A COMPARISON OF PLANNING OBLIGATION IN THE UNITED KINGDOM WITH TAKINGS IN THE UNITED STATES

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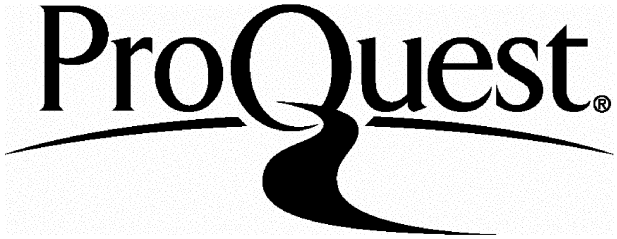

ABSTRACT

In recent years in both the United Kingdom and the United States there have been a series of court cases that have changed if not clarified the way in which planning obligation in Britain and takings in the United States are handled. While there are differences between the two systems of government generally and the planning systems specifically, the similarities are great enough to warrant a comparison. Court cases have been chosen as the primary vehicle of making this comparison as their impact is generally felt beyond the specific case under consideration. This is particularly true in the United States where each local jurisdiction adopts and administers it own planning system. Both planning obligations and takings have become more important as local authorities increasingly become less able to provide the infrastructure and other facilities required by new development. There is also a recognition that developers have an obligation to put back into the community some of the profits they receive from their developments.

This study looks not only at the cases, but also at the respective historical developments which led to the situation as it stands today. It also examines the impact of those cases on local authority planning, in their respective countries. As a method of comparison this study discusses the possibility of similar cases coming to court in the other country and if they did what the likely outcome would be. In spite of the different planning and legal systems the debate in the two countries covers similar ground, as it evidenced by the similar terms used in those debates. In spite of these similarities, the two legal systems have handled the issue in different ways. This different way of handling similar issues leads to a discussion of what the two countries can learn one from the other.

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DEFINITION OF TERMS

DEDICATION a voluntary contribution of land, by a developer, to the local authority which may be commuted to a fee, especially in the case of small developments.

DUE PROCESS from the Fourteenth Amendment to the Constitution, see below, which requires all citizens to be treated fairly in accordance with the law. Due process is both substantive and procedural. Substantive due process requires that regulations serve a legitimate public interest, such as the protection of the public health, safety and welfare. Procedural due process requires that proper and fair procedures are followed and that the regulation be clear and specific.

EXACTION contribution required of a developer to provide infrastructure either on- or off-site as a condition to a grant of planning permission. A part of the police powers granted to local government by the Constitution.

EQUAL PROTECTION from the Fourteenth Amendment to the Constitution, see below, requires that all persons and classes of property receive the same treatment before the law, making discrimination unconstitutional.

FIFTH AMENDMENT "No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

FOURTEENTH AMENDMENT Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law."

IMPACT FEE a fee which is assessed for each unit if development (dwelling unit, square foot of retail space) as a contribution towards extra capital costs, the need for which is generated by the development.

INVESTMENT BACKED EXPECTATIONS a property owner has investment backed expectations when they have put sufficient funds into a project to constitute an investment. The investment must be reasonable, rather than overly speculative and it must be appropriate for projects of its type and scale.

JUST COMPENSATION compensation which is fair to both the owner and the public when property is taken for a public use, the full monetary equivalent of the property taken.

MATERIAL CONSIDERATION in principle any consideration which relates to the use and development of land is capable of being a planning consideration. They must be genuine planning considerations i.e. related to the purposes of planning legislation to regulate the use of land in the public interest. Material considerations must relate to the development under review.

NUISANCE from English common law; no property should be used in such a manner as to injure another.

PLANNING CONDITION is a condition which is attached to a grant of planning permission to regulate any land under the control of the applicant. Planning conditions must be fairly and reasonably related to the development, fulfill a planning purpose and must not be so unreasonable that a reasonable planning authority would not have imposed it.

PLANNING GAIN a term without statutory significance, often used to refer to planning obligation. Has been applied to the legitimate operation of the planning system as well as attempts by local authorities or developers to use unrelated contributions to bring forward otherwise unacceptable developments.

PLANNING OBLIGATION through negotiation or in granting planning permission a local authority may seek to secure modifications of improvements to submitted development proposals.

POLICE POWERS powers granted to local governments by the Fifth Amendment to the Constitution, see above, to provide services to protect the public health safety and welfare. Zoning comes under the police powers. Generally, the power of a government entity to restrict private activity to achieve a broad public benefit.

RATIONAL/ESSENTIAL NEXUS "connection" between the charge levied on a developer and the burden that the development places on the community. It has led to a cost accountancy method for calculating what share a new development has had in creating the need for new public facilities and what the proportional charge should be.

ROUGH PROPORTIONALITY comes from the *Dolan* case and requires a local authority to make some sort of individualized determination short of precise mathematical calculations to show that a required dedication is related both in scale and nature to the impact of the proposed development.

SECTION 106 AGREEMENT from the Planning and Compensation Act 1991. Provides that a person with an interest in the land may enter into an obligation which restricts development, requires specific operations to be carried out, the land to be used in specific ways or money to be paid to the authority. May be a unilateral undertaking by the developer who promises to do or not do certain things if planning permission is granted. Replaces section 52 of the 1971 Act.

SPECIAL ASSESSMENT a local tax whereby specific infrastructure costs are shared by the properties which benefit from them.

SUBDIVISION the division of undeveloped land into smaller parcels for the purpose of sale and or development. Granting of subdivision approval is subject to the establishment of street and lot lines etc..

TAKING based on the Fifth Amendment to the Constitution, see above, occurs when the government takes private property for public use without just compensation.

ZONING division by a local authority of the land under its jurisdiction into zones. Within each zone only specified uses are permitted. Zoning also regulates the physical shape of development, for example, height, set-backs, lot coverage and parking standards.

CHAPTER ONE: INTRODUCTION

1.1 Introduction

During their debate in 1995 on the *Witney* case, the House of Lords looked at how the issue of planning gain was being handled in the United States. In their opinion:

> It is instructive to compare this basic principle of English planning law with the position in the United States. There the question of what conditions can be imposed on the equivalent of a grant of planning permission has a constitutional dimension because the Fifth Amendment prohibits the taking of property by the state except for a public purpose and upon payment of just compensation. Nevertheless, the debate over when the imposition of a condition amounts to an unconstitutional taking of property or (in terms of state law) an unreasonable exercise of planning (or "police") power, has given rise to a debate remarkably similar to that over "planning gain" in the United Kingdom. (Kirkwood, 1995, 599).

That the Lords should look across the Atlantic to examine how the issue of planning gain is handled in a country with different planning, legal and political systems demonstrates that the similarities are more important than the differences. It also suggests that the two countries have something to learn, one from the other.

Britain and America are two different countries. In spite of their common heritage, they have two different systems of government, and two planning and legal systems. Even with these differences, which are not to be minimized, there are sufficient similarities between the countries to make comparisons not only possible but useful. Although the systems of government are different, both countries are democracies with representatives who are responsible to the electorate. In both countries planning is carried out at the local level. In Britain it is a central government function administered locally. In the United States planning is both adopted and administered locally. However, in both countries planning is concerned with balancing the needs of the individual with that of the wider community. In America the courts play a larger role in planning than they do in Britain. In part, the courts play this larger role because, with rare exceptions, there are no administrative bodies charged with reviewing local authority planning decisions against which someone wishes to appeal. Although American law has its own history and traditions which derive from a written constitution, its roots are in English common law. The concept of nuisance, which will prove to be central to the American part of this discussion, is derived from English

common law. Significantly, the two countries share similar economic and social conditions. In both countries there was an economic boom in the early 1980's followed by a prolonged period of slow growth, in some places no growth at all. In both countries, government can no longer pay for all of the public facilities and infrastructure as it once did. In each country there has been a gradual increase in the provision of the public facilities being paid for by developers, who after expect all profit from the community and place a burden on it to pay for the external costs of development. In short, growth does not pay for growth. In their respective searches to find an equitable way to determine developer contributions the two countries have entered into remarkably similar debates. Even though the debates have been very similar, the outcomes have been quite different. What is it about the planning or legal systems or the underlying social and political situations in the two countries that has resulted in such a similar debate leading to such different results?

1.2 Methods of Comparison

To make a successful comparison there must be a vehicle. In this case the chosen vehicle is court cases. In recent years three important cases have been decided in each country. There are several reasons for choosing court cases as the means for comparison. First, these cases have all been decided in the last few years: the most recent a year ago and the earliest nine years ago. In many ways they represent the most recent developments in the field. At the time of this writing new policy guidance from the Secretary of State for the Environment is still being awaited. Second, in the United States, planning is a local government function. Each local authority, and there are over 3,000, has its own planning system. To be sure, the local authorities are circumscribed by the laws and constitution of their respective states, which are in turn circumscribed by the United States Constitution and federal laws. This diversity at the local level is compounded by fifty state court systems. The United States Supreme Court is the only court with jurisdiction over the entire country. It is only in those rare instances when a case reaches it that the ruling applies in all local authorities. Third, because there is no American equivalent to the Secretary of State for the Environment, the arm of government responsible for reviewing planning decisions is the judicial branch. The cases in Britain they are *R v Westminister City Council, ex p. Monahan* (1988) and often referred to as the Royal Opera House case, *R v, Plymouth City Council, J. Sainsbury plc*

Estates and Agency Holdings plc, Tesco Stores Ltd., Vosper Motor House (Plymouth) Ltd., ex parte Plymouth and South Devon Co-operative Society Ltd. (1993) and *Tesco Stores Limited v Secretary of State for the Environment and Others* (1995). In the United States they are *Nollan v The California Coastal Commission* (1987), *Lucas v South Carolina Coastal Council* (1992) and *Dolan v City of Tigard Oregon* (1994).

Why choose planning gain or obligation and its American counterpart of exactions, dedications or impact fees for comparison? A quick look through the planning literature from either country emphasises the importance of the issue for planners. At the level of the general public, there is an almost universal resistance to raising taxes to pay for what is often unwanted growth. Changing economic and social conditions in each country mean that items once paid for out of the public purse are more and more frequently being paid for by developers. Infrastructure and other public facilities being paid for by developers raises a whole series of issues. Perhaps most central is the issue of when is the contribution appropriate, neither too large nor too small? From the question of how much is enough, comes the question of how that contribution should be determined. Can a local authority expect developers to fund their entire "wish list"? Is each developer to contribute at the same level regardless of their ability to fund those contributions? How much of a connection, or proportionality, must there be between the development and its impacts? Does it make a difference if it is the developer who is offering to fund the infrastructure, or if it is the local authority making the contribution a condition of the grant of planning permission? When does a contribution become too much? When is the developer contribution so much greater than the external costs of the development that it constitutes an attempt to buy planning permission? Even if the economic conditions in the two countries should improve substantially, it is not likely that tax revenues will be able to pay for all of the public facilities that increased growth will require. Therefore, developer contributions will continue to play an important role in planning and local government.

1.3 Aims and Objectives

The focus of this thesis is a comparison of planning obligation in Britain with takings in the United States. The primary means used to make this comparison is court cases. There are other ways of examining the issue, but court cases have changed the way planning obligations and takings are

dealt with by local authorities in a way that changes in policy might not. In the United States, with its approximately 3,000 local authorities and as many planning systems, decisions taken by the United States Supreme Court are unique in that they apply to each of them. Court cases, therefore, are a way to by pass the variations in American land-use regulations. The aims of this thesis are threefold. First, to briefly examine the history and evolution of planning obligations and exactions. Second, to discuss the major relevant court cases in each country and their impacts on planning. Third, to compare and contrast planning obligations and exactions and discuss what each country can learn one from the other.

1.4 Outline of Thesis

This thesis is written in seven further chapters.

Chapter 2 briefly describes the history and evolution of planning obligations and takings that have led to the situation as it stands today.

Chapter 3 details the three major British court cases related to planning obligations.

Chapter 4 details the three major American court cases related to takings.

Chapter 5 discusses the impacts the cases have had on planning and land-use regulations in England.

Chapter 6 discusses the impacts the cases have had on planning and land-use regulations in America.

Chapter 7 compares and contrasts planning obligations and takings and looks at what the countries one from the other.

Chapter 8 draws conclusions from the whole study and looks toward the possible future developments.

CHAPTER TWO: HISTORY OF PLANNING OBLIGATIONS IN BRITAIN AND TAKINGS IN THE UNITED STATES

2.1 Introduction

Neither British planning obligations nor American exactions sprang up overnight. Both are the culmination of a the evolution of change in their respective planning system and in the economic and social context in which they operate. Before examining the current situations and developments in recent court cases, it is necessary to look at the histories which gave rise to the current state of affairs.

2.2 History of Planning Obligations in Britain

Local authorities in Britain have had the ability to enter into "agreements" since 1932. This power, however, was rarely exercised prior to the property boom of the 1970's. While the original provisions of the 1947 Town and Country Planning Act were in effect (1947-59) there was little reason to enter into a planning agreement. During this period the profits to be gained from development had been nationalized and most large projects were being built by government. This was part of the promise made by the post-war Labour government to deliver those social benefits which had won a them landslide. Not only have the planning regulations changed over the years, but so have the underlying social and political conditions. Together these changes have led to the current situation concerning planning obligations. The term planning obligation will be used rather than the more commonly used term planning gain as Circular 16/91 states that obligation is the proper term and gain has no meaning (Ambrose, 1986, 55, Cullingworth, 1994, 114, Circular 16/91, 4-587).

Prior to the 1960's developers were usually expected to pay for on-site facilities such as estate roads, street lighting and water and sewer pipes. It was generally the responsibility of the public sector to provide the off-site infrastructure. As the political and economic climate has changed over the years so has the provision of off-site infrastructure. These changes include the office boom which followed the introduction of office location controls in 1965. This was followed in 1968 by the removal of the requirement of ministerial consent before a local authority could enter into a section 52 agreement (the predecessor to today's section 106 agreement) (Jowell and Grant, 1983, 427-8, Town and Country Planning Act 1991, P106.08).

The period from 1969 to 1973 saw a sharp increase in the price of land, a great deal of which was made available for house building. At the same time there was an increased willingness on the part of home builders to contribute to off-site improvements. Developers were becoming more willing make contributions in order to bring forward a development rather than wait for the improvements to be made by the public sector. The government policy which legitimized these contributions was outlined in Circulars 10/70, 102/72 and 123/73. Collectively the circulars state that when a lack of infrastructure is an obstacle to the release of land for development it can be overcome through contributions from developers. The policies set out in the Housing Act 1974 and the Community Land Act 1975 also contributed to this trend. Taken together, these changes led to development control increasingly being based on negotiation rather than regulatory adjudication. With the increased pace of development, delays in determining planning applications increased in the early and mid 1970's. During this period there was an increased reliance on non-statutory plans and plans which legitimized planning obligations by incorporating them. There was also a growing consideration of social and economic factors in determining planning applications. Perhaps, most importantly the squeeze on local authority resources made it more difficult for local authorities to provide the public facilities they once had (Jowell and Grant, 1983, 427-8, Town and Country Planning Act 1991, P106.08).

Since the end of the Second World War, control of the government has swung between Labour and the Conservatives. Each change of government has brought changes in the legislation and policies governing how some of the gains which flow from the grant of planning permission are returned to the community. As part of their commitment to distribute wealth more equitably, the first post-war Labour government was committed to returning the profits of development to the community. This policy was explained in the 1942 Uthwatt Report which stated, in part that:

> It is clear that under a system of well-conceived planning the resolution of competing claims and the allocation of land for the various requirements must proceed on the basis of selecting the most suitable land for the purpose, irrespective of the existing values which may attach to the individual parcels of land.

The implementation of such a system would destroy the market value of some parcels. The question became how to compensate the owners of

those parcels. The solution chosen was to nationalise the development rights of undeveloped land, not the land itself. To do this a £300 million fund was established by the 1947 Town and Country Planning Act to make payments to all landowners who successfully claimed development value on the appointed day. A general feeling of unease resulted as the provisions were complex and there was uncertainty about when the payments would be made and for how much. Although the mechanism for accomplishing this was unclear the principle behind it was not. All development rights were to be vested in the state. Development could only take place with the permission of the local authority and upon payment of a development charge equal to one hundred percent of development value. No compensation was payable if planning permission were denied. The scheme did not work smoothly. Developers were willing to pay more than the existing use price for land with a scarce building license. The powers of compulsory purchase given to the Central Land Control Board to prevent this practice were not used (Cullingworth, 1994, 105-8).

In 1951 the Conservatives returned to power. Post-war rebuilding was proceeding slowly and the Torys were convinced that the free enterprise system was the vehicle to increase the level of building activity, especially in house building where there were still shortages. The one hundred percent development charge was by now considered to be a part of the cost of development and ultimately paid by the users of the land. The introduction of the £300 million from the compensation fund into the economy was now thought to have an adverse effect on it. Therefore, payments from the fund were to be deferred, the timing and amount remained uncertain. To encourage the private sector, in 1954 the development charge was abolished. The collection of betterment was now left to taxation. No compensation was to be paid when planning permission was refused for a change of use or for development that would have placed an undue burden on the community. Compensation was only to be paid for loss of development value accrued prior to the passage of the 1947 Act. The effect was to create two land values according to whether property was sold on the market, with no restrictions, or to a public authority for its 1947 existing use value. The Town and Country Planning Act 1959 eliminated the dual market and restored fair market value as the basis for compulsory acquisition. While removing an element of unfairness, this Act did not solve the fundamental problems of compensation and betterment. Development rights were vested with the state, therefore, no composition was payable if

planning permission was denied. When planning permission was granted the owner benefited without paying a development charge. This could be deemed as unfair to a "comparable" landowner who was denied planning permission (Ambrose, 1986, 59-60, Cullingworth, 1994, 109-11).

Labour regained power in 1964. In 1967 both the Finance Act and the Land Commission Act were passed: the former introduced a capital gains tax and the latter a new betterment levy. Capital gains were charged on an increase in current use value and betterment on an increase in development value. The 1965 White Paper spelled out the rationale behind the Land Commission Act. It stated that desirable development had often been thwarted by landowners withholding land in the hope of higher prices. This Land Commission had two major objectives. The first was to secure the right land at the right time for the implementation of government policy. The second was to insure that a substantial portion of the increase in development value created by the community, be returned to it. To these ends the Land Commission could buy land by agreement or compulsory purchase and introduce a betterment levy. Theoretically this removed the two price system created by the 1954 Act. The 1967 Act differed from the 1947 Act in two ways. First, it did not take away all development value. Initially it was set at forty percent, with the intention that it would rise to forty-five and later fifty percent, although this never occurred. Second, the levy was to be paid by the seller when the land was developed (Ambrose, 1986, 60, Cullingworth, 1994, 111-3).

The Conservatives once again came to power in 1970. In 1971 they abolished the Land Commission, in line with their policy of reducing state controls. Whilst land prices had increased by fifty-five percent between 1967 and 1970, they exploded in the early 1970's. Using 1967 prices as a base (100) by 1972 prices had risen to 287 and to 458 by 1973. The increase was thought to be largely a result of land hoarding. In an attempt to reduce the hoarding, development gains and first letting taxes were introduced: the former taxed profits from the sale of land by individuals as income rather than capital gains and the later taxed the first letting of shops, offices and industrial premises. In theory, these taxes were to be the equivalent of capital gains which would have been payable if the building been sold. Section 52 of the Town and Planning Act 1971 allowed developers to enter into agreements with local authorities to provide

community benefit when granted planning permission (Cullingworth, 1994, 113).

