accepted wisdom that conditions will be invalid if they relate to development outside of the site or of other land in the control of the developer, without any caselaw specifically to this effect.

land ownership patterns, the propensity of small sites, the diversity in age and condition of existing buildings and the range of land uses make it impossible and undesirable in planning terms to rely upon comprehensive development of single sites. Similarly if the purpose for which the payment to a third party is made is related to the development the blanket objection is not clearly justified. In this sense the payment of money is not the gain but is the method by which a gain is achieved.⁹

Without these reservations the report could have a profound effect on Tower Hamlets' office policy. For example, the Christ Church schemes, Paradise Row, the shopping centre at Gardiner's Corner, the improvements at Whitechapel Art Gallery funded by the Camperdown House development, the Half Moon Theatre scheme (CHAMPS) would all be excluded from the category of 'acceptable gains'. However, to accept the PAG report would be to support a narrow view of planning and of the considerations which a planning authority can validly take into account and to accept a generally negative attitude to the process.

In 1980¹⁰ the PAG identified planning gain as a 'problem' and this approach recurs throughout the report. It does not purport to be an objective assessment of the practice but a closer look at this practice of 'doubtful legality' so as to delimit the type of gain schemes that were considered to be legitimate. The process of

⁹ A parallel could be drawn with imposing a condition requiring the developer to do certain layout or landscaping works; the developer may do the work himself or may pay an organisation to do it for him. The payment is merely a method to achieve the landscaping rather than being a requirement in itself.

¹⁰ Property Advisory Group Report on the Structure and Activity of the Development Industry. 1980: HMSO.

defining planning gain in this way and seeking to remedy what central government sees as undesirable was a political decision which predetermined the approach of the report. Their standpoint excludes consideration of the possible benefits of planning gain to local authorities, developers or 'the public'. The local authorities are described in terms of pursuing ulterior motives without attempting to quantify the gains that have been achieved or how those residential and community facilities could be provided by other means. The practice is not put into the political context and is described as 'an ad hoc local tax not authorised by parliament'. This denouncement fails to consider the set-off provisions on liability for Development Land Tax which allow development costs (this includes requirements made by local authorities) to reduce the base of assessment, and so redirect the payment of tax rather than create an additional burden.

THE CIRCULAR CONSIDERED

After the PAG report and a draft circular were both distributed to bodies interested in planning gain as part of a consultation exercise, a circular was issued. This document has been criticised for oversimplifying planning gain and for its vagueness. Some of the defects of the PAG report were removed but it still reveals a lack of understanding of the subject and takes a restrictive attitude towards the practice.

It sets out to provide a framework within which seeking planning advantages could be regarded as a legitimate part of the development control process. The circular recites the responsibilities of the Council in deciding upon development applications.

" 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 ... they should be refused only where this serves a clear planning purpose ... imposing a condition or obligation - whether negative or positive in character - should arise only where it is considered that it would not be reasonable to grant 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 " ¹¹

It then goes on to acknowledge that it may be necessary to impose conditions or, if these are not an adequate method for achieving the planning authority's purpose, seek to enter into an agreement with the developer. The circular adds that the use of such agreements may help achieve 'the best use of land and a properly planned environment' but does not give any indication of what either of these stated aims mean.

The main body of the circular is concerned with setting up a series of tests to determine whether the obligations to be imposed on the developer are reasonable. At first instance the authority must consider whether what is being required falls into one of the following categories:

(1) needed to enable the developer to go ahead. eg. provision of adequate access, water supply and sewerage and sewerage disposal facilities and on land drainage;

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

(3) is otherwise so directly related to the proposed development and to the use of land after its completion, that the developer ought not to be permitted without it eg. the provision whether by the developer or by the authority at the developer's expense, of carparking in or near the

¹¹ DOE Circular 22/83 Planning Gain, 1983 London: HMSO, para.4

development or of reasonable amounts of open space related to the development;

(4) is designed in the case of mixed development to secure an acceptable balance of uses.¹²

If it passes this hurdle the authority must then apply a further test.

" whether the extent of what is required or sought is fairly and reasonably related in scale 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 provided. "¹³

Finally the planning authority must consider whether it is reasonable for the developer to provide, or help finance, what is proposed, rather than it be provided out of local or national taxes or by other means, such as a charge on the persons using the facility. The essential principle here is whether what is being requested is directly related to the development or the use of land after development.¹⁴

The circular does recognise that the obligations imposed could affect land other than that included in the permission provided there is a 'direct' relationship between the two sites and gives the example of the restoration of a nearby building as a screen for a new building. The conclusion to the circular states that if these tests are followed obligations can legitimately be imposed and local authorities should include guidance on planning gain in development plans. It adds that the applicant may appeal against unreasonable obligations and the appeal will be decided on the basis of the circular.

¹² *ibid.* para. 6, emphasis added.

¹³ *ibid.* para. 7, emphasis appears in the circular.

¹⁴ *ibid.* para.3

In the planners' report to the Tower Hamlet Development Committee these aspects of the circular were set out and it was concluded that, as the office policy had required planning benefits with the objective of achieving a properly planned environment and the best use of land by ensuring an acceptable balance of mixed uses, the circular confirmed the validity of the practice as operated in the borough.

" Whilst the circular is not totally satisfactory in that it tends to oversimplify the issues involved and presents a more restrictive interpretation of planning gain than might otherwise be justified it still allows the Council to operate its planning advantage policies contained in the Borough Plan. However despite its shortcomings the circular does endorse planning gain as a legitimate aspect of the planning process and the guidance it contains although more restricted than I believe is justified does offer a clearer mandate to secure community benefit from suitable developments than has hitherto existed. " ¹⁵

Is this assessment of the circular accurate? The criteria for seeking planning gain included in paragraph 6 are strikingly similar to the type of considerations to be taken into account in imposing conditions on a planning permission as set out in the Ministry of Housing and Local Government Circular 5/68: The Use of Conditions in Planning Permissions. That circular required a condition to achieve a proper planning purpose, to be relevant to the development and be reasonable¹⁶ in other aspects in order to be valid.¹⁷ In 1985 this

¹⁵ Non-Confidential Report from the Director of Development to the Planning Committee on DOE Circular 22/83 - Planning Gain, 11th January 1984, LBTH.

¹⁶ The meaning of unreasonable here is taken as the 'Wednesbury' sense ie. not so arbitrary or biased that no reasonable planning authority would impose it. See Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223 per Lord Greene MR.

circular was replaced by another which required six criteria to be met, namely that the condition was necessary, relevant to planning, relevant to the development, enforceable, precise and reasonable in all respects.

This is some indication of the continued restrictive approach of the Department, even though some conditions which were questionable had been held as valid by the courts.¹⁸ Paragraph 11 of this later circular makes this plain.

" In addition to satisfying the courts criteria for validity, conditions should not be imposed unless they are both necessary and effective and do not place unjustifiable burdens on applicants. "

The circular goes on to state that conditions may not be valid even if they satisfy the *Wednesbury* reasonableness test if they are onerous and, as a matter of policy, should be avoided. The approach to the relationship to planning is also narrow.

¹⁷ This was affirmed in the last major case on conditions: Newbury DC v SSE [1978] 1 WLR 1241 (CA); [1981] AC 578 (HL) which followed Pyx Granite Co.Ltd. v MHLG [1958] 1 All ER 625. As further examples of the restrictive approach to conditions see Fawcett Properties Ltd v Buckingham County Council [1960] 3 All ER 503; Hall & Co.Ltd. v Shoreham-by-Sea UDC [1964] 1 WLR 240; Chertsey v Mixnam's Properties Ltd. [1964] 2 All ER 627; Hartnell v MHLG [1965] AC 1134; R v London Borough of Hillingdon ex parte Royco Homes Ltd. [1974] 2 All ER 643 (JPL (1974) 507, 660-661 for comment); David Lowe & Sons Ltd. v Burgh of Musselburgh (1974) SLT; Peak Park Joint Planning Board v SSE (1979) 39 P&CR 361. Some relaxing of the approach by the courts can be seen in Kingston-Upon-Thames BC v SSE [1974] All ER 193 (see JPL (1973) 685,709 and (1974) 87 for comment); Penwith Council v SSE [1977] JPL 371; Bernard Wheatcroft Ltd. v SSE (1980) 257 EG 934 (discussed by Leach W.A. 'The Applicant and the Permission' (1982) JPL 37-42) and Grampian Regional Board v Aberdeen DC (1984) 47 P&CR 433 (comment in JPL (1984) 590-592).

¹⁸ See above note. In Kingston a condition had required land adjacent to the development to be used for carparking; in Penwith the conditions related to control of noise in buildings adjacent to the new one but on the same industrial site; in Grampian the House of Lords approved a condition which required the development not to proceed until an adjacent road had been closed on the basis of it being a negative condition rather than imposing an obligation.

" It is not sufficient that a condition is related to planning objectives: it must also be called for by the nature of the development permitted or its effects on the surroundings. " ¹⁹

Finally in paragraph 35 the circular states that an unreasonable decision does not become reasonable merely because a developer agrees to it.²⁰ Reviews of this later circular have concluded that the Department has taken a stricter attitude to conditions than the courts and has demonstrated their reluctance to acknowledge any relaxation in approach.²¹

If the planning gain circular is interpreted in the same narrow way as valid conditions have been²² by the courts, or in accordance with the Department's approach to conditions then many of Tower Hamlets' schemes would clearly fall outside the circular. Indeed, paragraph 6(3) appears potentially more restrictive than the circulars on conditions which state that conditions must be directly related to the development, rather than the more emphatic 'so directly' as appears here.

¹⁹ DOE Circular 1/85 The Use of Conditions in Planning Permissions. London: HMSO. para. 21.

²⁰ This was specifically addressed to a decision by an inspector in which he stated that a Section 52 agreement was really necessary but to expedite matters he would use conditions if the developer agreed to abide by them. See Douglas, C. Planning News, October 1983 for comment.

²¹ See eg., Scarse, A.J. "Planning Conditions - The Law and Policy " (1987) JPL 323 and Douglas, C. "New Circular on Planning Conditions " (1985) 71 The Planner No.3, 28.

²² See note 17 above. For a discussion of the courts attitude to planning conditions see McAuslan, P. Ideologies of Planning Law, 1980. Oxford: Pergamon; for a discussion of their operation see Bear, A. and Booth, P. Planning Conditions and their Effectiveness in the Development Control Process, 1980, Sheffield Centre for Environmental Research.

The planning gain circular also is opposed to off-site gain. In the draft circular²³ criteria 3 above merely required the obligations imposed to be 'clearly related to the proposed development and to the use of land after its completion', whereas the wording in the final circular is far stricter. Similarly, in the section dealing with other land which may be affected by the obligations imposed, the word 'direct' has been added since the draft. Thus it is no longer sufficient to show that the sites are related, they must have a direct relationship.

The Tower Hamlets' planners' report relies heavily on the reference in paragraph 6(4) of the circular to achieving a balanced mix of uses through imposing obligations on a developer. However, the interpretation of this phrase in Tower Hamlets is very broad so as to include works on a site some distance from the development site.²⁴ There is no justification within the circular for assuming that a similar attitude would be taken by the Department or by an inspector or the courts. The vagueness of the circular was put forward in the planners' report as a benefit²⁵ in that it allowed a Tower Hamlets' interpretation of the tests laid down, but it also left the way open for a restrictive interpretation so as to limit acceptable planning gains to mixed development on a single site.

²³ DOE Draft Circular on Planning Gain, 1983, London: HMSO

²⁴ For one of many examples see Buck & Hickman scheme which involved offices around Dock Street linked to an industrial refurbishment in Mulberry Street some 3/4 kilometre to the North. The offices were in an area near Leman Street and Mansell Street while the industrial element was close to Whitechapel Road, to the west of Gardiner's Corner and the city fringe area.

²⁵ The RTPPI also felt that the vagueness could be an advantage.

The planners' report, in fact, was very similar to a press report made by the Chairman of the Development Committee which was inevitably designed to portray the Council in a favourable light. Certainly, as long as the Council retained credibility with developers in the area, projecting the idea that the Council is operating within the circular would continue to discourage appeals and so avoid potentially harmful ministerial decisions. However, the report was given as professional advice to the Council on the realities of a government circular and the effect should have been to provide information upon which the Council's objectives could be based. It seems²⁶ that the report was heavily influenced by an approach which the Chairman at least wished to see adopted by the Council, that is not to restrict the operation of the office policy, and indicates a tailoring of the advice to the political will of the committee.

There were also problems in the paragraph of the circular on provision of public access which could affect Tower Hamlets but were not drawn to the committee's attention.

" Where open space or other facilities, eg. 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 (eg. a parish church), that body should be involved in the discussions at the earliest possible stage. "²⁷

²⁶ This assertion is supported not only by a comparison between the circular and the report but also by memoranda appearing on the legal department file on the circular.

²⁷ DOE Circular 22/83 para. 10.

Principally, this paragraph fails to take account of the existing statutory provisions relating to walkways²⁸ and fails to acknowledge the requirement of such a walkway as a legitimate planning objective. Stungo and Dempsey²⁹ illustrate this with an example which occurred in St Katherine's Dock. The public had been denied access to the river for centuries and the policy for the area stated that opening up public access was an aim of the planning authority. When a developer planned to redevelop the site, if he failed to make such a provision the authority would be justified to refuse permission. The local authority may then have to acquire rights over the walkway, depending on the terms of the agreement. The above paragraph does not contradict this sequence of events but nor does it clarify the position in favour of the Council seeking walkways as planning gain.

THE EFFECT OF THE CIRCULAR ON TOWER HAMLETS

The circular was published in August 1983 and the Borough Plan had been on deposit since the previous April. The Borough Plan included an office policy which declared that providing planning advantages could not justify planning consent for schemes which did not comply with other policies in the Plan, and would only allow office developments where a mix of uses was assured, industrial, residential, and community uses were protected and the locational criteria were met. The Plan was also amended to annex the RTPI

²⁸ Such as the Greater London Council (General Powers) Acts 1969 and 1970.

²⁹ (1983) op.cit.supra note 3.

Code of Practice on planning gain to, inter alia, act as a counter-balance to the circular and retain the credibility of the office policy.

The RTPI Code of Practice on Planning Gain

It had been suggested by a number of the groups consulted on the draft circular that these guidelines be incorporated in the circular because of their clarity in dealing with the subject. They require local authorities to have published policies upon which basis planning gains should be sought (a planning brief may be used but only where the authority had not contemplated substantial development), to only demand gains that are related to the development in scale and in planning terms, to avoid delays and to consult the public on significant changes to applications as a result of negotiations.

