HOUSE OF LORDS
OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT
IN THE CAUSE

TESCO STORES LIMITED (APPELLANTS)

v.

SECRETARY OF STATE FOR THE ENVIRONMENT AND OTHERS (RESPONDENTS)

ON 11 MAY 1995

Before:
Lord Keith of Kinkel
Lord Ackner
Lord Browne-Wilkinson
Lord Lloyd of Berwick
Lord Hoffmann

LORD KEITH OF KINKEL

My Lords.

1. At the end of the judgments of the Court of Appeal in this case Sir Thomas Bingham M.R., said that it involved:

> "a question of unusual public importance bearing on the conditions which can be imposed, and the 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."

2. Three companies applied to the local planning authority for planning permission to build a retail food superstore in the town of Witney in Oxfordshire, each on a different site. Tesco's site was described as the Henry Box site, and that of Tarmac (which was associated with Sainsburys) as the Mount Mills Site. The third company's site does not figure in these proceedings and can be ignored. There had previously been a Local Plan inquiry into certain proposed alterations to the development plan. One of these related to a proposed new road to the west of the town of Witney. The town straddles the River Windrush. There is only one bridge over this river, and as a result there is severe traffic congestion in the centre of the town, which is a conservation area. The proposed new road known as the West End Link (WEL for short) included a new river crossing, and the purpose of it was to relieve the traffic congestion. Another proposed alteration to the plan was to provide for a major retail food superstore in the town centre.

The Inspector who conducted the inquiry issued a report approving the WEL and rejecting the proposal for a retail food superstore in the town centre. Tesco, Tarmac and other developers had taken part in the inquiry, opposing the town centre superstore and promoting the merits of their own sites for such a store, these sites" being a considerable distance from the town centre. The Inspector did not make any formal recommendations about these sites, but he held that development of a retail food superstore on one only of these sites would be beneficial, and he expressed a preference for Tesco's Henry Box site. Further, he expressed the view that funding for the WEL was unlikely to come from the highway authority and he recommended a policy statement including reference to the district council's intention to negotiate with developers funding for the WEL or a major contribution to it, before a superstore went ahead.

3. Tarmac's application for planning permission was not determined by the local planning authority within the statutory period, and so became the subject of an appeal to the Secretary of State, who then called in Tesco's application for the Henry Box site.

4. In July 1992 an inquiry into Tarmac's appeal and Tesco's application and another appeal not now relevant was held by Mrs. S. E. Hesketh. At the inquiry Oxfordshire County Council contended that without the construction of the WEL there was a fundamental constraint to the development of a superstore on any site because of the traffic congestion situation, and that full private funding at a cost of £6.6 million must be provided. West Oxfordshire District Council supported this contention, as did Tesco, which offered to provide the full funding for the WEL itself.

5. The Inspector recommended that Tesco's application should be granted and Tarmac's appeal dismissed. She first addressed the question whether there was a fundamental constraint to the development of a food superstore in the absence of funding for the WEL and rejected that proposition. Having referred to the traffic problem in Witney, she said:

> "7.2 ... 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 traffic at Bridge Street would be well below 10% over and above that which would be generated by Bl office development, for which planning permission exists. ..."

6. The Inspector went on to refer to the Department of the Environment Circular 16/91, dealing with planning obligations under section 106 of the

Town and Country Planning Act 1990 (as substituted by section 12 of the Planning and Compensation Act 1991), and observed that such obligations could relate to land, roads etc. other than those covered by the planning permission provided there was a direct relationship between the two. She went on to say:

> "7.4 . . . In this case there is some relationship between the funding of the WEL and a proposed store in that a store would slightly worsen traffic conditions in the town over and above the existing planning permission. The relationship is however tenuous. Any superstore site would be a considerable distance from the WEL and Bridge Street and the development proposed would not generate a great deal more traffic than the other permitted uses of the sites. ..."

7. Having further observed that the Circular stated that the extent of what is required should be fairly and reasonably related in scale to the proposed development, she said:

> "7.5 . . . 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. ..."

8. The Inspector took the view that it would be unreasonable to require a developer of a previously approved development site to fully fund a major road proposal because his development would marginally increase traffic over and above that already permitted but concluded:

> "7.6 However, no such requirement is being made by the Council. The Proposed Modifications of the Local Plan Alterations provide an upper case policy relating to the provision of the WEL and a lower case statement to the effect that it will be the Council's intention to negotiate funding or a major contribution to funding the WEL. The Local Plan Inspector also stated that the superstore may contribute 'all or most' of this funding. If the Council negotiations result in the offer of a full contribution to the cost of the WEL from the developer of a site preferred by the Council following a lengthy Local Plan inquiry, then it would be perverse to turn away the offer. The Council therefore finds itself in the somewhat surprising but felicitous position of the first

> major developer since the Local Plan inquiry responding to the Council's offer to negotiate on WEL funding by a full funding proposal. This seems to me to be a perfectly proper outcome of negotiations provided that the agreement entered into is sufficiently robust to achieve the benefits promised."

9. The Inspector went on to consider the merits from the planning points of view of the competing sites, upon the basis, which she found proper, that only one site should be approved. She found those merits to be finely balanced, but having regard to the informal preference for Tesco's Henry Box site expressed by- the Local Plan Inspector she came down in favour of that one.

10. Though the matter is not directly alluded to in the Inspector's Report, it is relevant to notice that on 28 July 1992, the third last day of the inquiry, Tesco entered into an agreement with Oxfordshire County Council containing a planning obligation under section 106 of the Act of 1990. The obligation was to pay the Council the sum of £6.6 million if planning permission for the development of the Henry Box site was granted.

11. On 16 April 1993 the Secretary of State issued a decision letter in which he rejected the Inspector's recommendation. He allowed Tarmac's appeal regarding the Mount Mills site, and dismissed Tesco's application for the Henry Box site. I will have occasion to consider the decision letter in some detail later, but his reasons in brief were (1) that he held Tesco's offer of funding not to be a good ground either for granting planning permission to Tesco or for dismissing Tarmac's appeal, (2) that the Local Plan Inspector's informal preference for the Henry Box site should receive only limited weight, and (3) that on planning grounds the Mount Mills site was to be preferred.