Labour returned to power in 1974. Their objective, at this time, was "to enable the community to control the development of land in accordance with its needs and priorities" and to "restore to the community the increase in land value arising from its efforts." To this end positive planning was to be achieved through local authority, rather than central government, ownership of land. Local authorities were to buy land at current use value and then sell it to developers at market value. In this way the development value would accrue to the community. Provisional development value was to be recouped by a development land tax. The 1975 Community Land Act legislated wide powers for compulsory land acquisition. The Development Land Tax Act 1976 allowed government to tax development values. These powers were to be phased in gradually. On the first appointed day, 6 April 1976, local authorities had a general duty to have regard to the desirability of bringing development land into public ownership. They were to have special regard for that land necessary to meet local planning needs. They were also given wider powers to buy such land and make it available for development. The price paid was to be net of any tax payable by the sellers. A second stage was to be introduced after sufficient resources had been built up. During the second stage, the Secretary of State would make orders stipulating that land for development of the kind at the location designated in the order would pass to public ownership before development began. When orders covering the entire country had been made, on a "second appointed day" the basis of compensation would change from market to current use value, with no account of a possible increase in price. Bad economic conditions meant that sufficient public money to fund the scheme never become available (Cullingworth, 1994, 113-4).

In 1979 the Conservatives once again came to power. Their return set in motion another series of changes, including recinding the Community land Act. The culminated with the passage of the Town and Country Planning Act 1990, which has been influential in shaping the current situation regarding planning obligations. Today the developer of a major project is likely to go beyond the provision of traditional on-site infrastructure and provide facilities that may include anything from highways to sewers, crèches to community centers. The statutory provisions which underpin planning obligations are

contained in the Planning and Compensation Act 1991, which states, in part that:

> Any person interested in land in the area of a local planning authority may, by agreement, or otherwise, enter into an obligation (referred to . . . as a *planning obligation*) . . .
> (a) restricting the development or use of the land in any specified way;
> (b) requiring specified operations or activities to be carried out, in, on, under or over the land;
> (c) requiring the land to be used in any specified way;
> (d) requiring a sum or sums to be paid to the authority on a specified date or dates periodically.

Planning obligations are not unilateral, they must be agreed to by the developer and the local authority but they are widely viewed as legitimate. On 16 April 1991 the then Minister for Planning, Sir George Young M.P. observed in a speech in the House of Commons:

> A planning gain would do more than merely provide facilities that would normally have been provided at public expense. It would provide facilities that the public purse could never have afforded. . . . Conservative members believe that there is no reason why the public sector should provide all the schools, community centres and infrastructure. A mixed economy, with the energy of the private sector being added to the resources of the public sector, is a process that I hope one would want to encourage. (Town and Country Planning Act 1990, 2-3419)

2.3 History of Takings in the United States

Planning has had a very different history in the United States. Changes in government have had a less direct impact on the rise of exactions than British planning obligations. Planning generally and exactions specifically are the result of local rather than central government policy. Regardless of these differences, the rise in the use of exactions has paralleled that of planning obligations in Britain.

The imposition of impact fees, dedications, or exactions today is a result of the evolution of land-use planning and changing economic conditions. Their predecessors date from the colonial period. At that time the taking of land for a public purpose created few problems as it generally involved vacant land with little value attached to it. However, when developed or enclosed land was required, by government, compensation was usually paid. Eminent domain, or the right of government to take private property for public use,

was accepted as an intrinsic power of government. "Takings," by government of private property for public use without just compensation, did not become an issue until much later (Wakeford, 1990, 190).

The adoption of the Constitution in 1787, most notably the Fifth (1791) and Fourteenth (1868) Amendments, changed the situation dramatically. The Constitution recognizes that a regulatory action by government can involve a "taking." During the years following the adoption of the Constitution, the term "taking" was only applied to the physical acquisition of land by the state. Where the use of land was regulated no compensation was payable. The police powers granted under the Fifth Amendment were used to regulate those uses perceived to be a nuisance. The concept of nuisance, as derived from English common law, holds that any use of property that results in injury to another shall not be permitted. Originally nuisance controls were negative, but over time evolved into more positive planning controls, including zoning (Cullingworth, 1993, 21-3).

Zoning is the procedure by which a local planning authority divided the land under its control into zones. In each zone specific uses of the land are permitted, subject to standards of development. The early predecessors of zoning ordinances were primarily concerned with segregating noxious uses and preventing the dangers to people and property arising from fires. The primary means of doing this was through the use of height restrictions. For example, in 1904 Boston limited wooden structures to fifty-feet and those in the business district to 125 feet. These restrictions also reduced traffic congestion and increased the amount of light and air available at street level. The piecemeal control of private land was the norm across America until 28 December 1909 when the City of Los Angeles adopted an ordinance creating seven industrial districts (later increased to twenty-seven). Two weeks later most of the rest of the city was designated a residential district. Businesses were permitted in the residential areas, subject to conditions and several were actually ejected. The most drastic example of the protection of residential amenity occurred in an outlying area where a brickyard was located. When the area was annexed to the city an ordinance was passed prohibiting brickyards in residential areas. The owner of the brickyard fought the city's efforts to close him down all the way to the United States Supreme Court. In *Hadacheck v Sebastian* the Court held that the city had not engaged in an arbitrary exercise of its police powers. On 25 July 1916 New York City adopted America's first comprehensive zoning ordinance. It was

comprehensive because it covers the entire city with use, height and area regulations. The use regulations were to prevent commercial and industrial uses in residential neighbourhoods. The height and area regulations were designed to provide open space and allow more light to reach street level (Revell, 1992, 19, 23, Scott, 1971, 75-6).

By the early 1920's urban America was in somewhat of a "zoning crisis." The appearance of this new remedy for urban ills made the presence of garages in residential areas or breweries in commercial districts suddenly seem intolerable. Zoning seemed to be much easier for the average citizen to comprehend then regional planning as the solution to the problems of the rapidly growing cities. By 1919 at least ten states had authorized zoning for some, if not all, classes of cities. By 1921 zoning was spreading rapidly across the country. In that year the Secretary of Commerce, Herbert Hoover, appointed an advisory committee to draft a model state zoning enabling act. The increasing separation of uses was seen as a panacea not only for investors and home owners but also for infrastructure providers. It was felt that zoning provided the certainty necessary to eliminate guesswork and provide efficiently for growth (Scott, 1971, 192-8).

In 1926 the United States Supreme Court (the Court) handed down the landmark decision *Village of Euclid, Ohio v Ambler Realty Co.* The Village wanted to keep commercial and industrial uses out of residential neighbourhoods, while property interests wanted to sell land for the most profitable use. With this decision the Court put the Constitutional stamp of approval on zoning, which now underlies much of American planning and land-use regulation. *Euclid* also represented a significant extension of the police powers. After *Euclid*, the police powers could be used regulate uses that might not be considered a nuisance in the strictest definition of the term, but rather in a specific context. This meant that uses such as shops, industry, and apartments could be excluded from single family zones. As stated in the decision: "A nuisance may be merely a right thing in the wrong place,--like a pig in the parlor instead of the barnyard." (Cullingworth, 1993, 29, Williams, 1980, 336-350).

Before the Second World War government was responsible for providing necessary if minimal public services. Developers were free to subdivide and sell land with only minimal registration requirements. Those land-use regulations that did exist were primarily designed to facilitate the efficient

and inexpensive sale of small parcels of land. To this end, the dedication of roads to assure that access would be provided to all lots was sometimes required (Alterman, 1988, 4-6, Juergensmeyer, 1988, 52-3).

The Second World War was followed by rapid suburban expansion. Developments were generally of a larger scale than during the pre-war period. The most famous of these was Levittown New York, although this type of development was repeated round the country. Levittown is a very large residential development with a limited range of houses built on assembly line principles. This car dependent subdivision with its track houses became the epitome of the American post-was housing boom. Prior to this time developers had provided on-site infrastructure such as roads and utility connections, with those off-site being provided by the local authority. This rapid expansion meant that local authorities no longer had the resources to provide the off-site facilities. The first off-site contributions by developers consisted primarily of linear infrastructure and parks, followed by schools. Today the contributions can include everything from fire stations and crèches to contributions to low income housing and job training schemes (Alterman, 1988, 4-6, Juergensmeyer, 1988, 52-3).

Court cases during the post war period provided the legal foundation for developer contributions. In 1949 the decision in *Ayres v City Council of the City of Los Angeles* by the Supreme Court of California, held that the provision by the developer of off-site infrastructure was not a taking. The court held that a developer is seeking the advantages that accrue from the subdivision of lots. Therefore, it is the developer's duty to design, dedicate, improve and restrict the use of land to provide for the safety and general welfare of residents and the public. The 1965 decision in *Jordan v Village of Menomnee Falls Wisconsin* held that the dedication of land for public schools and parks was a reasonable exercise of police powers. The Supreme Court of Wisconsin found the necessary rational nexus, or connection, was the determination by the local authority that growth had created a need for expanded public facilities and that the dedication requirements would benefit the developer being charged. At the other end of the spectrum is the 1961 case of *Pioneer Trust & Savings Bank v Village of Mount Prospect Illinois.* Here the Supreme Court of Illinois held that need must be "specifically and uniquely attributable" to the development prior to a requirement being imposed. This has tended to limit dedications to on-site improvements in those states where this precedent was followed. In a more

middle-of-the road ruling, the Florida Supreme Court held in the 1976 ruling in *Contractors & Builders of Pineallas County v City of Dunedin Florida* that impact fees were permissible if: (1) new development created a need for expanded capital facilities (2) the fee does not exceed the cost incurred by the local authority (3) the fees are earmarked and spent for the purposes collected (Nicholas, 1988, 129, Williams, 1980, 161-183, 188-198).

For nearly fifty years after the *Euclid* ruling, the United States Supreme Court did not hear takings cases. It did, however, continue to review economic regulation, generally stressing a deferential approach and invoking the "reasonableness" standard. In the late 1970's the Court returned to the takings issue. Decisions from this period harkened back to the *Euclid*-era substantive due process cases. in the decision in *Penn Central Transportation Company v New York City* (1978) the Court stated that a taking might result if a regulation was "not reasonably necessary to the effectuation of a substantial public purpose." This case was, however, mostly about an "ad hoc" balancing of interests that were consistent with inquiries into "reasonableness" and not about result-defining "substantially advances requirements." In their other decisions in the late 1970's and early 1980s the Court similarly suggested that "reasonableness" was the proper test. In *Agins v Tiburon* the Court held that the takings question "necessarily requires a weighing of private and public interests." Some public purposes, such as environmental nuisances and protection were considered to be so important and beneficial that regulations advancing them were upheld, even if they resulted in adverse economic impacts for landowners (Merriam and Lyman, 1994a, 20-1, Roddewig and Duerksen, 1989, 5).

The changes in the contributions required of developers and their validation by the courts has mirrored the changes in public sentiments concerning growth and its costs. The costs of any new development include more than the costs of the land and buildings. They include the costs to the community in providing public services. The question is who pays for these services and how. Existing residents may pay through property taxes or new residents through special assessments. Both have met with growing resistance in recent years. Increasingly the answer has been that the developer pays through some form of exaction, dedication, or impact fee. The simplest and oldest of these are the charges that arise in connection with subdivision control. These charges were legitimized by a provision of the Standard City Planning Enabling Act of 1928, which explicitiy required

the provision of infrastructure internal to the development. The strains put on local budgets by the post war housing boom led to taxpayer resistance to increasing taxes. Residents were not willing to see their taxes raised to benefit newcomers. This resistance peaked in California in 1978 with the passage of Proposition 13 which froze local property taxes for existing residents. At the same time funds from Washington were being reduced, most notably during the Reagan administration As a result developers were increasingly required to pay, for or dedicate land for, schools, parks and off-site services. The current situation will be discussed in Chapters 5 and 6 below (Cullingworth, 1993, 76-7, Delafons, 1990, 17-8, Wakeford, 1990, 191-2).

CHAPTER THREE: RECENT BRITISH CASES INVOLVING PLANNING OBLIGATIONS

3.1 Introduction

In 1988 and again in 1993 the Court of Appeals handed down decisions in what have proved to be significant cases in the area of planning obligation. In 1995 the House of Lords dealt with the issue. At least, in part, because of these decisions the Department of the Environment is now in the process of rewriting the policy guidance concerning planning obligations. Before discussing the significance of these cases and comparing them with their counterparts from the United States, it is necessary to summarize them.

3.2 R v Westminister City Council, ex parte Monahan (Royal Opera House Covent Garden)

In June/July 1987 the Westminister City Council granted planning permission to the Royal Opera House to carry out far-reaching redevelopment of its facility at Covent Garden and to construct offices. The primary purpose of the application was to extend, improve and modernise the Opera House. The local plan recognized the importance of the Opera House to Covent Garden and that no additional office space was required there. A decision to permit the development would involve a departure from the plan by allowing office accommodations to be erected on part of the site. The Council was reluctant to permit the offices. Ultimately planning permission was granted on the grounds of the importance of the Opera House and that the funds needed to carry out the renovations were unobtainable by any other means (Heap, 1989, 3-5, JPL, 1989, 107).

The Council's decision was appealed against by members of the Covent Garden Community Association. There were two grounds for the challenge. First, that the inclusion of the office accommodation for financial reasons was impermissible. The Association put this argument forward, even though the Opera House was willing to enter into a binding agreement that the proceeds from the commercial development would only be used to benefit the Opera House. It was the Association's contention that allowing commercial development for purely financial reasons was not a "material consideration" under section 29(1) of the Town and Country Planning Act 1971. Second, that the authority was bound to investigate whether or not the offices were financially necessary. At the High Court Webster J. rejected both of these arguments stating that the only issue was whether the planning permission was invalid in law on either or both grounds. The courts were not

concerned, nor could they be, with the planning merits of the decision (Heap, 1989, 5, JPL, 1989, 107-8).

The Association appealed to the Court of Appeal against the judgment of Webster J.. The appeal was dismissed. The court considered whether or not a financial consideration could be a "material consideration." Kerr L.J. felt that the Councils' approach was correct in principle. He noted that in this imperfect world financial constraints on the economic viability of an otherwise desirable development are a fact of life. As such it would be unreasonable to insist that they be excluded from the range of considerations that might properly be considered as material. In situations where financial constraints exist compromise or even sacrifice of what would otherwise be regarded as optimal for the public interest might be called for. As Kerr L.J. stated:

> Provided that the ultimate determination was based on planning grounds and not some ulterior motive, and that it was not irrational, there would be no basis for holding it invalid in law solely on the ground that it has taken account of, and adjusted itself to the financial realities of the overall situation.

As section 29(1) of the 1971 Act did not provide a legislative definition of "other material considerations" this approach is consistent with that taken by local authorities. In two prior decisions taken by the House of Lords "other material considerations" had not been circumscribed in a way that would exclude financial considerations. *Pyx Granite Co. Ltd. v Ministry of Housing and Local Government* (1958) established the principle that to be valid planning conditions must fairly and reasonably relate to the permitted development and can only be imposed for a planning purpose and not an ulterior one. The decision reached in *Westminister City Council v Great Portland Estates* (1985) reiterated the point and modified it, somewhat, with the statement that the human factor, which is always in the background, should not be ignored when it is of value to the character of the community (JPL, 1989, 108-110, Purdue, 1988, 802).

Additional guidance can be found in both *Bradford City Council v Secretary of State for the Environment* (1986) and *Hall and Co. Ltd. v Shoreham-by-Sea* (1964) each of which dealt specifically with financial considerations. In both cases a condition that had financial implications had been imposed with the ulterior motive of furthering the purposes of the local authority. In

both decisions the conditions were held to be "manifestly unreasonable." In this case the condition was not being imposed to serve the purposes of Westminister City Council. Even so, the Association asserted that under the Local Government Act 1972 the Council had the necessary power to make up the financial shortfall, making the situation no different, in principle, than that in either *Hall* or *Bradford.* Kerr L.J. did not agree with this, but rather sided with the approach taken by Woolf J. at the High Court in *Sosmo Trust Ltd. v Secretary of State for the Environment and Camden London Borough Council* (1983). He pointed out that "what could be significant was not the financial viability of a particular project but the consequences of that financial viability or lack of financial viabiiity." The issue, in this case, was summarized by Webster J. in his decision at the High Court:

> It seems to me quite beyond doubt [but] that the fact that the finances made available from the commercial development would enable the improvements to be carried out was capable of being a material consideration, that is to say, that it was a consideration which related to the use of development of he land, that it related to a planning purpose and to the character of the Royal Opera House which I have already described, particularly as the proposed commercial development was on the same site as the Royal Opera House and as a commercial development and the proposed improvements to the Royal Opera House all formed one proposal. (JPL, 1989, 110-114).

The second issue the court dealt with was whether or not the Westminister Council was entitled to conclude that without the offices the refurbishment of the Royal Opera House could not have proceed. On 3 February 1987 the Planning and Development Committee had expressed their concern over the issue and resolved that it:

> wishes to be absolutely convinced that the commercial development of the site is the only way of achieving the Royal Opera House improvements. Accordingly, while welcoming the application in principle, the Committee would wish there to be further discussion on this crucial aspect.

The Council did not reach its final resolution until 30 June 1987. It was the Association's argument that:

> . . . the information put before the Committee . . . was not such as to enable it rationally to conclude that the proposal was the only way of achieving the Opera House improvements.

In dismissing the appeal the court found that there had been adequate information and the Council's conclusion was not "irrational or manifestly unreasonable, or based on information that was, or should reasonably have been regarded, as inadequate, was untenable." (JPL, 1989, 114-115).

The central question in this case was whether a planning authority could permit development (A) to secure development (B) which it considers desirable on planning grounds. It is the same question whether it comes in the form of a material consideration or a condition imposed on the grant of planning permission. Following from the speech by Viscount Dilhorne in *Newbury District Council v Secretary of State for the Environment* (1981), in either case it must "fairly and reasonably relate to the development permitted," if it is to be valid. In this case, the improvement of the Opera House (B) was a development that the Westminister City Council considered to be desirable, for valid planning reasons, as evidenced by the local plan. The building of office premises (A) was necessary if development (B) was to occur. Due to its physical proximity development (A) could be said to fairly and reasonably relate to the proposed development (B) which ought to be permitted. It was, according to Kerr L.J., a composite or related development. The offices were not ulterior or extraneous; they were part of the whole. Leave to appeal to the House of Lords was refused (Heap, 1989, 8, JPL, 1989, 117-118, Kirkwood, 1993, 551).

3.3 R v Plymouth City Council, J. Sainsbury plc, Estates Holding plc, Tesco Stores Ltd., Vospers Motor House (Plymouth) Ltd., ex parte Plymouth and South Devon Co-operative Society Ltd.

During a short period in 1991-2 the Plymouth City Council received three applications for superstores. The application from The Co-op was for a store at Chaddlewood, on the outskirts of town; it broadly accorded with planning policy. Sainsbury's and Tesco both made applications to develop sites next to the Marsh Mills roundabout on the A38. These were both contrary to Adopted Local Plan policy. However, the plan was largely out of date and had regularly been overridden on appeal. Retail studies and emerging local plan policies all indicated that one superstore at Marsh Mills and two located elsewhere would be acceptable. On policy, retail and traffic impact grounds it was initially believed that two stores at Marsh Mills would be unacceptable. The emerging plan policies also stated that a change of use from existing employment to other uses, especially retail, would not be acceptable unless

it would result it a loss of amenity or was in accordance with policies elsewhere in the plan. Finally, plan policies suggested that community benefit should be sought from any superstore developer. On the basis of these policies, Sainsbury's and Tesco saw themselves as competing for a single planning permission. Both proposed a package of wide-ranging benefits, to be taken into account in deciding between the two applications. (Gilbart, 1993, 1101, Kirkwood, 1993, 541-2).