'Related' is defined as

- " (a) on-site;
- (b) on a site contiguous with the development site;
- (c) on a site which is related to the development site by way of an approved plan, or policy statement;
- (d) off-site access, infrastructure or service. " ³⁰

The Code itself does not include a specific list of gains that may be sought, although examples do appear in the appendix, but does provide that payment of money should only occur in exceptional circumstances. It suggests that payments may be made where they represent commuted carparking payments, contributions towards off-site access, infrastructure or services related to the development or (most permissive) contributions towards off-site infrastructure which is

³⁰ RTPI Planning Gain: A Code of Practice, 1982, London: RTPI, para.3.

indirectly related to the development by means of an approved local plan or policy statement.

The practice as appears from these guidelines is far more flexible than that envisaged by the circular. It states that a planning gain cannot be used as an inducement to approve a proposal which offends council policy for reasons other than the lack of planning gain, but it accepts that negotiation is a normal part of the development control system. Such negotiation is considered legitimate if it is for the purpose of satisfying planning standards or for seven other identified reasons:

- " (1) to provide carparking or essential infrastructure;
- (2) to include more land or facilities to provide links with the surrounding area;
- (3) to positively improve public access or other facility considered by the local planning authority to be desirable;
- (4) to facilitate substitution
 - a) to accept a new use or development provided another use or development in the control of the developer is abandoned, as both together would be excessive for planning reasons;
 - b) to allow development on open land where a more attractive area is substituted and maintained as open land where this is a benefit to the area;
- (5) to secure the carrying out of works within or outside the site eg. in the case of mineral workings to allow for a reasonable rate of extraction;
- (6) in comprehensive development to ensure that the application is not confined only to the highly profitable elements leaving other necessary or desirable, but less profitable, elements outside the application or to be provided at some unspecified future time.
- (7) to secure restoration or improvement of important buildings when dealing with proposals to change their use or to develop adjacent land in the same ownership. "³¹

The guidelines go on to illustrate the kinds of planning gain that could be reasonably achieved under these negotiations, which although varied and extensive do not cover the more pragmatic schemes in

³¹ *ibid.* Appendix: Examples of Legitimate Negotiations.

Tower Hamlets. However, the list given does not claim to be exhaustive.

- " (1) major road improvements where the local authority could not have reasonably acquired the land by allowing full plot ratio on a large redevelopment;
- (2) inclusion of housing or other benefit (such as carparking) within major developments, often conveyed to or made subject to an agreement with the local authority;
- (3) public use of facilities and improved linkages to an existing area, such as a supermarket providing carparking and access to an adjacent shopping centre;
- (4) extra carparking in an office development in a conservation area to serve other offices and improve provision for whole area;
- (5) extra landscaping outside of an industrial development to improve the townscape;
- (6) where there is an approved policy to temper the despoilation of open cast mining, a village by-pass, improved roads for heavy traffic and recreational facilities have been provided outside of the site;
- (7) creation of a precinct to show architectural qualities of a major public building or to provide a landscaped riverside walkway;
- (8) the redevelopment of former mineral workings to provide an industrial estate, a public golf-course, a district park with extensive sporting facilities and finance for the construction of a dual carriageway by-pass. "

The code and its appendix is clearly based on a different view of planning than the circular or the PAG report, in that it approves creative use of planning powers as long as those powers flow from a publicly approved document. The circular on the other hand is reluctant to acknowledge planning as anything more than a regulatory and negative function which needs to be constrained. To the RTPPI it is a function of planning to endeavour to produce development which is in the public interest by implementing the objectives included in the development plan and local policies. Thus, negotiation is a part of the development control process and the only issue is to ensure that obligations placed on a developer are reasonable and within the planning objectives of the authority.

In this way the code evidences a distinction between the receipt of money, or of benefits in kind, as a fund-raising exercise, or tax, and the attainment of planning advantages which fall within the reasonable planning aims of the authority. The former involves a sacrifice of planning standards, whereas the latter is necessary to uphold those standards. The use of conditions, the issue of an approval, the modification of applications and the use of agreements under local or national legislation are all recognised as methods that may be used to secure planning gains, and the choice between them is essentially a question of expeditious and effective enforcement.

In order to achieve the aims of a local plan it may be necessary, according to the RTPI, to require off-site gains, but as long as there is a relationship between the two sites it may still be reasonable as long as it is in scale with the development. Any money paid to the local authority should only be used for a purpose clearly associated with the development itself; similarly recreational or social facilities must only be provided where they are directly related to the proposal being negotiated. Otherwise what is being provided is an inducement to approve development which planning policies suggest should be refused (because of location or extent of development) rather than a planning gain.³² Acceptance of a development cannot depend upon the level of planning gain provided, it must depend upon proper planning objectives.

This view of planning gain represents an application of planning ideology to a part of the development control process. 'Proper planning objectives' are reasserted as defineable and ascertainable

³² RTPI Agreed Memorandum of the Planning Gain Guidelines Working Party, November 1983. London: RTPI.

concepts which can be decided upon by professional planners, effectively subjected to public scrutiny through consultation exercises, and overseen by the appeals and court system. The case for planning gain is not argued on economic grounds but within the structure of planning and the actors within the process are portrayed as apolitical, acting in the public interest.

As far as Tower Hamlets is concerned, the Code of Practice does give a basis for a broader interpretation of the circular. This is so, particularly, as it recognises that public planning policies can provide a link between various unrelated sites and this is sufficient for it to be a proper planning objective to regard the development of both as a single mixed use scheme. However, the Code would not necessarily find all Tower Hamlets' schemes to be reasonable. For example, does the restoration of Christ Church as planning gain on schemes to create office use outside of the conservation area, and even outside of the Spitalfields ward, comply with the RTPI definition of related sites? Does the increase in the amount of office space in the FABS scheme by over three times the amount previously approved, after an increased contribution to the restoration of Christ Church was negotiated, escape the definition of an inducement? The answer largely depends upon the interpretation of such terms as 'contiguous', 'clearly associated with the development' and 'proper planning objectives' which remains unresolved by the Code.

Schemes Under Consideration After the Circular was Issued

After the Circular was issued there was a perceived increase in the number of applications submitted to the Council with no planning

advantages included. This also coincided with a reorganisation of officers in the planning department and those previously responsible for the city fringe areas anticipated that there could be changes in the way negotiations were conducted and the pragmatism of their approach. The political leadership of the planning committee, however, remained strongly in favour of planning gain and was anxious to maintain the office policy in its previous form. By way of example three schemes that were alive at this time will be considered, namely Alie Street, No.s 14/20, Mansell Street, No.s 41/43 and Artillery Lane, No.s 37/41.

The Alie Street scheme was submitted in July 1983 after publication of the circular and included 1711m² of office space. The premises in Alie Street had previously been used for industrial purposes and a vacant property in Cheshire Street was to be refurbished to rehouse the tenants displaced on the same terms they had in Alie Street. The Alie Street building was on a corner and the frontage to Alie Street was to be the office element and the frontage to North Tenter Street was to be developed to provide ten single person flats for a housing association. This scheme was approved by the committee and an agreement was signed which prevented the development from commencing until the firms were satisfactorily relocated, and internal finishes to the offices from being applied until the residential element was complete. The agreement also required the Cheshire Street property to be let to the tenants of Alie Street on the same terms and, if any tenant did not accept Cheshire Street, the developer would use his best endeavours to relocate him or her elsewhere.

This scheme evidences little or no change in Tower Hamlets' policy or in what the developer was prepared to provide. The scheme accorded with Tower Hamlets' policy and relocating the industrial users could be justified on planning grounds so as to fall within paragraph 6(3) of the circular. It was, however, necessary to reduce the survey maps four times in order to have both parts of the development on one page. The Council would have to rely upon paragraph 6(4) in order to justify the requirement of residential space. In this instance the residential element was on the same site, although in an area of predominantly industrial and office use so may qualify as an extraneous benefit³³ rather than one which enables an otherwise unreasonable development to be acceptable. The provision in the agreement which prevented development from commencing until other works were done would be defensible as achieving the same purpose as a negative condition³⁴ but the requirements as to terms and the identity of the tenants, if analysed as conditions³⁵ would probably be treated as unreasonable.³⁶

³³ In terms of a condition it could be treated as unnecessary and an unjustifiable burden on the developer. See DOE Circular 1/85, para.11 and 21.

³⁴ Grampian Regional Board v Aberdeen DC (1984) 47 P&CR 433.

³⁵ In view of the above discussion this approach is possible particularly as para.4 of circular 22/83 states that imposing a condition or an obligation should only arise where it would not be reasonable to grant permission without it.

³⁶ See Fawcett Properties Ltd v Buckingham CC [1960] 3 All ER 503; Mixnams Properties Ltd v Chertsey UDC [1965] AC 735; Allnatt London Properties v Middlesex CC [1964] 62 LGR 304. In view of Council and GLC policy not to displace industrial users it could be argued that there are sound planning reasons for controlling occupation but the restrictive approach of the DOE discussed above may not accommodate this.

The Mansell Street scheme was proposed by Central & City, a developer with a long history with Tower Hamlets and a participant in a number of the more esoteric schemes in Spitalfields. This application involved the change of use of a warehouse in Mansell Street to offices and the planner responsible suggested an on-site gain or a gain in one of the adjacent buildings. The developer considered the site to be unsuitable for mixed use and could not acquire any of the neighbouring properties. Anxious to negotiate, he suggested an off-site gain but the planner felt constrained by the circular and refused to negotiate on this basis. The application was refused on the basis of no planning gain being provided and loss of industrial floorspace.

This approach was criticised by the legal department of the Council as it put the office policy unnecessarily in jeopardy. The developer lodged an appeal and there were strong arguments for him succeeding: the site was in a preferred location, parking restrictions made the building unsuitable for warehouse use, the site was on the corner of a major junction and so no loading bay could be constructed, and the proposal itself included restoration of the building and increased levels of employment.

On the other side of the argument, the developer had entered into many agreements with the Council previously which had produced planning gain and if they were lawful before the circular they were still lawful. Under the circular off-site gain was not in itself prohibited, in that it did recognise the possibility of such a gain provided it was in accordance with a published planning policy. The planner was pre-empting the interpretation of this and invited a determination by refusing permission. There was also the problem that although the consideration of planning advantages had been treated by

the courts as a material consideration³⁷, it had also been held by the Queen's Bench Division that lack of it is was not a valid ground for refusal.³⁸

The problems raised in this scheme were taken a stage further by the proposals for the site in Artillery Lane. The history to this scheme was interesting in that most of the site was originally intended for residential development as part of a larger mixed scheme covering several properties and sites in Spitalfields.³⁹ During negotiations calculations on the amount of gain was linked across the sites⁴⁰ but formally they formed separate schemes, subject to separate planning agreements. No.s 37/39 Artillery Lane and 51/53 Gun Street were to form one vacant lot adjacent to No.41 which stood on the corner of Artillery Lane and Gun Street. No.41 was to be left intact while the vacant site was used for an infill residential building as planning gain for the conversion of an adjacent vacant warehouse to offices.

The whole scheme was devised by Central & City with the financial backing of Royal Insurance Group who purchased this land, among other sites, intending to demolish the single storey warehouse on the Gun Street side. This demolition took place and, in accordance with the Section 52 agreement, Royal Insurance entered into an agreement with Peabody housing association, approved by the Council as a suitable body to perform the residential development (at this time

³⁷ see discussion on Tower Hamlets Appeals below.

³⁸ Westminster Renslade Ltd. v SSE [1983] The Times LR, May 9th, discussed below.

³⁹ See BAGS Scheme (West).

⁴⁰ See BAGS Scheme (East) and (North).

housing associations were awash with funding and the Council did not doubt their ability to complete).

This agreement allowed Peabody to enter the land and build the residential development within three years (which period could be extended by the developer) at which time Peabody would be granted an 80 year lease on payment of £10,000 premium, with a peppercorn rent. In October 1981 the Council confirmed, after taking Counsel's advice, that the agreement had been complied with but Peabody had been unable to complete because of the lack of finance from the DOE.⁴¹ Royal Insurance then applied to develop the site as offices.

In light of the PAG report, and later the draft circular, Royal Insurance refused to negotiate a planning gain for the scheme⁴² which involved the demolition of No.41, a building the Council were endeavouring to list. The Council tried to find a buyer for No.41 which was still in private hands, who would restore No.41 rather than demolish it and were prepared to allow an office use as long as restoration works were carried out. At this time SHPRS were actively discouraging property owners in Spitalfields from negotiating gain

⁴¹ This agreement is discussed above in chapter 8 in more detail.

⁴² There is some correspondence in late 1982 between the GLC and LBTH to the effect that the Royal intended to finance an industrial redevelopment (25,000 s/f) in Chiltern Street, some distance from the office site, in association with the Spitalfields Small Business Association who would manage the units for local businesses. The GLC owned this site and suggested that it would represent planning gain on the office scheme. They wrote on November 23rd "Obviously you must consider the planning application for offices on its merits, but I would like to emphasise that this Council regards the Royal Insurance's involvement in the industrial scheme as crucial to the scheme's realisation, and a valuable injection of private sector money into the Industrial Improvement Area." This was not however related to these offices by the applicants as the industrial scheme was also a mixed development with an office content. No reference was made to it in any of the reports to the planning committee.

agreements because they wanted to avoid all office development and as part of this they advocated the unacceptability of planning gains under the draft circular. Spitalfields Local Committee⁴³ also objected to an office scheme on this site because it was scheduled for housing and another housing association (the Spitalfields Housing Co-Op) were able and willing to build on the site. These objections, together with the objections to the demolition of 41 Artillery Lane received from six of the twelve consultative groups on historic buildings⁴⁴ were detailed in the reports to the development committee.

The application by Royal Insurance was finally refused in January 1983 and they lodged an appeal after the circular was issued which could have had disastrous affects on the credibility of Council policy. An Inquiry requested by the Royal was scheduled to be heard in April 1984 and the Royal were to argue the validity of refusing permission on the grounds of lack of planning gain as non-compliance with local office policy and the GLDP. They also intended to question the Council's interpretation of what amounted to an adequate planning gain. In their view improvements to an area of poor layout and design were a part of the scheme and the building of offices would revitalise the area.⁴⁵ The Council did, however, have the previous

⁴³ In the report to the committee which refused consent the SLC was described as "a forum for the local community chaired by Councillor Aylmer".

⁴⁴ These were namely the Ancient Monuments Society, Council for British Archaeology, Georgian Group, Society for the Protection of Ancient Buildings, Victorian Society, Royal Commission on Historical Monuments, The London Society, Metropolitan Public Gardens Association, Tower Hamlets Society, River Thames Society, Greater London Archaeological Society and Spitalfields Historic Buildings Trust.