12. Tesco took proceedings against the Secretary of State, under section 288 of the Act of 1990, to quash the decision letter. The grounds of the application were (1) that the Secretary of State had wrongly discounted the preference of the Local Plan Inspector for the Henry Box site and the local planning authority's acceptance of that, and (2) that the Secretary of State by discounting Tesco's offer of funding for the WEL had failed to take account of a material consideration. Tarmac and West Oxfordshire District Council, in addition to the Secretary of State, were called as respondents to the application, but the Council took no part in the proceedings. The matter came before Mr. Nigel Macleod, Q.C., sitting as a deputy High Court judge in the Queen's Bench Division, who on 7 July 1993 gave judgment in favour of Tesco quashing the decision letter. He rejected the first ground of application but accepted the second, holding that the Secretary of State had

wrongly failed to treat Tesco's offer of funding as a material consideration. Tarmac appealed, and on 25 May 1994 the Court of Appeal (Sir Thomas Bingham M.R., Beldam and Steyn L.J) allowed the appeal and reinstated the decision of the Secretary of State (unreported); Court of Appeal (Civil Division) Transcript No. 736 of 1994. Sir Thomas Bingham and Beldam L.J. held that the Secretary of State had not failed to have regard to Tesco's offer of funding nor treated it as immaterial, but had simply declined to give it any or any significant weight, as he was entitled to do. Steyn L.J. went somewhat further. He held that the Secretary of State, in announcing and applying a policy to the effect that planning obligations should only be sought where they were necessary to the grant of planning permission, had acted lawfully, and was entitled to take the view that in the light of that policy Tesco's offer of funding was immaterial. All three Lord Justices rejected a respondent's notice by Tesco directed to Mr. Macleod's refusal of the first ground of application to him. Tesco now appeals to your Lordship's House. The only matter now at issue is concerned with Tesco's offer of funding for the WEL.

13. The thrust of Tesco's argument is that the offer of funding was a material consideration and that the Secretary of State failed to have regard to it. The argument relies on section 70 of the Act of 1990 which, so far as material, provides: -

> "(1) Where an application is made to a local planning authority for planning permission:
>
> *(a)* subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit, or
>
> *(b)* they may refuse planning permission.
>
> (2) In dealing with such an application the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations. ..."

14. By virtue of sections 77(4) and 79(4), section 70 applies to the Secretary of State when he is determining an application or an appeal.

15. The Master of the Rolls in the course of his judgment in this case said that "material" in subsection (2) meant "relevant", and in my opinion he was correct in this. It is for the courts, if the matter is brought before them, to decide what is a relevant consideration. If the decision maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit. and the courts will not interfere unless he has

acted unreasonably in the *Wednesbury* sense *(Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223). In assessing whether or not the Secretary of State in the instant case wrongly treated Tesco's offer of funding for the WEL as not being a material consideration in determining the competing applications for planning permission it is necessary to examine both the published policy of the Secretary of State in regard to planning obligations and the terms of his decision letter.

16. Section 12 of the Planning and Compensation Act 1991 introduced a new section 106 to the Act of 1990 making provisions with regard to planning obligations. The first three subsections of it are in these terms:

> "(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A and 106B as 'a planning obligation'), enforceable to the extent mentioned in subsection (3) -
>
> *(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; or
>
> *(d)* requiring a sum or sums to be paid to the authority on a specified date or dates or periodically.
>
> "(2) A planning obligation may -
>
> *(a)* be unconditional or subject to conditions;
>
> *(b)* impose any restriction or requirement mentioned in subsection *(l)(a)* to (c) either indefinitely or for such period or periods as may be specified; and
>
> (c) if it requires a sum or sums to be paid, require the payment of a specified amount or an amount determined in accordance with the instrument by which the obligation is entered into and, if it requires the payment of periodical sums, require them to be paid indefinitely or for a specified period.
>
> "(3) Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection *(9)(d)* -
>
> *(a)* against the person entering into the obligation; and
>
> *(b)* against any person deriving title from that person."

17. Just before the section came into force on 25 October 1991 the Secretary of State issued a Circular, 16/91, giving guidance on the proper use of planning obligations under it. Annex B to the Circular commenced by observing that, rightly used, planning obligation might facilitate and enhance development

proposals, but that they should not be used to extract from developers payments in cash or in kind for purposes that were not directly related to the development proposed but were sought as "the price of planning permission." That no doubt reflected the dictum of Lloyd L.J. in *Bradford City Metropolitan Council* v. *Secretary of State for the Environment* (1986) 53, P. & C.R. 55, 64, to the effect that it has usually been regarded as axiomatic that planning consent cannot be bought or sold.

18. The Circular continued, under the heading *"General Policy":*

> "B5. The following paragraphs set out the circumstances in which certain types of benefit can reasonably be sought in connection with a grant of planning permission. They are the circumstances to which the Secretary of State and his inspectors will have regard in determining applications or appeals. They may be briefly stated as those circumstances where the benefit sought is related to the development and necessary to the grant of permission. Local planning authorities should ensure that the presence or absence of extraneous inducements or benefits does not influence their decision on the planning application. Authorities should bear in mind that their decision may be challenged in the courts if it is suspected of having been improperly influenced.
> "B6. Planning applications should be considered on their merits and determined in accordance with the provisions of the development plan unless material considerations indicate otherwise. It may be reasonable, depending on the circumstances, either to impose conditions on the grant of planning permission, or (where the planning objection to a development proposal cannot be overcome by means of a condition) to seek to enter into a planning obligation by agreement with the applicant which would be associated with any permission granted. If there is a choice between imposing conditions and entering into a planning obligation, the imposition of a condition is preferable because it enables a developer to appeal to the Secretary of State. The terms of conditions imposed on a planning permission should not be re-stated in a planning obligation, because that would entail nugatory duplication and frustrate a developer's right of appeal.
> "B7. As with conditions (see DoE Circular 1/85, Welsh Office Circular 1/85), planning obligations should only be sought where they are necessary to the granting of permission, relevant to planning, and relevant to the development to be permitted. Unacceptable development should never be permitted because of unrelated benefits offered by the

applicant, nor should an acceptable development be refused permission simply because the applicant is unable or unwilling to offer such unrelated benefits.

"B8. The test of the reasonableness of seeking a planning obligation from an applicant for planning permission depends on whether what is required:

(1) is needed to enable the development to go ahead, for example the provision of adequate access or car parking; or

(2) in the case of financial payment, will contribute to meeting the cost of providing such facilities in the near future; or

(3) is otherwise so directly related to the proposed development and to the use of the land after its completion, that the development ought not to be permitted without it, e.g. the provision, whether by the applicant or by the authority at the applicant's expense of car parking in or near the development of reasonable amounts of open space related to the development, or of social, educational, recreational, sporting or other community provision the need for which arises from the development; or

(4) is designed in the case of mixed development to secure an acceptable balance of uses; or to secure the implementation of local plan policies for a particular area, or type of development (e.g. the inclusion of an element of affordable housing in a larger residential development) or

(5) is intended to offset the loss of or impact on any amenity or resource present on the site prior to development, for example in the interests of nature conservation. The Department welcomes the initiatives taken by some developers in creating nature reserves, planting tress, establishing wildlife ponds and providing other nature conservation benefits. This echoes the Government's view in 'This Common Inheritance' (Cmnd. 1200) that local authorities and developers should work together in the interest of preserving the natural environment. Planning obligations can therefore relate to land, roads or buildings other than those covered by the planning permission, provided that there is a direct relationship between the two. But they should not be sought where this connection does not exist or is too remote to be considered reasonable.

