CHAPTER EIGHT

Contributions to Infrastructure Costs

This chapter, contributed principally by Nathaniel Lichfield, is based on Lichfield and Connellan's working paper *Land Value and Community Betterment Taxation in Britain: Proposals for Legislation and Practice* (2000a) and continues our exploration of the ways different British governments tried to capture increases in land value for the community. Here we examine the recovery of contributions to infrastructure costs via the development process.

Background

There are other ways to tax land values besides annual imposts for governmental expenses, recoupment via purchase, or capital gains taxes upon acts of development. With the demise of the latest form of development land tax, another method of extracting value from the development industry for the benefit of the community has evolved: making developers fund contributions to infrastructure costs.

What Is Infrastructure?

At the risk of oversimplification, a town can be seen as comprising two main elements (Lichfield 1992, 1116): the terra firma, buildings and spaces that are the base for socio-economic activities (production, distribution, exchange and consumption, both by town residents and by those coming in from outside as regular commuters or irregular visitors); and the *infrastructure* of these activities, namely, "the underlying foundation or basic framework" (Longman 1984). Although there are many interpretations of underlying, there is general agreement that this includes transportation, telecommunication and their associated facilities (such as parking lots, bus and railway stations and telephone exchanges), as well as basic utilities (water, sewerage, waste disposal, gas and electricity).

Along with this physical infrastructure, others (see, for example, Loughlin 1985, 229–248) include the social infrastructure required to serve people, comprising all services that facilitate land development:

- services that make development *possible* (circulation streets, roads, water, sewerage, gas, electricity, telecommunications, street lighting, street cleaning and refuse services); and
- services that make development *acceptable* in terms of amenity (parks and amenity areas) and social overhead (schools, health and welfare services, libraries and other cultural facilities).

The "proprietary land unit" (Denman and Prodano 1972) defines what is on-site. Often private and public entrepreneurs provide the urban fabric in which the socio-economic activities are developed. The private or public landowner, developer or occupier in question would also provide, on-site, the relevant infrastructure for the development itself. Off-site, in the traditional division of labour in urban development, central and local government generally pays for physical and social infrastructure on behalf of taxpayers/ratepayers, together with ad hoc bodies on a commercial basis, for gas, electricity, water and sewerage. This division of investment is blurred at the edges. In a residential area, the developer will build the streets and gift them at the required standard to the local authority for maintenance; in a rural area, a local authority could build coastal protection works that are financed by taxing specific beneficiaries.

Thus, the building and running of a town is a mirror of our mixed economy. In this mix there is another ingredient: intervention by government (central and local combined) in the development, via the urban and regional planning system. Broadly, this has two aims: to remove impediments to the working of the market for both the private and public entrepreneurs and to regulate the market's activities in the "use and development of land in the public interest" (DoE 1983, para. 5). This combined intervention provides a wider definition of the infrastructure framework:

> all the supporting services required to ensure that land development takes place in a socially acceptable way; that is it does not intrude on the landscape, cause disturbance to neighbours, create traffic congestion, or overload the school system. This would seem to bring into this definition the avoidance of unfavourable externalities which arise from development. (Wakeford 1990, 2)

Current Funding of Infrastructure in Britain

Centuries of history are behind the funding of infrastructure in Britain; policies have evolved piecemeal with the growth in the infrastructure itself and with the multiplication of public agencies and powers related to the funding. For these

reasons, current practice in British funding of infrastructure is complex (Loughlin 1985). For our purposes here, we do not need a comprehensive description, but only a categorisation of different kinds of funding, as a context in which to consider "planning gain" later in the chapter. Following is a somewhat heroic attempt (Lichfield 1991).

Paid for by Central or Local Government and Recouped Out of Taxes, Business Rates and Council Tax

These are the traditional public works funded from public sources, such as roads, rail links, drainage, sewerage and parking lots. Generally, the funds are drawn in the form of taxes from the population as a whole, paid into one pool and distributed from the pool for specific works. For certain public works, particular funds may be earmarked or hypothecated, or there may be a special levy assessed on the beneficiaries of those works.