⁴⁵ Grounds for Appeal, Royal Life Assurance v LBTH lodged August 1, 1983. App/E5900/A/83/4383.

permissions on the site and the Section 52 agreements as material considerations to reinforce their argument for mix of use and No.41 was approved for listing by the SSE. Consequently, the appeal was withdrawn and the office policy was saved from testing.

Conclusions

By the time the circular was issued Tower Hamlets had established a practice of consistently looking at each application for office development on its merits and in the context of the development plan and office policy. The stated aims of that office policy mirrored the GLDP and were intended to protect the viability of 'local communities' by providing a mix of compatible land uses, limiting the worst excesses of speculation in land and by making the developer accountable for some of the local externality effects of their action. The Borough Plan reinforced this approach, bringing planning gain into the development control system to make planning responsive to local needs. By incorporating the policy into the Borough Plan and by attaching the RTPI Code of Practice the Council's position had been strengthened and the issue had officially been introduced into the formal public participation process.

Issuing a circular which was largely opposed to planning gain necessarily questioned the validity of Tower Hamlets' approach, but it did not change the law and may not effect the practice of planning gain in the Borough. The fact that its introduction coincided with a change in personnel within the planning and legal departments could make its effect more significant, as their approach to the policy and to developers is an essential element in negotiating schemes. The

level of confidence developers have in the Council clearly has an affect on the credibility of the policy: while it was still possible to argue that the Council's interpretation of a mixed use development was reasonable within the terms of the circular the force of that argument must largely depend upon the relationship between planner and developer and the position adopted by the planner in negotiations.

For example, most of the schemes negotiated by Tower Hamlets fall within paragraph 6(4) of the circular, that is planning gain is necessary to achieve an acceptable balance of uses. Their interpretation of that phrase, however, had been very different from that intended by the Secretary of State who is clearly opposed to any off-site gain. The planner could rely upon the RTPI Code of Practice to continue to maintain a broad approach to the phrase and thus continue to negotiate pragmatic schemes; the Code of Practice does recognise that a published planning policy can provide a link between various unrelated sites sufficient to make it 'a proper planning objective' for the Council to regard the development of both as a mixed use scheme. Alternatively, as in the case of 41/43 Mansell Street discussed above, the planner could adopt the standpoint of the Secretary of State and only negotiate on-site gains. The fact that the members of the Council remain committed to a policy of planning gain would have an effect on the conduct of the planner and the advice he gives, but it may not be sufficient to maintain the type of negotiating evident before the circular.

During the Inquiry relating to an appeal on 36/40 Artillery Lane heard in May 1983 a planner, during the course of his evidence, was questioned by the Inspector about the six storey glass-clad office building standing opposite a terrace of eighteenth century buildings in

Artillery Lane. The planner was giving evidence in support of planning gain and the relocation of industrial uses in the buildings under appeal. He maintained that decisions on applications were made by the Development Committee and his role was as professional adviser, but when asked about how the modern building opposite⁴⁶ was approved he replied that it was recommended for approval by another planner; that he would not have recommended it as it was in total conflict with the area and was recommended with the planning gain of a contribution to the restoration of Christ Church which in his view had 'nothing at all' to do with ensuring a mix of use in the area. He saw it as contradicting approved planning policies, whereas the report prepared by the planner who did negotiate it supported his recommendation before the committee with those same policies.

This type of difference in approach is significant when the negotiations are conducted by individual planners who may adopt the importance of mixed uses as a valid aim of their profession, but interpret the meaning according to their own perceptions and precedents. The circular is vague on interpretation and while the Code of Practice is a clearer and more precise document it necessarily is advisory and cannot prescribe what particular approach should be adopted on a particular set of facts. Thus, to the planner giving evidence, the size and appearance of the building would have made that scheme unacceptable; whereas to the planner negotiating the scheme the planning gain did provide a sufficient balance.

It is also evident that the standpoint of the developer is also important. Central & City were enraged that the planner was not

⁴⁶ FABS Scheme, approved in the late 1970's.

prepared to negotiate an off-site gain for 41/43 Mansell Street as it meant he would have to go to appeal, waste time and risk his good relationship with the Council. On the other hand, Royal Insurance were not prepared to negotiate a gain for their proposed development in Artillery Lane as they considered it to be an unreasonable demand in light of the PAG Report and worthwhile going to appeal. These differing standpoints were fed by concepts of profit margins, the expense and delay of the appeals system, and the likelihood of succeeding on appeal. The latter being influenced by the existence of the circular, the office policy and the credibility of that policy in terms of precedents created by other schemes and other appeals.

Consequently, the circular itself has an effect on the bargaining process, but it does not control the operation of office policy. The effect it has depends largely upon other factors within the process and how they interact with, and are affected by, directives from the Secretary of State. The reaction of the Council was to rationalise the circular and to interpret it as broadly as possible while amending the Borough Plan to include a counterweight in the form of the RTPI Code of Practice. At the public level, the Council continued its objectives in the area of planning gain without any alteration, but reaffirmed the compliance of Tower Hamlets' policy with the circular by reference to its words, rather than its underlying philosophy. At the level of negotiation its effect could be felt more strongly: but again that reflects a choice of standpoint, rather than the force of this form of control.

B. THE APPEALS IN TOWER HAMLETS⁴⁷

Although a number of appeals have been lodged against decisions made and not made by Tower Hamlets, most were withdrawn before determination, normally because negotiations produced a compromise which both parties were prepared to accept.⁴⁸ Of those which did go to appeal on office policy none of them disputed the vires of the policy, and those which did find in favour of the applicant did so on the basis of what amounted to adequate gain⁴⁹ rather than refusing to accept that a gain was required.⁵⁰ The paucity of appeals in Tower Hamlets has been signalled out as unusual, particularly in an area which forms a part of the city fringe, and a survey of office development in those areas attributes this, at least in part, to the pragmatism of the Council and the satisfaction of developers.⁵¹

" ... planning attitudes in most boroughs surrounding the City are such as to reduce even the most reasonable agents to a state of incoherent apoplexy. With two exceptions, the planning policies of City Fringe boroughs attract comments which are either unprintable or libelous. The exceptions are the City of Westminster and the London Borough of Tower Hamlets, which politically are as alike as chalk and cheese ... agent after agent expresses appreciation of the realistic attitude of the controlling powers of Tower Hamlets. For the Borough has taken a thoroughly pragmatic view of what

⁴⁷ See chapter 7 for the background to each of the appeals discussed here.

⁴⁸ See eg., 37/41 Artillery Lane, 96/98 Middlesex Street and the Minorities Carpark site. An appeal was also made against a S.53 determination which was settled at the doors of the court: See Christchurch Schemes, Hill Samuel and Providence Life.

⁴⁹ See 24 Alie Street, Fairholt House and Fieldgate Street appeals.

⁵⁰ For a Ministerial decision which does question the "requirement" of a gain see (1983) JPL 265-269.

⁵¹ Estates Gazette, Focus on City Fringes, September 24, (1983) vol.267, 1142-1158.

is happening on its western boundary ... (they) have let development go ahead - understandably extracting some planning gain in the process - and as a result they have expanded their rate base enormously ... There is an interplay of politics and economics which result in some areas working (the non-fringe to the West; Aldgate to the east), while others are areas of conflict ... somehow, thanks to endless patience and determination, those who do want to see growth and renewal are getting it done, whether it be enlightened councils who want to see their boroughs enhanced or long-sighted developers who want to see their profits doing the same. " ⁵²

1/3 NORTON FOLGATE, SPITALFIELDS : Decision letter dated March 11, 1976

This was the first appeal decided on the office policy and the issue of planning gain was argued in some detail. The favourable decision was used by the Council to enhance the credibility of the office policy in later negotiations. Another appeal decision was not made on the office policy for four and a half years after this decision was issued.

It was heard at a time before the GLDP was approved⁵³ and so the IDP was the operative development plan, although the decision points out that it was out of date even then. The Appeal was dealt with on written representations and the Secretary of State based his decision upon the Council's office policy, although he also made reference to the GLDP. Another planning permission had been granted for this site by the time the appeal was heard and the existence of

⁵² *ibid.* 1154-1158.

⁵³ The SSE had indicated his support for a restrictive policy on offices in Central London in his Statement on the GLDP October 1975.

this alternative scheme which did not conflict with the policy seems to have been influential.⁵⁴

On the issue of planning gain the Secretary of State asked the question of whether this scheme had anything to offer, for example, in terms of planning advantages, to warrant the grant of permission as an exception to the Council's policy. The applicants had argued that gains were provided as the development would replace a petrol station with a building of good design, would create office employment opportunities, would improve traffic flow and would provide small suites of offices. The Secretary of State found that none of these elements were substantial enough to justify a departure from the policy of restraint even though the site was in a preferred office location and close to public transport.

In its appeal statement the Council, as well as pointing out certain design problems with the proposal, set out the planning objectives for the area and indicated that a number of schemes were in the pipeline which involved mixed use which could be prejudiced if this scheme went ahead without substantial gains. They stated that such gains were usually provided in the form of residential space, community facilities or the restoration of listed buildings in the area.

" This Council is attempting to retain the diversity of land uses in their area whilst alleviate (sic) the severe social and housing problems in the area. It is recognised that this is an area in transition which is under considerable pressure from office development as the office area of the City of London extends eastwards. This Council is not attempting totally to resist these pressures but sensitively to control the pressure during the transitional period as the character of the area change (sic). It is hoped that by encouraging mixed-use development including offices in selected areas to

⁵⁴ Appeal by Philstock Securities Ltd, under TCPA 1971, Section 36. DOE reference App/5031/A/74/9328 (J.C. Lippard authorised by SSE to sign)

avoid the damaging upheavals which have accompanied similar transitional periods in other parts of Central London. " ⁵⁵

The major problem they wished to avoid was the increase in land values created by office development in other boroughs which would then exclude development for less profitable uses.

Nowhere in the appeal decision is the basis of the policy questioned, nor is the validity of using such a policy for the social and housing purposes or for the maintenance of land values indicated. These issues were raised by the applicant who denounced the practice of negotiation as unlawful and represented 'an indirect levy' on developers wishing to build in the area.

" During the course of negotiations it was stated to the Appellant's Architect by Mr Draper, a Town Planning Officer of the Council, that the Appellants were unfortunate in that the Council did not want to locate any public offices or amenities on this site and that it was not considered to be a good or appropriate location for residential provision. The argument went therefore that the Appellant had little to trade in the way of 'public benefit' in exchange for an office approval. However if the Appellant it was suggested were to buy a listed building in the area and renovate it to provide housing accomodation this could be considered as meeting their social obligations and a bargain might be struck ... It is submitted that the Council's approach is identical to that which was condemned by the Court in R v London Borough of Hillingdon ex parte Royco Homes Ltd ... as being an ultra vires attempt to require the developer to assume part of the duties of the Housing Authority by misuse of the planning process. " ⁵⁶

The Council did respond to this by indicating that the phrase 'social obligations' was not used in negotiations, the purpose of which was to achieve a mixed balance of uses in Spitalfields. The Council

⁵⁵ Appeal Statement LBTH para.3.

⁵⁶ Appeal Statement by Phillstock Securities Ltd dated 11 December 1985, pg.5.

acknowledged their attempts to retain and improve housing so as to alleviate the housing problems, and where a developer was prepared to undertake such works it could provide substantial enough planning gain to justify a use which otherwise would not have been permitted. Certainly, the analogy with Royco Homes⁵⁷ is difficult to sustain in this instance as the Council were not requesting public housing or nomination rights, merely housing. Any direct benefit to the Council was not evident and the SSE had, in granting Industrial Development Permits for other sites⁵⁸, made similar conditions for residential floorspace to be included in those schemes.

The Council made ample use in its statements of 'well established town planning practise' as a justification for the approach it had taken, namely land-use mix, balancing the merits of the application, preventing speculative increases in land values which would affect land-use patterns. In this way, they presented their argument so as to demonstrate that the Council was not pursuing 'ulterior purposes' but only 'planning purposes'. For example, with land values they submitted that they were not concerned with the effect on the economy of increases (which would amount to a non-planning consideration) but with the effect those increases had on land use patterns. This dichotomy was not explored by the Secretary of State but it is in accordance with the approach taken by the courts and reinforces a rational view of planning so as to protect the validity of the Council's exercise of administrative discretion.

⁵⁷ R v London Borough of Hillingdon ex parte Royco Homes Ltd [1974] 2 All ER 643.

⁵⁸ See eg. chapter 7: Wingate Scheme at Haydon Square and Goodman's Yard Scheme.

TARN & TARN APPEALS, SPITALFIELDS: Decision letter dated October 17, 1980

Three appeals were dealt with at a six day Public Inquiry held in May 1980 against refusals issued in 1978 for office development in Spitalfields by different applicants, but all of which were made through Tarn & Tarn. The sites and premises had been purchased by the appellants, or their associated companies, many years previously for development for industrial use. This aim had been aborted by the designation of the Fashion Street (later Fournier Street) Conservation Area in 1969. In each case the appeal was the result of the breakdown of protracted negotiations over the development of these sites,⁵⁹ particularly in the provision of planning gain, and the grounds for refusal were non-compliance with office policy and, in the third appeal, also loss of residential space. The Inspector also heard an appeal against a Listed Building Enforcement Notice in respect of No.16 Wilkes Street. The sites in question are all described in the Results of Survey chapter above and will be referred to here as Puma Court, South Site, Puma Court, North Site and 14 & 16 Wilkes Street.

The Secretary of State agreed with the findings of the

⁵⁹ The problems concerned the refusal of Tarn & Tarn to sign a planning agreement before planning permission was issued, but even in November 1979 they indicated a willingness to continue negotiations, although the planning gains offered at that date were clearly inadequate eg. in a letter dated 1st November 1979 they suggested public use of the courtyard in Puma Court as gain on the proposed office developments, whereas the guidelines for the area were 55% residential gain to 45% office space.

Inspector⁶⁰ and the latter's 34 page report upheld the office policy, after hearing Counsel for the appellants⁶¹ and for the Council⁶² and submissions by representatives of SHPRS, The Friends of Christ Church and the Society for the Protection of Ancient Buildings, the Spitalfields Housing Co-Operative and Solon Co-Operative Housing Services Ltd. Most of the report was concerned with the character of the area, the history of the appeals and the architectural significance of 14 & 16 Wilkes Street, but the Inspector did describe and discuss the office policy and framed his decision within its context.

" The principal issues to be considered are the current office policy and its operation, the effect of the proposed development on the conservation area, and housing policy. "⁶³

Although the report did not consider the vires of the policy, it did accept its content and, to an extent at least, reinforced the approach of the Council.