> "B9. If what is required passes one of the test set out in the preceding paragraph, a further test has to be applied. This is whether the extent of what is required is fairly and reasonably related in scale and kind to the proposed development. Thus a developer may reasonably be expected to pay for or contribute to the cost of infrastructure which would not have been necessary but for his development, but his payments should be directly related in scale to the benefit which the proposed development will derive from the facilities to be provided. So, for example, a developer may reach agreement with an infrastructure undertaker to bring forward in time a project which is already programmed but is some years from implementation."

Paragraph B12, under the heading *"Unilateral Obligations"* stated:

> "The use of unilateral undertakings is expected to be principally at appeal, where there are planning objections which only a planning obligation can resolve, but the parties cannot reach agreement. Where a developer offers an undertaking at appeal, it will be referred to the local planning authority to seek their views. Such an undertaking should be in accordance with the general policy in this guidance. It should be relevant to planning and should resolve the planning objections to the development proposal concerned. Otherwise it would not be a material consideration and will not be taken into account. If the undertaking would resolve an identified planning objection to a development proposal but also contains unrelated benefits, it should only be taken into account to the extent that it resolves the objection. Developers should not promise to do what they cannot perform. Attention is drawn to the statutory requirement that a developer must have an interest in the land before he can enter into a planning obligation. At appeal the Inspector may seek evidence of title if it has not been demonstrated that the developer has the requisite interest. Where a trunk road is involved the developer will also need the agreement of the relevant highway authorities and any necessary highway orders."

19. The Secretary of State's decision letter, in dealing with the matter of Tesco's offer to fund the WEL, had regard to the policy guidance in Circular 16/91. The relevant paragraphs are these:

"7. Turning, therefore to the first main issue, the WEL, the Secretary to State accepts that a new foodstore on any of the three sites would result in additional traffic on the local road network, but he observes that such an increase would be less than 10% in excess of that which would have been generated by the permitted Bl development on the Mount Mills and Henry Box sites. He agrees with the Inspector that this slight worsening of traffic conditions produces some relationship between the funding of WEL and a proposed store, but shares her view that the relationship is tenuous, given the distance of these sites from WEL and the amount of traffic likely to be generated compared to the potential from uses already permitted. Looking at the offer of funding made by Tesco in relation to the tests of reasonableness set out in paragraph B8 of Annex B to Circular 16/91, the Secretary of State does not consider that WEL is needed to enable any of the superstore proposals to go ahead, or is otherwise so directly related to any of the proposed developments and to the use of the land after completion that any of the developments ought not to be permitted without it. He appreciates that provision for the road is made in the Local Plan which is nearing adoption, and that it is the County Council's intention to seek funding or a major contribution. However, having regard to paragraph B9 of the Annex to the Circular, and bearing in mind also that no contributions towards highway improvements were sought when planning permission was granted in 1991 for Bl development on two of the sites, he agrees with the Inspector that the full funding of WEL is not fairly and reasonably related in scale to any of the proposed developments. As to whether it would be appropriate to seek a major contribution from developers before allowing any superstore proposal, he takes the view, given the anticipated traffic levels and the distance between the sites and the route of WEL, that it would be unreasonable to seek even a partial contribution from developers towards the cost of the work in connection with the proposals currently before him. He notes the Inspector's conclusion that it would be 'perverse' to turn away an offer from a developer of a site preferred by the Council after a lengthy Local Plan inquiry but, for the reasons given in paragraphs 5 and 6 above, he thinks that the expressed preference can carry only limited weight. Accordingly, in his view, since the offer of funding fails the tests of Annex B of Circular 16/91, it cannot be treated either as a reason for

granting planning permission to Tesco or for dismissing either of the two section 78 appeals.

"8. If the Secretary of State is wrong in his conclusion that it would be unreasonable to seek even a partial contribution towards the funding of WEL, then it would be the case that he would be required to take into account Tesco's offer of funding, albeit not fully but only to the extent of such partial contribution as he considered was reasonable. For the same reasons that led him to his conclusion that not even the seeking of a partial contribution would be reasonable, he considers that the extent to which the funding should be taken into account (assuming, for the purposes of argument, that it has to be taken into account at all) will be of such a limited nature that, even upon taking the benefit into account, the balance of the arguments would not be tipped so as to change his decision."

20. The argument for Tesco draws attention to the reference in paragraphs B5 and B7 of the Circular 16/91 to the benefits of planning obligations being properly sought only where they are necessary to the grant of planning permission, and in paragraph B8 to the reasonableness of seeking a planning obligation being dependent on whether it is needed to enable the development to go ahead. Paragraph 7 of the decision letter states that the WEL is not needed to enable any of the superstore proposals to go ahead. This demonstrates, so it is maintained, that the Secretary of State has applied a test of necessity which has wrongly resulted in his treating Tesco's offer of funding as immaterial. Reliance is placed on *Newbury District Council* v. *Secretary of State for the Environment* [1981] A.C.578. That case was concerned with the question as to the type of conditions which might lawfully be annexed to a grant of planning permission. Viscount Dilhorne said, at p.599:

> "It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them."

The other members of the House spoke to similar effect.

21. The same test, so it is claimed, falls to be applied to a planning obligation for the purpose of deciding whether it amounts to a material consideration in connection with an application for planning permission. The parallel, however, cannot be exact. No doubt if a condition is completely unrelated to the development for which planning permission is sought it will not be lawful. But this case is not concerned with the lawfulness of Tesco's

planning obligation, and there may be planning obligations which have no connection with any particular proposed development. Further, in *Good* v. *Epping Forest District Council* [1994] 1 W.L.R. 376 the Court of Appeal held that an agreement under section 52 of the Town and Country Planning Act 1971, the predecessor of section 106 of the Act of 1990, might be valid notwithstanding that it did not satisfy the second of the *Newbury* tests. So I do not think that reference to the *Newbury* case is particularly helpful for the purpose of deciding whether a particular planning obligation is a consideration material to the determination of a planning application with which the obligation is associated.

22. Tesco's argument founded on *Reg. v. Plymouth City Council, Ex parte Plymouth and South Devon Co-operative Society Ltd.* (1993) 67 P.& C.R. 78 as being a decision of the Court of Appeal to the effect that offers of section 106 agreements by applicants for planning permission which promised various benefits on and off site, involving the payment of considerable sums of money, did not vitiate planning consents granted by the local planning authority, notwithstanding that the offers were not necessary in the sense that they overcame what would otherwise be planning objections to the proposed development. A supermarket operator was seeking to overturn planning consents granted to two rivals, and argued that the section 106 agreements were not material considerations unless they passed the necessity test. The Court of Appeal held that it was sufficient, on the basis of *Newbury* [1981] A.C. 578, that the obligations offered concerned planning matters and fairly and reasonably related to the proposed development. The only member of the court who referred to the Circular 16/91 was Hoffmann L.J. Having quoted, at p.90, from paragraph B7 the statement that planning obligations should only be sought where they were necessary to the granting of permission, he observed that this statement of policy embodied a general principle that planning control should restrict the rights of landowners only so far as might be necessary to prevent harm to community interests. He did not make any criticism of the policy but said:

> "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 ... to say that a condition or the requirement of a section 106 agreement would have been discharged on appeal by the Secretary of State, because its imposition did not accord with the policies I have quoted, is not at all the same thing as saying that the planning authority would have been acting beyond its statutory powers."