Paid for by a Statutory Undertaker with the Cost for a Specific Project Passed On to the Landowner/Developer

These are the traditional utility services, whether in public or private hands, or whether or not a monopoly. Their capital cost is typically met by developers as contributions, which are passed on to the consumers in the disposal price or to landowners in the reduced purchase price of land. An example is the levy for water and sewerage in the Water Act of 1989, supplementing the requisitioning required under the Water Act of 1945 by a system of general infrastructure charging, intended to fund capital costs incurred by undertakers when providing additional capacity.

Paid for by the Developer/Operator User Under the "Polluter Pays" or "User Pays" Principles

Public health. This involves construction that is regulated in the interests of public health, such as standards in sewers, water supply, etc., and access by streets to development that are initially constructed by the developer and then transferred to the local authority.

Environmental pollution. Emissions have been regulated in Britain since the Alkali Act of 1874, which has been the cornerstone of industrial air pollution control ever since. Modern concerns about environmental pollution (DETR 1994, part IV and Annex A) have added new dimensions. A more rationalised regulatory system was introduced in the Environmental Protection Act, 1990, with the adoption of the principle of "polluter or user pays" (both ex ante, in terms of tax, and ex post, in terms of damage caused) and the general move towards introducing financial incentives and disincentives.

In addition, since 1988, environmental assessment has been required as a preliminary to obtaining planning permission. Such assessments have been mandatory for projects where environmental pollution is fairly certain (e.g., power stations), and at the discretion of the local planning authority for projects where the environmental impacts are "likely to be significant" (e.g., from large-scale urban development) (DETR 1989c). In parallel legislation governing projects that fall outside the planning systems (e.g., forestry), the developer as potential polluter is called upon to pay an amount, by way of amelioration, proportional to the potential side effects (DETR 1989c).

Planning permission. When faced with an application for development, an authority may grant permission with or without conditions or refuse permission. Planning authorities have formidable powers of regulation over all physical development (new works and material change of use), with a complex array of typically insignificant exceptions. One objective of the Department of the Environment is to secure the "use and development of land in the public interest" (DETR 1997b, para. 5).

In general, the development control seeks to: improve the quality of development that is proposed, so affecting private development costs; minimise the divergence between private and social costs and benefits by ameliorating disbenefits in the proposals and thus internalising the costs; and coordinate with other development to minimise overall costs. Thus, development control can make the developer/landowner finance costs that would otherwise fall on the public purse.

The Shifting Frontier of Financing Infrastructure Development

Responsibility for the financing of the urban fabric for socio-economic activity and its infrastructure has been shifting in recent years towards developers in various ways. Utility services (water, gas, electricity, telecommunications, etc.) have been privatised. The public purse has been free to opt out of financing education and health services. The polluter pays or user pays principle makes operators and users, not the public purse, responsible for protecting the natural environment. Planning permission requirements transfer part of the cost and operation of developments from the public to the private purse. For matters that cannot be dealt with by planning conditions and that must be provided for under agreement, planning gain/obligation agreements transfer development cost to the developers. In cases where the cost of infrastructure being developed is too big to pass on to the landowner and/or developer as part of a planning permission, as in major road schemes, the financing has been sought entirely from the private sector, as provided for in the New Roads and Street Works Act of 1912.

In this the private sector seeks to recoup from sources that would otherwise be used by the public sector, such as tolls on the roads or recoupment from rising land values, on associated property. The Private Finance Initiative (PFI) has resulted in the private sector financing buildings for occupation by the public (RICS 1985, 5–7).

Shifts Through Ad Hoc Planning Agreements on Development Control

When local planning authorities decide to approve a planning application, they have been able to impose conditions on approval as they think fit (TCPA1971, sec. 29). But their freedom for imposing such conditions has been firmly constrained following court rulings against unreasonableness (DETR 1995). To overcome such constraints, local planning authorities have long been able to make deals with the developer that enable them to extend the scope of "conditions" (TCPA1932; TCPA1947). Although such agreements were originally conceived as a minor addition to planning control powers, their scope expanded considerably during the 1970s. The reasons were ones of expediency.