" The office policy can only be determined by reading the policy documents together, ie GLDP refined by Offices in Tower Hamlets refined by Fournier Street Conservation Policy. I do not accept the appellants' contention that the conservation policy is an inappropriate vehicle for development control. Offices, which are to be encouraged in certain circumstances under the council's office policy, have a place in the conservation policy in 2 guises, in the periphery, where commercial and other uses are preferred

⁶⁰ Appeals by Bishopgate Managements, Manwin Properties and Tarn Estates under TCPA 1971, Ss. 36 and 97. DOE References App/5031/A/78/02524, App/5031/A/78/02525, App/5031/A/78/05956 and App/5031/F/79/36. Decision letter dated 17 October 1980, Report by Inspector Stephen Marks MA, RIBA, of the Public Inquiry held 12/16 and 20 May 1980 attached.

⁶¹ Mr Desmond Wright QC.

⁶² Mr Barry Payton.

⁶³ supra note 60, page 32, paragraph 131.

uses, and in the core, where they may be associated with residential in the change of use of certain properties. It was also explained by the Council that office accommodation might be allowed if circumstances justified it within new developments on the vacant sites: so far from undermining their designation for residential use it seems to me that the Council has demonstrated a degree of flexibility which should be welcomed on this point. The policy is clear that in all these locations for offices, office development must offer planning gains in the form of direct community benefit: offices are acceptable, therefore, only if they bring this benefit and are not acceptable on their own. By this test the appellants' proposals fail. "⁶⁴

In reaching this conclusion the Inspector had heard evidence not only on the content of the office policy, but also on the history of negotiations between the appellants and the Council, other negotiated schemes in Spitalfields and the use and content of the draft planning agreements discussed between the parties. The appellants argument had essentially been that they had in the early 1970's been in a position to bring substantial improvements to Spitalfields but the Council had delayed, and made such unreasonable demands, that the schemes became unviable. To demonstrate this they produced evidence of the content of their negotiations and other schemes in order to show the unworkable nature of the policy.⁶⁵

The Council, for their part, relied upon the policy itself and the disastrous precedent this appeal would create if successful, in terms of increased land values, loss of residential space, and loss of balanced

⁶⁴ supra note 60, page 32, paragraph 132.

⁶⁵ eg. they indicated that a number of schemes had been allowed which did not comply with the policy: 37/38 Artillery Lane where the offices were completed but the residential element was not because the housing association did not have adequate funding; the Peabody buildings were treated as planning gain although renovation is not usually treated as such; 10/14 Folgate Street where residential floorspace was decreased and office space increased because the original distribution was unworkable. Inspectors Report supra note 60 page 11, paragraph 44.

mix of uses in the area. They produced evidence to illustrate the importance of planning gain to be included in all schemes in Spitalfields so as to restrict offices to those developments which positively contributed to the objectives for the area, indicating that a successful appeal would reduce the possibility of negotiating such schemes.

" These appeals raise fundamental questions about the council's office and conservation policies: their future will be decided by the appeal decisions. The implications of allowing the appeals are far-reaching: planning permission for speculative offices either on the vacant sites or in Nos 14 & 16 would be reflected in an increase in land value and would lead to other mixed schemes complying with the policy being placed in jeopardy; houses would be left empty, deteriorating the while, in expectation of office use, rehabilitation of existing residential accomodation would be very unlikely, and the reversion of other properties to residential would certainly not occur. It is essential now, for the benefit both of developers and of the conservation area, to dispose of the hope value which is a valid element of valuation: any uncertainty can only be removed by the dismissal of the 3 appeals. " ⁶⁶

The Inspector did not comment upon the conflicting pictures presented of the operation of the planning gain policy, nor on the methods used by the Council to secure planning advantages, but chose to leave these areas outside of his decision. In doing this, while including the details in his report, he indicated an acceptance of the process of negotiation involved. It cannot be said that he impliedly approved of it, but certainly, by agreeing with the Council's approach and by going on to state that the gains put forward by the appellants did not satisfy the policy, he affirmed its existence and facilitated its continuance.

" The appellants' office development would, as they claim, bring about certain benefits, the development and use of the

⁶⁶ *ibid.* page 23, paragraph 97.

vacant sites and the restoration and use of 2 historic buildings. These would be significant gains for the area, but it seems to me that they can only be put to the credit of the office developments if no other way of achieving these gains is available: I am not satisfied, however, either that rehabilitation of 14 and 16 Wilkes Street as houses for sale is uneconomic or that no other, more acceptable, form of development is possible on the vacant sites. Moreover, there are drawbacks which at least cancel these benefits, both in the new office developments and in the change of use of existing buildings ... Most seriously, permission for offices would increase the hope for similar developments elsewhere in the conservation area thus affecting land values, and would diminish the prospects of re-introducing residential use and improving dwellings. "⁶⁷

Overall, the approach of the Inspector on this appeal was very positive in that he took the evidence on the character of the area, the housing shortage and the needs within Spitalfields and saw the planning policies as a mechanism for achieving improvement of all of these elements. He then assessed the applications in the light of these circumstances and patently balanced the disadvantages and advantages of the schemes, but only in the context of the policies themselves without criticism of their content.

42 FIELDGATE STREET, WHITECHAPEL: Decision letters dated June 5, 1981 and April 27, 1982

Both of these appeals by written representations were instituted by the same appellant and were successful. The first related to the removal of a condition imposed on a consent for office development on

⁶⁷ *ibid.* page 32, paragraph 133.

the site which was adjacent to a new clothing factory.⁶⁸ The appellants were the directors of that company and had applied in their personal capacity to build a five storey office development. The Council had agreed to grant permission in consideration of the fact that the offices were required by local industry to facilitate their expansion, but attached a condition making their use personal to the company so as to avoid contravention of the office policy. The permission also provided that the offices should only be used as ancillary to the factory and the Inspector took the view that this was sufficient to avoid speculation and protect office policy and deleted the condition on personal use. No discussion of the content of the office policy was included in the decision.

The second appeal was against a refusal of consent for a building with a carpark on the ground floor with four floors of offices above.⁶⁹ The factory was still not in operational use and the appellants application had been for non-ancillary office use. The Inspector therefore had to consider the GLDP and Tower Hamlets' office policy as material considerations in assessing the appeal. He agreed that paragraphs 4.13 - 4.15 of the GLDP were relevant and, as the Council's office policy did not require the approval of the SSE, considered them the weightier document. He also took into account the draft borough plan but, as it was only in its early stages of consultation, gave it little weight.

⁶⁸ Appeal by Sidney and Abigail Lipman, under TCPA 1971, S.36, DOE reference App/5031/A/80/16187, decision dated 5 June 1981 (DA Robinson, authorised to sign on behalf of the Secretary of State).

⁶⁹ Appeal by S. and A. Lipman, under TCPA S.36 and Schedule 9, DOE reference T/App/5031/A/82/260/G9, Decision dated 27 April 1982 (J.H.P. Draper authorised to sign on behalf of SSE).

The Inspector took the GLDP criteria of preferred office location, proximity to public transport and the provision of planning advantages in turn and found each of them to be satisfied by the proposed development. The site was outside of the preferred office location as defined by the Council, but the Inspector noted that the area was not specifically limited by the GLDP and the site was only 440m away from a site acknowledged by the office policy to be within the preferred location. The site was also only six minutes walk from an important underground interchange (Aldgate East) and was even closer to Whitechapel station and bus services. These specific considerations led him to conclude that the site could be considered to be within the preferred location and, even if it was not, the Council did specifically prohibit office development outside of those areas in exceptional circumstances. The draft local plan indicated that any office development must be within 400m of a transport interchange and, as this site was only an additional 40m away, it should not, he argued, necessarily be excluded.

" As I have shown, there is room for argument on the evidence presented to me whether the appeal site is within such a location. But even if it is not, none of the 3 plans contains a general prohibition of office development elsewhere). There are other local plans within the area of the GLDP which do: the District Plan for the City of Westminster for example). "70

As far as planning advantages are concerned the Inspector did not comment on whether the policy was intra vires the local planning, other than saying that it was based on the GLDP, nor did he specifically consider if there was sufficient gain within the proposal. Rather, he raised the issue and made reference to the economic

⁷⁰ *ibid.* para.11.

problems the applicants had experienced with their expanding company and their need for financing from an office development in order to operate their factory. He seemed to treat this as satisfying the requirement for planning gain as, if the finance were not forthcoming, 80-100 jobs were to be lost through the non-operation of the factory and a new industrial building would remain vacant. On this basis the decision letter directed approval without any conditions restricting user of the offices.

The overall approach here to the issue of office policy was misconceived. The decision relied heavily on the technical location criteria and on the possible liquidation of the company to justify approval. The Council's argument on creating an undesirable precedent in an area under pressure from office development was dismissed⁷¹ on the grounds that the GLDP recognised the pressure existed and thus gave it some legitimacy. On the other hand, the Inspector did not uphold the restrictive attitude of the GLDP towards the criteria which must be fulfilled before permission was granted. However, the decision itself was not considered too harmful to Council policy because it specifically related the permission to exceptional circumstances presented by the financial condition of a company already providing employment in the borough, and many of the remarks made on preferred office locations were unsustainable in reality. The Solicitor to the Council summed up the position accurately in a memorandum to the Director of Development on this appeal.⁷²

⁷¹ In Collis Radio Ltd and Another v SSE and Another [1975] P&CR 390 it was held that precedent was a material consideration in determining a planning application on the grounds that uniformity was a valid planning objective.

⁷² Dated May 4, 1982.

" It does appear that the Inspector has got round his neck the issue of preferred locations for office uses and his suggestion that Fieldgate Street is a significant area of passenger interchange is a conclusion that seems to me only possible if made by a shepherd from the Falkland Islands who is not used to public transport at all. On the other hand, however, it seems to me that these are only observations on matters of policy and the latter one is so absurd that it could not be said to have any persuasive weight. "

What is interesting, however, is that the Inspector did seek to justify approval with reference to the planning policies for the area upon which the Council relied, yet, ultimately, the decision was made with direct reference to the financial predicament of the applicant and the effect of the decision on employment. In internal correspondence following the appeal the Council also recognised that these factors were relevant to the grant of permission even though the problem of creating a precedent was a more significant argument. These economic considerations were used by the Inspector selectively, in that similar arguments that could have been raised, for example, as to the effect on land values, social infrastructure, use of the site for industrial or residential purposes were not mentioned. This obviously raises the issue of the impossibility of pure planning considerations and the political decision making inherent in the selection of what amounts to 'relevant' criteria.

FAIRHOLT HOUSE, SPITALFIELDS: Decision dated September 24, 1982

In this appeal⁷³ the Inspector made a number of points which had a bearing on the Council's office policy, but again made no suggestion that the policy was unacceptable or an abuse of power. The appeal site, the first floor of a mixed use building, had been the subject of a string of temporary office permissions covering the previous twenty years and the appeal was against a refusal for permanent use. The site was in a preferred office location and the Inspector acknowledged that the application fulfilled few of the office policy criteria as it involved no environmental improvement, did not affect employment and provided no planning advantages. However, it did relate to one floor in a mixed use building and so did not, in his view, represent a comprehensive redevelopment and would not offend the planning objectives behind the office policy, that is to ensure a balanced mix of use in an area.

" In considering this case against that policy background [the GLDP, the office policy and draft borough plan] it seems to me that while there is a strong case for exerting firm control over office development many of the policies, especially those requiring office development schemes to provide other uses such as residential, industrial and leisure, are aimed at comprehensive development of new sites. In this particular case the appeal site is within a 4-storey building, the present uses of which are shopping with a strong recreational element. This reflects the mixed nature of surrounding land uses and accords generally with existing planning objectives ... The site is near Aldgate East station and main traffic routes which carry public transport. There would be no loss of housing, industry or shopping facilities and the proposal thus meets much of the criteria for office development. "⁷⁴

⁷³ Appeal by Daxmay Properties under TCPA S.36 and Schedule 9, decision dated September 26, 1982 DOE reference T/App/5031/A/82/2451/G5 (Inspector E. Green).

⁷⁴ *ibid.* paragraphs 6 and 7.

The Inspector also resisted the suggestion, made by the Council, to restrict the use to small suites of offices on the grounds that there was no evidence before him that there was a shortage of such accommodation and that the junior employment opportunities created by larger office use amounted to 'a significant planning gain'.

The site fell within an area north of Whitechapel High Street, between Commercial Street and Gunthorpe Street, which had formed the subject of a development brief approved by the Council in March 1982. This application had been submitted in April 1981 whilst the contents of the brief were being debated. An application for the development of a vacant area as an office building within the development brief had been refused on design grounds and non-compliance with office policy and the Council were anxious to ensure that this whole area achieved the policy objectives of the Council. The brief did not suggest that the area be cleared and rebuilt but did emphasise mixed uses.

The area was in a prime position in that it was opposite Gardiners Corner, adjacent to Aldgate East Station and very close to the City boundary. It, therefore, put the Council in an excellent bargaining position for the attainment of planning advantages. Any decision in the area for offices without advantages would be likely to prejudice negotiations for other parts of the block and represent a failure to achieve planning gain in respect of the office development component. As the brief was to ensure mixed uses each element given over to office use should register a return in planning advantages.

" The Council requires any significant level of new offices to be associated with other specified uses that are of direct and obvious benefit to local households and people ... These

planning advantages must show substantial and realistic gains that are demonstrably of direct use to local people. "75

The statement submitted by the Council on the appeal made this reasonably clear and presented the appeal site as a part of a wider area on which the office policy would operate to ensure a mix of uses. It also pointed out that the lease by the City Polytechnic, on the second and third floors of the same building, was due to expire in March 1985, which would be a more suitable date to assess the use of the building as a whole. The Council were happy to grant a temporary consent to use the first floor as offices until that date. The Council had received extensive redevelopment proposals for the area adjacent to that covered by the brief which included a substantial element of gain,⁷⁶ and development of this building by other applicants who were prepared to offer planning advantages was also under discussion.

Consequently, this appeal represented, to the Council, a piecemeal development which was premature in light of negotiations which were underway and the possibility of more space becoming available in the building itself. The Inspector, however, concentrated upon existing planning policies and assessed the merits of this application against those policies to find no planning objection to the development. This approach, which is perfectly valid, reasserts a particular view of the planning process as a rational exercise of an essentially negative

⁷⁵ LBTH Development Brief for Land Between Commercial Street and Gunthorpe Street, South of Canon Barnet School, E.1. March 1982 London: LBTH.

⁷⁶ See Whitechapel High Street, between Middlesex Street and Commercial Street in chapter 7.

character. The Inspector took the policies and the content of the application and compared the two, taking into account the objectives of the Council, without any real regard to the effect of the decision on the development of the area as a whole. This exercise was performed in a straightforward way, without questioning the validity of the policies or the Council's objectives, but construing them acontextually.

As a result the office policy remained intact as an instrument to achieve its stated objective but only on an application by application basis, rather than in the context of longer term and more comprehensive planning.