23. The meaning, as I understand it, is that a local planning authority is not bound to apply a policy favoured by the Secretary of State in the sense that failure to do so will vitiate its decision. The effect of the decision, therefore,

is simply that the local planning authority is not acting unlawfully if it fails to apply a necessity test in considering whether a planning obligation should be required or accepted. It does not decide the converse, namely that the local planning authority would be acting unlawfully if it did, as a matter of policy, apply a necessity test.

24. An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only 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. But the extent, if any, to which it should affect the decision is a matter entirely within the discretion of the decision maker and in exercising that discretion he is entitled to have regard to his established policy. The policy set out in the Circular 16/91 is intended to bring about certainty and uniformity of approach, and is directed among other things to securing that planning permissions are not bought and sold. It is not suggested that there is anything unlawful about Circular 16/91 as such. It might be thought the Secretary of State has made a slip in paragraph B12 where it is stated of unilateral undertakings:

> 1. "It should be relevant for planning and should resolve the planning objections to the development proposal concerned. Otherwise, it would not be a material consideration and will not be taken into account . . . ."

25. But the context is that of an appeal against refusal of planning permission, which involves that the local planning authority should have taken the view that there were planning objections to the proposed development. If these objections were bad there would be no need for any unilateral obligation. If they were good then something would require to be done to overcome them and a unilateral obligation which would not do so would indeed be irrelevant. As regards the references in paragraphs B5 and B7 to planning obligations being necessary to the grant of permission and in paragraph B8 to their being needed to enable the development to go ahead, I think they mean no more than that a planning obligation should not be given weight unless the exercise of planning judgment indicates that permission ought not to be granted without it, not that it is to be completely disregarded as immaterial.

26. When it comes to the Secretary of State's decision letter. I am clearly of opinion that on a fair reading of it he has not disregarded Tesco's offer of funding as being immaterial. On the contrary, he has given it careful consideration. Paragraph 7 examines the effect of a new foodstore on the

traffic situation in Witney, concludes that there would be a slight worsening, and agrees with the Inspector that this produces some relationship between the funding of the WEL and the proposed foodstore but that the relationship is tenuous. He expresses the view that the WEL is not so closely related to any of the proposed superstores that any of them ought not to be permitted without it. He goes on to say that full funding of the WEL is not fairly and reasonably related in scale to any of the proposed developments, and further that having regard to the expected traffic and the distance between the sites and the route of the WEL it would be unreasonable to seek even a partial contribution from developers towards the cost of it. All of this seems to me, far from being a dismissal of the offer of funding as immaterial, to be a careful weighing up of its significance for the purpose of arriving at a planning decision. In paragraph 8 the Secretary of State considers whether in the event of its being reasonable to seek a partial contribution to the funding of WEL the amount of the benefit would be such as to tip the balance of the argument in favour of Tesco, and concludes that it would not. That is clearly a weighing exercise.

27. Upon the whole matter I am of opinion that the Secretary of State has not treated Tesco's offer of funding as immaterial, but has given it full and proper consideration, and that his decision is not open to challenge. I would accordingly dismiss the appeal.

LORD ACKNER

My Lords,

28. I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel. For the reasons which he gives I too would dismiss the appeal.

LORD BROWNE-WILKINSON

My Lords,

29. I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Keith of Kinkel. For the reasons which he gives I too would dismiss the appeal.

LORD LLOYD OF BERWICK

My Lords,

30. I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Keith of Kinkel. For the reasons which he gives I too would dismiss the appeal.

LORD HOFFMANN

My Lords,

31. I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree that for the reasons which he gives, this appeal must be dismissed. But in view of what the Master of the Rolls, in the passage quoted at the beginning of my noble and learned friend's speech, described as the unusual public importance of the questions involved in this appeal, I add some observations of my own.

1 ***External costs***

32. A development will often give rise to what are commonly called external costs, that is to say, consequences involving loss or expenditure by other persons or the community at large. Obvious examples are the factory causing pollution, the office building causing parking problems, the fast food restaurant causing litter in the streets. Under the laisser-faire system which existed before the introduction of modern planning control by the Town and Country Planning Act 1947, the public had for the most part to bear such external costs as best it could. The law of torts (particularly nuisance and public nuisance) and the Public Health Acts could provide a remedy for only the most flagrant cases of unneighbourly behaviour.

2 ***Imposing conditions***

33. Section 14(1) of the Town and Country Planning Act 1947 gave planning authorities the power, when granting planning permission, to impose "such conditions as they think fit." This power has been repeated in subsequent planning acts and is now contained in section 70(1) of the Town and Country Planning Act 1990. This might have been thought to be a suitable instrument by which planning authorities could require that developers bear, or at any rate contribute to, their own external costs. But the courts, in the early days of planning control, construed the power to impose conditions very narrowly. It was not so much the general principles which the courts laid down as the way in which in practice the principles were applied. The classic statement of the general principle was by Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 572:

> "Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

34. As a general statement, this formulation has never been challenged. In *Newbury District Council* v. *Secretary of State for the Environment* [1981] A.C. 578 it was paraphrased by Viscount Dilhorne as stating three conditions for the validity of a condition. It must (1) be for a planning purpose and not for any ulterior one (2) fairly and reasonably relate to the permitted development and (3) not be *Wednesbury* unreasonable. [1948] 1 KB 223.

3 *The Shoreham case*

35. The inability of planners to use conditions to require developers to bear external costs arose from the way in which these principles were applied to the facts of particular cases. The landmark case was *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240. The plaintiffs wanted to build a ready mixed concrete plant and other facilities on land between the sea near Shoreham and the heavily congested main road to Brighton. The local planning authority granted permission subject to a condition that the plaintiffs construct an ancillary road on their own land parallel to the main road and allow access over that road to traffic from neighbouring land which was scheduled for development and over which it was proposed that a continuation of the ancillary road would be built. Willmer L.J. said that this was an admirable way to avoid further congestion and minimise the risk of accident. Nevertheless he and the other members of the Court of Appeal held the condition to be *Wednesbury* unreasonable. He said, at pp. 250-251:

> ". . .if what the defendants desire to achieve is the construction of an ancillary road serving all the properties to be developed along the strip of land that is scheduled for development, for the use of all persons proceeding to or from such properties, they could and should have proceeded in a different way. What is suggested is that, in addition to the strip of land already earmarked for the proposed road widening, they could have designated a further strip 26 feet wide immediately to the southward, and could have imposed a condition that no building was to be erected on this additional strip which would

> in any way interfere with its use hereafter for the building of the proposed ancillary road. . . .
> "Under the conditions now sought to be imposed, on the other hand, the plaintiff must construct the ancillary road as and when they may be required to do so over the whole of their frontage entirely at their own expense. . . . The defendants would thus obtain the benefit of having the road constructed for them at the plaintiff's expense, on the plaintiffs' land, and without the necessity for paying any compensation in respect thereof.
> "Bearing in mind that another and more regular course is open to the defendants, it seems to me that this result would be utterly unreasonable and such as Parliament cannot possibly have intended."