> The practice is a common-sense response to the contemporary situation. With the firm abandonment by the current government of the third post–World War II attempt at collecting betterment (in the Community Land and Development Land Tax Acts) landowners/developers/financial institutions can make fortunes out of a planning permit for using development rights which are still nationalised (the relevant provisions of the Town and Country Planning Act 1947 never having been repealed). Concurrently, under the present Administration, local government has restrictions on its financial resources and freedom to spend. Thus, the tax which planning gain imposes on the development industry, which it is generally prepared to accept to obtain the planning permission, offers a way of assisting local government in the financial trammels in which it finds itself, and comforts the taxpaying public in seeking social justice. (Lichfield 1989, 68)

These practices were recognised at the time by the government, which attempted to regularise them in a circular called *Planning Gain*:

> *Planning Gain* is a term that has come to be applied whenever, in connection with a grant or planning permission, a local planning authority seeks to impose on a developer an obligation to carry out works not included in the development for which permission has been sought, or to make some payment or confer some extraneous right or benefit in return for permitting development to take place.
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> It is distinct from any alterations or modifications which the planning authority may properly seek to secure to the development that is the subject of the planning application [para. 2]. But the planning gain must be reasonable, depending on the circumstances [para. 5] and tests of such reasonableness are presented [paras. 6–8]. (DoE 1983)

The Conservative governments of the 1980s assumed direct and vigorous control over the expenditures of local authorities, whether from local taxation or government grant, which drove those authorities to seek ways to supplement their resources to meet their obligations. At the same time, landowners and developers were competing fiercely for permission to use the development opportunities on their land, which meant so much for them financially. During the boom of the economy and of the development industry during the 1970s, planning permission thus became a way that landowners and developers could accrue huge increases in the value of their land without having to pay for the development rights, beyond normal taxation. As a result, there arose without express legal sanction the system of planning gain, which amounted to the authority exacting contributions from the planning applicant, in money or in kind, towards the direct costs that would otherwise fall to the authority.

Under these pressures, the use of agreement grew. Recovery was made in practice not only to the 1932 and 1947 acts but also to three other legal bases: Section 52 of the Town and Country Planning Act of 1971, Section 111 of the Local Government Act of 1972, and Section 126 of the Housing Act of 1974. Besides these three, some additional powers were also obtained under local acts (McAuslan et al. 1984, 84).

In practice, only a small percentage of planning decisions in England involve planning agreements. The largest proportion of such agreements are concerned with regulatory matters (contracts, plans and drawings, building materials, etc.), and more than half of them deal with occupancy conditions (for example, restrictions required for sheltered housing, agricultural dwellings or social housing). Agreements also play an important role in funding the infrastructure necessitated by development (particularly roads) and in environmental improvement (such as landscaping). Only a very small number of agreements are concerned with wider planning objectives (Cullingworth and Nadin 1994, 115).

The Shortcomings of Planning Gain

Local authorities' experiences applying the national policy of planning gain in their locales have been very mixed. It has attracted many criticisms (Rosslyn Research 1990), and there is a considerable and rich body of literature on the topic (e.g., Healey et al. 1992). Following a review of some 12 agreements in action, Elson described the patchwork nature of the application of the policy in the following terms:

> A number of the schemes exceed the guidelines in Circular 22/83, by providing off site facilities mainly of use to the town or settlement, rather than exclusively for the development itself.... In some cases the facilities provided were not necessary to enable the development to proceed. In other cases, the facilities constituted requirements for a reasonable balance of uses, but their need was not

> established in development plans.... Planning agreements are being used to commit different bodies to action (building roads, producing management plans or providing cash for long term maintenance). They appear to be important tools to commit the public sector to providing, or bringing forward, infrastructure.... In many cases agreements have an important role where sites are difficult to develop. We can see the presentation of a package of measures by developers which may involve some compromise in existing policies (e.g., green belt or densities).
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> In most of the cases here approvals and agreements have led, or significantly influenced, policies in development plans. In areas of high growth and development pressure local plans tend to be making sense of agreements across a range of sites, after most have been concluded, as well as others still under negotiation.... The schemes provide wide ranging off-site benefits. A number fall outside any definition of directly related infrastructure under the 1983 Circular, although others fall in a grey area between what might be regarded as strictly necessary for the scheme to proceed at all, and generally desirable local infrastructure or community provisions. ... A wide variety of environmental, and some community, groups were involved in the negotiations surrounding agreements. These included Housing Associations, Parish Councils and local wildlife groups. ... Many of the schemes suffered major time delays. A four year time span from application to approval, often including an appeal, was commonplace in the case studies. (1990, 35)

