OPTIMISING FUNCTIONAL RELATIONSHIPS FOR NEW RESIDENTIAL DEVELOPMENTS

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The acquisition of land and planning permission on favourable terms is the crucial first stage in any construction project; essentially determining what might be built, where and how profitably. The research project on which this paper is based takes as its starting point the negotiations around the conditions and obligations accompanying grants of planning permission. The process has been criticised on grounds of moral and legal validity. Furthermore, anecdotal evidence suggests that this may be the root cause of a typically adversarial relationships between Town Planners and Developers. The existence of the problem may be acknowledged, if not the causes, and the conviction shared that any improvement must be sought within the framework of existing legislation and resources. But how and to what extent might this change be achieved?

In an ongoing project it is hypothesised that aspects of the development process can be deconstructed into their component activities. Furthermore, their rationale and allocation to stakeholders can be critically examined to enable a conceptual model of a better optimised process to be synthesised based on the partnering philosophy. This paper will explore the background to the problem, outline first thoughts on solutions and a method of completing the research.

Keywords: agreement, obligation, partnership, planning, process, residential development

INTRODUCTION

All but the smallest construction project requires planning permission. It is the detail contained in the 'conditions' attached to permissions, particularly those expressed as planning agreements, that defines the location, appearance and materials of a construction project and hence, to a significant degree, the cost. Yet, consideration of the interaction between Planners and Developers, occurring very early in the project cycle, rarely extends to it being thought appropriate for inclusion as one of the varied family of relationships constituting Latham's concept of the 'construction team'. Latham (1994, 5), if not directly recognising Planners as potential team members, clearly considers that the construction team should have an inclusive and catholic composition.

Traditionally, considerations of issues around improvements to the effectiveness of town planning have been the exclusive province of established town planning theory and theorists. It is believed that the views of those contributing to the debate have become entrenched and that the arguments have become moribund; mired in the consideration of the interests of myriad legitimate, socio-political, pressure groups. This project does not attempt to address the mechanisms of making town plans but rather, seeks to examine how the mechanism of their physical realisation might

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possibly be optimised to the benefit of Developers and Planners, and by extension to the local community.

Local Authorities are responsible for the drafting of town plans and the management of their translation into reality. It can be argued that their ability to do this has been compromised for a variety of reasons. Principally central government intervention and the absence of well developed methods of financing projects, which do not rely on competing for central or opportunity funds such as the Single Regeneration Budget.

Developers face a different problem, they operate in a market economy, they buy land, add value by building and typically sell the end product at a market price. The search for suitable land is expensive, time consuming and involves the tying up of considerable capital and resources. There are increasing environmental demands both in the form of confining the spread of developments and pressure to reuse former industrial land. Add to this the constraints imposed by Planners in the form of planning agreements and conditions then a considerable degree of risk, uncertainty and cost is introduced into the early stages of the construction process. Authors such as Nolan (1997), Crow (1998) and Rodgers (1999) have recognised that the use of planning agreements by local authority Planners as a means of achieving a degree of piecemeal realisation of town planning aims is a cause for deep concern. Indeed Crow (1998) argues that their use amounts to an illegal tax and the buying and selling of planning permission.

THE HISTORICAL BACKGROUND TO THE PROBLEM

The Run Up To The Town And Country Planning Act 1947

Throughout the 19th century there was great progress in the development of the structure of local government from it being a 'patchwork' of boroughs and 'ad hoc' authorities to a position by the end of the 19th century closely resembling that of the present day. This local government structure remained fundamentally intact until the local government reforms of 1974. Unlike that of the local authorities, the history of the evolution of Developers is not readily or easily summarised. Throughout the 19th century to the present Developers have been a disparate collection of a huge number of individuals, small, medium and large enterprises, public, spiritual, charitable and social organisations.