36. This judgment shows no recognition of the possibility that the need to widen the Brighton Road could in part be regarded as an external cost of the applicant's ready mixed concrete business, to which they could in fairness be required to contribute as a condition of the planning permission. It is assumed that the "regular course", the natural order of things, is that such costs should be borne by taxation upon the public at large. The fact that the local authority has power, on payment of compensation, to take land for highway purposes from any person, whether or not he imposes external costs upon the community, is treated as a reason for denying that it can use planning powers to exact a contribution from those who do.

4 *Planning agreements*

37. I have dwelt upon *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* because it exercised a decisive influence upon the development of British planning law and practice. The Ministry of Housing and Local Government issued a circular for the guidance of local planning authorities (5/68) which was intended to reflect its ratio decidendi. It has since been replaced in similar terms by paragraph 63 of Circular 1/85:

> "No payment of money or other consideration can be required when granting a permission or any other kind of consent required by a statute except where there is specific statutory authority. Conditions requiring, for instance, the cession of land for road improvements or for open space, or requiring the developer to contribute money towards the provision of public car parking facilities, should accordingly not be attached to planning permissions. Similarly, permission cannot be granted subject to a condition that the applicant enters into an agreement under section 52 of the Act [now s.106 of the Act of

> 1990] or other powers. However, conditions may in some cases reasonably be imposed to oblige developers to carry out works, e.g. provision of an access road, which are directly designed to facilitate the development."

38. Faced with this restriction on their power to require contribution to external costs by the imposition of conditions, local planning authorities resorted to a different route by which they could achieve the same purpose. This was the agreement under section 52 of the Town and Country Planning Act 1971, now replaced by section 106 of the Town and Country Planning Act 1990. In its original form it provided as follows:

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

5 *Planning gain*

39. During the property boom of the early seventies, local planning authorities increasingly used the power to enter into section 52 agreements (or agreements under their general powers) to exact payments or cessions of land which could not be imposed by conditions. Under Circular 5/68 it could not be made a condition of the planning permission that the developer enter into such an agreement, but that presented no difficulty. The local planning authority simply refused to grant a planning permission until the developer had entered into the agreement. Then it granted permission unconditionally. Of course the developer could always appeal against a refusal to the Secretary of State, but the delay and expense which would be involved was a powerful incentive to negotiate an agreement which would meet the local planning authority's demands.

40. There developed a practice by which the grant of planning permissions was regularly accompanied by negotiations for what was called a "planning gain" to be provided by the developer to the local planning authority. The practice caused a good deal of public concern. Developers complained that they were being held to ransom. They said that some local authorities insisted that in return for planning permission, an applicant should make a payment for purposes which could in no way be described as external costs of the particular development. In the boom atmosphere of the time, in which a grant of planning permission could add substantially to the value of land,

some authorities appeared to regard themselves as entitled to share in the profits of development, thereby imposing an informal land development tax without the authority of Parliament. Citizens, on the other hand, complained that permissions were being granted for inappropriate developments simply because the developers were willing to contribute to some pet scheme of the local planning authority. There also a more general concern about distortion of the machinery of planning. The process envisaged by the planning acts was that decisions would be made openly in council or committee by adjudicating on the merits of the application and then either refusing permission or granting it with or without unilaterally imposed conditions. If the developer did not like the condition, he could appeal to the Secretary of State, who would also adjudicate upon the matter openly after public inquiry. But the shift from conditions to agreements meant that a crucial part of the planning process took place in secret, by negotiation between the developer and the council's planning officers. It began to look more like bargain and sale than democratic decision-making. Furthermore, the process excluded the appeal to the Secretary of State. The developer who had entered into a section 52 agreement could not appeal. Nor did anyone else have a right of appeal. The only possibility of challenge was if some sufficiently interested party applied for judicial review on the ground that the planning authority had taken improper matters into consideration when granting the permission. In this respect the decision in *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240 had been self-defeating. By preventing local planning authorities from requiring financial contributions or cessions of land by appealable conditions, it had driven them to doing so by unappealable section 52 agreements.

6 *Circular 16/91*

41. It was in response to these concerns that the Department of the Environment issued its circular *Planning Gain* (22/83), now replaced by Circular 16/91, *Planning Obligations.* The purpose of these circulars was to give guidance to local planning authorities and state the policy which the Secretary of State would apply in dealing with appeals. The essence of the advice is contained in paragraph B5 of Circular 16/91. It says that any benefit sought in return for a grant of planning permission must be "related to the development and necessary to the grant of permission." The test thus has two limbs: relationship to the development and necessity for the grant of permission. The need for a relationship to the development flows from the requirements of what is now section 70 (2) of the Town and Country Planning Act 1990, which says that in deciding whether to grant or refuse planning permission (or to impose conditions) "the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations." A benefit unrelated to the development would not be a "material consideration" and a refusal based

upon the developer's unwillingness to provide such a benefit would therefore be unlawful. Thus far, the Circular does no more than reflect the requirements of the statute. But the second limb, "necessary to the grant of permission," is a different matter. The foundation for this test is the policy which has been applied by successive governments since the inception of the modern planning system, namely that "applications for development should be allowed, having regard to the development plan and all material considerations, unless the proposed development would cause demonstrable harm to interests of acknowledged importance." *(Planning Policy Guidance 1* (PPG1, March 1992), *General Policy and Principles*, paragraph 5). As a corollary of this principle of policy, the Department had for many years advised that conditions should not be imposed unless without them the development would be unacceptable in the sense that it would have to be refused as likely to cause "demonstrable harm to interests of acknowledged importance." (See Circular 1/85, paragraph 12). Circular 16/91 declares a similar policy in respect of benefits required to be provided by agreements under section 106 of the Town and Country Planning Act 1990. It says that an obligation to provide such a benefit may be imposed if it is needed to enable the development to go ahead, or designed to secure an acceptable balance of uses or "so directly related to the proposed development that [it] ought not [be allowed to go ahead] without it:" para. B8. If there is the necessary relationship between the development and the benefit, i.e. if the benefit can be regarded as meeting or contributing to an external cost of the development, then

> "the extent of what is required [must be] fairly and reasonably related in scale and kind to the proposed development." A developer may "reasonably be expected to pay for or contribute to the cost of infrastructure which would not have been necessary but for his development, but his payments should be directly related in scale to the benefit which the proposed development will derive from the facilities to be provided:" para B9.

42. In each case the language emphasises that an obligation should not be required if, even without it, or with a less onerous obligation, a refusal of planning permission would be contrary to the presumption in favour of development.