From Planning Gain to Planning Obligation

After some years of controversial practice, it became necessary for the Department of the Environment to attempt once more to clarify the situation. This it did initially in a consultation paper (DETR 1989a) that "substantially reaffirmed" the guidance in its circular 22/83 (DoE 1983), which the consultation paper was to supersede. In doing so, it introduced certain welcome clarifications, including the intention to replace the controversial term *planning gain* with the term *planning agreement*, because the name had "come to be used very loosely to apply to both normal and legitimate operations of the planning system and also attempts to extract from developers payments in cash or in kind for purposes that are not directly related to the development proposed but are sought as the price of planning permission. The Planning Acts do not envisage that planning powers should be used for such purposes, and in this sense attempts to exact 'planning gain' are outside the scope of the planning process" (DETR 1989a).

These clarifications were introduced by the Planning and Compensation Act of 1991 by substituting a new Section 106 in the Town and Country Planning Act of 1990, replacing Section 52 of the 1971 act. The policy change appeared in circular 16/91 (DETR 1991) as amended by circular 1/97 (DETR 1997a). Agreements have become obligations, which may be unilateral, not necessarily involving any agreement between a local authority and a developer at all

(Cullingworth and Nadin 1994, 115; Section 12 of the Planning and Compensation Act 1991, amending Section 106 of the Town and Country Planning Act 1990).

> 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) . . . restricting the development of the land in any specified way; requiring specified operations or activities to be carried out, in, on, under, or over the land; requiring the land to be used in any specified way; requiring a sum or sums to be paid to the authority on a specified date or dates or periodically. (Cullingworth and Nadin 1994, 115)

Although the new provisions adopted the term *planning obligations*, the term *planning gain* continues to be generally and loosely used. While introducing what has been called technical changes, planning obligations also reflected some of the fundamental criticisms of the former system. All in all, planning obligations have legitimised and institutionalised planning gain and clarified some important policy details, three of which stand out:

- planning obligations can be seen as part and parcel of the development application itself, even though the obligation relates to land other than that included in the initial application;
- the infrastructure that is the prime purpose of the obligation is no longer limited to the physical—it can also take in social facilities; and
- the gain can also directly relate to the conservation and/or preservation of the natural environment.

But while the switch from planning gain to planning obligation was a welcome clarification, and while it has affected procedural practice, it has hardly made any significant difference to everyday practice or to the acceptability of the system. Indeed, Elson's critique (1990, 35) is relevant to the critique of planning obligations.

Criticism was also levelled in the report of a working group of the Society for Advanced Legal Studies:

> The ability to create planning obligations is undoubtedly of benefit in connection with matters which cannot otherwise be dealt with. But their use is too often contentious. The Committee on Standards in Public Life then chaired by Lord Nolan stated in their third Report that planning obligations were "the most intractable aspect of the planning system with which we have had to deal . . . (and that they) have a tremendous impact on public confidence." They were informed that such obligations were being used to enable planning permissions to be bought and sold and that developers were being held to ransom and asked to provide benefits which had little or nothing to do with the development proposed. In the Committee's view the evidence they had received made clear that these criticisms were valid. The Committee recommended that the present legislation should be

> changed to prevent planning permissions being bought and sold. They also found that the negotiation and terms of planning obligations are sometimes treated as being confidential to the exclusion of those with a legitimate interest in the consideration of the planning application to which they may relate. (1998, 5)

Summary

The current situation as regards contributions to infrastructure costs is obviously unsatisfactory, despite the attempted clarification of replacing the term *planning gain* with *planning obligation*. This gives cause for fresh thinking, including some recent aspirations from the British government. We review these initiatives in Chapter 13 and Appendix C, presenting proposals for legislation and practice designed to avoid previous shortcomings and pave the way to a more acceptable future for LVT in its broadest applications.