In parallel with the development of administrative capability there evolved a framework of by-laws relating to construction analogous to the present Building Regulations. Primarily these addressed technical issues of lighting, ventilation, sewerage, sanitation, spacing, construction of walls, widths and making up of streets etc. Issues of location, street layout and aesthetics of developments were considered to be the sole business of the developer. The drivers for change were primarily a climate of social, health, political and moral reform. Together these led to a popular movement to improve the general health of the public, commencing with reports such as that of The Royal Commission on the Health of Towns in 1844 and 1845. This report had been careful to note the link between disease and overcrowded, insanitary living conditions. A series of acts including the Housing of the Working Classes Act 1890 provided local authorities with the means of removing substandard housing and of building new properties for rental. The Housing, Town Planning etc. Act of 1909 continued this work but was also the first of several planning Acts made between 1909 and 1944. These cumulatively sought to control the activities of developers by means of a combination of local and central government action. However, textbooks such as

Newbold (1924) and Geeson (1946) fail to note any significant impacts on Developer's activities. A fuller exposition of the history of housing and planning legislation up to and including 1947 can be found in the contemporary account of Schuster (1950, pp 1-11) and the more recent one of Duxbury (1999, pp 1-7). It is important to note that, in the period 1st January 1919 to 31st March 1939, of the approximately 4.3 million houses built, 3 million were built by private enterprise and that this compared with a total of 8.1 million pre 1914 houses, Barlow (1940, 67). By the outbreak of war over a third of all UK housing stock was less than 20 years old. The report goes on to make it clear that, the very scale of the success of the construction industry in helping to pull the economy through the Great Depression led to a dramatic rise in overall living standards. However, in doing so, the lack of co-ordination and planning also placed great pressure on existing infrastructure and social institutions Barlow (1940, pp 67-69).

The position at the outbreak of the second world war was then that: the Developer's freedom to build what and where he liked was still to all intents and purposes unfettered and the industry had great strength and diversity. Correspondingly, local authorities were accumulating and exercising their powers on a large scale to remove substandard housing and improve the standard of the new. Significantly, planning was assuming an increasing profile in legislation.

The Town and Country Planning Act of 1947

The genesis of the present system of town planning is generally ascribed to the Town and Country Planning Act of 1947. Schuster (1950,2) documents the immediate drivers of the 1947 Act in detail but these can be summarised as a series of reports including Barlow (1940) and Uthwatt (1942) and legislation aimed at prioritising wartime and anticipated post-war construction needs. The widespread damage caused by bombing to urban areas such as Coventry and Hull was obvious and the ineffectiveness of pre-war planning had been acknowledged, Uthwatt (1942, 58). Existing legislation was therefore generally considered to be incapable of dealing with the anticipated burden of post-war rebuilding. The 'khaki election' of 1945 and the new administration's priorities meant that legislation to deal with the issue was to be delayed until August 1947.

The Act of 1947 was the first attempt at a comprehensive, planning Act. Amongst other things it contained provisions, based on the recommendations of Uthwatt (1942) to capture betterment. Betterment resulted from low value land increasing markedly in value as a result of being built on and was expressed as a tax. Development taxes, in their various guises, proved both difficult to administer and unpopular and were eventually discarded in the budget of 1985. There remained however a widespread view that some of the 'planning gain' resulting from the granting of planning permission should be captured for society, if not to central funds by HM Treasury, then to the local authority. Crow (1998, 360) cited a 1981 Government report defining planning gain as :

> *'…the arrangements whereby local authorities , in granting planning permission , achieve planning and other community gains at the expense of developers* (Crow, 1998, 360).*'*

The 1947 Act also marked a watershed shift in the relationship between Developers and Planners. For the first time local authorities were required to plan their future civic development and, crucially, acquired the power to determine whether a development took place. The various bye-law acts had required the submission of

plans for technical approvals but generally, the local authority had no real powers to prevent a development taking place. The 1947 Act, section 12, changed this situation fundamentally by requiring the Developer to seek and obtain 'planning permission' before construction operations commenced, control of whether something could be built had passed to the local authority. Crucially such permission could be accompanied by a series of mandatory conditions, section 14(2)(a), the clear antecedent of what was eventually to become section 106 of the Town and Country Planning Act of 1990, stated :

> *"They may make their permission conditional on the applicant carrying out works on any other land in his control, if they consider this advisable in connexion with the development authorised by the permission* (MTCP 1948, 11)'

The act of 1947 had three main effects of relevance to this paper. Firstly, local authority Planners gained control of where and in what way construction took place. Secondly, conditions could be placed on the granting of permission and lastly, planning gain was to be captured for the community.