7 *Modern policy on external costs*

43. I shall defer for the moment an examination of the relationship between this second limb of the test in Circular 16/91 and the legal limits of the powers of planning authorities. For the moment I would only draw attention to two aspects of the policy which it lays down. Firstly, it comes down firmly

against the practice of using demands for "planning gain" as a means of enabling local planning authorities to share in the profits of development. The more flagrant examples of demands for purposes unrelated to the development were in any event illegal as *Wednesbury* unreasonable [1948] 1 KB 223 or founded upon immaterial considerations. But the Circular also makes it clear that appeals will be allowed if local planning authorities make demands which are excessive in the sense of being in planning terms unnecessary or disproportionate. This policy is reinforced by a warning that applications for costs against local planning authorities making such excessive demands will be sympathetically considered. But secondly, the Circular sanctions the use of planning obligations to require developers to cede land, make payments or undertake other obligations which are bona fide for the purpose of meeting or contributing to the external costs of the development. In other words, it authorises the use of planning obligations in a way which the court in *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240 would have regarded as *Wednesbury* unreasonable in a condition. A good example of its application is the recent case of *Reg. v. South Northamptonshire District Council, Ex parte Crest Homes Plc.* (unreported, 13 October 1994; Court of Appeal (Civil Division) Transcript No. 1204 of 1994. The District Council, faced with an alteration to the structure plan which contemplated residential development which would double the population of the small town of Towcester, decided that applicants for planning permission to build the new houses would be required to enter into agreements to contribute to the necessary infrastructure, such as schools, community centres, a by-pass road and so forth. The Council calculated how much these works would cost and decided to allocate the burden among prospective developers in accordance with a formula based on the percentage of value added to the land by the grant of planning permission. The Court of Appeal held that this policy was both lawful and in accordance with Circular 16/91. Henry L.J. said:

> "Where residential development makes additional infrastructure necessary or desirable, there is nothing wrong in having a policy that requires major developers to contribute to the costs of infrastructure related to their development."

He went on to say that the formula was, in the circumstances of that case, a practical and legitimate way of relating the infrastructure costs to the various developments.

8 ***Legislation in support of the new policy***

44. The Government policy of encouraging such agreements has been buttressed by amendments to the planning and highways legislation to confer upon local planning authorities and highway authorities very wide powers to enter

into agreements with developers. The new section 106 of the Town and Country Planning Act 1990 says in express terms that agreements under that section may require a developer to pay sums of money. The new section 278 of the Highways Act 1980, substituted by section 23 of the New Roads and Street Works Act 1991, confers a broad power upon a highway authority to enter into agreements by which some other person will pay for the construction or improvement of roads or streets. Parliament has therefore encouraged local planning authorities to enter into agreements by which developers will pay for infrastructure and other facilities which would otherwise have to be provided at the public expense. These policies reflect a shift in Government attitudes to the respective responsibilities of the public and private sectors. While rejecting the politics of using planning control to extract benefits for the community at large, the Government has accepted the view that market forces are distorted if commercial developments are not required to bear their own external costs.

9 ***Law and policy in the United Kingdom***

45. This brings me to the relationship between the policy and the law. I have already said that the first limb of the test in paragraph B5 of Circular 16/91 marches together with the requirements of the statute. But the second - the test of necessity (and proportionality) - does not. It is well within the broad discretion entrusted to planning authorities by section 70 of the Town and Country Planning Act 1990. But it is not the only policy which the Secretary of State might have adopted. There is nothing in the Act of 1990 which requires him to adopt the tests of necessity and proportionality. It is of course entirely consistent with the basic policy of permitting development unless it would cause demonstrable harm to interests of acknowledged importance. But even that policy is not mandated by Parliament. There may come a Secretary of State who will say with Larkin:

> "Despite all the land left free
> For the first time I feel somehow
> That it isn't going to last,
> That before I snuff it, the whole
> Boiling will be bricked in...
> And that will be England gone,
> The shadows, the meadows, the lanes,
> The guildhalls, the carved choirs."

and promulgate a policy that planning permissions should be granted only for good reason. There is nothing against this in the statute. And among the good reasons could be the willingness of the developer to provide related external benefits.

46. The potentiality for conflict between the policy of Circular 16/91 and other equally defensible policies has arisen most acutely in cases in which developers are in competition for a planning permission, that is to say, in which it is accepted that the grant of permission to one developer is a valid planning reason for refusing it to another. In such cases the presumption in favour of development does not yield an easy answer. If there was no competition, it might be that the proposal of developer A could not be said to cause demonstrable harm to interests of acknowledged importance. But what happens when one has to throw into the scale having to forego the benefits of the far more attractive proposal of developer B? Is that not harm to an interest of acknowledged importance? I do not think anyone would doubt that in such a case of competition, it would be legitimate to take into account that one developer was willing, for example, to employ the finest architect, use the best materials, lay out beautiful gardens and so forth, whereas the proposal of the other developer, though not unacceptable if it had stood alone, was far inferior. The problem arises when a developer tries to win the competition by offering more off-site benefits.

10 ***The Plymouth case***

47. If it is proper in a case of competition to take into account the architecture and landscaping within the respective development sites, it is difficult logically to distinguish the provision of benefits related to the development but off the site. It is true that the former may be more likely to enhance the value of the developer's land than the latter. But the difference is one of degree and, one might think, a matter for the developer's choice. This was the view of the local planning authority in *Reg. v. Plymouth City Council, Ex parte Plymouth and South Devon Co-operative Society Ltd.* (1993) 67 P. & C.R. 78. It was advised by its planning officers that only one permission should be granted for a superstore on the eastern approach to Plymouth. It thereupon organised a competition. It invited prospective developers to select from a menu of "community benefits", all of which satisfied the test of being fairly related to the proposed development, and indicated that it would take into account the extent to which a developer was willing to pay for items on the menu. Having received two attractive bids which included a number of external benefits, it changed its policy and decided to grant both permissions. This was challenged by the Co-operative Society, which had a competing supermarket nearby, on the ground that the local planning authority had taken into account an offer of benefits which were not <u>necessary</u>, in the sense that they overcame what would otherwise have been planning objections to the development. Because a local planning authority gives no reasons for a decision to grant planning permission, it is not easy to tell what view it has formed about whether a proposed benefit did or did not overcome an objection to the development. It is probably true to say that, as it was agreed that there could be a superstore in the area, the

menu of benefits offered by each developer was not necessary to make his development acceptable if his had been the only application. The matter becomes more complicated when, as the council originally intended, acceptance of one application involves rejection of the other, or when, as afterwards happened, it was decided to grant both applications - a change of policy in which the benefits offered no doubt played a substantial part. But the Court of Appeal was content to deal with the matter on the basis that the council had indeed taken into account promises of benefits which, though relating to the proposed development, were not necessary for the grant of permission within the terms of Circular 16/91. It dismissed the appeal on the ground that the test of necessity, whether as explained in the Circular or in any other form, was not a legal requirement. It said that the tests for the vires of a grant of planning permission which took into account benefits offered under a planning obligation were the same as the tests for the validity of a condition laid down by this House in *Newbury* [1981] A.C. 578: the planning obligation must be for a planning purpose; it must fairly relate to the proposed development and having regard to it must not be *Wednesbury* unreasonable [1948] 1 KB 223. There is no additional test of necessity.