The City Council was initially minded to grant the one planning permission for a superstore at Marsh Mills, to Tesco. Sainsbury's then persuaded the Council to have a competition in which the two developers would put forward packages of benefits. Both benefit packages were presented to the Council along with the detailed analysis of the issues by the City Planning Officer. In his report (adopted by the Council) the Planning Officer treated the offers of benefit as material considerations. It was his opinion that the emphasis in PPG6 (1988, Major Retail Development) on large stores selling food and other convenience goods out of town has a positive effect on town centres by relieving traffic congestion, thus rendering the Local Plan policy on the location of superstores obsolete. The Officer also felt that on appeal the Secretary of State for the Environment would overturn a refusal of either application for Marsh Mills. He stated no preference for either proposal. In the face of no objections on 23 April 1992 the Council concluded that it would be unreasonable to refuse either and granted planning permission for both stores. It was accepted that two stores could be permitted without harm occurring. Each applicant was to enter into a section 106 agreement coveting to provide or fund certain items that were not part of the development. They included:

	Sainsbury's	Tesco
Works outside the application site	River Plym Enhancement	Park and Ride, Wildlife habitat
Contribution to funds	Crèche, Park and Ride, £1 million for industrial development	Child care facilities, Art Competition
Works on site but not included in the application	Tourist information centre, Art gallery display, Bird watching hide	Sculpture within site

At the same meeting, the Council decided to defer consideration of The Co-op application. The Council felt it would be appropriate to seek a reduction in its scale in light of the capacity taken up by the other two superstores. The Co-op had purchased the property in 1990 with the expectation of building a food store consistent with the County Structure Plan. The application was approved as submitted on 19 August 1992 (Ashworth, 1993, 1105-6, Gilbart, 1993, 1101, Kirkwood, 1993, 538-47).

The Co-op made application for judicial review on three grounds. First, that the Council had considered immaterial considerations in breach of section 70(2) of the Town and Country Planning Act 1990. Specifically, that the offers of community benefit were unrelated to the developments and as a matter of law were, therefore, immaterial to the grant of planning permission. Any such offers, to be material, must overcome, remedy or alleviate planning objections. Policies SR13 and IR14 of the Draft Local Plan stated that developers of superstores, in particular, should provide substantial community benefit. The Co-op considered these policies to be unlawful and or a breach of the Secretary of State for the Environment's policy as set out in Paragraph B7 of Circular 16/91.

> Planning obligations should only be sought where they are necessary to the granting of planning permission, relevant to planning and relevant to the development being permitted.

The Co-op's second ground for appeal was that the Council had failed to take into account a material consideration in the form of the Secretary of State's policy on prematurely contained in PPG1. Third, it was The Co-op's contention that the Council had misdirected themselves as a result of erroneous advice from the Chief Planning Officer and had misinterpreted the Draft Local Plan. In short, a planning authority could not, by whatever means, exact an obligation, unnecessary in planning terms, as the price of a grant of planning permission (Ashworth, 1993, 1105-6, JPL, 1993, B81-2, Kirkwood, 1993, 539).

It was the respondents' argument that the test is whether the planning obligation is fairly and reasonably related to the development, even if it is unnecessary. They also argued that there was no test which stated that an obligation was material only if it overcame harm flowing from the development. Offers such as the contribution for industrial development and

the park and ride scheme were defended on the grounds that they overcame potential objections to the losses created by the superstores (Gilbart, 1993, 1101, Kirkwood, 1993, 548).

Both the High Court and the Court of Appeals rejected The Co-op's arguments. The Court of Appeal relied on the *Newbury* threefold test of materiality: first it must serve a planning purpose, second it must be fairly and reasonably relate to the permitted development and third it should not be so perverse and unreasonable that no reasonable planning authority could have imposed it. Using these criteria the court held that each of the offers made by the developers was for a planning purpose and could not be said to be for an ulterior motive. Also, it could not be said that the offers did not fairly and reasonably relate to the development permitted. A reasonable planning authority could have accepted them. The bird-watching hide and water sculpture were considered material by virtue of being on-site and making the development more attractive, thereby, serving the public interest. The off-site benefits were also found to be clearly related and, therefore, the Council had acted properly by taking them into account when determining the grant of planning permission (Ashworth, 1993, 1106, JPL, 1993, B81).

The Planning Officer's report (as adopted by the committee) contained ample material to support the materiality of each obligation. The planning obligations had not been given inappropriate weight. The Council's decision was based on planning issues and there was no demonstrable harm to interests of acknowledged importance flowing from either proposal. The Co-op also appealed on the grounds that the applications were premature, as they were departures from the Adopted Development Plan. Under such circumstances it should be considered whether the applications would prejudice the Local Plan. Although, this was not addressed in the planning report, it was assumed to have been taken into account. The Co-op also argued that the Local Plan had been misinterpreted by the Planning Officer regarding superstore location. This argument was likewise rejected (Kirkwood, 1993, 558-62).

In addressing the test of necessity, Hutchison J. at the High Court felt that it was not contained in Circular 16/91, Annex B paragraphs B5-B9. At the Court of Appeal Hoffmann L.J., with whom Evans L.J. agreed, held that necessity is a test applied to conditions by PPG1 paragraphs 46 and 47 and Circular 16/91 paragraph B7. In his judgment:

> These statements of policy embody a general principle that planning control should restrict the rights of landowners only so far as may be necessary to prevent harm to community interests. A German or European lawyer would have difficulty in recognizing it as the principle of proportionality. . . materiality is an entirely different matter, because there is a public interest in not allowing planning permission to be sold in exchange for benefits which are not planning considerations or do not relate to the proposed development. . . . The fact that the principle of necessity is applied as policy by the Secretary of State does not make it an independent ground for judicial review of a planning decision.

Leave to appeal to the House of Lords was refused (Gilbart, 1993, 1102).

3.4 Tesco Stores Limited v Secretary of State for the Environment and Others

Three companies applied for planning permission to build a retail food superstore in the town of Witney, Oxfordshire, each on a different site. The Tesco site was at Henry Box and Tarmac's (associated with Sainsbury's) at Mount Mills. The third company's application is not relevant to this discussion can be ignored. Previously there had been a local plan inquiry into certain proposed alterations to the development plan. One issue related to a proposed new road on the west side of Witney. The town straddles the River Windrush and there is only one bridge over the river. As a result there is severe traffic congestion in the centre of town, which is also a conservation area. The proposed new road known as the West End Link included a new bridge to relieve traffic congestion. Another proposed alteration to was to provide for a superstore in the town centre. The local plan inspector who conducted the inquiry issued a report approving the West End Link and rejecting the town centre superstore. The three developers had taken part in the inquiry, each opposed the town centre site in favour of their own, some distance away. The inspector did not make any formal recommendations concerning these sites, but held that a superstore on one would be beneficial. He did express an informal preference for the Henry Box (Tesco) site. Furthermore, the inspector expressed the view that funding for the West End Link was unlikely to come form the highway authority, thus he recommended a policy statement including a reference to the West Oxfordshire District Council's intention to negotiate funding for West End Link before any superstore went ahead (JPL, 1994, 919-20, Kirkwood, 1995, 581-2).

The application for the Sainsbury's site was not determined within the statutory period and became the subject of an appeal to the Secretary of State for the Environment, who also called in the Tesco application. In July 1992 an inquiry was held at which the Oxford County Council argued that the West End Link had to be built before any superstore could go ahead. Furthermore, full funding would have to be provided by outside sources. West Oxfordshire District Council and Tesco added their support. On the third day of the inquiry Tesco offered to provide the entire £6.6 million necessary to build the road, if they received planning permission for the Box Henry site. The inspector recommended the Tesco application be approved and Sainsbury's be dismissed. In reference to the traffic problem and the funding of the West End Link she said:

> . . . It is clear that a new foodstore would result in additional traffic on the local road network, and Bridge Street in particular. However, whilst a store would generate more traffic at peak times, particularly the Friday evening and Saturday morning peaks, even the worst estimates indicate the increase in the traffic at Bridge Street would be well below 10% over and above that which would be generated by B1 office development, for which planning permission exists. . . . (JPL, 1994, 920, Kirkwood, 1995, 582-3).

The inspector went on to point out the tenuous nature of the relationship between the additional traffic to be generated by a new superstore and that which would be alleviated by the West End Link. This observation was made in light of the requirement under section 106 that planning obligations could be related to land other than that covered by the planning permission only if there was a direct relationship between the two. The requirement of section 106 and the situation as it existed in Witney led her to conclude that:

> . . . In the case of Witney, the WEL is necessary to ameliorate existing traffic conditions and to assist in bringing forward the development of Policy Areas 1-3, I take the view therefore that the full funding of the road is not fairly and reasonably related in scale to this proposed development. . . .

The inspector went on to consider the merits of the two applications from a planning point of view. She found them to be finely balanced. Having regard for the local plan inspector's preference for the Tesco site she came down in favour of it, in light of the government's emphasis on plan led development (JPL, 1994, 920-2, Kirkwood, 1995, 582-3).

In his decision letter of 16 April 1993 the Secretary of State for the Environment rejected the inspector's recommendation that planning permission be granted to the Tesco for the Box Henry site. He allowed Tarmac's appeal for the Sainsbury's. The Secretary of State accepted the inspector's conclusions that a superstore would create only marginally more traffic than the permitted B1 development and that only one superstore should be allowed. He also felt that Tesco's offer to fund the West End Link was not good grounds to grant their application or dismiss the Sainsbury's appeal. The local plan inspector's preference for the Tesco site should receive only limited weight and on planning grounds the Sainsbury's site at Mount Mills was preferred (JPL, 1994, 922-3, Kirkwood, 1995, 583).

Tesco took proceedings against the Secretary of State under section 228 of the Act of 1990 to quash his decision letter. Tesco's challenge at the High Court centred on two principal arguments. First, that the Secretary of State for the Environment had wrongly discounted the local plan inspector's preference for the Box Henry site. Second, by discounting their offer to fund the West End Link the Secretary was failing to have regard for a material consideration. The Secretary of State's decision letter was quashed by the High Court on 7 July 1993. At the High Court, Maclead Q.C. rejected the first argument, but accepted the second. It was his decision that the Secretary of State was wrong if not considering the offer of funding to be a material consideration (JPL, 1994, 923-4, Kirkwood, 1995, 583).

Tarmac appealed against the decision. On 25 May 1994 the Court of Appeal allowed the appeal and reinstated the decision of the Secretary of State for the Environment. The main issue was whether or not the Secretary of State had misdirected himself by treating Tesco's offer to fund the West End Link as immaterial and in excluding it from his consideration as not meeting the test of necessity as laid out in *Newbury*. It was held that the Secretary of State had not failed to have regard for the Tesco offer. Rather, he had declined to give it significant weight, as he is entitled to do. Essentially, the question was should planning permission be granted for one of the three superstores, and if so which one? In making his decision it was the duty of the Secretary of State to have regard for any material considerations. Whether a matter is capable of being a material consideration is a matter for the courts. The weight it is given is a planning matter (JPL, 1994, 927-30, Kirkwood, 1995, 583).

In the appeal a great deal of reliance was placed on the *Plymouth* decision. In that decision the Court of Appeals decided that a section 106 agreement involving on- and off-site benefits and financial contributions that were not necessary to overcome planning objections, nevertheless, did not invalidate planning permission. The argument rejected in that case was that a planning obligation could only be regarded as material if it could also be imposed as a planning condition. The court went on to consider the degree of materiality of both on- and off-site obligations. The court held that a planning obligation involving the payment of money for a planning purpose connected to the proposed development would be regarded as material. This must be seen in light of Circular 16/91 which states, in part, that a planning obligation must be related to the development rather than extraneous to it, that an otherwise unacceptable development not be permitted because of unrelated benefit and that there must be a direct relationship between any off-site obligation and the development. In this case the Secretary of State for the Environment determined that the provision of the West End Link was not directly related to any of the proposed developments and, therefore, not a material consideration. He did not overlook or ignore the offered obligation. Beldam J. did not think it was his duty to substitute his assessment of the extent of the relationship for that of the Secretary of State (JPL, 1994, 9230-3, Kirkwood, 1995, 584-9).

Tesco appealed against the decision to the House of Lords. In short, the House of Lords held that a planning obligation that has nothing to do with the proposed development is not a material consideration. If its connection is *de minimis* than weight to be given it is the province of the decision maker, with regard to established policy. The appeal was dismissed and the Secretary of State for the Environment's decision was upheld. In summing up the decision Lord Keith of Kinkel quoted Sir Thomas Bingham M.R. at the end of the judgment of the Court of Appeal in this case:

> a question of unusual public importance bearing on conditions which can be imposed, and obligations which can be accepted, on the grant of planning permission and the point at which the imposition of conditions, and the acceptance of obligations, overlaps into the buying and selling of planning permission, which are always agreed to be unacceptable. (Kirkwood, 1995, 581).

Lord Hoffmann agreed with Lord Keith of Kinkel and went on to add his own observations. First, developments often give rise to external costs, which

prior to the advent of planning had to be borne by the community as best they could. The 1947 Act gave planning authorities the power to impose "such conditions as they see fit." This power was repeated in subsequent Acts including section 70 of the 1990 Act. From the courts has come the principle that conditions must be fairly and reasonably related to the permitted development. Further, a planning authority may enter into an agreement for provisions (including financial) which it deems to be necessary or expedient per section 106. The *Shoreham* decision that prevented a local authority from taking land for the construction of a road as a condition for the grant of planning permission, without compensation, drove planning authorities to rely on planning obligations instead. Circular 16/91 provides guidance regarding planning obligations. The essence is that to be material an obligation must be "related to the development and necessary for the grant of planning permission." An obligation should only be required if without it planning permission would be refused. A planning obligation is not a way for the local authority to share in the profits of development, rather, it is a way for developers to cover some of the external costs of development (Kirkwood, 1995, 591-595).

Together with the highway acts, section 106 gives local authorities the power to enter into agreements whereby developers pay for infrastructure and facilities that once would have been provided at public expense. This represents a shift in public policy regarding the roles of the public and private sectors. While planning control can not be used to extract benefits for the public at large, they can be used to require developers to pay some of the external costs of development. The relationship between these two policies does not always work well. There is nothing in the 1990 Act that requires the Secretary of State for the Environment to adopt tests of necessity and proportionality. As a result there is the potential for conflict especially in cases where developers are in competition for planning permission. In such cases the presumption in favour of development does not provide easy answers, so it becomes legitimate to consider how the projects will be developed. Problems arise when off-site obligations are offered. As shown in the *Plymouth* case, which pointed out the difficulty in differentiating between off-site and on-site benefits such as architecture and landscaping. The Court of Appeal dismissed that case on the grounds that the test of necessity was not a legal requirement. Obligations must only be for a planning purpose and be fairly and reasonably related to the development (Kirkwood, 1995, 595-6).

Like *Plymouth, Witney* hinges on whether the obligations offered were material considerations that could legitimately be taken into account in the granting of planning permission and whether the planning authority had proper regard for them. The test of necessity or acceptability which Tarmac raised in this case suffers from the fatal flaw of involving the courts in determining the merits of a planning decision. The courts can only be concerned with the legality of the decision making process and not the merits of the decision and can only intervene if an obligation would be unreasonable in the *Wednesbury* sense. It is appropriate that the criteria in Circular 16/91 be applied by the Secretary of State for the Environment and not the courts (Kirkwood, 1995, 597-9).

The courts are reluctant to intervene in those cases where there is a sufficient connection between the development and the obligations to make it material, but where it appears to be disproportionate. This was the case in *Plymouth*. However, in *Whitney*, which is in some respects the reverse of *Plymouth,* the offer to pay for the West End Link was disproportionate to the additional traffic a superstore would generate. If such an obligation were to be a material consideration it would be unfair to a competitor who was unwilling or unable to match the offer. The Secretary of State accepted this argument, even though it did not maximize the benefit to the community. To be a material consideration, a planning obligation must overcome a problem which would result in a denial of planning permission. Planning obligations should cover some of the external costs of development, not provide a windfall to the community (Kirkwood, 1995, 599-601).

CHARTER FOUR: RECENT AMERICAN CASES INVOLVING TAKINGS

4.1 Introduction

In 1987, after an absence of over fifty years, the United States Supreme Court reentered the debate over what constitutes a taking. In that year the Court decided three takings cases. One, discussed below, has proved to be especially significant. In 1992 and again in 1994 the Court handed down significant takings decisions. Taken together, these decisions are having a significant impact on the way the takings issue is dealt with by local planning authorities. Before exploring their significance and implications it is necessary to first look at the cases themselves.

4.2 Nollan v The California Coastal Commission

Like so many precedent setting cases this one has rather humble beginnings. The Nollans originally leased the subject property which is located in Ventura County. The property is located a quarter mile from one public beach and 1,800 feet from another. A 504 square foot bungalow, which they used primarily as a holiday home, was located on the lot. The bungalow had fallen into disrepair when the Nollans entered into a purchase option on the condition that they demolish and replace it. On 25 February 1982 they made application to the California Coastal Commission, as required under California statute, for a two storey, three bedroom house in keeping with the neighbourhood. The Commission conditioned their approval on the dedication of a ten foot wide lateral access easement, bounded by the mean high tide line and their seawall, to facilitate movement between the two public beaches (Michelman,1987, 1605-6, 1098, Nollan, 483 U.S., 1987, 3141-4, Roddewig and Durken, 1989, 6-7).

On 3 June 1982 the Nollans filed a petition to invalidate the condition, arguing that it could not be imposed without evidence that their house would have an adverse impact on public access to the beach. The Ventura County Superior Court agreed. The issue was returned to the Coastal Commission. At a public hearing, the Commission reaffirmed its position that the new house would contribute to a wall of development that reduced the public's visual and "psychological" access to the beach. The "burden to the public's ability to traverse to and along the shoreline" created by the new house was to be offset by the access easement. The Commission had applied similar conditions to forty-three of the sixty-nine coastal lots in the area. Of the seventeen without the condition, fourteen had been approved prior to the

inception of the Commission and the remaining three were not shore-front lots (Nollan, 483 U.S., 3134, 1987).

The Nollans petitioned the Superior Court of California on the grounds that the condition violated the takings clause of the Fifth Amendment to the United States Constitution. The court ruled in favour of the Nollans on statutory grounds. The court held that under the California Coastal Act of 1976 the Commission could impose access conditions if there was an adverse impact on public access to the sea. In the court's view the administrative record was not adequate to concluded that the new house would create a such a burden. Having made this ruling the court found it unnecessary to rule on the constitutional issue (Harvard Law Review, 1987, 243-4, Nollan, 483 U.S., 1987, 3134-5).

The Commission appealed the decision to the California Court of Appeal. While that decision was pending the Nollans demolished the bungalow and built a new house without informing the Commission. The Superior Court decision was reversed. The Court of Appeal found that a coastal permit was required as the new house was more than ten percent larger than the bungalow and a condition that an access easement be granted could be imposed. On the basis of on the earlier Court of Appeal ruling in *Grupe v California Coastal Commission* (1985) the court held that the requirement did not violate the Constitution. In *Grupe*, the court had found that as long as a development contributed to the need for public access, even if indirectly, the imposition of the access easement was constitutional. The Nollan claim also failed because although the access easement diminished the value of their lot, they were left with a reasonable economic use (Harvard Law Review, 1987, 243-4, Nollan, 483 U.S., 1987, 3134-5).

The Nollans then appealed to the United States Supreme Court which reversed the lower court decision. Justice Scalia, writing for the five justice majority, stated that had the Commission demanded the outright granting of the easement there "no doubt would have been a taking." Beginning with the 1982 decision in *Loretto v Teleprompter Manhattan CATV Corporation* the Court had consistently held that "the right to exciude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" There can not be a permanent physical occupation of property, regardless of the extent of the occupation and whether or not it achieves an important public purpose. Here a permanent

physical occupation occurred even though no individual would be permanently stationed on the property (Harvard Law Review, 1987, 244, Nollan, 483 U.S., 1987, 3135-6).