BRITISH AND EUROPEAN UNION MEMBER STATE'S PLANNING SYSTEMS COMPARED

In a study commissioned by the former Department of the Environment, Davies et al (1989), the planning systems of Britain, France, Denmark, Holland and The Federal Republic of Germany were compared. All four nations share the fundamental principles that development should be planned and controlled at an appropriate, local level. The principle differences between Britain and the other three nations is that Britain employs a 'discretionary' system of controls perhaps being best described as a high level zoning system. These zoning or development plans are not binding and there is latitude to negotiate almost every aspect of them; it is argued that it this feature of the system contributes most to the uncertainty of their outcome.

The states other than Britain have more detailed, binding, local plans with comprehensive consultation taking place at the plan preparation stage. Subsequently, the processing of applications is an administrative function operating within a tight legal and procedural framework. If the planning application is compliant with the local plan and the law then the outcome is certain and a permit to build is granted. The principal result is a much greater degree of certainty as to the duration and success of the process than in the UK. This situation, it can be argued, is loosely analogous to the degree of certainty of outcome available under the system of bye-law controls existing in England and Wales until 1947.

The European Commission (EC), EC (1997), has published a comparison of the planning systems of member states which drew attention to the existence of rarely used Simplified Planning Zones (SPZ) in Britain, EC (1997, 66) and Town and Country Planning Act, 1990, sections 82-87, These would permit the introduction of planning application mechanisms with an arguably similar degree of certainty of outcome to European systems.

FUTURE IMPACTS OF EU MEMBERSHIP

It is possible, given the interest of the EC's Directorate General XVI in planning policy that pressure will begin to build to align the spatial planning procedures of the EU and most probably on the common core systems of the bulk of members. DETR (1999) published an executive summary of a report analysing how the EU might use the principles of subsidiarity and proportionality to initiate development of EU wide common planning systems. It is interesting to note this in the context of the current political climate of Scottish and Welsh devolution and the pressure to match this with devolved power to the English regions and the election of a London Mayor.

THE PROBLEM(S) STATED

Under the provisions of the Town and Country Planning Act 1990 Act, before building or any other development can take place, it generally requires planning permission from the local planning authority. Permissions are frequently granted with conditions attached, such as the colour or type of construction materials to be used. An aggrieved developer can appeal to the Secretary of State against their content. In parallel with this runs the ability to negotiate agreements under section 106 of the Act, typically these specify infrastructure such as roads and sewers that should be provided at the expense of the Developer. The content of agreements is executed as a deed and may only be challenged in the Courts.

The use of planning agreements has been accompanied by concerns that their purpose has been subverted and that they are metamorphosing into a form of substitute tax on development. On the one hand it can be argued that groups such as planning theorists, environmentalists and Planners see these as variously compensating for or mitigating impacts on the community, and as a way of transferring some of the increase in value of land, resulting from granting the permission, to the community. On the other hand, others such as lawyers, politicians, reformers and developers see the potential for corruption in a poorly regulated area. Nolan (1997, 69-84) and DETR (1998,57) recognise the problem but rather than fresh legislation see yet more guidance as the answer. Crow (1998) examines the purpose and methods of achieving 'planning gain' in terms of their legality and moral acceptability. He concludes that there is evidence that planning permissions are, essentially, being bought and sold. Crow 1998 goes on to note the findings of two Department of Environment reports that the Developers would rather agree to accept the content of agreements than attempt to appeal to the Secretary of State. Probably, in the belief that the appeal procedure would be longer than the cited average of 13 months or 44% of project time taken to conclude agreements. The problem for the developer is not so much the cost of the agreement itself, which if not too large can be accepted and passed on to the customer, rather the uncertainty and risk introduced by the delay. The pressure is to swallow the cost of planning agreements and manage out a source of delay.

By contrast the problems of Planners lies in the fact that they have been unable to realise their plans effectively, except for periods of stability in the 1950s and 60s. This can be seen partly as a result of central government policy constraints on finances and the diversion of resources. Arguably though, it is due mainly to successive local government reforms e.g. those of 1974 disrupting local authorities ability to maintain levels of expertise and to act consistently. This line of thought might be extended to suggest that Planners have, as a result, become largely reliant upon acting opportunistically either to secure planning obligations from Developers or

by bidding for funds from other sources such as the Single Regeneration Budget. The basic tension is therefore between Planners with a plan, time and no money and a Developer needing to turn projects around quickly.