11 ***Planning obligations and the Newbury tests.***

48. Although I was party to the *Plymouth* decision and accepted the transposition of the three *Newbury* tests to the validity of a planning permission granted on the basis of the developer undertaking a planning obligation, I am bound to agree with my noble and learned friend, Lord Keith of Kinkel that the parallel is by no means exact. The analogy was been invoked because, as Lord Scarman pointed out in *Newbury* [1981] A.C. 578, 619A, the first two tests are a judicial paraphrase of the planning authority's statutory duty in section 70(2) of the Act of 1990 to have regard to the provisions of the development plan and "any other material considerations." This duty applies as much to the decision to grant a planning permission (which is what was under attack in *Plymouth)* as to the decision to impose conditions (which was under attack in *Newbury).* The third *Newbury* test, *Wednesbury* unreasonableness, is a general principle of our administrative law. But the use of the *Newbury* tests in relation to planning obligations can cause confusion unless certain points are borne clearly in mind.

49. Firstly, *Newbury* was concerned with the validity of a condition and there is a temptation to regard a planning obligation as analogous to a condition. But section 70 (2) does not apply to planning obligations. The vires of planning obligations depends entirely upon the terms of section 106. This does not require that the planning obligation should relate to any particular development. As the Court of Appeal held in *Good v. Epping Forest District*

Council [1994] 1 W.L.R. 376, the only tests for the validity of a planning obligation outside the express terms of section 106 are that it must be for a planning purpose and not *Wednesbury* unreasonable. Of course it is normal for a planning obligation to be undertaken or offered in connection with an application for planning permission and to be expressed as conditional upon the grant of that permission. But once the condition has been satisfied, the planning obligation becomes binding and cannot be challenged by the developer or his successor in title on the ground that it lacked a sufficient nexus with the proposed development. The reason why the adoption of the *Newbury* tests had any plausibility in *Plymouth* was because the case was not concerned with the validity of planning obligations. It turned upon whether the planning obligations undertaken in that case were material considerations which could legitimately be taken into account in granting planning permission. The same is true of this case.

50. Secondly, it does not follow that because a condition imposing a certain obligation (such as to cede land or pay money) would be regarded as *Wednesbury* unreasonable, the same would be true of a refusal of planning permission on the ground that the developer was unwilling to undertake a similar obligation under section 106. I say this because the test of *Wednesbury* unreasonableness applied in *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* to conditions is quite inconsistent with the modern practice in relation to planning obligations which has been encouraged by the Secretary of State in Circular 16/91 and by Parliament in the new section 106 of the Town and Country Planning Act 1990 and the new section 278 of the Highways Act 1980 and approved by the Court of Appeal in *Reg. v. South Northamptonshire District Council, Ex parte Crest Homes Plc*, Court of Appeal (Civil Division) Transcript No. 1204 of 1994.

51. Thirdly, while *Newbury* is a convenient judicial paraphrase of the effect of section 70(2), it cannot be substituted for the words of the statute.

52. The principal questions in a case like this must always be whether the planning obligation was a "material consideration" and whether the planning authority had regard to it.

12.- *The necessity test*

53. This brings me to the submissions in this appeal, the facts of which have been fully stated by my noble and learned friend, Lord Keith of Kinkel. Mr. Vandermeer Q.C. for the appellant submitted that Tesco's offer to pay for the West End Link was a material consideration and that the Secretary of State failed to have regard to it. Mr. Ouseley Q.C. for the Secretary of State agreed that it was a material consideration but said that upon a fair construction of the Secretary of State's decision letter, he did have regard to

it. Mr. Lockhart-Mummery Q.C., for Tarmac, said that the offer was not a material consideration at all. Logically I should start with Mr. Lockhart-Mummery's submission, because if he is right, it does not matter whether or not the Secretary of State had regard to the offer.

54. Mr. Lockhart-Mummery's submission was that Tesco's offer was not material because it did not have the effect of rendering acceptable a development which would otherwise have been unacceptable. The development would have been perfectly acceptable without it, or at any rate, with an offer of a good deal less. He formulated the test of materiality as follows:

> "A planning authority may lawfully take into account a developer's offer to provide off-site infrastructure or other benefits whose objective and effect are to render his development *acceptable* so that it may be granted planning permission under section 70 of the Town and Country Planning Act 1990." (My emphasis).

55. Mr. Lockhart-Mummery disclaimed any intention of challenging the correctness of the *Plymouth* decision, despite some encouragement from Steyn L.J. in the Court of Appeal. But in my judgment his formulation is in substance a re-run of the unsuccessful submission of Mr. Gilbart Q.C. in *Plymouth.* The key word is that which I have emphasised: acceptable. The planning obligation, he says, must have the effect of making acceptable what would otherwise have been unacceptable. This, it seems to me, is indistinguishable from the test of necessity for the purpose of granting a planning permission which was rejected in *Plymouth.*

13 ***Materiality and planning merits***

56. It would be inappropriate for me rehearse the reasoning in *Plymouth.* But I shall, if I may, look at the question from a slightly different perspective. The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.

57. This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State.

58. The test of acceptability or necessity put forward by Mr. Lockhart-Mummery suffers in my view from the fatal defect that it necessarily involves an investigation by the court of the merits of the planning decision. How is the court to decide whether the effect of a planning obligation is to make a development acceptable without deciding that without that obligation it would have been unacceptable? Whether it would have been unacceptable must be a matter of planning judgment. It is I suppose theoretically possible that a Secretary of State or local planning authority may say in terms that he or it thought that a proposed development was perfectly acceptable on its merits but nevertheless thought that it was a good idea to insist that the developer should be required to undertake a planning obligation as the price of obtaining his permission. If that should ever happen, I should think the courts would have no difficulty in saying that it disclosed a state of mind which was *Wednesbury* unreasonable. But in the absence of such a confession, the application of the acceptability or necessity test must involve the courts in an investigation of the planning merits. The criteria in Circular 16/91 are entirely appropriate to be applied by the Secretary of State as part of his assessment of the planning merits of the application. But they are quite unsuited to application by the courts.