Requiring dedication of an easement without compensation would violate the Fifth Amendment. Therefore, question then became whether such a dedication imposed as a condition of a grant of planning permission would also be a taking. Justice Scalia asserted that the Court had:

> long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'

However, previous cases had not set standards for the connection between legitimate state interests and land-use regulations. In this case the Coastal Commission argued that protecting the public's visual and "psychological" access to the beach was a legitimate state interest. The Court assumed this to be so. The Commission would have been within their constitutional rights to deny a permit for the house if it would have blocked views, unless this would have left the Nollans without an economically viable use of their property. The Commission went on to argue that the access easement served the same purpose. The Court held that a height limit or a condition requiring a public viewing spot would have been constitutional. The access easement, however, was not sufficiently related to the legitimate government purpose of visual and "psychological" access. Therefore, it failed to meet "even the most untailored standards." In short, there was no "essential nexus", or connection. Unless the condition served the same purpose as a building restriction it was not a valid exercise of the police power, but was a taking (Harvard Law Review, 1987, 244, Nollan, 483 U.S., 1987, 3147-8).

In their dissents, Justices Brennan and Marshall asserted that the access requirement imposed by the Commission was not irrational. Rather, the Commission had sought to offset the visual and "psychological" barrier created by the new house with public access across the property. They felt that the standard imposed by the Court was too precise and out of line with previous rulings. The justices rejected the contention that land-use regulations must be "substantially related" to a legitimate government purpose, rather a state's exercise of its police powers demands only that the state "could rationally have decided" that the measure adopted might achieve their objective. The dissenting justices wondered at the rationality of

a decision that would have allowed the State of California to deny the permit for a house, but denied them the power to impose a condition that would have served the interests of both the Nollans and the public. Justice Blackmum also dissented, disagreeing with the majority's strict correlation. He felt that the Commission had been constitutional in their exercise of the police power. There was only a minimal physical intrusion and no investment backed expectations had been diminished as a result of the condition. The Nollans also had known about the dedication requirement before they purchased the property. In his dissent Justice Stevens warned that public officials would need to be increasingly aware of vague standards in their regulations (Harvard Law Review, 1987, 245, Nollan, 483 U.S., 1987, 3150-64).

4.3 Lucas v South Carolina Coastal Council

In 1992 the United States Supreme Court again ruled on the takings issue. The Court was seeking to resolve some of the ambiguity of the tests it used to determine whether or not a taking had occurred. There was ambiguity over the economic diminution of value, physical invasion and "noxious use" or "nuisance" tests. This six to three decision actually clarified only that portion of the takings doctrine that deals with a narrow class of land-use regulations which eliminate all economically beneficial use.

In 1977 the State of South Carolina passed its Coastal Zone Management Act. The Act requires owners in "critical areas" to obtain permits from the South Carolina Coastal Council prior to construction. In 1986 David Lucas purchased two vacant coastal lots, zoned for single family homes, for $975,000. At that time the area was not classified as critical and homes had been constructed on surrounding lots. In 1988, before Mr. Lucas had begun construction, South Carolina passed the Beachfront Management Act. The Act stipulated that construction of a permanent structure, other than a dock or walkway, was prohibited on the seaward side of the coastal erosion line. The whole of the Lucas properties was covered by the prohibition. The statute had been enacted in response to "critical erosion" of significant portions of the state's dune/beach system due to development occurring "too close" to the beach (Harvard Law Review, 1992, 269-70, Land Use Law and Zoning Digest, 1992a, 22-23, Land Use Law and Zoning Digest, 1992b, 21-22, Land Use Law and Zoning Digest, 1993, 23, Lucas, 112 U.S. 436, 1992, 2887, Purdue, 1995, 279-80).

Mr. Lucas sued the Council, arguing that the Act resulted in an unconstitutional taking of his property. He argued that he had been deprived of all economically viable use of his property and was therefore entitled to compensation, even though the Act had been passed to prevent serious public harm. The Coastal Council countered that landowners were not entitled to compensation when their private use threatens serious public harm. The trial court agreed with Mr. Lucas and awarded him $1.2 million as just compensation. The Council appealed to the South Carolina Supreme Court which reversed the lower court decision. It did so on the grounds that no compensation was payable as the regulation was designed to prevent serious public harm. In coming to their decision the court stated "The United States Supreme Court has never articulated a 'set formula' to determine where regulations ends and takings begins." Following from that the court held that a regulation in the public interest does not constitute a taking even though it prohibits economically beneficial use (Harvard Law Review, 1992, 269-70, Land Use Law and Zoning Digest, 1992a, 22-23, Land Use Law and Zoning Digest, 1992b, 21-22, Land Use Law and Zoning Digest, 1993, 23, Purdue, 1995, 279-80).

Mr. Lucas appealed to the United States Supreme Court. The Court reversed and remanded the case to the South Carolina Supreme Court. Writing for the majority, Justice Scalia held that regulations which eliminate all economic value and do not accord with the background principles of nuisance law, constitute a compensatable taking. The case was sent back to the South Carolina Supreme Court to determine whether the State's nuisance law prohibited the construction. They held that it did not and that Mr. Lucas was entitled to compensation for a temporary taking. The taking was temporary because while the appeal to South Carolina Supreme Court was pending the Beachfront Management Act had been amended to allow applications for special exemptions. Mr. Lucas applied for and was granted such an exemption. The Council settled the case by buying the property and, in an ironic twist reselling the lots for residential construction (Harvard Law Review, 1992, 269-70, Land Use Law and Zoning Digest, 1992, 21-22, Land Use Law and Zoning Digest, 1993, 23, Purdue, 1995, 279-80).

As noted by the South Carolina Supreme Court, the United States Supreme Court has traditionally avoided set formulas to determine when a taking had taken place. The *Lucas* decision laid out two types of land-use regulations

that constitute a taking. The first is a regulation that denies the owner "all economically viable use of his land." The second is a regulation that results in the physical invasion, no matter how trivial. Justice Scalia was critical of any regulation which presses private property "into some form of public service under the guise of mitigating serious public harm." He rejected the state supreme court finding that the Act constituted a legitimate exercise of the police powers to mitigate public harm. Prior to *Pennsylvania Coal Co. v Mahon* (1922) it was generally held that the Takings Clause of the Fifth Amendment only applied to a "direct appropriation" of property or the functional equivalent. As a result of the *Mahon, ruling*, a regulation that goes too far, is also recognized as a taking. How far is too far remained ad hoc for seventy years. One of the first attempts to clarify what constitutes a taking came in 1982 case *Loretto v Teleprompter Manhattan CATV Corporation* (1982). In *Loretto* the Court held that no matter how small the physical invasion and how worthy the public purpose, it requires compensation. In 1987 a trio of Supreme Court takings cases also went some way to clarify their stand on what constitutes a taking. The facts in *Keystone Bituminous Coal Ass'n v DeBenedictis* (1987) were quite similar to those in *Mahon,* but, the outcome was very different. In the intervening years the state of Pennsylvania has enacted a law which prevented mining that would cause surface damage. In *Keystone* the Court held that no taking had occurred as the loss of economic viability was not total. This case exposed a flaw in the economic viability rule. The loss of economic value could either be total or partial depending on how the property was parceled. In *Keystone* the entire holding was taken into consideration. In *Mahon* only the pillars of coal to be left intact were considered. In *First English Evangelical Lutheran Church v Los Angles County* (1987) the only question was whether compensation was payable if there was a taking. In this case a flooded church camp was prevented from being rebuilt by a temporary floodplain ordinance. The Court concluded that compensation was the appropriate remedy for a regulatory taking (Purdue, 1995, 280, Rubenfeld, 1993, 1088-91, Wakeford, 1990, 96).

In his decision Justice Scalia asserted that "the distinction between a"harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder" On this basis he concluded that:

> this logic cannot serve as a touchstone to distinguish regulatory 'takings'--which require compensation--from regulatory deprivations that do not require compensation.

Justice Scalia also specified that a land-use regulation that renders property valueless will require compensation unless it duplicates a provision found in common-law nuisance. A regulation that labels something as a noxious use cannot be enacted and sustained in order to avoid the payment of compensation. The ruling went to state that the claim was not unripe even though Mr. Lucas might be granted a special construction permit under an amendment to the Act. It also stated that the South Carolina Supreme Court had erred in applying the "harmful and noxious uses" principle in their decision. They erred because regulations that deny the owner "all economically viable use of his land" constitute one of the discrete categories of regulation requiring compensation. In such cases compensation is payable without the usual case-specific inquiry into whether or not the public interest is advanced by the regulation. That is because the denial of all economically viable use is the practical and economic equivalent of a permanent physical occupation. *Lucas* begins by stating that traditional nuisance reasoning is unworkable under takings law and ends by saying that such cases must only be decided by applying traditional nuisance reasoning where a total taking is involved (Harvard Law Review, 1992, 272-3, Land Use Law and Zoning Digest, 1992, 21, Lucas, 112 U.S., 1992, 436, 2887-2901, Purdue, 1995, 282-3, Rubenfeld, 1993, 1091-94).

In his dissent Justice Blackmum argued that this decision went too far, accusing the majority of "launch[ing] a missile to kill a mouse." He felt that this decision destroyed two previously unusable premises. First, that the state had the power to prevent any use of property that it finds is harmful to its citizens. Second, and with perhaps more far reaching consequences, that a state statute is entitled to the presumption of constitutionality. It was his view that the takings clause did not transform the principle that a property owner is subject to the implied obligation to use land in a way will not cause harm to others into one that requires compensation when the state asserts its power to enforce such obligations. In this case the Court found "less value" and "valueless" to be synonymous. It found the property to be valueless when if was no longer available for its highest and best use of luxury single family homes (Harvard Law Review, 1992, 273-4, Lucas, 112 U.S., 1992, 436, 2904-17).

In a separate dissent Justice Stevens echoed Justice Blackmum's view that the majority had erred in adopting the "categorical rule." He also argued that the complete economic diminution test was arbitrary in that

> [a] landowner whose property is diminished in value by 95% recovers nothing, while an owner whose property is diminished by 100% recovers the land's full value.

He argued that a rule this important needs more support from history and reason:

> The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property.

In his dissent, Justice Kennedy took a more middle ground approach. The majority placed the emphasis on the economic impacts of the regulation and the minority on its general character. Justice Kennedy placed more weight on the owner's reasonable investment-backed expectations, arguing:

> Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable investment-backed expectations. (Lucas, 112 U.S., 1992, 436, 2920, Purdue, 1995, 280-4)

On remand the South Carolina Supreme Court ruled in favour of Mr. Lucas, holding that the State's nuisance law did not justify the total taking of his property. The court went on to find that a temporary taking had occurred from the time the amendment to the Act was passed in 1988 until the date of their decision. The court also noted that if Mr. Lucas were to apply for a special permit and the Coastal Council was to deny his application or impose further conditions, he could have a claim for further compensation. The state of South Carolina purchased the property for $1.3 million and in turn sold it for single family development under a special exemption (Land Use Law and Zoning Digest, 1993, 23).

4.4 Dolan v City of Tigard Oregon

Mrs. Dolan owns the 9,700 square foot A-Boy Plumbing Store located on 1.67 acres in the Portland suburb of Tigard. The property is zoned Commercial Business District and is covered by an "Action Area" overlay zone. A large portion of the lot is devoted to paved and gravelled car

parking. A small stream, known as Fanno Creek, runs along the western boundary of the property. This portion of the property lies within the 100 year floodplain. In many ways the site is unremarkable. In April 1991 Mrs. Dolan and her husband, who has since died, applied for a permit to demolish the existing building and replace it with a 17,600 square foot store. The application also included a proposal for 20,200 square feet of paved car parking. This was to be the first phase of a multi-phased expansion, although the subsequent phases were not specified (Merriam and Lyman, 1994a, 17-18).

A plumbing store is an outright permitted use in the Central Business District zone. However, the Action Area overlay zone gives the City of Tigard the authority to impose conditions on "major modifications" to provide for anticipated demands on transport and other public facilities. Both the City's Comprehensive Plan, last updated in 1983, and Community Development Code, revised in 1989, which authorized the overlay zone, had been adopted in accordance with Oregon state law. Since 1973 Oregon has required all cities to adopt a comprehensive land use plan consistent with statewide planning goals. The Community Development Code requires fifteen percent open space in the Central Business District as well as a provision that new development facilitate pedestrian and bicycle traffic. This provision was adopted subsequent to a study that found problems with traffic congestion. The City had also adopted a Master Drainage Plan that included improvements to Fanno Creek, the cost of which were to be shared by new development. The City approved Mrs. Dolan's application subject to several conditions, including the dedication of 7,000 square feet, in the 100 year floodplain, or roughly ten percent of the property. This was consistent with the requirements of the Comprehensive Plan. Mrs. Dolan was also required to dedicate a fifteen wide foot strip next to the floodplain for a bicycle and pedestrian trail, as required by the zoning code. These dedications could be used to meet both the open space and landscape requirements. This area is not conducive to development as it is in the floodplain and contains steep slopes. (Dolan 114, U.S. 2309, 1994, 2313-4, Harvard Law Review, 1994, 291-2, Merriam and Lyman, 1994a, 18,19).

Mrs. Dolan sought a variance from the required dedications. The City Planning Commission rejected Mrs. Dolan's argument that her expanded business would not adversely affect flood control or traffic management efforts in Tigard. The Commission denied the request. The City backed up

their denial with twenty-seven pages of findings. It was the City's position that the dedications did not constitute a taking and were reasonably related to Mrs. Dolan's request to develop the site more intensely. The City felt that it was reasonable to assume that the larger store would generate additional traffic and storm water runoff. They also felt that it was reasonable to expect that some customers and employees would use the cycle path, there was even a bicycle rack shown on the site plan (Harvard Law Review, 1994, 292, Merriam and Lyman, 1994a, 18).

The City imposed three additional conditions on the grant of planning permission. First, a traffic impact fee of $14,256.02 was assessed

> to ensure that new development contributes to extra-capacity transpiration improvements needed to accommodate additional traffic generated by such development.

This fee was later eliminated, although it was apparently to be paid sometime during the development of the project. Second, Mrs. Dolan was to determine the increase in impervious surface and pay a fee in lieu of water quality improvements to mitigate the additional storm water runoff. Third, that the eastern portion of their building was to be relocated to enable the City to protect and enhance the floodplain (Merriam and Lyman, 1994a 19).

Mrs. Dolan appealed first to the Tigard City Council, in September 1991, and then, in February 1992, to the statewide Land Use Board of Appeals. She appealed on the grounds that the dedication requirements were not related to her proposed development and were, therefore, a taking. Both bodies agreed with the City's "reasonably related" analysis and denied Mrs. Dolan's appeals. Her next appeal was in May 1992 to the Oregon Court of Appeals. She argued that the *Nollan* decision had established a more stringent "essential nexus" test that the City had failed to meet. The court found that *Nollan* had not created any new test and that the "reasonable relationship" test had been met. On 1 July 1993 the Oregon Supreme Court held likewise and noted that the City's position was consistent with the United States Constitution. In their decision the court cited the *Nollan* concept that for an exaction to be considered reasonable it must serve the same purpose as denying the permit. One justice dissented by saying that the critical question was whether the increased used of the site was sufficient to justify a "virtual taking of the petitioner's land" (Franzen, 1994, 13-4, Harvard Law Review,

1994, 292, Land Use Law and Zoning Digest, 1994b, 18, Merriam and Lyman, 1994a, 19, Purdue, 1995, 285).

The United Supreme Court granted Mrs. Dolan's petition. She asked the Court to determine whether or not the justification for the exactions put forward by the Oregon Supreme Court was permissible under the Takings Clause of the Fifth Amendment. She argued that an exaction is invalid unless it "substantially advances" legitimate state interests. The City countered that the test is more lenient, allowing exactions to survive judicial scrutiny as long as they are "reasonably related" to the impacts of the development. The City further argued that the burden of proof rested with the applicant who had not produced any studies to refute the City (Franzen, 1994, 15, Merriam and Lyman, 1994a, 19)

In a five to four decision handed down on 24 June 1994 the United States Supreme Court reversed and remanded the case in favour of Mrs. Dolan. The Court held that the City's dedication requirements constitute an uncompensated taking of property. Under the established doctrine of "unconstitutional conditions" the government may not require anyone to exchange a constitutional right for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit. The Court then applied a two-step test to determine if the exactions bore the required relationship to the anticipated effects of the development. Citing *Nollan* it was first determined that the "essential nexus" did exist between the legitimate state interest of flood and traffic control and the exactions. Here the Court turned to an issue not resolved by *Nollan*, that of how close the relationship between the exactions and the anticipated impacts must be. The Court held that there must be a "reasonable relationship" between them. Writing for the majority Chief Justice Rehnquist began by distinguishing between the dedication requirements placed on this development and land-use regulations analysed under the Court's economically viable use test, used in *Lucas*. The Court held that Tigard's exactions were subject to a higher level of scrutiny than other land-use regulations for two reasons. First, they had been imposed by an adjudicative rather than legislative body. Second, Tigard had required the outright dedication of the land rather than its regulation. Invoking the doctrine of unconstitutional conditions, the Court stated that the exaction could only be upheld if it was related to the costs the development would impose on the City. In other words there must be "rough proportionality," between the

dedications and the impacts of the development. The Court felt "rough proportionality" was the term that best describes the requirements of the Takings Clause (Dolan 114 U.S., 1994, 2309, 2311-2, Harvard Law Review, 1994, 293-4, Land Use Land and Zoning Digest, 1994b, 19, Merriam and Lyman, 1994c, 59, Purdue, 1995, 285).

It is this test of "rough proportionality" that is new to *Dolan* and which the Court held that the City failed to meet. The requirement to dedicate open space was struck down as it deprived Mrs. Dolan of her right to exclude others, per *Nollan.* The dedication of the cycle path was also struck down even though the Court acknowledged that the larger store would generate more traffic. The dedication was struck down because the Court felt the City had not shown that the additional number of trips the larger store would generate were "reasonably related" to the exaction, therefore, it had not met its burden of proof. The City estimated that the larger store would generate an additional 435 trips per day and that the cycle path "could offset some of the traffic demand . . . and lessen the increase in traffic congestion." In the Court's view this analysis was not sufficient and the City should have determined how many customers and employees would (or would be likely) to use the cycle path (Dolan 114 U.S., 1994, 2309, 2316, 21, Land Use Land and Zoning Digest, 1994, 19, Merriam and Lyman, 1994c 59-60).

In his dissent Justice Stevens, joined by Justices Blackmum and Ginsberg derided the Court for its narrow focus on the right to exclude others. He felt that more emphasis should be placed on the property as a whole rather than focusing on the portion that was to be dedicated. Justice Stevens felt that the Court was misguided especially in a case involving commercial property; exactions associated with business are a type of business regulation and, therefore, warrant a strong presumption of constitutional validity. Tigard had shown that their plan was rational and impartial and fulfilled legitimate land-use planning objectives. Mrs. Dolan offered no evidence that the dedications would impact on the profitability of her store. He criticized the majority for not following the lead of the state courts in considering the gains to be made by the property owner in the permit-for-a-dedication exchange. Requiring local authorities to make individualized determinations before attaching exactions as a condition for the grant of planning permission was thought to be an unreasonable burden. The Court made a serious error in abandoning the traditional presumption of constitutionality and transferring the burden of proof to local government. He took the Court to task for

scraping the "reasonable relationship" test for "rough proportionality." Most importantly he accused the majority of giving judges "superlegaslative power" (Dolan 114 U.S. 2325-8, Merriam and Lyman, 1994c, 60).

In his dissent Justice Souter also criticized the majority for not only the creation but also the application of the "rough proportionality" test. He pointed out that the Court's trouble with the floodplain dedication arose from the nature of the justification (the *Nollan* element) and not from the degree of the relationship or what was supposed to be the *Dolan* element. He pointed out that the majority found a taking based on a single word, "could" offset rather than "would" offset. Justice Souter found this inappropriate in the light of the traditional deference to municipal decision making. His rejection of this traditional deference can be found in a footnote:

> [I] evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. *See, e.g., Euclid v Ambler Realty Co.*, U.S. 365 (1926). Here, by contrast, the city made an administrative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.