ISSUES AND SOLUTIONS?

Historically weaknesses in the planning system have been addressed by variously calling for more guidance, performance indicators, codes of practice and 'tweaking' the system. The latter by, for example, by providing for planning decisions to be delegated to planning officers by planning committees. Mitchell (1967) took the latter stance in response to a narrow brief, Rogers (1999, 158-168) 30 years later, with a more sweeping brief, devoted less than 3% of his seminal report to enhancing the capability of Planners to improve their performance. It is speculated that removing the need for some classes of application may be a more effective strategy than attempting to increase their speed of turnover. In this context Simplified Planning Zones (SPZ) were announced in a press release in May 1984, DoE (1984). SPZs clearly define an area, acceptable uses and blanket conditions, if any, applicable. The theory is that these provide the reduced time scales of other EU states since the planning conditions are published in advance of applications and are not intended to be negotiable. However, Allmendinger (1997) argued they were ill conceived, counter productive and have rarely been used successfully.

From the mid 1980s onwards governments have experimented with the concept of Urban Development Corporations (UDCs), partly as a means of breaking the log jam of regeneration and partly as a political device. UDCs operated in clearly defined areas where planning control was vested in a body answerable to central government rather than a local authority and its electorate. UDCs were able to enter into partnerships with developers and financial institutions in order to shorten the normal planning cycle and were by definition successful in increasing the amount of brownfield land brought back into use. The up-front costs of rehabilitating contaminated brownfield sites are commonly cited as the reason why more use is not made by Developers of former industrial sites for housing. A feature common to UDCs and SPZs is that by definition they represent the a measure of relinquishment of control by the local authority. Some local authorities were more able than others to accommodate and work with UDCs than others, Imrie and Thomas (1993, 24). It is speculated that this was the barrier to their acceptance and that full participation by local authorities may cause them to be regarded more positively.

Blake (1971) and Sheaf (1972) responded to briefs which anticipated large scale projects to meet substantial projected shortfalls in the supply of housing stock particularly to feed demand in the south east and to renew stocks in urban areas. Significantly both reports anticipated that proactive solutions would be required and that the involvement of the private sector and the partnership ethos would be both crucial and integral. Sheaf (1972, 3) detailed several forms that partnerships might take including, co-operatives, joint stock corporations and land pooling. Blake (1971,vii) explored the legal impediments to such arrangements; it was concluded that there were remarkably few. Objections to such schemes it was thought would be largely political and in retrospect these appear to be along the lines of current objections to the Private Finance Initiative (PFI). PFI itself is in many ways echoes the forms of financing public projects in the 19th and earlier centuries e.g. bridges, hospitals and public buildings etc.

There has long been debate as to the role, function and training of town planners, this was the rationale behind Schuster (1950), and a recurrent conclusion that there is no single discipline of town planner; rather the function is one composed of a team of complementary specialists. This view is redolent of the team and partnership based views of construction and urban regeneration espoused by Latham (1994), Egan (1998) and most recently by Rogers (1999, 157 et seq.). We can carry this line of argument forward by arguing that 'Planners' should separate the process of making plans and implementing them by developing a distinct realisation function.

The separate strands of thought from above can be drawn together and interpreted as supporting the contention that there are other, more proactive ways of implementing planning goals that can make use of the strengths of Planners and Developers. These can also be interpreted as proto features of the required replacement system. It is now useful to summarise the strengths of and benefits to Planners and Developers. The key strengths of the local authority are:

their ability to formulate plans down to the level of neighbourhoods corresponding to one of several time horizons;

their powers to assemble and dispose of land, grant planning permissions, manage large scale developments and enter into plural relationships with other organisations.

Against this it may be argued that the main weakness of local authorities is their ability to raise sufficient finance to act on other than the relatively small scale. The benefits to local authorities are principally ones of being able to realize their plans effectively and minimise costs to the public purse. Whereas, the principal strengths of the Developer are their ability to raise finance and their expertise in building what the market requires their vulnerability is in the costs of tying up capital in extended planning negotiations. Potential benefits or opportunities for the Developer are:

removal of uncertainty of planning requirements and shortening timescale;

obviation of the need to seek and speculatively acquire land and avoid the various risks associated with brownfield land purchase.