14 *Law and policy in the United States*

59. 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 the planning (or "police") power, has given rise to a debate remarkably similar to that over "planning gain" in the United Kingdom. The courts, following the decision of the Supreme Court in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, apply what has been called the "rational nexus" test. This requires the planning authority which exacts a contribution to infrastructure as a condition of its consent to demonstrate that "the development will cause a <u>need</u> for new public facilities and that the contribution required is <u>proportionate</u> to that

need and will actually be used to provide those facilities." ("Planning Gain and the Grant of Planning Permission: Is the United States' Test of the "Rational Nexus' the Appropriate Solution? by Purdue, Healey and Ennis [1992] J.P.L. 1012, 1014.) This, as the authors of the article from which I have quoted point out, is very similar to the tests of necessity and proportionality in Circular 16/91. In another article, "Paying for Growth and Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees and Development Agreements" Callies and Grant ((1991) 23 The Urban Lawyer 221, 248) say:

> "The necessity to avoid falling foul of the 'taking' doctrine has meant that United States local governments have always had to be in a position to justify their rules in case of constitutional challenge, and hence to pursue openness and economic transparency. ..."

Purdue. Healey and Ennis add that the rational nexus test "has led some state courts to require sophisticated analysis which goes into questions of past expenditure and double taxation."

60. My Lords, no English court would countenance having the merits of a planning decision judicially examined in this way. The result may be some lack of transparency, but that is a price which the English planning system, based upon central and local political responsibility, has been willing to pay for its relative freedom from judicial interference.

15 *Buying and selling planning permissions*

61. This reluctance of the English courts to enter into questions of planning judgment means that they cannot intervene in cases in which there is sufficient connection between the development and a planning obligation to make it a material consideration but the obligation appears disproportionate to the external costs of the development. *Plymouth*, 67 P.& C.R. 78, was such a case, leading to concern among academic writers and Steyn L.J. in the present case that the court was condoning the sale of planning permissions to the highest bidder. My Lords, to describe a planning decision as a bargain and sale is a vivid metaphor. But I venture to suggest that such a metaphor (and I could myself have used the more emotive term "auction" rather than "competition" to describe the process of decision-making process in *Plymouth)* is an uncertain guide to the legality of a grant or refusal of planning permission. It is easy enough to apply in a clear case in which the planning authority has demanded or taken account of benefits which are quite unconnected with the proposed development. But in such a case the phrase merely adds colour to the statutory duty to have regard only to material considerations. In cases in which there is a sufficient connection,

the application of the metaphor or its relevance to the legality of the planning decision may be highly debatable. I have already explained how in a case of competition such as *Plymouth,* in which it is contemplated that the grant of permission to one developer will be a reason for refusing it to another, it may be perfectly rational to choose the proposal which offers the greatest public benefit in terms of both the development itself and related external benefits. Or take the present case, which is in some respects the converse of *Plymouth.* Tarmac say that Tesco's offer to pay £6.6 million to build the West End Link was a blatant attempt to buy the planning permission. Although it is true that Witney Bridge is a notorious bottleneck and the town very congested, the construction of a superstore would make the congestion only marginally worse than if the site had been developed under its existing permission for offices. Therefore an offer to pay for the whole road was wholly disproportionate and it would be quite unfair if Tarmac was disadvantaged because it was unwilling to match this offer. The Secretary of State in substance accepted this argument. His policy, even in cases of competition for a site, is obviously defensible on the ground that although it may not maximise the benefit for Witney, it does produce fairness between developers.

62. Tesco, on the other hand, say that nothing was further from their minds than to try to buy the planning permission. They made the offer because the local planning authority had said that in its view, no superstore should be allowed unless the West End Link was built. Tesco say that this seemed a sensible attitude because although it was true that the development would add only marginally to the congestion which would have existed if offices had been built, this was an unrealistic comparison. In practice it was most unlikely that anyone would build offices in that part of Witney in the foreseeable future. The fact was that the development would make the existing traffic problems a good deal worse. In an ideal world it would have been fairer if the highway authority had paid for most of the road and Tesco only for a proportion which reflected the benefit to its development. But the highway authority had made it clear that it had no money for the West End Link. So there was no point in Tesco offering anything less than the whole cost. Why should this be regarded as an improper attempt to buy the planning permission? The result of the Secretary of State's decision is that Witney will still get a superstore but no relief road. Why should that be in the public interest?

63. I think that Tesco's argument is also a perfectly respectable one. But the choice between a policy which emphasises the presumption in favour of development and fairness between developers, such as guided the Secretary of State in this case, and a policy of attempting to obtain the maximum legitimate public benefit, which was pursued by the local planning authority in *Plymouth,* lies within the area of discretion which Parliament has

entrusted to planning authorities. It is not a choice which should be imposed upon them by the courts.

64. I would therefore reject Mr. Lockhart-Mummery's submission that Tesco's offer was not a material consideration. I think that it was open to the Secretary of State to have taken the same view as the Plymouth City Council did in *Plymouth,* 67 P.& C.R. 78, and given the planning permission to Tesco on the grounds that its proposals offered the greater public benefit. But the Secretary of State did not do so. Instead, he applied the policy of Circular 16/91 and decided to attribute little or no weight to the offer. And so, on the ground that its site was marginally more suitable, Tarmac got the permission.

16 ***The appeal***

65. This brings me to Mr. Vandermeer's submissions in support of the appeal. He says that although the Secretary of State through Mr Ouseley now asserts that the offer was a material consideration, that was not the view he took in his decision letter. There he treated Circular 16/91 as being not merely a statement of policy as to the weight to be given to planning obligations but as a direction that planning obligations which did not satisfy its criteria were not to be treated as material considerations at all.

66. For the reasons given by my noble and learned friend. Lord Keith of Kinkel, I do not think that the Secretary of State fell into this error. Paragraph 21 of *Planning Policy Guidance* 1 (PPGI, March 1992), *General Policy and Principles,* describes the status of the Department's circulars in unambiguous terms:

> "The Department's policy statements cannot make irrelevant any matter which is a material consideration in a particular case. But where such statements indicate the weight that should be given to relevant considerations, decision-makers must have proper regard to them."

67. The Secretary of State can hardly have forgotten this statement when he came to apply Circular 16/91 in his decision letter. So, for example, when he said in paragraph 7:

> "Accordingly, in his view, since the offer of funding fails the tests of Annex B of Circular 16/91, it cannot be treated either as a reason for granting planning permission to Tesco or for dismissing [the appeal by Tarmac]"

he could not have used the word "cannot" to mean that he was legally precluded from doing so. He clearly meant that he could not do so consistently with his stated policy in Circular 16/91.

17 *Little weight or no weight?*

68. Finally I should notice a subsidiary argument of Mr. Vandermeer. He submitted that a material consideration must be given some weight, even if it was very little. It was therefore wrong for the Secretary of State, if he did accept that the offer was a material consideration, to say that he would give it no weight at all. I think that a distinction between very little weight and no weight at all is a piece of scholasticism which would do the law no credit. If the planning authority ignores a material consideration because it has forgotten about it, or because it wrongly thinks that the law or departmental policy (as in *Safeway Properties Ltd v Secretary of State for the Environment* [1991] JPL 966) precludes it from taking it into account, then it has failed to have regard to a material consideration But if the decision to give that consideration no weight is based on rational planning grounds, then the planning authority is entitled to ignore it