The majority was quite frank in explaining its dramatic departure from the past,

> see[ing] no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment of Fourth Amendment, should be relegated to the status of a poor relation when applied to the regulation of economic enterprise (Merriam and Lyman, 1994c, 60-1, Purdue, 1995, 287).

Having summarized the relevant court cases, this study will now move on to look at how they have impacted planning in their respective countries.

CHAPTER FIVE: IMPACTS OF THE BRITISH CASES ON PLANNING OBLIGATIONS

Introduction

Having now discussed the major court cases in each country, this study now moves on to consider their impact on how planning obligations are handled. Under the British system much of what determines the acceptability of a planning obligation is whether or not it can properly be considered to be a material consideration. Each of the three British cases outlined above adds to the understanding of what is a material consideration. The courts have held that planning obligations can be taken to be fairly and reasonably related to the development under review even if they are not necessary to alleviate its impacts. Repeatedly the discussion returns to the *Newbury* and *Wednesbury* tests. Does the condition serve a planning purpose, is it fairly and reasonably related to the development and not manifestly unreasonable? Is it a condition that a reasonable local authority could have imposed? In the *Royal Opera House* case physical proximity constituted a sufficient relationship. In *Plymouth* the relationship was created because the profits from the development would finance other desirable developments. *Witney* adds the principle that a planning obligation must be related, in scale, to the development (Purdue, 1995, 289).

5.2 Impacts of the *Royal Opera House* Decision

The *Royal Opera House* case turned on whether or not the Westminister City Council was correct in considering the benefits to the Opera House of granting planning permission and listed building consent for the development of adjacent offices. In this case financial considerations were found to be a material consideration for two reasons. First, because the offices were the way to finance renovations to the Opera House. Second, because of the physical proximity of the offices to the Opera House. No principle was laid down as to what constitutes adequate physical proximity. In this case, the benefits and the harm that would flow from the entire proposal were weighted. It was found that the benefits outweighed the perceived harm to the community and, therefore, planning permission was granted for the entire development (Heap, 1989, 5-7, JPL, 1989, 116-8, Purdue et al, 1992, 1017-8).

It appears that since the passage of the 1947 Act, no legal authority has ever held that financial matters cannot be a material consideration. Just because

financial matters are capable of being material considerations does not mean that every financial matter is material. Every planning application must be dealt with on its own merits. This is nothing new to the *Royal Opera House* case, which does make it clear that those financial matters that affect the viability of a desirable scheme may lawfully be taken into consideration. The decision gives local authorities another tool, it does not compel them to grant planning permission to every "cowboy developer" who conjures up a financial consideration. A local authority can and should turn down a proposed development that is not a desirable in planning terms (Heap, 1989, 5-7, JPL, 1989, 116-8).

5.3 Impacts of the *Plymouth* Decision

If the decision in the *Royal Opera House* case reaffirmed that financial considerations could be material, the *Plymouth* case created a whole range of possible material considerations. After *Plymouth* a local authority, not withstanding clear policy to the contrary, could take into account any benefit, provided it is fairly and reasonably related to the permitted development. While planning permission can not be bought and sold, the proffered benefit does not have to be something the absence of which would result in planning permission being denied. If the test for materiality is the same for the purposes of imposing a condition, or for determining an application, an authority with two similar applications before it can make its decision based on which offers more unnecessary, but relevant, benefits. Taking it a step further, it might even be lawful to impose a *Grampian* condition restricting development until off-site benefits have been provided. It could also mean that the advice contained in Circular 1/85 and PPG1, on the tests for imposing conditions, are more stringent than the law requires. If this is so it could be lawful to refuse permission to a development that does not provide unnecessary but related benefits. An applicant faced with conditions that exceed the Circular 1/85 tests could, of course, appeal to the Secretary of State for the Environment. In such a case, the Secretary would surely follow his own clear policy and ignore those benefits which fail to meet the test laid down in policies. The *Plymouth* decision allowed a new set of offered planning obligations to be material considerations, but it also raises as many questions as it answers (Ashworth, 1993, 1110, Gilbart, 1993, 1102, Kirkwood, 1995, 588-9).

One set of policies coming from the Secretary of State for the Environment and another from the courts, results in a confusing state of affairs. The *Plymouth* decision makes it easier for an aggressive local authority, keen to circumvent Circular 16/91 and PPG1, to convince a developer with a weak case that the best way to proceed is to offer unnecessary but related benefits and not appeal. Not all parties harmed by a grant of planning permission have the time, resources or inclination to appeal to the Secretary of State for the Environment. As he rarely exercises his power to call in applications, the only route left is judicial review. The Court of Appeal has stated that a case can not be brought if the Secretary of State for the Environment's policies have not been followed. The court went further and held that a local authority is not required to apply a policy favoured by the Secretary of State for the Environment, so that failure to do so will annul the local authority decision. The effect is that a local authority is not acting unlawfully if an accepted obligation fails to meet the necessity test as laid down by the Secretary of State for the Environment. Would a local authority be acting unlawfully if it did, as a matter of policy, apply the necessity test? All this would seem to lead to the conclusion that Circular 16/91 and PPG1 can be circumvented by those eager to secure planning permission and willing to pay the price in the form of unnecessary but related benefits, when the local authority is willing to cooperate. The Secretary of State for the Environment's policies only become relevant when there is an appeal. Only legislation, not another Circular, could achieve restraint concerning what is a material consideration (Gilbart, 1993, 1103, Kirkwood, 1995, 588-9).

The conclusion can be drawn from *Plymouth* is that in a world free of Government guidance the correct legal approach to planning obligation would be relatively clear. To be acceptable, in legal terms, a local authority would only have to be sure that offers of planning benefit were clearly and reasonably related to the development under consideration. *Plymouth* indicates that anything on-site is related, off-site benefits can also be related. This relationship need not be strong and the developer can probably create a legal link. If a benefit will happen as a result of the grant of planning permission than, as a matter of law, it must be a material consideration. As highlighted by *Plymouth* there is a wide range of material considerations. It is unclear whether a material consideration test can prevent proffered obligations that are being used to "buy" planning permission from being taken into account. The weight given is up to the local authority and a decision can only be overturned if the weight is perverse. However, the

court suggested that it did not, and probably could not, spell out an adequate legal test. It is the remit of policy makers to develop the guidance as to the weight to be attached to certain policies (Ashworth, 1993, 1107, 1110).

Of course, in the real world things are not so clear cut. The courts have said that Government policy advice notes, including Circular 16/91 and PPG1 are also material considerations, but with limits. Policies cannot make conditions that would otherwise be immaterial relevant, nor the other way round. Circular 16/91 fails because it tries to tell local authorities what they can and cannot take into account. That is the role of the courts. The Circular confuses matters by trying to do more than is permissible in a Government statement (Ashworth, 1993, 1107).

Offers of planning obligations can create two problems. First, there is a clear prohibition against planning permission being bought and sold. A fundamentally unacceptable development should never receive planning permission because of the benefits the developer is willing to provide. Second, permission for acceptable developments should never be delayed or refused because benefits are not offered. Planning obligations can make it easier for an application to move smoothly through the system without the need for appeal. Benefits can also provide a means of distinguishing between competing applications. The disadvantage to this is that planning obligations can introduce uncertainly into the system and, when taken to excess, may endanger the financial viability of a project or exclude developers who are unwilling or unable to make similar offers. For almost any development, conflicting policies will be relevant (Ashworth, 1993, 1109).

What distinguishes *Plymouth* from earlier cases is that the obligations were offered and accepted for developments that were both acceptable in planning terms. In earlier rulings planning obligations had been instrumental in tipping the balance in favour of granting planning permission for developments that would have otherwise been unacceptable. The logic that an obligation can be material even if it is not strictly necessary is impeccable. The fact that the benefits were offered by the developers rather than imposed by the local authority was critical to the decision. For example, the local authority could not have required the developer to provide the bird watching hide, nor could they have refused planning permission if it was not offered. The pronouncements of the court aside, the practical consequence

is that planning permission can be bought. Where there is some doubt about the grant of permission, obligations can be used to tip the balance. The only restriction is that they must be related to the development (JPL, 1993, B91-2, Kirkwood, 1993, 564).

5.4 Impacts of the *Witney* Decision

If *Plymouth* opened the flood gate in terms of which planning obligations can be material considerations, *Witney* went some way towards tightening that definition. The Secretary of State for the Environment's policy regarding planning obligations, was defensible in *Witney* because, while it may not maximize the immediate benefits to the community, it does produce fairness among developers. The choice between a policy that favours fairness between developers, and one which maximizes the benefit to the community, as was the case in the *Plymouth*, is not a matter for the courts to decide. Rather, it lies within the area of discretion granted to local authorities by Parliament. In *Witney,* the Secretary of State for the Environment rejected Tesco's argument that their offer to fund the entire cost of constructing the West End Link was a material consideration. Instead he applied the policies set forth in Circular 16/91 and having considered the offer decided, as he is entitled to do, to attribute little or no weight to it (Kirkwood, 1995, 600-1).

Witney does clarify the situation and lays down some guidelines for practice in the area of planning obligations. First, it settles the argument over whether the same rules apply to the lawfulness of obligations as conditions. The House of Lords accepted that a planning obligation can be lawful even if it does not meet the second *Newbury* test of being related to the permitted development. Lord Hoffmann explicitly stated:

> The *vires* of planning obligations depends entirely upon the terms of section 106. This does not require that the planning obligations should relate to any particular development. As the Court of Appeals held in *Good v Epping Forest District Council* [1994] 1 W.L.R. 376, the only tests for validity of a planning obligation outside the express terms of section 106 are that it must be for a planning purpose not *Wednesbury* unreasonable.

Lord Hoffmann went further and dashed the suggestion that if a condition were manifestly unreasonable it would automatically follow that the same requirement in the form of an obligation was also be *Wednesbury* unacceptable. Together with Lord Keith he added that it would be unlawful

for a planning authority to take into account the existence or absence of an obligation that had no connection to the development under consideration. Lord Keith argued:

> An offered planning obligation which has nothing to do with the proposed development, will plainly not be a material consideration and could only be regarded as an attempt to buy planning permission. If it has some connection with the proposed development which is not *de minimis*, then regard must be had to it.

While Lord Hoffmann in the context of examining Circular 16/91 accepted that:

> A benefit unrelated to the development would not be a 'material consideration' and a refusal based upon the developer's unwillingness to provide such benefit would therefore be unlawful.

Neither of these speeches gives any guidance as to what constitutes a sufficient connection; that question remains to be answered. Here, the emphasis was placed on having found the relationship between the obligation and the development. It did not matter if the obligation is not necessary to make the development acceptable in planning terms, or that it appears to be disproportionate to the external costs created by the development (Kirkwood, 1995, 601-2)

It would appear that Lord Hoffmann did not want to delve into the issue of proportionality, as he felt it would involve the courts in determining the merits of a decision. There is an important distinction between the courts stating that the decision-maker shouid only take into account a proportionate obligation and the court actually deciding what is proportionate. On the issue of necessity, both Lord Hoffmann and Lord Keith appear to accept that, whether or not there is a sufficient connection between the obligation and the development, may rest on whether the obligation is necessary to make the development acceptable. Obligations are acceptable when they overcome objections. Where developers are competing for a planning permission, obligations can tip the balance in favour of one development, as long as they are material and related to the development. Difficulties arise when the obligations are off-site and have little or no connection to the proposed development. Off-site obligations should only be relevant if they overcome planning obligations. A planning obligation should not be given weight unless permission would be denied without it, which is not the same

as completely disregarding it as immaterial. In practice, there does not appear to be much practical difference between giving an obligation no weight and disregarding it as immaterial. The concern should be over what constitutes a sufficient connection between obligations and objections and the application of such principles should be openly justified (Kirkwood, 1995, 602-3).

Much like the *Plymouth* decision, *Witney* seems to allow a local planning authority and the Secretary of State for the Environment to take diametrically opposed approaches to planning obligations. As long as there is some connection the local authority can consider an obligation to be material, no matter how disproportionate. On the other hand, on appeal or call-in, the Secretary of State could give the same obligation no weight at all. This does appear to set up a two-tier approach to planning obligations. Lord Hoffmann justified the situation on the grounds that if it is merely a matter of differing emphasis within an area of discretion which Parliament has entrusted to planning authorities. While local authorities will always have differing views as to the weight to be given to material considerations, the courts should ensure consistency as to what factors are given weight. It seems odd that one decision-maker should give an obligation full weight and another no weight at all (Kirkwood, 1995, 603).

Having discussed the impact of the British cases on planning obligations, this study will now move on to look at the impact of the American cases on takings. This will be followed by a comparison of the cases and heir impacts in the two countries.

CHAPTER SIX: IMPACTS OF THE AMERICAN CASES ON TAKINGS

6.1 Introduction

Not unlike their British counterparts, the justices of the United States Supreme Court have recently decided cases meant to define more clearly when a land-use regulation constitutes a taking. Unlike its British counterpart, the Court has tightened the rules, making it more difficult for a local authority to derive some benefit for the community from development. From the first major takings case, *Pennsylvania Coal* (1922) came: "The general rule at least is that, while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." While defining the general principle, it was left to the courts to determine exactly when a taking occurred. For fifty years a workable, if imprecise set of rules, was hammered out in both the state and federal courts (Michelman, 1987, 1607, 1626-9, Roddewig and Durksen, 1989, 1-3, 7).

6.2 Impacts of the *Nollan* Decision

The pre-*Nollan* takings test consisted of three broad parts, applied on a case-by-case basis. First, what is the economic impact on the property owner? What are their "investment backed expectations," were they being left with a "reasonable economic use," even if not the "highest and best" use? However, what constitutes an economically viable use was not always clear or consistent. Second, is it a valid exercise of the police powers, promoting a public purpose so important and beneficial that it outweighs any loss incurred by a property owner? The police powers granted to local governments by the Constitution only require that the state "could have rationally decided" that a measure *might achieve* its stated objective. Until *Nollan*, the state was given the benefit of the doubt. Third, could the regulation be characterized as acquiring private property for a public function, even without physical occupation? If the regulation's purpose was to restrict harmful or nuisance-like activities, it would be exempt from further scrutiny. If the regulation failed to meet these tests, there remained an inquiry into whether its impacts were so grievous as to constitute a taking. Only rarely was the answer "yes", and then the usual remedy was to invalidate it rather than award damages (Michelman, 1987, 1607, 1626-9, Roddewig and Durksen, 1989, 1-3, 7)

The Court was apparently willing to consider the denial of the permission for the Nollan's new home to be constitutional, as it would have both advanced

a legitimate state interest and not destroyed the economic viability of the property. Therefore, the question remains as to why the imposition of a condition constituted an unconstitutional taking. The Court insisted on being satisfied that the claimed nexus was sufficiently credible to alleviate any fears of taking by subterfuge. Justice Scalia defended this heightened scrutiny by suggesting that takings claims fall into the same sensitive category in the as freedom of speech claims. Takings claims are distinct from the less stringent claims of denial of due process of law and denial of equal protection under the law. While it is unconstitutional to deny due process or equal protection, these are rather "lower order" constitutional rights, than the right to freedom of speech. Anyone can claim a taking rather than deprivation of property without due process. For a case to involve a taking, it must be found that the suspect regulation has had the effect of imposing a permanent physical occupation on an unwilling owner (Michelman, 1987, 1605-7, 1611-4).

In *Nollan* the Court also attempted to resolve the competing traditions of the "reasonable relationship" between the public good and the cost to the property owner and "substantially advances," or a regulation which promotes a legitimate state interest. The opinion began: "[w]e have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests.'" It continued, noting that the Court's previous opinions:

> have not elaborated on the standards for determining . . . what type of connection between the regulations and the state interest satisfies the requirement that the former 'substantially advances' the latter.

Although this suggests that the "substantially advances" standard was the appropriate one, the decision actually applied the "reasonable relationship" test. The Court, acknowledging that protecting the public's ability to see the beach was a legitimate public purpose, then went on to look at the fit between the purpose and the beach access condition. Here, applying the "reasonable relationship" test, they found it "quite impossible to understand" how the means served the ends, as the condition did "not meet even the most untailored standards" of judicial review (Merriam and Lyman, 1994a, 21, Roddewig and Durksen, 1989, 11-23).

For local authorities *Nollan* and the other cases decided in 1987 changed some ways of doing things but not others. It was still the case that all

administrative remedies had to be exhausted before a case could go to court. For a takings claim to be upheld, virtually all reasonable use or economic return still had to be denied, a difficult threshold to achieve. Normal planning delays still did not constitute a temporary taking. However, regulations which the court decides have gone too far could now result in compensation being paid for a temporary taking (*First English*). It is still possible to overturn a regulation without payment (*Keystone*). The Court provided little guidance as to how damages would be assessed and payments made (Merriam and Lyman, 1994a, 21, Roddewig and Durksen, 1989, 11-23).

6.3 Impacts of the *Lucas* Decision

Nollan established a new category of taking, but the overall situation was far from clear. Although *Lucas* does tie up some loose ends, by no means does it resolve all of the uncertainties associated with takings doctrine. It shifted the inquiry from whether a regulation is harm-preventing, rather than benefit-conferring, to traditional common law principles of nuisance. While this offers some certainty and predictability to the takings issue, there is still no way to predict which regulations the courts will deem to have eliminated the value of the property. The ultimate significance of *Lucas* will depend on whether the Court resolves the uncertainty surrounding the elimination of economic value test or applies *Lucas* to other cases of suspected illicit appropriation by legislation (Harvard Law Review, 1992, 278-9).

Viewed in an extreme light, *Lucas* can be seen as opening a quagmire. Before this decision certain "truths" had been relied upon, including that a state legislature could modify its laws concerning nuisance. The *Lucas* decision means that the courts will decide what constitutes a nuisance, rather than the legislatures. The Supreme Court felt that the state courts were best equipped for this task because they have expertise and experience in nuisance law; in balancing the rights of the individual and society as well as knowledge of local conditions and traditions. As the courts are bound by precedent, the Supreme Court felt that the definition of "nuisance" would remain more predictable than if defined by state legislatures, which can be swayed by shifting majorities. Any regulation that results in the elimination of value, invites the suspicion that the legislature has a hidden agenda to appropriate private property for public benefit. A nuisance must also have historic roots: a state legislature cannot legislate

something as a nuisance, in the Court's opinion, in order to circumvent *Lucas*. If this is the case then the courts are needed to restrict the legislatures; allowing the latter to enact such a statute would undermine the constitutional requirement for compensation (Harvard Law Review, 1992, 274-8, Mandelker, 1992, 3).

Seen in a different light, the ruling in Lucas is quite narrow and therefore has a limited impact. Any regulation which removes all economically beneficial use from a discrete piece of property is now, *per se*, a taking and must be compensated. The *per se* rule of total economic deprivation does not apply when a land-use regulation reaffirms a common law nuisance. Writing for the majority, Justice Scalia pointed out that the "harmful of noxious" use principle was the Court's early attempt (i.e., *Hadacheck*) to describe circumstances under which government may regulate property in such a way as to affect its value, but not constitute a taking. He explained that there had been a transition, to the current understanding of a broad realm within which government may regulate without compensation. Relying on the noxious use principle, the government could regulate the use of land to prevent harm, but not to confer a public benefit. For Justice Scalia the harm/benefit distinction had become outdated, as any regulation may both prevent harm and confer benefit, depending on the point of view. In his dissent, Justice Blackmun brought the issue full circle. He pointed out that the new *per se* rule did not escape the "trap" of the harm/benefit distinction as nuisance law is based on the concept of harm. In a typical nuisance case there is an intruding and a defending land use. Proponents of the defending land use claim that the introduction of the intruding land use is harmful because it is not compatible with the existing uses. A classic example is a slaughterhouse in a residential neighbourhood (Berger, 1992, 7-8 Callies, 1992, 5-7, Mandelker, 1994, 3-4, Morgan, 1993, 4).