63/65 PRESCOT STREET, ST KATHERINE'S: Decision dated March 4, 1985

This appeal involved one of the many sites in Tower Hamlets owned and redeveloped by the Co-Operative Wholesale Society and arose as a result of a directed refusal by the GLC⁷⁷ on a scheme which Tower Hamlets were prepared to approve. Tower Hamlets supported CWS in their appeal against the GLC, who argued for a restrictive policy on office development and directed a refusal because the premises were outside of any preferred office location. At the Inquiry⁷⁸ the GLC also put forward arguments against the development based on plot ratio and the insufficient level of planning advantages.

The Council had negotiated a comprehensive programme of

⁷⁷ The application was passed to the GLC for approval as the Strategic Planning Authority on developments including over 30,000² of offices.

⁷⁸ Held from August 21-23 and November 6-8, 1984.

redevelopment of several CWS sites with planning advantages with the aim of keeping CWS, with their employing potential, in the borough and this particular site represented Phase 3 of that programme.⁷⁹ The site was to be linked by planning agreement to the refurbishment of large premises in Fairclough Street for industrial use as small workshops. The other CWS sites were also linked to this industrial redevelopment so as to produce about 9000m² of offices to 7000m² at Fairclough Street.

The Inspector visited the appeal site, Fairclough Street and other office developments in the locality and his six page decision letter discussed what he considered to be the three principal issues raised by the appeal: whether it was practical to refurbish the appeal premises for industrial use; if not, whether the location was suitable for offices; whether the additional floorspace would produce an unacceptable increase in office space in that part of the borough.⁸⁰ In answering these questions the Inspector made extensive use of evidence presented on the economic viability of developing Prescott Street. Quantity surveyors had been used to analyse the likely costs of refurbishing the whole building for industrial use (as desired by the GLC) together with the likely profits on its development as offices. The Inspector concluded that the former development was not viable, whereas the second allowed the developer sufficient profits to also provide the anticipated gains at Fairclough Street.

⁷⁹ See CWS Schemes in chapter 7.

⁸⁰ Appeal by the Co-Operative Wholesale Society Ltd, under TCPA 1971, S.36 and Schedule 9, decision dated March 4 1985, DOE reference T/App/E5900/A/84/10874/P7 (Inspector J.M.Loveday B.Eng., C.Eng., M.I.C.E.)

" I take the view that evaluations of development should have regard to the market forces which dictate the likely level of investments into schemes of this nature. Neither the GLC nor the Borough Council have any proposals to acquire and develop the site. I am satisfied that there is very little prospect of the premises being refurbished to provide industrial units. With over 1m. sq.ft. of vacant industrial and storage space on the Borough Council's list, as well as that unreported, I can find no special justification to warrant retaining the premises to meet the uncertain prospect of them being used for industrial purposes. "81

This approach as to what was relevant in considering the acceptability of a proposed development goes much further than that anticipated in existing caselaw on the nature of development control. For example, Stringer v MHLG⁸² significantly broadened the approach to material considerations for determining planning applications and is still treated as authoritative. Cooke J. stated that for a consideration to be material it must be of a planning nature and any consideration which related to the use and development of land (not only those of amenity) could be material depending on the circumstances of the case. In Esdell Caravan Parks Ltd v Hemel Hempstead RDC⁸³ Lord Denning MR had listed sewerage, education, traffic, shopping, amenities and the effect of the development on social balance of the community as potentially relevant factors. Yet the Inspector here was looking directly at the cost and economic viability of the scheme in terms of likely profit yields and the potential for development actually to take place as relevant factors. Thus he took into account not only the effect of the development on the use of land but the viability of the scheme for the developer in the present economic climate as opposed

⁸¹ Decision letter *ibid.* p.2.

⁸² [1971] 1 All ER 65; [1970] 1 WLR 128.

⁸³ [1965] 3 All ER 737.

to the viability of alternatives, taking the evaluation of applications into the realm of economic decision making, rather than restricting it to the allocation of space.⁸⁴

A similar attitude was apparent in his consideration of the availability of offices in this part of London. The GLC had presented figures for all of London to show twenty million square feet of offices in the pipeline, with a potential further thirty million square feet on sites where consent would in principle be granted, producing sufficient offices to meet requirements until the end of the century. The extra restraints adopted by the GLC, in its proposed amendments to the GLDP, were given little weight by the Inspector in view of the forthcoming abolition of the GLC and the negative response of the SSE.⁸⁵ The Inspector went on to state that the city fringe should be looked at as a separate area for office development because of the particular demands made upon it, and on the figures presented by Tower Hamlets, there was expected to be insufficient supply over demand for office space in the Borough over the next seven years.

In concluding that this development would not lead to an oversupply of offices the Inspector took into account evidence on the importance, in terms of invisible earnings within the economy, of the relationship between international and London markets facilitated by office development in this area. He also concluded that the supply

⁸⁴ This distinction between the economic and allocation of space is intended to refer to the perceived role of planning and should not be read as confirmation of the two actually as distinct processes. In other words the allocation and use of space is a necessarily political process which effects and is affected by social (including economic) conditions. See eg., Foucault, M. *Discipline & Punish*, 1977. Trans. A. Sheridan. London: Pantheon.

⁸⁵ DOE Statement of the SSE on Alterations to the Greater London Development Plan, October 23, 1984. HMSO.

and demand of offices is primarily a matter to be determined by the market, yet, in identifying the particular market and the particular area (within which demand for offices is actually highest) as relevant factors on this application for development, the Inspector treated market forces as part of his planning decision.

In dealing with the remaining issue identified by him, the location of offices, the Inspector brought in economic considerations wider than merely market forces. He began by making reference to the Borough Plan Inquiry and the treatment of the location criteria within that document (400m from a designated transport interchange) as not being a rigid line, so as to include the site within an area where office development could be allowed. He referred to the distance from Aldgate East station as being 440m and the other stations which are in walking distance, and the proximity of this site to other office developments as making it an appropriate site. He then looked at the criteria for allowing office development, as set out in paragraph 4.15 of the GLDP, and discussed environmental issues, planning gain and employment as the relevant tests.

In reaching conclusions on each of these, he took into account characteristics of the area, the availability of industrial space and the types of employment required in the area. In considering the plot ratio of the proposed site he acknowledged that it exceeded the normal and that identified in the IDP and the Borough Plan, but did not simply apply these measures but examined the scale and setting of nearby developments to find the development acceptable. He found that office development would have less affect on the amenity of the area than industrial development by taking into account the likely noise generated and the proximity of housing to the site. In assessing

the contribution made by the planning gain element the Inspector began by comparing the amount of floorspace (21,000f² of industrial units and 42,000f² of offices) but went on to consider the provision of employment this represented, which would not be feasible without the level of office space at Prescott Street. So, again, he was not simply applying percentage criteria but assessing the economic value of the proposal as a whole in light of the social structure of the Borough.

" The scheme not only provides for a new building on the site of scale similar to others in the immediate locality but it will enable development of the Fairclough Street industrial conversion, a planning gain, to proceed as secured by an agreement. The provision of new jobs is an important feature of the proposal and the related scheme. With the staggering potential of some 50m.sq. ft. of office space in Central London the proposed scheme of up to 42,000 sq.ft. cannot be regarded as one of strategic importance. I attach considerable weight to the Borough Council's resolve to permit the development, a decision which must have been taken after having regard to all its obligations to the community. "⁸⁶

Nowhere in his decision did the Inspector question the validity of the planning agreement, which he had before him, nor the necessity of considering the obligations of the Council which extend to the socio-economic status of the Borough as a whole. The assumption throughout was that this was a necessary aspect of planning rather than exceptional. Finally, the conditions suggested by the Inspector made no reference to the planning gain element nor to the planning agreement although his decision accepted the essential part they played in making the scheme acceptable.

⁸⁶ Decision letter supra note 81, p.5, paragraph 22.

36/40 ARTILLERY LANE, SPITALFIELDS: Decision dated July 18, 1983

An Inquiry was held in May 1983 and the Inspector dismissed the appeals against the refusal of applications made for the demolition of an unlisted building in a conservation area and construction of a new office and residential building, whilst specifically not commenting on the Council's office policy.

" I do not find it necessary in this case to go further into this aspect of the case [the loss of industrial floorspace and insufficient level of residential gain] or to comment on the acceptability of the Council's policy of expecting a replacement of industrial floorspace or as much as a 55% proportion of residential accomodation. "⁸⁷

The Inspector did, however, recite in his report the attitude of the appellant, the Council and SHPRS to planning gain and his conclusions were strongly influenced by the representations made by SHPRS at the Inquiry.

The scheme under consideration involved the demolition of buildings which formed part of a continuous terrace and, although delapidated and mediocre in appearance, contributed to the street scene of the area of narrow streets in this part of Spitalfields. On the other hand, they were almost opposite a seven storey glass-clad office building developed by Central & City.⁸⁸ Much of the evidence submitted concerned the viability of refurbishing these buildings in such a way as the development would conform with office policy and

⁸⁷ Appeals by Eversleigh Investment and Property Company Ltd under TCPA 1971 S.36 and paragraph 8, Schedule 11. DOE reference App/5031/A/82/008586 and App/5031/E/82/257. Decision letter dated July 18, 1983, Report of Inspector CF Allan CB, ARIBS, FRTPI attached, para.41.

⁸⁸ See FABS Scheme.

both parties presented conflicting figures on refurbishment costs and the need for industrial floorspace in the area. The Inspector concluded that the developers had not effectively proved that such a scheme was impossible. The Inspector did, however, register concern over whether such a scheme if it had a high residential content would actually be undertaken, leaving the buildings to deteriorate still further.

Having concluded that demolition could not be justified, leaving a presumption of preservation in a conservation area intact, the Inspector assessed the proposal for development. He concluded on this that the policies were not complied with and it would be against the public interest to allow speculative office development and the loss of potential light industrial and residential use.

" The evidence, particularly that submitted by the Spitalfields Housing and Planning Rights Service persuades me of the special character of the community of the locality, the potential buoyancy of its trades and businesses, its dependancy on a particular variety of job opportunities and low-cost housing and the need for an available choice of inexpensive small industrial units. None of the resultant community requirements would appear to be assisted by a net loss of potential small industrial units or potential residential accomodation and the Council's office and industrial policies are designed to avoid such losses. Indeed, it appears to me to be important in the interests of the local community to restrain the tendancy for speculative office development to make further incursions. "89

In this, the Inspector reinforced the policy of restraint included in the office policy and the refusal had been issued on the grounds that only in exceptional circumstances, where the scheme improved or bestowed a public benefit on the neighbourhood, or directly contributed towards a specified and necessary planning objective,

89 *ibid.*

would offices be allowed.⁹⁰ The scheme was for 824m² of offices with two residential flats above, which had no independent access, and involved the loss of industrial space with no proposed replacement, and as such did not present an exceptional scheme and was in direct conflict with paragraphs 4.86, 4.22 and 4.24 of the draft Borough Plan.

During the course of the Inquiry the appellants argued that the planning gain requirement of 55% residential space on office development within a conservation area and not involving refurbishment was 'arbitrary, onerous and inappropriate, ignoring the physical and economic constraints of individual sites'. They submitted in evidence as support for their argument the PAG report and the Draft Circular on Planning Gain. The Council for their part justified the policies on the basis of ensuring a mix of use by restricting speculative offices and increases in land values. SHPRS, on the other hand, presented detailed information on the dire state of housing, the demand for small industrial units and the adverse effect of office development on these needs which were, in their view, inadequately compensated for by planning gain policies.

The Inspector, however, declined to comment upon the merits of any of these three approaches, or on the relevance of the PAG report and the draft circular to the issues raised, although neither document was mentioned in his findings or conclusions. The appellant had specifically directed the Inspector's attention to the draft circular's requirement to only impose planning gain obligations where it was unreasonable to grant permission without them, rather than as a

⁹⁰ Notice of Refusal of planning permission.

normal practice.⁹¹ They also referred him to a ministerial decision⁹² which supported this view.

" Section 4.15 of the GLDP says that account should be taken of planning; this should be construed on the merits and the ability of the site to give planning advantages, and should not be construed in a mandatory sense. "⁹³

The Inspector made no finding on this point and did not question the requirement of a planning gain, but merely assessed its adequacy. The approach he took to the development was squarely based on the figures presented on economic viability and on an assessment of the public interest from the evidence given, which in this case was largely supported by Council policy.

C. THE COURTS

The courts have rarely considered whether a Council's decision to refuse planning permission on the grounds of non-compliance with an office policy which requires planning gain⁹⁴ is *intra vires* and

⁹¹ DOE Draft Circular on Planning Gain, para. 4 & 6. London: HMSO (the content of these paragraphs are basically the same as the final version).

⁹² Appeal against the decision of the London Borough of Richmond upon Thames Council to refuse planning permission for the erection of a four-storey building comprising three shops on ground floor with offices above, at 26/30 London Road, Twickenham, DOE Reference T/App/5028/A/81/09717/G7. Reported (1983) JPL 265-269.

⁹³ *ibid.* p.266.

⁹⁴ This begs the question as to whether the courts can allow the challenge of a policy they consider to be invalid after the requirements of TCPA, S.242(1) have elapsed. It appears that a plan cannot be challenged as invalid, R v SSE ex parte Ostler [1977] 1 QB 122, EH Bradley & Sons Ltd v SSE [1983] JPL 43, but it remains arguable that the policy itself may be challenged as it is only

consequently have not commented on the legality of the practice. In the cases discussed in this section the court has been confronted with the status of planning gain policies, the effect of the PAG Report on those policies and the role of planning gain in the system of development control; yet the judgments are not categorical and rely upon a rational interpretation of the status of the policies examined and continue to use tests based upon 'proper planning objectives' and 'proper planning objections' without clarifying their interpretation of those phrases.

The courts have also been called upon to judge the validity of using conditions and agreements to achieve certain objectives but that involves an assessment of the legality of the method of enforcement rather than of the process of negotiation itself or of the policy making functions of the planning authority.⁹⁵ In view of the nature of the system it is not surprising that little judicial attention has focused upon this area. The major bargaining tool is the avoidance of conflict so as to avoid the delays and expense of invoking the court system as a mediating force. Any involvement by the courts, therefore, is necessarily marginal in terms of direct control, but remains important as an indirect influence on the operation of the process in that policies and practices are adapted and administered so

something which the SSE must have regard to and may therefore be affected by other material considerations, Westminster City Council v SSE and Another [1984] JPL 27 (Transcript: Marten Walsh Cherer). Whether the issue of the vires of the policy is in fact a material consideration is not certain.