METHOD TO DATE AND FURTHER WORK

Initially the problem was attacked by means of a traditional literature review and a series of telephone and face to face interviews with what were then thought to be possible stakeholders in the planning process: town planners, emergency services and construction companies etc. The primary purpose of these activities was to attempt to define an envelope or boundary to the problem and to shape the initial statement of understanding or hypothesis. Early in the literature review the feasibility of using systems analysis techniques was explored, in particular the Structured System Analysis and Design Methodology, SSADM. However, SSADM was discarded as being inappropriate. It was felt that if the research had been aimed at simple efficiencies in the processing of the paperwork related to planning applications then this would have been a legitimate, 'hard systems', route to follow. However, since the system is people based ,complex and, to an extent, confused a 'soft systems' approach is more appropriate.

Following the initial literature search and formulation of the problem there was a period of reduced activity. Resumption of the research was accompanied by a period of reflection and re-examination of the problem, notably where the real root of the

problem lay and methodological issues. It was felt that the focus of the problem was not in the negotiation of planning agreements themselves but may lay in the purpose which they were meant to serve. Analysis of 21 responses to a pilot survey of the attitudes of 56 Developers to planning agreements had just started at the time of preparing this paper. The indications are that the view that there is a problem is strongly confirmed. However, there seems not to be a direct translation of this into generally poor relationships with local authorities and to there being only a slight, negative, influence on the character of those relationships. The costs of negotiating agreements and their value appear highly variable, from a few thousands to over £20 millions,

It can be argued that conventional texts aimed at researchers concentrate on the classification of approaches in philosophical terms and a description of individual techniques such as questionnaire design and interviewing. Furthermore, the conventional view offered of the research process is one of a relatively linear, deterministic activity. The necessity and benefits of a reflective, iterative approach is badly neglected. Research was described by Gill and Johnson (1997, 153) citing Pettigrew as best:

> '*characterised in the language of muddling through, incrementalism and political process than as rational, foresightful, goal-directed activity* (Gill and Johnson, 1997, 153)'

Nevertheless, it is possible to offer a broad direction to the remainder of the research. The Soft Systems Methodology, SSM, described by Checkland and Scholes (1999) seems to offer both a practical framework for conducting 'the enquiring process' and a set of tools for obtaining a multi-faceted view or statement of the problem. Within this framework an adequate triangulated study should be readily attainable, to this end:

Surveys will be conducted aimed at capturing the perceptions of the Planners and Developers of the process of negotiating planning agreements;

Case studies will be assembled by a variety of means to illustrate the use and possible abuse of planning agreements;

Observational studies and in depth interviews in Planner and Developer organisations will be conducted to construct a view of the potential, capacity and will to move away from the existing situation;

The literature will be continuously reviewed;

A theoretical or conceptual model of a revised spatial planning system will be synthesised.

SUMMARY

This paper, produced 9 months into a 3 year research project, has shown how formal town planning in England and Wales has evolved from roots in public health and housing legislation. It has been argued that prior to 1947 there existed a framework rules within which developers operated in an environment of high certainty, and with few substantial obstacles to their activities. It is further contended that the Town and Country Planning Act of 1947 marked the completion of a transition to a system of town planning with a strong discretionary element, and which embodied the concepts of planning obligations and planning gain. In this environment it is argued Developers moved into a milieu of high uncertainty and risk; where Planners use planning

obligations as a means of effecting their plans. Disquiet about aspects of the cost, conduct and outcomes of negotiating planning agreements has been posited as a key factor in the allegedly poor relationship between Planners and Developers. The importance of this to the construction industry lies in the fact that conditions attached to a planning permission may have very substantial impacts on the design, location and materials of a project. Their costs, together with the direct and indirect costs of planning agreements, may be as, or more significant, to the ultimate success and profitability of a project than activities regarded as being in the mainstream of construction processes.

A way of carrying forward the research based on the Soft Systems Methodology has been outlined, as have some thoughts on possible elements that might be included in a conceptual model of how spatial planning might be better implemented within the existing framework of legislation. Simplification of procedures to operate along the lines of Simplified Planning Zones is one possibility. Another possibility is to incorporate the strengths of local authorities and Developers in a partnership reminiscent of Development Corporations. A more co-operative, less adversarial, Planner and Developer relationship may be an important outcome of the process.

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