The decision in *Lucas* sets up a conflict with that in *Keystone*. In *Keystone* the Court held that harm preventing regulations do not constitute a taking. While in *Lucas* they held that destroying all economically viable uses does constitute a taking. Reconciling the two requires a "balancing test." Society's interests outweigh individual economic interests unless a total loss is inflicted. The individual's interests outweigh society's except where the harm is a nuisance. Choosing between preventing harm and retaining economic viability is difficult as both are so deeply entrenched. The incompleteness of each principle makes the other seem indispensable.

Rather than choose between them, the solution may be to decide that the differences are irresolvable or even necessary. When the harm principle breaks down the inquiry shifts to find a positive criteria to delineate the state's powers. *Loretto* and *Nollan* establish the right to exclude: from *Lucas* comes the principle that what is important is the ability to make money from the property, not the ability to use it in other ways. Taken together, if government violates a landowner's right to exclude or make money from land, (except in cases of nuisance) it must pay compensation (Rubenfield, 1993, 1094-1105).

Lucas still leaves some questions unanswered. There was no definition of nuisance that would withstand judicial scrutiny, or indication that it must be in place before property is purchased. While this case dealt with the elimination of all economic value, there was no indication of how the court would deal with a partial taking. While *Lucas* was concerned with a discrete piece of property the Court did not suggest how it would deal with a taking which involved a portion of a piece of property or adjacent holdings. The ripeness doctrine states that a property owner must exhaust all administrative avenues before going to court. In this case the majority neither overturned nor followed that doctrine. While *Lucas* was before the South Carolina Supreme Court the Beachfront Management Act was amended to allow variances, but the United States Supreme Court still heard the case. As a result of the *Lucas* decision it is likely that future takings claims will be made on grounds other than the traditional elimination of all economic value. Property owners may claim that land-use regulations interfered with their investment backed expectations, constituted a partial taking or theuses permitted had no value in the market place (Berger, 1992, 7-8, Kayden, 1992, 9-10, Morgan, 1993, 4).

This case represents a shift towards preserving private property rights and away from government regulation. The message to government is to exercise care and sensitivity where property rights are concerned. In crafting land-use regulations care must be taken to avoid triggering *Lucas* impacts. It is less likely that a takings claim will be successful if the regulations allow for a variety of land-uses and preserve resources located on the property. It is also possible to distinguish between allowable uses and their intensity. Allowing some use, even if not at the same level of intensity as elsewhere, will make the regulation more defensible. Likewise, so will performance standards which allow increased intensity of use if mitigation standards are

met. It would also be advisable to allow some uses while temporary regulations or moratoriums are in place. The denial of all economically viable use categorical rule can also be avoided if a special permit process is used to impose conditions. Other useful tools could include density transfers and clustering of development (Callies, 1992, 5-7, Morgan, 1993, 7-10).

6.4 Impacts of the *Dolan* Decision

After the United States Supreme Court decisions handed down in 1987, which reopened the takings issue, together with the *Lucas* decision in 1992, speculation was rife as to how the Court would handle the *Dolan* case. Would it go further in restricting the powers of local government to level exactions on developers? Or, would the Court reaffirm earlier decisions in the field, leaving the burden of proof of the constitutionality to appellants?

Together, *Nollan* and *Dolan* establish two elements of the "substantially advances" test. From *Nollan* comes the "essential nexus" between the dedication and a legitimate state interest. From *Dolan* comes the test for "rough proportionality" between the dedication and the impacts of the proposed development. In the latter there was no question that protecting floodplains and encouraging alternative modes of transport are legitimate state interests. Likewise, it was accepted that the larger shop would increase storm water runoff and traffic congestion. However, the City of Tigard failed because it could not demonstrate, to the Court's satisfaction, that there was "rough proportionality" between the impacts and the dedications. Finding no precedent in previous United States Supreme Court rulings the majority established just such a test in *Dolan.* In affirming the importance of the Takings Clause, the Court invoked

> the well settled doctrine of 'unconstitutional conditions,' [under which] government may not require a person to give up a constitutional right. . . . in exchange for a discretionary benefit conferred by the government where the [right sacrificed] has little or no relationship to the benefit.

In his dissent, Justice Stevens pointed out that this doctrine may not be well-settled. Rather, in his opinion it would break "considerable and unpropitions new ground." (Kelly, 1994a, 5-7, Merriam and Lyman, 1994b, 1-4, 1994c, 61-2).

In *Lucas* the Court held that the economic viability of property is a constitutionally significant concern. In *Nollan* they held that where there is a choice between permitting a new house and losing the economic return on the property the "substantially advances" test is justified. When a property owner is seeking increased economic return from a piece of land, they are seeking a discretionary benefit. In such a situation ordinary judicial deference to legislation would be appropriate, unless the owner was being asked to sacrifice an "essential" stick in the bundle of constitutionally protected property rights. In *Dolan* it was the "right to exclude others" that the Court held need not be sacrificed for the sake of a permit (Land Use Land and Zoning Digest, 1994b, 19, Merriam and Lyman, 1994c, 63).

Seen in its most extreme light, the message of Dolan to local government is that you cannot always get what you want and you cannot get something for nothing. The decision was not a challenge to the merits of flood and traffic control. Rather, it sets up criteria for assessing payments to achieve legitimate ends Applications for planning permission cannot be viewed as a blank check for funding public projects. The conditions must be the result of individualized assessments of development impacts. If a local authority wishes to impose a condition, the burden of constitutional proof is on them. Seen in this light, *Dolan* represents the coming of age of the Fifth Amendment. It can now be seen to protect the rights of property owners, in the same way free speech rights are protected under the First Amendment (Berger, 1994a, 3-4, 1994b, 5, Callies, 1994a, 4-5).

The recent success of takings claims suggest that planners must focus on key points when dealing with exactions. *Dolan* (like *Nollan* before it) was concerned with the dedication not the regulation of land. While there will no doubt be attempts to extend the *Nollan/Dolan* reasoning to all land use controls, it appears that, at present, regulation remains the constitutionally safer way to proceed. These decisions do not represent a threat to the ability of local authorities to zone, or otherwise regulate, land. What they do strike down are exactions based on the local authorities needs rather than the impacts of development. In short, the message is: land-use regulations are acceptable, taking land through dedications is quite a different matter. This is now the rule, even if as Justice Stevens said in his dissent, it is not great jurisprudence. The Court has now sent the message as to how far a local authority may go in passing on the costs of public facilities to developers. To be acceptable a dedication must pass a three part test: First, the condition

must promote a legitimate state interest. Second, there must be an essential nexus between that interest and the condition. Third, the exactions must be roughly proportional to the projected impact of the development. In *Dolan*, the answer to the first two was "yes," but "no" to the third. The City's "tentative findings" concerning increased storm water runoff and traffic congestion were not "constitutionally sufficient to justify the conditions imposed by the City on petitioner's building permit." (Callies, 1994b, 3, Kelly, 1994b, 6-9, Merriam and Lyman, 1994b, 1-4, 1994c, 61-2).

Despite the possible extension of the *Nollan/Dolan* inquiry to impact fees, they still have an advantage over their "in-kind" counterparts. While "in-kind" requirements are indivisible i.e. a lane of a road, impact fees can be calibrated to the penny. Exactions are not doomed either, but, they must be roughly proportional. Local authorities can still require dedications of land, but any dedication would have to be credited against impact fees at fair market value. If the land was more valuable than the impact fees, the local authority would have to refund the difference. There may be circumstances where only a dedication will serve the public interest and where it may be impractical or impossible to demonstrate the required "essential nexus" or "rough proportionality." The government can still acquire land, but it must pay "just compensation." In *Nollan* and *Dolan* the Court made it clear that government may deny applications when granting them would harm legitimate government interests. This may not always be advisable as it could deny the important benefits that new development can bring to a community. Denial may be appropriate when the impacts on the environment or infrastructure are too great to mitigate and conditions cannot be justified (Calavita, 1994, 29, Kelly, 1994b, 6-9, Merriam and Lyman, 1994b, 1-4, 1994c, 61-2, Rawlinson and Hauser, 1995).

Justifying dedications, in constitutional terms, is now the responsibility of the local authority. As a result, more and more of them will be preparing public facilities plans to justify impact fees, exactions and dedications. Land-use regulations must be consistent with these plans to demonstrate that there is the "essential nexus." Beyond plans and regulations, local authorities will be carrying out more case-by-case analysis of applications to ensure "roughly proportionality." All of this will cost more time and money, but it may well result in more thoroughly thought out regulations and, therefore, better planning (Calavita, 1994, 29, Kelly, 1994b, 6-9, Merriam and Lyman, 1994b, 1-4, 1994c, 61-2).

6.5 Impacts of Takings Decisions of State Level Legislation

Takings has become an issue in the legislatures as well as the courts. During the 1995 session the United States House of Representatives passed a takings bill, another was pending in the Senate. H. R. 925 The Private Property Protection Act would require the government to pay compensation whenever endangered species or wetlands laws reduced the value of property by a fifth. The cost was estimated to be $28 billion over seven years, to be paid by the agency issuing the regulation. In the Senate, S. 605 would set the takings threshold at a third and would apply to all federal regulations. President Clinton has promised to veto any such legislation. Eighteen of the fifty states have passed some kind of taking provision since 1991. At state level the most common measures are "assessment" bills. These would require that the impact of a piece of legislation be determined prior to its implementation and could be very expensive. In Colorado the cost of implementing one such bill was put at $3 million a year in staff and operating costs. The measure ultimately failed. More far reaching are "compensation" bills which require cash payments when a regulation is found to diminish the value of land. An extreme measure adopted by the state of Washington would have required state and local government to compensate any loss in property value resulting from regulations. The cost of implementation had been put at between $3.8 and $11 billion. It was ultimately defeated at the polls by a margin of sixty to forty percent (Freilich and Doyle, 1995, 1-5, Tibbetts, 1995, 5-7, 1996, 16-7).

Having looked at the impact of the court decisions in their respective studies, this study will now move on to a comparison of planning obligations and takings.

CHAPTER SEVEN: COMPARISON OF PLANNING OBLIGATIONS AND TAKINGS

7.1 Introduction

As underlying economic and political conditions have changed in both countries, both planning obligations and exactions have increasingly become part of the planning process. These underlying conditions, while not identical, are comparable. Where once government, local or national, was willing and able to foot the external costs of development, this is no longer the case. Today, it is the norm for the developer to foot some or all of those costs. The argument can be made this is a more equitable situation as it is the developer who reaps the profits of development and, therefore, should be responsible for some of the costs to the community. The question remains, how much should the developer pay? At what point does the community strike the right balance between requiring too little and subsidizing development and requiring too much and losing development and the benefits it brings? Is it a bad thing when the developer offers to tip the balance and pay more than is required by the community to "break even"? Even though this brings short term gains to the community, is it possible that the community will be hurt in the long run by a lack of competition? Furthermore, what is ethical and legal to either be offered or requested? Is there an equitable, legal, ethical way to determine these costs? In attempting to arrive at the optimal situation what can planners, developers and others learn from their counterparts on the other side of the Atlantic?

The United Kingdom and the United States are two different countries. While they do share a great deal, there is also a great deal that is different in the planning and legal systems. In Britain, planning is a function of central government while in the United States it is a function that the states delegate to local authorities. In the United States the Supreme Court has the final say on planning matters, not as whether they are good or bad planning but rather whether are they constitutional. The United Kingdom does not have a written constitution. Whatever laws are made by Parliament are by default constitutional. The final word on planning matters is in the hands of the House of Lords. As in the United States the role of the Lords is not to decide good or bad planning practice, but rather to ascertain that the law has been followed.

In the United States the Fifth Amendment to the Constitution states that "nor shall private property be taken for a public use without just compensation."

In the United Kingdom there is no Fifth Amendment. However, the same principle that property should not be taken by government without just compensation guides Parliament when it passes legislation and the courts when interpreting it. In a different form the same principle is the guiding force on both sides of the Atlantic; which makes comparisons and exchanges all the more possible. In both countries legislatures pass the laws. In Britain both interpretation and implementation are largely carried out by policy makers, primarily the Secretary of State for the Environment, as well as local planning authorities. The role of the courts in interpreting the legislation is not as extensive as it is in the United States. As there is no American counterpart to the Secretary of State the courts take a more active role in interpreting policy. It is the local authorities who implement policy within the boundaries of those interpretations. Although the courts do play a larger role in American planning than do their British counterparts, most local authorities have little to do with them. The majority of decisions are taken based on local issues. It is only rarely that a higher level of government is involved. This is in contrast to the British system where structure plans and development control decisions must comply with central government policies, rather than the courts. There are also differences in the issues addressed by those responsible for interpretation The American courts almost seem to go out of their way in refusing to address the issues which most concern planning professionals. Rather than lay down general principles that could act as guidelines, they deal with the very specific issues that distinguish one case from another. By contrast, the Department of the Environment provides policy guidance, within the framework of legislation, at a more general level (Cullingworth, 1993, 1-2, Purdue, 1995, 279, 291).

7.2 Could British Cases Happen in the United States?

One way in which countries can learn from each other is to compare and contrast the underlying circumstances behind the court cases and to consider if the outcomes would have been the same under the other legal system. Could a situation similar to the *Royal Opera House* arise in the United States? It is entirely likely that a cultural institution could request that they be allowed to develop a portion of their property in a financially lucrative way to support their cultural activities. In the United States it might require rezoning the land for commercial use. If the rezoning was in conformance with the plan it would likely to be approved with a minimum of controversy. If it did not conform and particularly if there was strong neighbourhood

opposition, a situation similar to Covent Garden could result. If the local authority approved the rezoning over the opposition of neighbours they would have the option of taking the authority to court. The recent United States Supreme Court decisions on the takings provide little insight in to how such a case might be decided. The courts would most likely consider the protection of the public health, safety and welfare, the proper exercise of the police powers granted to local government under the Constitution and whether the use would be a nuisance. Though the reasons for arriving at the decision would be different from those in England, at the end of the day it seems possible that the result would be the same. A cultural institution would be allowed to develop offices to support their operations.

Could a *Plymouth* or *Witney* type situation happen in the United States? The zoning system as it operates in large portions of the United States makes it highly unlikely that such a situation would arise. Under the equal protection clause of the Fourteenth Amendment to the Constitution, all land with the same zoning must be treated in the same manner. Therefore, as long as the land had the appropriate zoning, any number of superstores could be built without regard to the need for them. That decision would be left to the market. The only situation in which something similar might happen is if it was necessary to rezone land and there were competing applications for rezoning. Even this scenario seems unlikely as rezoning can only be sought by the property owner(s) or with their permission. Should such a situation happen, the recent decisions of the American courts do not provide much guidance as to how it would be dealt with. Those decisions have all concerned the imposition of conditions on developers by local authorities, rather than the offer of benefits by developers (Ashworth, 1993, 1105-6, Gilbart, 1993, 1101).

7.3 Could American Cases Happen in the Britain?

Could a *Nollan* type situation happen in Britain? It seems possible that a similar set of conditions could occur; however, it also seems likely that the outcome would be different. Under English law, a planning obligation can be taken to be fairly and reasonably related of the development even if it is not necessary to alleviate the impact to the development. Sufficient relationship can be derived from physical proximity, as in the *Royal Opera House* case and in *Plymouth*, from the fact that the profits from the development enabled other desirable development to take place. In Britain

it seems likely that the requirement of an easement would be seen as balancing the loss of visual access to the beach and, therefore, the condition would have been allowed to stand (Purdue, 1995, 289).

It is not inconceivable that a *Lucas* type situation where a property owner was prohibited from building on ocean front property could happen in Britain. However, the situation governing the payment of compensation is different. Under English common law, as a general rule, there is no right to compensation for the reduction in land values that results from a refusal of planning permission. The owner, or his/her predecessor, would have received compensation under the 1947 Act. As with the Fifth Amendment to the Constitution, the rationale is that only where land is expropriated is there any right to compensation. Situations where there is a right to compensation for the refusal of planning permission are limited. The main exception is where the refusal results in land being "incapable of reasonable beneficial use in its existing state." The term "reasonable beneficial use" is clearly imprecise. While the benefit must be to the owner rather than the public it is not always synonymous with profit. A garden has been held to be reasonably beneficial. It is doubtful if the circumstances in *Lucas* would have led to a purchase notice having been upheld by the Secretary of State for the Environment. The British courts would be even less likely to overturn such a decision. If a person in Mr. Lucas' position was to receive compensation at all it would be limited to the "existing use rights" i.e. rebuilding a ruined house. The Planning and Compensation Act of 1991 abolished most of these "existing use rights." The right to rebuild does, however, remain as an important and valuable planning assumption (Purdue, 1995, 284-5).

It seems entirely possible that circumstances similar to *Dolan* could happen in Britain. There could be a situation where either, through conditions or a section 106 agreement, similar benefits could be involved. The British legal system would seem likely to uphold *Dolan* type conditions to the grant of planning permission, as long as the requirements set out in the *Whitney* decision were followed. The regulations were part of the City of Tigard Comprehensive Plan and Community Development Code, both adopted in accordance with Oregon law. This would increase their relevance in Britain as section 54a of the 1990 Act made the development plan a prime material consideration. It seems likely that the conditions would have been considered to be material as they had to do with the development. The

question is whether the conditions would pass the tests of necessity and proportionality as opposed to the "rational nexus." The reluctance of the English courts to require the kind of scrutiny now required by the American courts, coupled with the reliance on central and local political responsibility, makes it seem likely that the conditions would have been upheld (Kirkwood, 1995, 599, Merriam and Lyman, 1994, 18).

7.4 Affect of the decisions on local authority planning

How do these differences affect planning in the two countries? The feature of the British planning system that limits the amount of development, for example, the number of superstores, is not generally a feature of planning in the United States. The equal protection clause of the Constitution means that all land with the same zoning must be treated in the same way. Therefore, situations like those in Plymouth and Witney would probably not arise. The situation, among these three, that would have the greatest likelihood of an American counterpart is the Royal Opera House. The details would be different but the outcome could well be the same. It does not seem beyond the realm of possibility that any of the American situations would occur on this side of the Atlantic. However, it seems likely that in each case the outcome would have been different with the conditions being upheld.

While the overall approach to the question of the scale of benefits is quite similar in the two court systems, the application is quite different. Under English law planning obligations can be held to be fairly and reasonably related the development under review, even if they are not necessary to alleviate its impacts. The American rational/essential nexus is a tighter test. Under the rational nexus a condition is only acceptable if it directly compensates for a closely connected negative impact of the development. On the other hand, English law puts only minimal restraints on what has been termed: the buying and selling of planning permission by negotiation of unrelated planning advantages. The only real safeguard is when decisions are appealed against or called in by the Secretary of State for the Environment. When this happens the Secretary can decide not to give weight to offered obligations which he feels are extraneous. The far from perfect essential nexus can provide a useful starting point for formulating what is a reasonable relationship between an obligation and the impacts of development. When obligations are necessary to alleviate the impacts of a development, Circular 16/91 argues that they should be "fairly and reasonably related in scale and kind to the proposed development." This is

quite similar to the "rough proportionality" test established in *Dolan*, even if its application was rather specious. In *R. v South Northamptonshire, ex p. Crest Homes* the developers offered to pay twenty percent of the increase in the development value of their land in return for a grant of planning permission. In accepting the offer, Brooke J. came up with a similar, though probably less strict test, for determining whether an obligation was fairly and reasonably related:

> Even if the proposed benefit was of a type which could properly be regarded as material it and not to be disproportionately large as to include a 'significant additional benefit' over and above that which could properly be considered to be material.