⁹⁵ This distinction is made clear, eg., in Westminster Renslade Ltd v SSE and Another [1983] P&CR 255 where Forbes, J. at 264-267 distinguishes between what may validly be taken into account in assessing an application and what would be ultra vires if imposed as a condition. See below for discussion.

as to be justifiable under the law. This does not mean that the law can effectively control negotiation, but rather that negotiation will adapt to the circumstances presented to it by law: the few decisions by the courts were analysed by the officers (legal and planning) at Tower Hamlets to assess whether they may be interpreted in such a way as to allow negotiation to continue in its present form or whether its basis of operation must be adjusted so as to allow it to continue under a different guise.

The courts have long indicated the function of local planning authorities to weigh the benefits of a planning application against its disadvantages when reaching a decision.⁹⁶ There has been some judicial acknowledgement of the relationship between this function and the provision of planning gain. For example, in RKT Investments Ltd. v Hackney London BC⁹⁷ Sir Douglas Frank QC upheld the validity of an informative on a permission intended to encourage a planning gain to balance a planning loss produced by office development.

This case concerned the use of a warehouse for offices and the Secretary of State attached a certificate to the Office Development Permit requiring the offices to be used only by the applicants. The permission included this as a condition and attached an informative to the effect that if the freeholders of the premises were to convert another building currently in office use to residential, the Council would consider an application to modify this condition. After finding that the office development was contrary to the development plan

⁹⁶ See eg. Stringer v MHLG [1971] 1 All ER 65; Granada Theatres Ltd v SSE [1976] JPL 96; Clyde & Co v SSE [1977] 2 All ER 1123 at 1126.

⁹⁷ QBD, [1978] 36 P&CR 442.

which advocated the restraint of offices in central London, Sir Douglas treated the development as representing a planning loss which the Council had a valid ground for trying to balance with a planning gain.

" It is possible, as said in evidence, that but for the potential residential use of Insurance House permission might not have been granted at all, but that does not vitiate the certification.

The conclusion that I have reached is that the only motive for the certification was to safeguard the development plan and that the informative (in the planning permission) was no more than an encouragement to someone to bring about the change to residential use of Insurance House so that there would be a planning gain in that use to set off against the planning loss at Chart Street. Accordingly it follows that in my judgment this action fails ".⁹⁸

In performing this function the local planning authority is entitled to consider the benefits offered by the developer which would form the content of a planning agreement as well as those falling within the application itself,⁹⁹ although there must be a relationship between the two.

In McLaren v SSE and Another¹⁰⁰ Woolf, J. considered an application under S.205 TCPA 1971 in respect of a dismissal of an appeal against refusal of permission for the use of a building for the processing and retailing of meat in a green belt area. The facts are

⁹⁸ *ibid.* at 447.

⁹⁹ *eg. Brittaniam (Cheltenham) Ltd v SSE and Tewkesbury Council* [1978] JPL 554, where Sir Douglas Frank QC overturned the decision of the SSE as he had refused to consider the content of agreements reached on the provision of open space, a children's play area and a shopping/social centre within a housing development. These agreements had been made after refusal of permission but before the appeal was heard so were not a part of the application itself. Sir Douglas went on to say that the layout for these gains could be included as valid conditions on the consent as there was no required public dedication, distinguishing it from Hall & Co v Shoreham UDC [1964] 1 WLR 240.

¹⁰⁰ QBD, unreported, noted (1979) SJ370, transcript: Barnett, Lenton.

unusual in that the appellants, realising the unacceptability of their proposal, persuaded the Council to consider planning gains including the extinguishment of existing use rights and limitations on the number of employees and working hours on the site. An agreement covering these gains was drawn up,¹⁰¹ but due to local opposition the agreement was not signed and a refusal was issued.

At the appeal the Inspector referred to the agreement but did not consider the contents of it as relevant and the SSE accepted his conclusions. The issue before the court was the acceptability of this approach. Woolf, J. concluded that by refusing to balance the benefits proposed by the developer alongside the disbenefits of the application the SSE had erred and the reasons stated for the dismissal were inadequate.

" The Inspector, because he had ignored the S.52 agreement in coming to his decision, never considered those planning gains; and, because the Secretary of State, as regards the merits, had merely said that he agreed with the Inspector's conclusions, he has likewise not dealt with those merits. Bearing in mind how extensive they were I think that it was at least incumbent on the Secretary of State to say something to the effect that although it was recognised that there would be planning gains from the proposals contained in the S.52 agreement, they were not sufficient, in his view, to justify the development. "

This approach was reiterated in Westminster Renslade Ltd v SSE and Another¹⁰² which affirmed the relevance of considering the provision of planning gain in deciding whether to grant or refuse planning permission, while also stating it to be outside the powers of a planning authority to require gains through the use of planning conditions.

¹⁰¹ This case is also considered in chapter 6.

¹⁰² QBD, [1983] P&CR 255.

" Mr Brown [on behalf of the SSE and the planning authority] ... accepts that any condition suggesting that there should be a provision of parking space subject to public control would be ultra vires the planning authority and, of course, the Secretary of State equally. He goes on, however, to say that it is legitimate to take into account, in deciding whether to grant or refuse a planning permission, that the proposed development would produce a gain for the public and that the provision of public off-street car parking is such a gain and, therefore, a legitimate consideration in this case. Of course, if the developer freely chooses to give away his right because he considers that it is more likely that he will get planning permission if he does, then it may be legitimate to take into account what he is providing as a planning gain, but it cannot be right, in my view, to say that planning permission can be refused unless a landowner takes on the burden that should more properly be shouldered by a local authority in another capacity. " ¹⁰³

This amounts to a denial of the underlying attitude behind the PAG Report in that Forbes, J. accepted 'of course' that bargaining is a part of the development control process and that planning gains are not necessarily illegitimate if they cannot be included in a valid condition. Rather, he asserted a dichotomy between negotiating over the grant of permission and the content of what can be actually imposed on the developer through conditions. In accordance with this he spoke of freedom of choice on the developer's part, although at the same time acknowledging the motives behind that exercise of 'choice'.

Looking more closely at the facts of this case, it clearly represents a negotiated planning scheme, but the court only addressed itself to one aspect of the gains involved and makes no reference to the benefits provided within the scheme itself. The application concerned a site for office development surrounding Feltham railway station in the London Borough of Hounslow and the notice of motion was against the several bases of the SSE's decision to refuse the

¹⁰³ *ibid.* at 266-7.

development including the scale of the development and the lack of provision for public car parking space. Planning gain was considered in the context of the latter point, in that the failure to provide this benefit could not form a valid ground for refusal. On this point the decision of the Secretary of State was quashed.

The court did not comment directly on the gains actually included in the scheme and in a planning agreement already signed between the parties. The appeal arose, in fact, as a result of a deemed refusal following failure by the Council to determine the application within the prescribed time.¹⁰⁴ The local authority supported the developer at the appeal, with the GLC and local residents in opposition. The planning application for the site was not only for an office development but also for redevelopment of the railway station, a multi-storey car park, surface car parking, a bus and rail interchange, a car and pedestrian bridge, accommodation for public and community use, a rifle range, improvements to existing public gardens and pond and to a public house. It was accepted that these were elements of the scheme and the adequacy of them as planning gains was not argued, although it was indicated that the office development grew to its now unacceptable size as a result of gains provided.

In reaching the decision that the requirement of public car parking was outside of the powers of the planning authority, the court relied strongly on the fact that the GLDP included its policy on this point in a section titled 'Parking' which was interpreted as a local authority objective addressed to non-planning functions. As such, it

¹⁰⁴ See TCPA, 1971, S.37.

was outside of planning powers to achieve this objective through the vehicle of development control.¹⁰⁵ On the other hand, the provisions included in paragraph 4.15 were treated as proper planning policies.

Taken together, all of the points made in this case do not detract from, or diminish, the operation of planning gain, but merely contain the use of conditions along established lines. The most significant aspect is the effect which it could have on respective bargaining positions by making the failure to provide planning gain an inadequate ground for refusal on its own. However, this part of the judgment is clearly concerned with planning gain which involves an obligation on the developer which should be provided by the local authority in a capacity other than as planning authority, rather than for the achievement of planning objectives.

The approach here was largely mirrored by Glidewell J. in London Borough of Richmond upon Thames v SSE and Hutchison Locke and Monk,¹⁰⁶ in a judgment delivered during the same month, which dealt with non-compliance with a planning gain policy as grounds for refusal and the effect of the PAG Report. He concluded that where there were no legitimate planning objections other than the lack of planning advantages there was no valid ground for refusal. He found that the office policy was valid and had to be taken into account by the Inspector but did not go on to explore, in the light of non-compliance with that valid policy, what amounted to a legitimate planning objection.

¹⁰⁵ Hall & Co.Ltd. v Shoreham-by-Sea UDC [1964]1 WLR 240, [1964]1 All ER 1; R v London Borough of Hillingdon ex parte Royco Homes Ltd [1974] QB 720, [1974] 2 WLR 805, [1974]2 All ER 643.

¹⁰⁶ QBD, CO/1171/82, May 9, 1983, noted in [1984] JPL 24, The Times May 16, 1983 (Transcript: Marten Walsh Cherer).

It seems from his judgment that it is possible for office use to produce valid planning objections and, as an extension of this, for a policy to balance those objections to make it acceptable under certain circumstances, such as the provision of planning advantages. Yet, as in the Westminster Renslade case there is no clear statement as to when it is valid to operate the policy or what the characteristics of a 'proper planning objection' are. If the planning authorities in these cases had argued that the policy was necessary to achieve the 'proper planning objective' of a balanced mix of land use would the courts have refused to uphold it? The only certainty here is that these judgments leave it open to argue that it would be a proper planning objection to allow office development without appropriate gains if the Council demonstrated that it was necessary to sustain a proper planning objective.

Glidewell, J. certainly suggested that the PAG Report, by its definition of planning gain, was talking about something far more restricted than the 'planning advantages' referred to in the Richmond Plan and the GLDP, as some of the latter at least could be inherent in the application itself and/or be incorporated into valid conditions.

" [The authors of the report] defined 'planning gain' as meaning 'advantages which could not be gained by the imposition of conditions on planning permission'. Thus, in my view, they clearly meant something quite different from the wider phrase 'planning advantage' used in the plan because, quite clearly, some at least of the planning advantages referred to in the plan would be inherent in the application itself and certainly some could be, in my opinion, the subject of condition. " ¹⁰⁷

He went on to quote the guidelines suggested by the Report: that if there were no legitimate planning objections consent should be given

¹⁰⁷ Transcript: Marten Walsh Cherer ibid. p.6.

and if there was some technical problem with the development which could be overcome with a planning agreement the Council should grant consent subject to such an agreement. Overall, he concluded that the Borough's policy was valid, it should have been applied to the facts of the case which involved an extension to an existing office building and the PAG Report could not override that policy. He, however, did not quash the decision as he considered that the Inspector had found considerable planning advantages in the development.

Three months after this decision planning gain was again considered by the Queen's Bench Division on an application under section 245 TCPA 1971 - Westminster City Council v SSE and Another - to quash the decision of an Inspector to allow office use to continue in premises in Mayfair.¹⁰⁸ Westminster, a strongly Conservative Council, have operated a planning gain policy¹⁰⁹ since the early 1970's and refused an application for permanent office use on premises which had a temporary office use until 1990, on the following ground:

" The proposal is contrary to the Council's policy as expressed in Chapter 10 of the City of Westminster District Plan which is to restrain the further development of offices in Central London and in particular paragraph 10.27 which states that permission for office development within the Central Activities Zone will normally only be granted, subject to other policies in the plan, if accompanied by appropriate planning gain. It is considered that planning gain in the form of residential accommodation can be provided on this site but that, in the absence of any such gain, the continued use of the building as offices beyond the expiration of the current limited period permission is unacceptable in the context of the above policies."

¹⁰⁸ Westminster City Council v SSE and Another, QBD, CO/1193/82, noted in [1984] JPL at 27, transcript Martin Walsh Cherer.

¹⁰⁹ It has been suggested that Westminster and Tower Hamlets have been the two most consistent, pragmatic and successful boroughs to operate a planning gain policy. See Focus on City of London Fringes, (1983) Estates Gazette.

The paragraph of the District Plan referred to appeared under the heading 'Ensuring that Planning Advantages result from New Development' and stated that the Council would consider applications for office development subject to account being taken of the contents of paragraph 4.15 of the GLDP. The Council added an informative to the refusal enforcing the point that permission would only be granted if planning gains were included in the proposal:

" You are advised that in the City Council's view the potential to provide residential accommodation exists primarily in the 'Brick Street buildings ' and the top floor only of 17 Old Park Lane and that if a scheme were submitted showing the conversion of these floors into residential use the Committee would be likely to approve permanent office consent in respect of the rest of the main building 17 Old Park Lane. "

The appeal had been dealt with by an Inspector on written representations and his report was quite short and indicated that the planning gain policy was not one which could properly be applied, citing the PAG Report as authority. He, accordingly, decided that consent should be given and the Council appealed against the decision on five grounds: the Inspector had failed to have regard to the Statutory Development Plan; had failed to apply the residential and office policies of the District Plan and the GLDP; had taken account of and used as a deciding factor an advisory report; had misunderstood what amounted to new development under paragraph 7.6 of the GLDP. The most relevant parts of the Inspector's Report were as follows:

" 2 ... I am of the opinion that the decision in this case is primarily dependent upon whether the continuation of the office use in question would involve a serious breach of a proper planning policy for office development in this part of London, bearing in mind the Report of the Property Advisory Group to the Secretary of State on the subject of 'Planning Gain ', their view that the practice of bargaining for planning gain is unacceptable, and the fact that the recommended issue of guidelines to which the Department's

press release of 26th October, 1981 referred, is a matter yet to be determined.

3. The matter of whether the absence of planning gain is properly a compelling planning objection is in doubt, pending the issue of the Secretary of State's guidelines. In these circumstances, and because I take the view that planning permission cannot properly be withheld solely because an alternative new development is to be preferred, I am not satisfied that the continued use of the appeal premises as offices would involve the breach of a planning policy which may properly be applied for the control of office development, notwithstanding the fact that the policy in question is embodied in the adopted City of Westminster District Plan.

4 ... even if the policy of requiring a planning gain is one which may in general be properly maintained under the provisions of the District Plan, the use under consideration may not be a new use which by virtue of paragraph 7.6 of the Greater London Development Plan, should be guided, in whole or in part, to another area. "

Reading these three paragraphs together produces confusion. In the first the Inspector appeared to be putting the approved Plan aside and considering what the proper planning policy ought to be in the light of the PAG Report, but in the second he pointed out that the proper planning policy was that included in the Plan although he appeared to be talking about something completely different. Finally, he casts doubt in the last paragraph on the validity of the policy adopted in the Plan. Mr Widdicombe QC concluded that the Inspector's Report was 'a fine old muddle' and quashed the decision.

However, a number of arguments were rehearsed before the Court which Mr Widdicombe QC went on to consider. It had been suggested that the policy itself was ultra vires and that the Court could hold it so¹¹⁰ notwithstanding the fact that the time limit for submissions on a policy had elapsed and the policy approved. Mr Widdicombe did not agree that the Court had the power to find it ultra vires once a

¹¹⁰ Citing Anisminic Ltd. v Foreign Compensation Commission [1969] 1 All ER 208.

statutory time limit had elapsed¹¹¹ but added that it could be challenged on appeal to the Secretary of State as they were not legal proceedings. This assessment in fact goes further than R v SSE ex parte Ostler upon which Mr Widdicombe relied, as that case is authority for saying that a statutory Plan cannot be challenged, whereas what was submitted was that the policy itself could be challenged as invalid and so not applied to determination of the application.

It was accepted in this case that the Development Plan was not a binding document but one which the planning authority, Inspector of Secretary of State should take regard of.¹¹² This being so, it could be argued that other relevant considerations dictated that the policy should not be applied, and arguably that could include the vices of the policy.

Mr Widdicombe also commented upon the status of the PAG Report and relied upon his own judgment in JA Pye (Oxford) Ltd v West Oxfordshire District Council¹¹³ and that of Glidewell, J. in London Borough of Richmond upon Thames v SSE and Hutchison Locke and Monk¹¹⁴ to conclude that a draft circular could not be a relevant consideration but the final report of an advisory body to the Secretary of State was such a consideration and could be given whatever weight considered appropriate by the Inspector. As to the extent of its

¹¹¹ R v SSE ex parte Ostler [1977] 1 QB 122.

¹¹² See Niarchos (London) Ltd. v SSE and Another (1977) 35 P&CR 259; Co-Operative Retail Services Ltd. v Taff-Ely Borough Council and Another (1979) 39 P&CR 223.

¹¹³ [1982] JPL 577.

¹¹⁴ QBD The Times, May 16, 1983, noted [1984] JPL 24, CO/1171/82 Transcript Marten Walsh Cherer.

influence he went further than Glidewell J. in the Richmond case by saying that it could justify a departure from the Development Plan or be used as an indicator of what a proper planning policy should be. Glidewell, J. had specifically stated that the PAG report could not be used in such a way that it 'wiped out the development plan or any part of it'.¹¹⁵

Glidewell J.'s approach was significant in that by treating the report as a relevant consideration, it follows that failing to take account of it would amount to an error in law. As discussed above, the Report betrays a lack of understanding of the process of development control and its conclusions are based upon a definition which fails to appreciate the form of planning gain. To require such a Report to be taken account of at law essentially allows the views of a consultation body to directly affect the development control process. Concern has been voiced about circulars and other official documents being considered as material considerations in that it allows direct government interference without the need for legislation; the Glidewell J. judgment widens that concern, but that of Mr Widdicombe QC could open the way for the displacement of statutory documents through this informal mechanism.

In a less direct context the courts have commented upon the possibility of using development control to achieve positive planning purposes in enforcing a particular use. These cases are relevant to a consideration of planning gain on two levels: they interact with planning gain policies which involve requiring a developer to provide

¹¹⁵ Transcript: Marten Walsh Cherer, *ibid.* p.11.

certain uses within a scheme and they also offer comment on the mechanisms through which a planning authority can enforce a particular use. The line of cases, beginning in 1976 with Granada Theatres Ltd. v SSE and Another,¹¹⁶ established that a preference for one use over another without any planning merits to support it did not amount to a material consideration but went on to acknowledge the relevance of weighing alternative uses for a site under consideration. This judicial acceptance of an essentially common sense approach, which was certainly departmental practice,¹¹⁷ indicated a willingness by the courts to take into account more than purely private property interests¹¹⁸ and to consider applications in the light of less profitable as well as equally profitable competition of uses.

In Clyde & Co. v SSE¹¹⁹ the court considered an application concerning the change of use of a building with the permitted use of offices and residential to solely office use. The Court of Appeal stated that it was relevant for the planning authority to consider the housing and other needs in the area against the application proposal when assessing its merits.¹²⁰ The fact that the premises had never been used for residential purposes, that such a use was considered by

¹¹⁶ [1976] JPL 96.

¹¹⁷ See Clyde & Co. v SSE [1977] 1 WLR 926 at 1126.

¹¹⁸ See McAuslan, P. *Ideologies of Planning Law*, 1980, Oxford: Pergamon Press p.176-179 who notes that a similar movement from a private property ideology to one based on public interest can be detected in eg. Sovmots Investments Ltd. v SSE [1976] 1 All ER 178.

¹¹⁹ *supra* note 117.

¹²⁰ These clearly represents quite a different approach from R v London Borough of Hillingdon ex parte Royco Homes Ltd.[1974] 2 All ER 643 mentioned above. See McAuslan, P. (1980)*op.cit.* *supra* note 118, p178-9 for discussion.

the developer to be uneconomic and would in any event be restricted to the private market did not make it an immaterial consideration, whether or not it was included in a statutory plan.

This approach was taken up by Niarchos (London) Ltd v SSE and Another¹²¹ and applied by Forbes, J. in the later, 1981, Granada Theatres Ltd v SSE¹²² which concerned an appeal from the SSE's attempts to balance the existing uneconomic use (as a cinema), desirable in planning terms, with the less desirable use in the application (a bingo hall) by suggesting a mixed use within the building. In the earlier Granada case Woolf, J. had overturned the Secretary of State after a concession was made by counsel to the effect that the only reason for the refusal was to enforce a particular use. Forbes, J. did not consider the approach of the SSE in the later case to be so unreasonable as to overturn the refusal to allow the undesirable use outright because the preservation of an existing use was necessarily a material consideration. Consequently, what Forbes, J. was saying in this case was that it was acceptable for the local planning authority to continue to refuse the bingo hall use unless the applicant agreed to include in the scheme a planning gain in the form of a partial cinema use.

This was considered by Hodgson J. in L.O. Finn & Co. and Others v SSE and the London Borough of Brent¹²³ to represent a decision on what amounted to a valid planning consideration. After examining this line of cases he concluded that the development control process

¹²¹ cited supra note 112.

¹²² [1978] JPL 278.

¹²³ QBD, CO/476/83, noted [1984] JPL 734, transcript Marten Walsh Cherer, November 7, 1983.

cannot be used to ensure a particular use unless there was a material planning reason for doing so. In looking at the two Granada cases he distinguished between them on the basis of the existence in one of a material planning reason.

" The point in both cases of Granada Theatres Limited v Secretary of State seems to me to have been whether there was any planning consideration which would entitle the Secretary of State to refuse to allow someone to do what he liked with his own property. In Granada Theatres Limited v Secretary of State for the Environment [1976] JPL 27 Mr Justice Woolf accepted, I think, that there was no 'planning gain' to be achieved by the retention of use as a cinema over change of use to bingo. In Granada Theatres Limited v Secretary of State for the Environment [1981] JPL 278, 257 EG 1154 Mr Justice Forbes seems to have accepted that there was, because it does not seem that there was there any other material planning consideration why permission for change of use to bingo should be refused ... If the choice between cinema and bingo is not a matter for planning authorities (unless of course the change has an affect on the environment by, for example, an increase in vehicular traffic) then Mr Woolf was entirely right ... If it is a material planning consideration then Mr Justice Forbes was entirely right " ¹²⁴

By implication he treated the existence of a 'planning gain' as a material planning consideration, although he did not define what is meant by that phrase in the context within which he made use of it. He also referred to a technical view of planning in the indication he did give of what in his view amounted to a 'matter for planning authorities'.

This case concerned the use of a building for office use: the ground floor had an existing office use but the first floor had a permitted residential use which the appellants wished to change to offices. The application had been refused on the grounds of being contrary to the GLDP in that it represented a loss of residential space

¹²⁴ *ibid.* Transcript: Marten Walsh Cherer.

and the appeal was dismissed after a public inquiry. The present appeal attacked the decision of the SSE for taking into account an immaterial consideration by assessing the possibility of the premises being used for residential use, for using a test of 'possibility' and for reaching an answer to the test in a way that no reasonable SSE could have done. In applying the arguments presented Hodgson, J. concluded that the possibility of the house reverting to residential use was undoubtedly a planning consideration and attempted by counsel to align this consideration with the Council pursuing an ulterior, rather than a planning purpose was unacceptable.

" ... Mr Horton in an elegant, if at times somewhat obscure, argument has attempted to extend the principles which have been developed in that field of planning law which deals with the validity of conditions imposed under sections 29(1)(a), 30 and 30A of the Act. Any such extension cannot be justified by the *rationes decidendi* of the two Granada cases and Clyde ... What Mr Horton contends in this case is that by taking into consideration the possibility that there would be a reversion to residential use of the whole premises if planning permission for office use on the first floor was refused, the Secretary of State was seeking to use planning control to bring about the discontinuance of an established use without having to pay compensation, and that was an ulterior object and not a planning object. I cannot think that is right. The Secretary of State is entitled to take into account the possibility of a reversion of the planning unit under consideration " ¹²⁵

Thus the court accepted in this case a distinction between material considerations and the method of enforcing a particular result and maintained that the developer could not be forced to continue or implement a particular preferred use. This essentially preserved the view of development control as a negative and regulatory power, rather than a positive one. However, Hodgson J. does suggest that the assessment of a planning application did represent an opportunity

for the planning authority to try and encourage the developer to continue or apply for a preferred use.

On the Wednesbury aspect of the appeal Hodgson, J. did find in favour of the appellants on the basis that the SSE had not addressed his mind to the correct question, in that he only considered the practical possibility of converting the premises to residential use, rather than asking whether there was a 'fair chance that, within the period which present planning policies comprehend, the whole of these premises will revert to residential use?'. In formulating this test he had regard to the Clyde & Co and the second Granada Theatres cases, and acknowledges that the determination of the test will usually depend upon the economic viability of the alternative use. Hence if the preferred use is economically unfeasible the planning authority must have other planning reasons upon which to refuse the proposed use, but where the competing uses are both feasible (although not necessarily equally profitable) it is legitimate to use the planning system to guide the developer into implementing the preferred use or both uses.

SUMMARY

Taken at their broadest sense these cases represent a significant movement in planning in that they seem to recognise the use of planning powers to achieve planning objectives through various means, of which valid conditions are only one. Certainly in determining what amounts to a planning consideration they signal an approach which allows consideration of a broad range of political variables including assessments of social needs, the viability of developments and the

opinions of government appointed bodies, while leaving the concept of 'proper planning' intact. Judicial pronouncements against the practice of planning gain have not been forthcoming, and there have been attempts to distinguish unlawful planning gain from the lawful attainment of planning advantages on the basis of 'proper planning objectives', so as to leave the process to continue without direct judicial interference.

In addition, the courts have made no attempt to draw up guidelines and have avoided consideration of the vires of the policies themselves. On the other hand they have demonstrated a willingness to quash decisions on the basis of procedural faults, such as the failure to give proper reasons and the failure to ask the correct question. In extending their view of planning considerations they have moved beyond considerations which are determinable through hard evidence to include some elements which are essentially questions of opinion or political choice, such as the test suggested in L.O. Finn & Co. v SSE. The total effect of this is uncertainty for the planners as to the lawfulness of taking into account various factors, an increase in the breadth of control exercised by the courts and a continued tension between what planners and lawyers perceive to be within the realm of 'proper planning'.

CHAPTER 12: CONCLUSIONS

Before this study was commenced it was anticipated that its conclusions would answer the question of who actually gains and who actually loses through the practice of planning gain. It was assumed that there would be identifiable benefits and losses which could be attributed to groups of individuals with shared interests and who could be differentiated in terms of 'the local authority', 'the developers' and 'the community'. What evolved, however, was something far more complex than this and what the study did succeed in demonstrating were the problems inherent in seeking to analyse objectively the interests of groups and individuals within a practice involving the exercise of power. These conclusions begin with an overview of those problems so as to highlight the limitations on the results of this study while establishing the importance of recognising those limitations in assessing the role of planning gain within the system. The failure to recognise the complexities of the process has been a major impetus for the demands made to outlaw the practice as 'unlawful' without any regard to the characteristics of the system which promoted it and which facilitate its continuance. Thereafter, the major arguments of this thesis will be briefly recapitulated.

The hierarchical system of government portrayed in theories of liberal western democracy rests on the assumption that legitimacy of action is voluntarily given to the state by the population as a whole: the passivity of large sections of that population is then attributable to the existence of genuine authority of those in power to act on their behalf, in the interests of the collective good.¹ This consensus

¹ See eg. Parsons, T. *Sociological Theory and Modern Society*, 1967, Glencoe: Free Press; Dahl, R, *Who Governs?* 1961, Yale University Press.

view has been widely criticised by Marxists and Non-Marxists so as to present a picture of power not only as the result of authority but as producing and reproducing its own legitimacy through coercion, inducement and manipulation. This latter view recognises the power inherent in defining what the interests of groups are and the use of what Gramsci called 'ideological hegemony' to give apparent legitimacy to those definitions. Thus the population may be prevented from voicing or even recognising what their 'real' interests are.

Bachrach and Baratz² have argued against consensus to assert that power can be used to avoid the emergence of opposition, and so preserve the status quo, by failing to respond to articulated views of the less powerful, by deterring groups from voicing their objections, or by mobilising bias within the system. This latter tactic, referred to as the manipulation of political agendas, involves controlling the system so as to exclude certain demands from being considered or from even crossing anyone's mind. Thus, by excluding debate on particular issues the status quo may be preserved and the resulting non-decision represents a disguised exercise of power. This approach to non-decisions has been criticised and certainly produces methodological problems in assessing the influence of these processes in a system where power relations are largely routinised. As Durkheim pointed out³ one's aspirations are limited by one's expectations as to what is likely to be achieved, consequently common perceptions of power may preclude the possibility of action at an unconscious, rather than a conscious, level.

² Bachrach, P. and Baratz, M, *Power and Poverty*, 1970, Oxford: Oxford University Press.

³ Durkheim, E. *Rules of Sociological Method*, 1964, New York.

This debate raises two parallel issues which are repeated within the microcosm of planning gain: the first is one of formal legitimacy of any exercise of power and the other is whether the exercise of power is objectively in the interests of the population. As has been seen these two characteristics are considered necessary to a genuinely authoritative relationship but cannot simply be assumed from the nature of modern government⁴ and, moreover, rest upon the assumption that the 'real' interests of a particular group or individual may be identified separately from how those interests are subjectively perceived. This assumption is problematic in itself and Keat and Urry⁵ have identified three epistemological traditions influencing the different approaches to analysing interests: namely positivism, conventionalism and realism.