The American "rough proportionality" test could have the advantage of striking a balance between impact fees which in being applied to all developments, including those which, in practice, have little impact and the inefficiency of detailed investigations and calculations (Purdue, 1995, 287, 289-90)

In the House of Lords decision in the *Witney* case Lord Hoffmann made reference to the impositions of conditions on the grant of planning permission in the United States. Regardless of the constitutional dimension in American planning, the debate over when and how to impose conditions is remarkably similar to that in Britain. The "rational nexus" test, which came from the *Nollan* decision and requires that developer contributions to infrastructure be proportionate to needs generated. This is quite similar to the tests of necessity and proportionality on Circular 16/91. The American test has resulted in some courts requiring a sophisticated analysis which can delve into questions of past expenditure and double taxation. No English court would countenance examining the merits of a planning decision in this way. The result may be a lack of transparency, but this is the price that the English planning system has been willing to pay for its relative freedom from judicial interference. In their dissents, in the *Nollan* decision, Justices Brennan and Blackmun felt that the majority had gone too far in finding that there was no "rational nexus" between beach access and the blocked view. Their position is more in line with that of Circular 16/91 (Kirkwood, 1995, 599, Nollan, 483 U.S., 1987, 3150-2, 3164).

The British principle that a local authority can only have regard for material considerations when granting planning permission is very similar to the

American principle that the police powers, upon which zoning rests, can only be used to advance legitimate state interests. In Britain a planning obligation, to be material, must fairly and reasonably relate to the proposed development. In other words, it must further a planning purpose and it cannot be totally unreasonable. The concepts of the "essential nexus" and "rough proportionality" as fashioned by the United States Supreme Court cover much the same territory. However, the English courts have taken a less strict approach to what is meant by a reasonable relationship. Although it has never been expressly stated, this more liberal approach probably stems from the fact that planning obligations are either agreed to or offered by the developer and not imposed by the local authority. The English necessity principle is quite similar to the Supreme Court's "essential nexus." The Secretary of State for the Environment considers that planning conditions should not be imposed or obligations sought unless they are necessary and relevant to the development being permitted (Purdue, 1995, 288).

During the Witney debate in the House of Lords, Lord Hoffmann did not want proportionality to play any part in determining whether or not a planning obligation was a material consideration. It would appear that the main reason for this was that he felt that it would involve the courts in judging the merits of a planning decision. This was his reason for rejecting the American "rational/essential nexus" test. However, there is an important distinction between the courts mandating that the decision-maker should only take into account a proportionate amount of the offered obligation and the court itself deciding what that is. In *Dolan* the United States Supreme Court required "rough proportionality" between the exaction and the impact of the development. Again this is similar to the approach taken by the Court of Appeal in *Crest Homes*. The difference is that the Supreme Court was far more strict in deciding if the test had been satisfied. The Court of Appeal was willing to take a less strict approach:

> the contribution agreed or assumed by the developer was one which could properly be regarded by the planning authority as a genuine pre-estimate of the developer's contribution to the related infrastructure

Henry L.J. approach ensured that the local authorities do not openly seek more than is necessary and if more is offered the extra will not be taken into account in deciding whether or not to grant planning permission. When an offered obligation overcomes planning objections, permission can lawfully

be granted. It is regrettable that the advantages and disadvantages of the test of "rough proportionality" were not debated by the Lords (Kirkwood, 1995, 602-3).

In criticizing the majority in the *Nollan* decision, Justice Blackmun recommended an approach more in line with that taken by the House of Lords:

> I disagree with the Court's rigid interpretation of the necessary correlation between a burden created by a development and a condition imposed pursuant to the State's police power to mitigate that burden. The land-use problems this country faces require creative solutions. Theses are not advanced by an 'eye for an eye' mentality. The close nexus between benefits and burdens that the Court now imposes on permit conditions creates an anomaly in the ordinary requirement that a State's exercise of its police powers need be no more than rationally based. (Nollan 483 U.S. 825, 1987, 3163).

In the United States, where zoning is in place, planning has traditionally been a largely passive process. Local governments rarely tried to influence the course of development or strike any kind of financial bargain. The requirements set out in the zoning regulations were simply "applied" to each case. Although a certain amount of "bargaining" has always taken place, it was a system characterized by a lack of discretion on the part of planners. This situation has changed for a number of reasons including: the fiscal problems faced by local governments; changes in the economy including the growth of relatively footloose tertiary activities; demographic changes leading to a demand for new types of residential development; increasing concern over the environment and conservation and increasing public opposition to growth: the NIMBY syndrome. Although zoning remains in place, it is now more common to see developers and local governments negotiate development proposals. In the United States most legal issues can be resolved, without going to court, if the developer and the local authority can come to agreement concerning the conditions on a grant of planning permission. These kinds of agreements resemble British section 106 agreements in that they are negotiated rather than the conditions being imposed by the local authority. One difference is that in the United States a developer may have automatic rights to develop under zoning, but has no guarantee that other regulatory requirements will not change from the time planning permission is granted to when development begins. This was the case in *Lucas*, where the zoning permitted single family homes, but the

coastal regulations, which were adopted later, prohibited building. To secure guarantees that this will not happen, a developer may be willing to assume responsibility for a large portion of the infrastructure. In Britain a grant of planning permission means that a local authority can only change its terms if they are willing to pay compensation. Before planning permission is granted the developer must sign a planning agreement stipulating their obligations. In the United States it is considered to be a violation of the police powers to relax zoning regulations in exchange for developer agreements not to do something. The British equivalent is that local authorities may not, by contract, fetter away the exercise of statutory discretion. A local authority could not enter into a contractual obligation or a planning agreement to grant planning permission for future development or to refrain from taking enforcement action against unauthorized development. (Callies and Grant, 1991, 239-44, Cullingworth, 1993, 84).

Under English law, the general rule is that there is no right to compensation for diminished property value resulting from a refusal of planning permission. As with the Fifth Amendment, compensation is only payable when land has been expropriated. The 1942 Uthwatt Committee on Compensation and Betterment accepted that there might well be situations which amounted to an expropriation, but recognized the difficulty in determining when that would occur. In Britain, circumstances where there is a right to compensation for the refusal of planning permission are very limited. The principal exception is when the refusal results in the land being "incapable of reasonable beneficial use in its existing state." This is similar to the American dictum that a taking occurs when regulations leave a piece of property without an "economically beneficial use." Both terms are imprecise. In Britain, the benefit must accrue to the owner, rather than the public, but benefit is not necessarily synonymous with profit for example, a garden has been held to be a reasonable beneficial use. If the property is left without reasonable beneficial use a purchase order can be served. When a purchase notice is accepted by the local planning authority or confirmed by the Secretary of State for the Environment, the local authority must then purchase the property, for the existing use value. In determining compensation it can be assumed that permission would have been granted for "existing use rights." The Planning and Compensation Act of 1991 abolished most of these "existing use rights," however, the right to rebuild does remain as an important and valuable planning assumption. In a case where planning permission had been revoked, the land owner would have

the right to be compensated for the loss of damage directly attributable to that revocation (Purdue, 1995, 284).

In both countries the courts had accepted that it is appropriate for developers to make contributions toward the provision of public services. Both have been striving to establish limits to ensure that the power to regulate the use of land is not misused. In spite of the similarities there are important differences between the systems. When applying the "rational nexus test" an American local authority can impose fees or require a dedication only to compensate for the impacts of that development. There is no provision to remedy any infrastructure backlog. In Britain there is no such legal prohibition and the dividing line between past and possible deficiencies would be a matter for negotiation. Also, under the American system any fee scheme would be applied to all developers regardless of economic conditions. The British approach allows for greater discretion and flexibility to relax fees in some locations and increase them in others. While not a built in feature of the American system, the fact that impact fees are set by each local authority, their level and even their existence is in that way responsive to local economic conditions (Callies and Grant, 1991, 248, Lichfield, 1992, 1117).

As the situation stands today, American local authorities are more constrained than they were in 1986, before the United States Supreme Court reentered the takings field. A local authority can require a developer to dedicate land or pay fees in lieu only if the exaction meets the three-part test of serving a legitimate state interest, having the required nexus between the condition and the impacts of the development and being roughly proportional. These terms are similar to those used in Britain. A legitimate state interest has much the same meaning as serving a planning purpose. The rational/essential nexus is much like the test of necessity. Rough proportionality is similar to fairly and reasonably related. The difference is in how these terms are interpreted. The United States Supreme Court has chosen a narrow interpretation, thus limiting the ability of local authorities to require exactions. By contrast, the British courts and the House of Lords have chosen a more liberal interpretation. This has resulted in some confusion as a local authority and the Secretary of State for the Environment can take a different view as to the weight to be given a planning obligation. This may give local authorities an advantage, as conflicting and, at times,

inadequate guidance allows them to do what they feel is best for their community in a given situation.

CHAPTER EIGHT: CONCLUSIONS

8.1 Introduction

This paper has looked at two countries with two legal systems, two planning systems and two systems of government, but with similar economic conditions. One outcome of the changing economic situations, is that government is no longer able to provide the infrastructure and public facilities necessitated by growth that it once did. Now, developers are often footing at least part of that bill. In both America and Britain there is a dilemma concerning what constitutes a legitimate contribution. What issues can legitimately influence that decision? Does it matter if the offer comes from the developer (even if they are picking from a "menu" drawn up by the local authority) rather than the local authority itself? Should every developer be required to make a proportionally equal contribution? How closely should the contribution be tied to the impacts of the development? Must the contributions only be used to fund the impacts of that development? What kind of mechanism must be devised to ensure that the funds are only used for the purposes for which they were collected? Is it acceptable to ask a developer to provide more than what is necessary to make their development revenue neutral? Can developers be asked to give a little more to the community from which they plan to profit? When can developer contributions legitimately be used as a way to decide among competing proposals? What is a legitimate planning problem and when does offered benefit overcome it, rather than functioning as a bribe? Planning permission is not and should not be for sale to the highest bidder. At the same time communities can not provide the infrastructure necessary to accommodate growth. Every development brings costs as well as benefits to the community, and those costs must be paid for by someone.

8.2 Summary of Findings

In Britain it is often the developers who offer to enter into planning obligations to provide community benefits. To be sure, the local authority may have, "wish list"; however, it is the developers who pick which and how many of those items to fund. In the cases which have ended up in court have not involved planning obligations imposed by local authorities. Certainly there is a process of negotiation, nevertheless, it appears to be developers rather than the local authorities who are taking the initiative. This would seem to limit offers of planning gain coming from those developers who can be assured of a large enough profit in a short enough period of time to make

it economically feasible. The geographic areas most likely to profit are those which are growing already and where there are profits to be made. In economically depressed areas any development may be seen as "planning gain." If choices between competing developments are based on the obligations they offer, in the long run it could also reduce competition to those developers who are able to those absorb the costs.

In one way the situation in the United States is quite opposite. Most the exactions are a condition of the grant of planning permission, as there it is the local authority who determines what the developer is to contribute. In the United States those contributions are often arrived at though some predetermined formula. For a house of size A, a payment of $B will be made to fund schools, parks, roads and other public facilities. Developers, rather than offering to build roads, often complain of having to contribute to them. This is not to say that developers do not make offers to fund public facilities. The practice seems less common than in Britain, in part because formulas are in place. Also, with the appropriate zoning, any amount of development can be built. There is no competition over who builds the one superstore that the plan calls for. At a slightly different level there may be a limit to the amount of land that a local authority is willing to rezone. However, rezoning requests are usually dealt with on a case-by-case basis rather than the total amount of land be rezoned to a specific zoning category during the life of the plan. Also zoning categories can allow a very wide variety of uses, making it more difficult to control the amount of any specific use.

The different solutions to the problems which come from the two countries, reflect the differing nature of the planning and legal systems and what constitutes a legitimate contribution. Taken at face value, the tests laid down by the United States Supreme Court have applicability on both sides of the Atlantic. Examining the tests themselves can provide a basic framework for determining an equitable formula for developer contributions. These decisions can be summarized as a three part test. First a condition should serve a legitimate government purpose. Second, there should be a nexus, or connection, between the impacts of the development and the contribution or condition. Third, the contribution must be roughly proportional to the impacts of the development. The local authority should not become greedy, nor should the developer attempt to buy planning permission. These tests are strikingly similar to the three *Newbury* tests: that a condition must have a

planning purpose; be fairly and reasonably related to the development and not be manifestly unreasonable (AER, 1980, 731).

The difficulty with the Supreme Court decisions, both in terms of their impact on planning in America and the relevance for planning obligations in Britain, arises over the way they chose to apply the test. In keeping with the shift of the political winds to the right in America, a more conservative Supreme Court (three of its nine members were appointed by Ronald Reagan) has interpreted these tests in such a way as to tip the balance in favour of the protection of individual property rights. The ultimate irony will be if this strategy backfires due to its excessive costs to the taxpayers. This is already beginning to happened in those states which have held referendums on takings legislation which has have been overturned by the voters due to their high costs. Property owners may find that when their neighbours are also subject to less stringent regulations and reduced contributions they, as members of the larger community, may suffer (Fulton, 1991, 192).

In their discussions in the *Witney* case, the House of Lords did clarify some of the issues surrounding planning obligations, while leaving others unanswered. The decision did confirm that the rules of lawfulness which apply to planning conditions do not apply to planning obligations. Section 106 does not require that a planning obligation be related to any particular development. A planning obligation must be for a planning purpose and not *Wednesbury* unreasonable. A planning obligation that has no connection whatsoever with the proposed development would not be a material consideration. What the decision does not discuss is what constitutes a sufficient connection between a planning obligation and the proposed development. Rather, there was greater concern that once a relationship had been found, it does not matter that the obligation on offer is not necessary to solve a planning problem or that it is not proportionate to the external cost of the development. Apparently, the reason for not wanting proportionality to play a part in determining whether or not a planning obligation is a material consideration, was that it would involve the courts in determining the merits of planning decisions. This was why the American "rational/essential nexus," and the advantages and disadvantages of the "rough proportionality" test were not examined. Also unresolved was the possibility that a local planning authority and the Secretary of State for the Environment could take opposite views on how much weight to give a planning obligation, resulting in a two-tier approach. The justification being

that the weight given a planning obligation falls within the area of discretion granted by Parliament (Kirkwood, 1995, 602-3).

As was pointed out by the Lords, the courts in America, while not deciding the merits of planning decisions, do play a larger role in determining the merits of planning decisions than do the British courts. No doubt, part of the reason for this is that there is no American counterpart to the Secretary of State for the Environment to review local decisions or provide advise on how the law should be interpreted. The more proscriptive nature of the decisions of the United Sates Supreme Court also reflects a rather fundamental difference in the nature of the two legal and political systems. The courts generally play a larger part in American life than they do in Britain. Americans are more likely to resort to legal action when they are not satisfied with a planning or other decision. The American system is such that the courts are the recourse for the dissatisfied and so are seen as the arbiter when a solution can not be reached between the parties concerned.

The American system is often held up as being characterized by certainty rather that the discretion of the British system. To a large extent this is true. Within a certain zone only certain uses are acceptable and there are definite standards, for example, of height, setback and parking that must be met. At another level the British system seems to provide a greater deal of certainty. In America planning decisions are almost always taken at local level but with regard for the state and federal constitutions, state enabling legislation and relevant court decisions. They are, however, primarily local decisions and there is very little likelihood of review at a higher level. Even if a decision is reviewed it is only at the United States Supreme Court the standard applied is the same regardless of where the case originated. By contrast, in Britain there is a national planning system administered locally. Again, the vast majority of decisions are taken at local level. However, review happens more frequently and when it does it is always by the Secretary of State for the Environment. Review by a single body increases the degree of consistency, not only in those cases that are reviewed but also at local level as a review is always a possibility. Additionally the Secretary of State for the Environment provides policy guidance, which while it may in some cases be contradictory, but is the same for every local authority.

8.3 Future Areas of Inquiry

The story does not here, on either side of the Atlantic. As economic conditions improve and building activity picks up there may be more benefit on offer. Even in improving economies governments cannot provide all of the infrastructure and community facilities that new development will require. As the underlying need for developer contributions is not likely to disappear, neither are those contributions. The circumstance that brought about the need for both planning obligations and exactions has not gone away, if anything the need has increased. There is less and less government money around, with the reliance on planning obligation and exactions being curtailed the question arises of how the need will be filled, or will roads remain unbuilt and communities forced to go without the facilities which taxes can not provide. Will planning permission be denied until the infrastructure can be provided? If so, how will this harm communities? If developers find they can not obtain planning permission because the necessary infrastructure is not there will they devise new ways around the regulations? Will other areas of communities suffer because tax money is being spent on those items once provided by developer contributions? Will developers not build for want of infrastructure, therefore stifling growth?

As we are in a period of rather slow economic growth, it may be the optimal time to look abroad. Yes, the planning, legal and government systems are different, but not so different that lessons can not be learned one from the other. All of us concerned with planning, growth and how to equitably pay for it can learn from the success and failures of other countries.

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APPENDIX A

Supporting British Cases

Associated Provincial Picture Houses Ltd. v Wednesbury Corporation (1947)
Primary Issue: 'Wednesbury reasonableness' test.

Facts of the Case: Associated Provincial applied for a license to open their cinema on Sunday, under the Sunday Entertainment Act 1932. A license was granted with the condition that no one under fifteen be admitted.

Held: The Court of Appeal heid that it was unlawful for a corporation to consider the well-being of children.

> The task of the court is not to decide what it thinks is reasonable but to decide whether the condition imposed by the local authority is one which no reasonable authority acting upon within the four corners of their jurisdiction could have decided to impose. (AER, 1947, 680).

Pyx Granite Company. Ltd. v Minister for Housing and Local Government (1958)
Primary Issue: Conditions must "fairly and reasonably" relate to the development.

Facts of the Case: A private Act of Parliament (The Malvern Hills Act 1924) granted Pyx Granite the right to mine certain parts of their land in exchange for not mining others. The Minister for Housing and Local Government refused planning permission for an application related to their mining operations, and imposed conditions on other parts of the development. Pyx Granite appealed against the decision, arguing that the 1924 Act had amounted to a grant of planning permission.

Held: Appeal dismissed. 1) Pyx Granite Company did not have automatic authorization from the 1924 act to proceed. 2) Planning permission was required, and the conditions imposed by the minister were valid as being fairly and reasonably related to the permitted development. (WLR, 1958, 371).

Hall & Co. Ltd. v Shoreham by Sea Urban District Council (1964)

Primary Issue: Provision of an access road as a condition to the grant of planning permission.

Facts of the Case: Hall applied to develop land along a busy road for industrial purposes. Planning permission was granted, with the condition that an access road be built along the entire frontage, with access rights on either side of the property. Hall appealed against the condition.

Held: At the Court of Appeal the appeal was upheld. 1) The condition was so unreasonable as to be *ultra vires*. In effect, the Council was requiring Hall to "construct a road and virtually dedicate it to the public without paying any compensation." 2) "A more regular course [would be to]...acquire the land, paying proper compensation, and then construct the road at public expense." 3) The ultra vires conditions were fundamental to the whole planning permission, which was accordingly void. (WLR, 1964, 240).

Newbury District Council v Secretary of State for the Environment and International Synthetic Rubber Co. Ltd. (1981)
Primary Issue: Conditions relating to the continuing use of a permitted development.

Facts of the Case: In 1941, two hangars were placed on open land used by Crown as a wartime airfield. From 1947 to 1959, they were used by the Crown for storage. In 1959 planning permission was granted by the Newbury District Council to store fertilizers and corn, with the condition that the hangars be removed by 1970. In 1962, International Synthetic Rubber bought the property and received planning permission to use the hangars to store synthetic rubber, with the above condition extended to 1972. In 1970 International Synthetic Rubber applied for a 30-year extension. It was refused, on the grounds that the land was in an Area of Outstanding Natural Beauty. Upon receiving an enforcement notice for not removing the hangars by the deadline, International Synthetic Rubber appealed to Secretary of State for the Environment who quashed the condition (WLR, 1980, 379).