Under a positivist analysis relationships within the real world are reducible to hypotheses which are then tested through the scientific observation of directly perceived data: subjective views of interests are, therefore, the only valid criteria by which to measure whether or not interests are fulfilled and any objective view is external, metaphysical. This clearly excludes the consideration of ideology as a method of social control⁶ and creates problems in distinguishing an individual's desires from his or her interests. A realist approach, on the other hand, takes the view that an individual is precluded from distinguishing between real needs and false needs by the existence of

⁴ See chapter 3 above.

⁵ Keat, R. and Urry, J. *Social Theory as Science*, 1975, London: Routledge and Kegan Paul.

⁶ There are many interesting discussions on this point but for a classic statement of it see Marcuse, H. *One-Dimensional Man*, 1964, London: Routledge and Kegan Paul.

ideologies which manipulate and control his or her perceptions. Thus an individual, the only appropriate final arbiter, is only able to assess what is in his or her best interests if he or she is first released from the restraints imposed through ideology.⁷

This approach is dominant within the Frankfurt school and Habermas has maintained that empirical research cannot be used to determine what is in the public interest as data is necessarily collected within the context of ideological and political bias. Thus it remains the domain of theory

" by counter-factually imagining the limit case of a conflict between the involved parties in which they would be forced to consciously perceive their interests and strategically assert them ... The social scientist can only hypothetically project this ascription of interests; indeed a direct confirmation of this hypothesis would be possible only in the form of a practical discourse among the very individuals or groups involved. "⁸

As an extension of this, the work of Poulantzas and other structural Marxists has taken the view that all interests are class-interests and as such are determined by the outcome of class conflict within the context of capitalism. This view requires an acceptance of Marxist philosophy, which raises the conventionalist perspective on interests as it denies the possibility of objective definition outside of the theoretical framework in which interests are perceived.

On this view objective interests cannot be measured, or alternatively do not exist, and different paradigms cannot be compared, as all may be equally valid in pursuing their individual aims. In

⁷ See Marcuse *ibid.*

⁸ Habermas, J. *Legitimation Crisis*, 1976, London: Heinemann. p.114, cited and discussed by Saunders, P. *Urban Politics: A Sociological Interpretation*, 1983, London: Hutchinson, pp.37/39.

Kuhn's version of this approach, he suggests that some comparison is possible but the 'truth' of any argument should only be considered within its own paradigm and Lukes, too, is not prepared to accept that there are absolutely no objective criteria. He contends that the concept of 'real interests' does exist and is an 'irreducibly evaluative notion' which gives 'a licence for the making of normative judgments of a moral and political character'.⁹ Consequently, different views of interests will reflect different moral and political standpoints and as such will be contestable.

Saunders,¹⁰ after summarising the literature, contends that it is possible to go further than this and identify a definition of real interests which refers to the attainment of a benefit and the avoidance of cost in any given situation, determined independantly of subjective preferences and desires. This utilitarian approach goes on to state that it is possible to identify the actual value of the benefits and costs when they are viewed in context. The example he suggests is if pollution is viewed in the context of health, it can be decided objectively that the more pollution in the air the greater the risk to health. Thus if policy making is viewed in the context of allocation of public resources then benefits may be maximised by obtaining 'environmental and locational' advantages without increase in local taxation, negative visible effects 'and so on'. Saunders goes on to state that short term benefits and costs can be empirically quantified so as to show an overall pattern between groups of gains and losses.

⁹ Lukes, S. Power, A Radical View, 1974, London: Macmillan, p.34.

¹⁰ Saunders, P. Urban Politics: A Sociological Interpretation, 1983, London: Hutchinson. p.45.

This analysis, however, does not necessarily take the definition of 'real interests' any further than Lukes' approach, but merely, in most cases, delays the value judgment. Certainly where there is strong scientific evidence to show that, for example, pollution is harmful to health, then, provided the empirical evidence is considered to be sound, a scale of objective values could be created. However, where the benefits and costs under analysis are themselves decided upon through subjective values, objectivity may be achieved in the comparison of one against another but not in the allocation of value to each. By requiring that the costs and benefits should be determined by someone other than the individuals concerned the problem of subjective desires and preferences is avoided, but merely to the effect of substituting another group's or individual's political or moral view of what amounts to a 'benefit' or, ultimately, 'interest'. The dangers inherent in such an opportunity for social control through paternalism are obvious.¹¹

The search for objectively assessed 'real' interests is misplaced and to advance a claim for their assessment by others leads to simplification and, thus, further obscuring of the very complexities which studies should be working to reveal. Not only should the perspective of the less powerful or excluded groups or individuals be taken, but the unstated assumptions must be revealed as a part of the analysis of power. Theorists and reformers who have called for the recognition of different perspectives have often reasserted the interests of those with access to power, merely changing the context

¹¹ See, eg., the work of feminist lawyers on the use of paternalism to perpetuate inequality as discussed by Jagger, A. *Feminist Politics and Human Nature*, 1983.

of existing assumptions¹²: in other words to dedicate oneself to assessing the interests of a disempowered group does not mean that unstated assumptions are removed.

More attention must be paid to the relationship between power and knowledge and to the simplifying images of reality which shape and are shaped by the prevailing political, economic struggles over conflicting images of reality. Ideological success is secured when the competing views are perceived as ideology and the dominant view is regarded as truth.¹³ This process conceals the subjectivity of the reality which prevails, making it appear neutral: beyond any single perspective. Those whose view remains excluded become convinced by, internalise and help reproduce the truth of this reality and challenge is subsumed by the routine of practices reinforcing existing structures. Any reference to knowledge of 'consensual values' or 'individual choice' or 'community benefit' made in this context necessarily raises inquiry as to which views of reality are being suppressed, rather than assessing the 'objectivity' of the view which is heard.

Power, under this model, is at its most influential when it seems the least controversial: by shaping the content of agendas, predetermining preferences and excluding discussion, or thought, on possible challenges to the desired result. The interpretation of rules and the development of precedents in the way power is exercised reinforces the 'reasonableness' and the 'neutrality' of the political

¹² Here I am thinking specifically of the work of John Rawls and Ronald Dworkin which advocate equality but assume a single perspective. For discussion see Minow, M. "The Supreme Court 1986 Term, Foreword: Justice Engendered" (1987) 101 Harvard Law Rev 10 at 60/61.

¹³ See Thompson, E.P. Whigs and Hunters, 1977, Harmondsworth: Penguin.

practice and thus adds to its acceptability while embodying a further exercise of power.

" Power is tolerable only on condition that it mask a substantial part of itself. Its success is proportional to its ability to hide its own mechanism."¹⁴

Any analysis must then seek out the hidden assumptions, explore alternative perceptions of reality and examine the basis of the exercise of power critically. The courts have not chosen to adopt this type of approach but have explored only the dominant versions of reality they are able to hear within the structure of their own position, declaring other views as the domain of politics and in so doing reconfirming their own 'neutrality'.

Within this context it is possible to identify a range of different views on what amounts to a 'planning gain' in 'real' terms, but the reality of each is necessarily subjective. To some of the active local groups the only possible compensation for the loss of land to office development is low-cost housing: their perspective is coloured by emphasising the number of homeless in the borough and the inadequacy of existing accommodation. To other groups the restoration of listed buildings and the preservation of cultural activities in the borough is regarded as a benefit, on the grounds of national heritage and the importance of advancing 'community life'. To some developers there is no loss in providing local facilities or land for housing as a permission to develop is obtained and a measure of the costs could be set off against Development Land Tax liability. The Council for their part

¹⁴ Foucault, M. *History of Sexuality*, Volume 1, trans. R. Hurley, 1978, New York: Pantheon. p.86.

could produce lists of 'gains' to appear as compensation for 'losses' which maintain the balance of mixed uses required by their own policies.

It can be concluded that there are conflicting views on the content of an acceptable planning gain and that these views are articulated by persons with access to the planning system. They are not objective views of the interests of 'the community' or of 'the planners' or of 'the developers', but are views fed by the political and moral standpoint of the protagonist. Many other views remain unarticulated. Above all, the assumption that there is a 'community' interest which merely requires identification is not substantiated by the data collected.

These conflicting views extend to the conception of the role of planning and, consequently, the limits of that role. This is clearly demonstrated by the differing approaches taken towards defining planning gain and towards the use of planning agreements. In both of these areas the law is effective in tailoring those approaches, but is sufficiently flexible to allow any particular group to emphasise and interpret the application of law differently. Consequently, the officers of the Council were able to justify continuance of the office policy on the grounds of there being no judgment which actually declared it to be outside of local authority powers. Thus, the law did effect the ability of the Council to pursue its policy through its authoritative role, but the concern of the officers was to preserve the domain of planning gain as a part of the scope of 'planning' so as to keep its legitimacy within their sphere of authority.

The data collected from Tower Hamlets illustrates this interaction between law and planning, with the officers constructing planning gain

as justifiable in planning terms, and also by carefully drafting agreements to support that justification. Planning gain was not pursued as an alternative to the legitimate structure of development control, but as a part of it: using the tools and discretions provided by that structure and drawing upon the objectivity of their profession. The process of negotiation for planning gain did not, therefore, appear as underhand or as revolutionary but as a product of the development control system. It was operated with a concern for precedent and certainty and with a conscious awareness of the legal, political, economic demands that the local authority had to satisfy.

This position was largely mirrored in Sydney, where structural reforms had been imposed which did not eradicate negotiation. The councils still made use of their discretion to bargain over the content of schemes and the level of developer contributions either through their interpretation of the legislation, or through operating other methods of obtaining contributions outside of the legislation itself. The structural reforms, therefore, did alter the framework but the economic and political demands upon the councils still remained the same. Negotiations were more limited as the bargaining power the planners possessed was restricted by the active interference of the Land and Environment Court and of state government, but the councils did continue to formulate alternative mechanisms for revenue raising. This took place within the ambit of 'planning' and in 'the public interest' and similar problems of definition of these terms arose in Sydney as in London.

Finally, the influence of planning ideology should not be underestimated. The 'common sense' assumptions as to the benefit of town planning and of promoting 'community life' through physical

development are rarely questioned in the literature, and were used to justify the requirement of planning gain. The role of the planner was, therefore, guaranteed and reinforced as a necessary expertise for the efficient organisation of the city. The role of the local authority as provider of facilities and services has added to the scope of planning by bringing those concerns within its range. Thus, although appearing apolitical, planning is undeniably concerned with the distribution of valuable resources and planning determinations are necessarily political.

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APPENDIX

1. NAME:
2. ADDRESS:
3. POSITION ON COUNCIL:
4. OTHER POSITIONS:

THE POSITION BEFORE THE ENVIRONMENT PLANNING AND ASSESSMENT ACT 1979

5. As I understand it on a subdivision application the council is entitled under the Local Government Act to require a contribution towards open space. Were there guidelines for the amount of space required or was it the subject of negotiation?
6. Would financial contributions be made in lieu of open space?
7. Could that money be used to provide open space some distance away from the development?
8. Similarly, at one time the council operated a fund to provide carparking financed by the income from parking meters and developer contributions. How did the council operate that system?
9. Were conditions attached to development consents or were they essentially voluntary payments?
10. Would a particular rate be charged or would considerations such as levels of developers profits be taken into account?
11. Did the council operate a policy whereby the developer could earn a floorspace bonus by making car parking contributions? How did that operate?
12. Who would negotiate these contributions?
13. Would aldermen have any involvement with individual schemes or would they only formulate the policies put into effect by the planners?
14. Were any other funds-apart from the 2% levy operated, say to provide social facilities? How were they operated?
15. Would it be a general rule for developers to contribute towards the physical infrastructure of their development?
16. How would that operate?

17. Would the level of contribution be decided on actual costs, on a scale or by some other means?
18. How did the 2% levy emerge? Was it a formalisation of existing practices or did it represent a change in policy?
19. How did the system operate?
20. Would there be negotiations with the developer or would the council name the figure and refuse to issue the consent without payment?
21. Would there be a condition on the consent or would there be a separate agreement in writing, under seal or verbal?
22. How was it enforced?
23. Did any developer refuse to pay?
24. Do you know why so many did pay? Was it to avoid the cost of delays?
25. How did you perceive the levy as a developer?
26. How was the money spent?
27. Who decided how it was spent? Would the developer play any part in that decision?
28. What happened to the fund when the levy was abandoned?
29. Were you involved as a developer or as an architect in any scheme on which a contribution was levied? Details -
30. Did the operation of the levy affect local government spending?
31. How, if at all, did it affect the development industry?
32. Did it affect the price of land or housing?
33. Do you think that any particular sector of the community either benefitted or suffered from the operation of the levy?
34. Are there any particularly notorious schemes involving the levy?

POSITION UNDER THE ENVIRONMENTAL PLANNING LEGISLATION

35. Have you been involved in any schemes involving a s.94 contribution? Details -
36. What kind of development in your view is more likely to attract a s.94 contribution? Do they attach to developments within the business sector?
37. Is any negotiation involved?
38. Would a developer present a scheme involving the contribution or would the council lay down its requirements?
39. How does the council go about demonstrating the increased demand on public services or amenities?
40. How do they calculate the contribution?
41. Have studies been done to identify patterns of amenities required by the community?
42. Can s.94 contributions be land some distance away from the development? Examples of this?
43. What sort of services may be provided with financial contributions?
44. What sort of use would land contributions be put to?
45. In deciding upon the acceptability of a scheme the council will presumably take into account such matters as design, plot ratio, zoning requirements, light and air requirements and so on. Will such things as shopping facilities, public housing, leisure centres, creches, squash courts and swimming pools be taken into account in terms of making a development more desirable? And will the inclusion of such amenities affect the council's decision to require a s.94 contribution?
46. Would this still be the case if, for example, the facility provided is not one the council envisaged as being necessary in the area?
47. How would the effect on a s.94 contribution be calculated?
48. Are there guidelines for s.94?
49. How satisfactory do you think they are?
50. It was envisaged in 1982/3 that the State would impose guidelines on the operation of s.94. What is the position now?
51. How do you perceive s.94?
52. Would you like to see any changes in the law?
53. How, if at all, do you think s.94 has affected the development industry?
54. Has it in your view affected the price of land, housing, industrial and commercial buildings?
55. Has it affected council spending?
56. Does s.94 provide a considerable income for the Council?
57. Do you think that any particular section of the community benefits from s.94?
58. Does any sector suffer?
59. Do voluntary contributions exist alongside s.94 contributions?
60. How are they operated?
61. Is a scheme such as the Circular Quay scheme likely to attract developer contributions?
62. Does the Council operate a policy on office development which requires the developer to include shopping, car parking or other social infrastructure in the scheme?
63. How is that operated?