Held: At the House of Lords the condition was quashed: 1) The hangars had long been used by the Crown for storing various goods, and the storage of synthetic rubber did not amount to a change of use (Use Classes Order 1950, Class X). 2) The implementation by International Synthetic Rubber of planning permission did not so change the nature of the use that the existing

use rights were extinguished. 3) The condition requiring demolition of the hangars was *ultra vires*, because it did not "fairly or reasonably relate to the permitted development." A condition must meet what have become known as the three *Newbury* tests 1) it must serve a planning purpose, 2) it must "fairly and reasonably relate" to permitted development 3) it cannot be manifestly unreasonable. (All England Report, 1980, 731).

Grampian Regional Council v City of Aberdeen District Council (1983)

Primary Issue: Setting a negative condition, now called a "Grampian-type condition."

Facts of the Case: The Grampian Regional Council applied for outline permission for an industrial development to Aberdeen District Council and another local authority. Upon their deemed refusal, Grampian Regional Council appealed to Secretary of State for the Environment and the inspector ruled that the concern over increased traffic at a certain junction was such that the development should not be approved unless one of the roads at the junction was closed. Since the Grampian Regional Council had control over the road, the inspector could not reasonably set such a condition, and therefore had to refuse planning permission. Grampian Regional Council appealed against the decision to the Divisional Court, which quashed the ruling. Aberdeen District Council appealed against the decision to the House of Lords.

Held: Appeal by Aberdeen District Council dismissed. Lord Keith of Kinkel: The difference between a positive condition, requiring Grampian Regional Council to close the road themselves and a negative condition, preventing the development unless and until the road was closed was that the first was not enforceable while the second was: "It was impossible to view a condition of that nature as unreasonable and not within the scope of the Act." (47 P & CR , 1983, 633).

Sosmo Trust Ltd. v Secretary of State for the Environment and Camden London Borough Council (1983)

Primary Issue: Financial considerations and their impact as material considerations.

Facts of the Case: Sosmo Trust applied for outline planning permission for three schemes on a derelict site in Camden. The only financially viable one was an office development. Camden refused planning permission on the grounds that it ran counter to the development plan. On appeal, Sosmo Trust argued that allowing the site to remain derelict was a worse planning outcome than accepting a development contrary to the development plan. The appeal was dismissed on the grounds that the financial considerations of a developer were not a material consideration, because planning permission runs with the land.

Held: At the High Court the decision quashed, and returned to Secretary of State for the Environment. Woolf J: 1) The issue is not the financial considerations of the developer, but the impact. They became material in this case because the outcome of refusal would be to have a derelict site remain so, that was a planning consideration. 2) The relative weight to be given to this consideration was not up to the courts to decide, but it could not be ignored entirely (JPL, 1983, 806).

Westminster City Council v Great Portland Estates plc (1985)
Primary Issue: 1) Whether industrial policy in a development plan could protect a certain group of industries; and 2) whether non-statutory guidelines could guide development and land-use.

Facts of the Case: The Westminster City Council development plan included an industrial policy intended to protect traditional industries (clothing, fur/leather, printing and publishing) which would otherwise be under pressure from more profitable uses such as offices. The development plan stated that outside the "central activities zone," office development would only be allowed in special circumstances, subject to "non-statutory guidance. . . prepared after consultation following adoption of the plan."

Held: At the Court of Appeal, one part of the development plan was upheld, one quashed: 1) The test of development plan policy validity was "whether it served a planning purpose which related to the character of the use of the land." By that measure, the industrial policy was valid, because it referred not to the users of the land, but to the uses, and thus the character, of the land itself. The industrial policy was upheld. 2) "Adoption by a Local Planning Authority of non-statutory guidelines for the development and use

of land in its area" was not allowed by Town and Country Planning Act 1971, schedule 4, paragraph 11. Thus it was quashed (JPL, 1985,108).

City of Bradford Metropolitan Council v Secretary of State for the Environment and McLean Homes Northern Ltd. (1986)
Primary Issue: Setting unreasonable planning conditions (Circular 1/85, paragraph. 63)

Facts of the Case: McLean Homes applied for planning permission for a development of 200 homes on a busy, undersized road. The Council granted permission, on the condition that McLean Homes widen and rework the road to accommodate the added traffic from the development. McLean Homes agreed to this condition. The Secretary of State for the Environment held that the condition was *ultra vires*, because road works were to be carried out by the Council, and could not be passed on to a developer. He felt the condition was also unreasonable because the road was not owned or controlled by McLean Homes, who therefore had no chance of satisfying the condition. McLean Homes appealed against the decision.

Held: At The Court of Appeal the appeal was dismissed. 1) As the Secretary of State for the Environment ruled, the developer could not be required to do the work of the local authority. Hence the condition was *ultra vires*. 2) The crucial issue is the unreasonableness of the condition, even though the developer had agreed to it. The matter was not limited to just the interests of the Council and the developer: the public good had to be taken into account. 3) If a condition is manifestly unreasonable and beyond the powers of the local authority to impose it, then it follows that it is also beyond their powers to include the condition in a section 52 agreement. 4) Something more reasonable, such as a cash contribution to the road widening might not be unreasonable. 5) If a negative *Grampian* type condition had been imposed that could also have been valid (JPL, 1986, 598).

Good and another v Epping Forest District Council (1993)
Primary Issue: Whether an agreement that would be void as a condition is capable of being imposed as a section 52 agreement.

Facts: Planning permission had been granted to for a house on the farm, with the condition that the house only be occupied by someone employed in

agriculture locally. The owner also entered into a section 52 agreement stipulating that and that the house not be sold separately from the farm. The farm was sold and the new owners wanted to void the section 52 agreement on the grounds that the local authority could not require in an agreement terms which could not be imposed as a condition.

Held: Appeal dismissed at the Court of Appeal. 1) A section 52 agreement is not controlled by the same statute as conditions. 2) A requirement is not *ultra vires* merely because the purpose could not be achieved by imposing a condition. The validity of the section 52 agreement depends on whether or not it was made "for the purpose of restricting or regulating the development or use of land." There would be little need for section 52 agreements if all the relevant issues could be dealt with by way of conditions (EG, 1994, 135).

APPENDIX B

Supporting American Cases

Hadacheck v Sebastian (1915)
Primary Issue: What constitutes a valid exercise of police powers.

Facts of the Case: Mr. Hadacheck had operated a brickyard since 1902. The once open countryside had developed as a residential area and was annexed by the City of Los Angeles. The City declared that brickworks were a nuisance and passed an ordinance effectively prohibiting their continued operation. The ordinance reduced the value of the property from $800,000 to $60,000.

Held: The United States Supreme Court held that it was a valid exercise of police powers to close the brickyard. To allow the use to continue:

> . . . would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community. (Cullingworth, 1993, 22, Williams, 1980, 329-35).

Pennsylvania Coal Co. v Mahon (1922)
Primary Issue: When does a land-use regulation go so far as to constitute a taking?

Facts of the Case: Pennsylvania law required mining operations to be conducted in such a way as not to cause buildings to sink. Pillars of coal were to be left unmined to prevent subsidence.

Held: The United States Supreme Court, for the first time, struck down a land-use regulation as an uncompensated taking. The coal pillars were treated separately, rather than as part of the entire mining operation. In the decision Justice Holmes stated: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." (Roddewig and Duerksen, 1989, 1-2, Rubenfeld, 1993, 1083-7).

Euclid v Ambler Realty Company (1926)
Primary Issue: Constitutionality of zoning.

Facts of the Case: The Village of Euclid Ohio passed an ordinance prohibiting the construction of apartment houses, businesses, retail shops and like establishments in residential zones.

Held: For the first time the United States Supreme Court held that a zoning ordinance was a constitutional exercise of the police powers granted under the Fourteenth Amendment to the Constitution to protect the public health, safety and welfare. Where previously a nuisance could only be regulated if it was inheritantly a nuisance, after this ruling a use that in a particular setting was considered to be a nuisance could also be regulated. "A nuisance may be merely a right thing in the wrong place,--like a pig in the parlor instead of the barnyard." The ruling also held that it zoning does not deny the constitutional right of due process granted under the Fifth and Fourteenth Amendments (Williams, 1980, 336-50).

Ayres v City Council of the City of Los Angeles (1949)
Primary Issue: Is the dedication of land and payment for off-site infrastructure a "taking" under the Fifth Amendment?

Facts of the Case: The City required the developer to dedicate land and pay for street widening, landscaping and buffering as conditions of the grant of planning permission for a subdivision.

Held: By the Supreme Court of California that the conditions were reasonable. The developer is seeking the advantage to be gained by subdividing the property into residential lots. Therefore, it is the developer's duty to comply with:

> reasonable conditions for the design, dedication, improvement and restrictive use of the land so as to conform to the safety and general welfare of the lot owners of the subdivision and of the public. (Williams, 1980, 161-83).

Pioneer Trust & Savings Bank v Village of Mount Prospect Illinois (1961)
Primary Issue: Can a developer be required to dedicate land for a public use as a condition of subdivision approval?

Facts of the Case: The village required the dedication of one acre of land, for public use, for every sixty dwelling units. The proposed subdivision consisted of 250 residential units and the required dedication was 6.7 acres for an elementary school with secondary use as a playground.

Held: By the Supreme Court of Illinois that the dedication of land for a public use as a condition of subdivision approval was invalid.

> The developer of a subdivision may be required to assume those costs which are specifically and uniquely attributable to his activity and which would otherwise be cast upon the public.

The condition was a taking of private property without just compensation (Pioneer Trust 22 Ill. 2d 375).

Jordan v Village of Menomnee Falls Wisconsin (1965)
Primary Issue: Dedication of land for schools, parks or recreational sites as a condition of the grant of planning permission for a subdivision.

Facts of the Case: Developer wished to recover monies paid ($200 per lot) in lieu of the dedication of land for schools and parks as a condition of subdivision approval.

Held: By Supreme Court of Wisconsin that requiring dedication of land, or fees in lieu, to provide for schools, parks and other public facilities is a valid exercise of police powers. Such dedications or payments are not an unconstitutional taking as long as they relate to the additional demands on public services created by the subdivision (Williams, 1980, 188-98).

Contractors and Builders Association of Pineallas County v City of Dunedin Florida (1976)
Primary Issue: Does a municipal water and sewer connection fee amount to an unauthorized tax when monies collected are placed in the city general fund?

Facts of the Case: Property owners in the City were required to pay a connection fee to the municipal water and sewer systems. Appellants argued that as the monies were collected and earmarked for "capital improvements of the water and sewer system as a whole" they constituted an authorized tax.

Held: The Florida Supreme Court held that as long as the monies collected were used to meet the costs of expanding the systems to accommodate growth they did not constitute an unauthorized tax. The costs of new facilities should be borne by the new users, however, the fees should not be used for other purposes (Contractors and Builders Association of Pineallas County v City of Dunedin Florida, 329 So. 2d 314,1976).

Penn Central Transportation Company v City of New York (1978)
Primary Issue: Can a city place restrictions on the development of historic landmarks over and above zoning restrictions without effecting a taking requiring payment of just compensation?

Facts of the Case: In 1965 New York City passes a Landmark Preservation Law to protect desirable features of the existing urban fabric. The law requires property owners to keep the exterior "in good repair" and have any exterior alterations approved by the Landmark Preservation Commission. Under New York City zoning laws owners of real property who have not developed their property to the full extent permitted under zoning are allowed to transfer development rights to other lots, provided the development on those lots does not dot exceed twenty percent of the limit allowed in the zone.

The Penn Central terminal is an eight story building in midtown Manhattan. It is one of a number of high profile buildings owned by the appellants in midtown. At least eight of these buildings could be the recipient of transferred development rights. The appellants had requested and were denied permission to build a fifty-five story office building cantilevered over the terminal and make alterations to the facade.

Held: By the United States Supreme Court that by prohibiting of building over the terminal the appellants use of the air rights had not been nullified. They could still transfer the air rights to their other properties in midtown. No taking had occurred, the restrictions are substantially related to the promotion of the general welfare. They also permit reasonable beneficial use of a landmark site and afford opportunities to enhance other properties (Cassidy, 1995, 10-5,28).

Agins et ux. v City of Tiburon California (1980)

Primary Issue: Does a municipal ordinance reducing the density of development take property in violation of the Fifth and Fourteenth Amendments?

Facts of the Case: Appellants acquired five acres of undeveloped land in the city of Tiburon for residential development. The City adopted a zoning ordinance in accordance with state law, permitting one single family house on five acres. Appellants claimed a taking, although they had never sought planning permission for the land.

Held: In an unanimous decision the United States supreme Court held that the zoning ordinance did not take the property without just compensation. The ordinance substantially advances the legitimate government goal of discouraging urban sprawl. The ordinance is a proper exercise of the police powers as it limits but does not prevent development (Agins, 447 U. S., 1980, 7-13).

Loretto v Teleprompter Manhattan CATV Corporation (1982)
Primary Issue: Does a "permanent physical occupation" of property , no matter how small, constitute a taking?

Facts of the Case: New York State statute provides that a landlord must permit cable television companies to install facilities on property. Landlords cannot demand payment in excess of the amount determined by the State Commission as reasonable. In this case the Commission determined that a one time payment of $1.00 was reasonable. Appellant argued that the installation of thirty feet of one half inch diameter cable, eighteen inches below the roof and two large silver boxes on the roof, was a permanent physical occupation and constituted a taking without just compensation.

Held: The United States Supreme Court held that a regulation which results in a permanent physical occupation of the property of an unwilling owner is a taking *per se*. It does not matter how small the invasion is or that it achieves an important public benefit. To the extent of the occupation, the owner's right to possess, use and dispose of property is effectively destroyed. Occupation is more severe that a regulation as the owner has no control over the nature and extent of the invasion (Loretto, 458 U. S., 1982, 15-42, Michelman, 1987, 1608, Rubenfeld, 1993, 1083-5).

Grupe v California Coastal Commission (1985)
Primary Issue: Could the California Coastal Commission require the dedication of beachfront land for a public access easement?

Facts of the Case: The appellant's property is located in a private gated community between two public beaches. The appellant applied for planning permission to build a single family house on the property. Permission was granted with the condition that an access easement on the seaward side of the seawall be dedicated. The easement took up approximately two-thirds of the property.

Held: The Court of Appeals of California held that the imposition of the access easement condition did not constitute a taking. It did not violate the Fifth Amendment of the Constitution as it advances a legitimate government interest. The condition does not amount to a taking as the property owner is left with a reasonable economic use of the property. An access easement is not the same as a physical invasion (Grupe 116 Cal. App. 3d 148, 1985, 2-30).

Keystone Bituminous Coal Ass'n v DeBenedictis (1987)
Primary Issue: Is it an unconstitutional taking to require coal mine operators to leave in the ground, unmined, about two percent of the coal as pillars to hold up the ground and buildings above the mine?

Facts of the Case: Very similar to *Mahon*, see above. Pennsylvania law had changed in the intervening years. In 1966 the Bituminous Mine Subsidence and Land Conservation Act was passed by the Pennsylvania legislature. The purpose of the act was to protect the public health, safety and welfare by preventing environmental and economic damage due to subsidence resulting from mining operations. The Act required that at least fifty percent of coal be left below buildings and cemeteries. The appellants argued that the Act constituted a taking of private property without just compensation.

Held: The United States Supreme Court held that the Pennsylvania Subsidence Act met the constitutional requirements of due process and eminent domain and served a public purpose. There was no taking because the activities it regulated fell within the "nuisance" of "noxious use" exception from regulatory-takings analysis. As the mine could continue to operate

profitably, they were not denied all "economically viable use" of their land. The Court reaffirmed that the regulation of uses which are socially harmful or nuisance-like ordinarily cannot be considered takings despite onerous consequences for the owners. Exposed a flaw in the economic viability rule, in that a taking could be total or partial depending on how the property was parceled up. In *Mahon* only the pillars of coal were considered, in this case it was the entire property (Becker, 1995, 105, Michelman, 1987, 1601-2, Roddewig and Duerksen, 1987, 5-6, Rubenfeld, 993, 1088-91).

First English Evangelical Lutheran Church v County of Los Angeles (1987)

Primary Issue: Is compensation payable if a regulation which results in a taking is subsequently revoked?

Facts of the Case: There was a forest fire in 1977 and a major flood in 1978 which effected land owned by the Church and used as a camp. In 1979, in the wake of the flood, the County passed interim emergency flood control regulations, forbidding building in the floodplane. The regulations later became permanent. The entire camp lay in the floodplane and, therefore, could not rebuild. The purpose of the ordinance was to protect the public health and safety from flood hazards. The Church argued there had been a taking because they were denied all use of the camp and were entitled to monetary damages.

Held: The United States Supreme Court did not decide whether a taking had occurred and did not establish a rule establishing when a regulatory taking occurs. The Court held that in the case of the judicial termination of a land-use regulation that would have forever denied the owner an economically viable use of their land, the state must compensate the owner for the time the regulation was in effect (Becker, 1995, 105, Fulton, 1991, 192-5, Michelman, 1987, 1616-8, Roddewig and Duerksen, 1989, 5-6).

APPENDIX C

How A Case Is Heard By The United States Supreme Court

The requirements of the Constitution mean that there is a major role for the courts in American land-use planning. Exactly how active the courts are changes over time in the light of changing social and economic conditions as well as the political complexion of the judiciary. The United States Supreme Court is the finial arbiter, but it does not stand alone. There are over one hundred federal courts and each state has its own court system. Decisions made at state level stand unless they are overturned by the United States Supreme Court. As it hears only a few cases the law can differ from state to state. It is the function of the courts to ensure that the local authorities are acting in a lawful manor. It is not their function to act as an administrative body. The role of the courts is limited to overruling a legislative body only if their actions are shown to be clearly arbitrary, capricious and unreasonable (Cullingworth, 1993, 16-8).

Most of the work of the United States Supreme Court involves reviewing cases which are appeals from lower federal or state courts. The statute that defines the jurisdiction of the Supreme Court provides for appeals in certain cases from the highest court in each state. There are, however, rare instances when an appeal may be taken from a lower state court. In hearing appeals from state courts, the Supreme Court has jurisdiction only in these cases that involve "substantial federal questions." Even if a case does involve a substantial federal question, it still may not fall within the jurisdiction of the Supreme Court. If there is "adequate and independent state ground" on which a state court decision can be based, the Supreme Court lacks jurisdiction. The Supreme Court cannot review a state decision that rests on both state and federal law if the decision on the federal law was unnecessary in light of the disposition of the state law question. The Constitution does not expressly provide for such review. Article III does, however, authorize the Congress to provide for appellate review of federal questions. Congress has enacted laws that provide for review by the Supreme Court of questions arising in a state court. (Elliott, 1986, 21-2).

The Supreme Court does not, however, review all of the cases in which a federal question is raised. The federal question must be "substantial" rather than frivolous. The federal question must also have been raised in a proper

and timely manner during the state court proceedings. What constitutes a proper and timely manor is determined by the procedural rules of the respective state. There is one exception. If the highest court in a state decides a federal question, whether or not it was raised in a lower court, it can be reviewed by the Supreme Court (Elliott, 1986, 22).

The federal law which provides for review by the Supreme Court of state court provisions outlines two mechanisms by which such a decision can be reviewed. A writ of certiorari may be granted at the discretion of the Supreme Court in any case falling within the terms of the statute. This is essentially any case involving a federal question where review of a final judgment is sought. A writ of certiorari is an order from a higher court to a lower court to send up a record to be reviewed. The practice of the Supreme Court is to grant a petition for a writ of certiorari when at least four of the nine justices vote in favour of granting the writ. A denial of certiorari says nothing about the merits of the case, but does leave the decision of the lower court intact (Elliott, 1986, 22).

In a more narrow range of cases, defined by the statutes, review may be by appeal. Review by appeal may be obtained where a state court has held a federal statute or treaty invalid or has upheld a state statute against a claim the it is repugnant to the Constitution, treaties or laws of the United States. Both types of cases are heard at the discretion of the Court, although the review by appeal is greater than by a writ by certiorari (Elliott, 1986, 22-3).