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PLANNING INQUIRIES – THE NEW DIMENSION

THE MAJOR INQUIRY - WHERE STANDS THE INDIVIDUAL

by

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The individual is the person who arrives at the appointed room at the time given for the Inquiry, but who has not been consulted by the Department about the arrangements for the Inquiry, who has not been a party to the exchange of papers and other circulated documents, who has not been allocated a place to sit and cannot easily find one, who is probably either not professionally represented, or if he is his representation looks decidedly thin compared with the ranks of barristers and other advisors appearing for the promoters and main objectors and who doesn't know yet that the hearing is likely to continue for what will seem an interminable length of time.

In short he is the person who feels, and probably is, out of place and irrelevant to the main argument.

For the purposes of this discussion I define the individual as anyone who wishes to appear at a public inquiry but is not:

- a) the promoter
- b) the main objector
- c) so grouped with others as to represent a major additional point of view

It will be observed that this definition depends not on how the person is affected, but basically on their resources at the Inquiry. Whilst at first sight this may seem surprising, it does make somewhat more sense if you remember that we are examining the procedures and therefore the mechanism by which various types of view points can be adequately expressed and taken into account in arriving at the final decision.

Who then is likely to be "an individual" in the

context of these major inquiries:

- a) very probably the actual owner of the site - often there will be more than one site and very often more than one owner
- b) the owners or occupiers of properties nearby
- c) further away from the site there may be quite large areas of residential or other property where the effects will be more remote, but who nevertheless will feel strongly about the proposal. Often they would fall within the definition.
- d) parish councils and in the context of some extremely large proposals perhaps even district authorities, although the resources which the latter can command may well take them automatically out of this definition.
- e) further away from the specific site and the specific proposal are a number of special interest groups. Whether they fall into the category of the "individual" will very much depend on the facts of the particular case. In a few cases they have in fact led the opposition to a proposal; in the majority however their role has been of a secondary nature. I consider them to be on the fringe of my definition.

The category of possibilities is of course endless but those I have referred to give you the flavour of the range of people who can have strong views which they wish to be considered and many of whose voices one would expect to be able to be heard. Nevertheless they generally fulfill a secondary role at any hearing or inquiry.

Before considering where the individual should stand, and how he can be accommodated into a particular system I feel it would be helpful to consider what is the actual purpose of any system of inquiry. There seem to me to be 3 alternatives which are not necessarily mutually exclusive, but are I believe quite distinct.

- a) Decision taking - the person taking the decision holds the inquiry and makes a decision on the material gathered at the hearing eg. as in a court of law or transferred planning appeals where the Inspector takes the decision
- b) Information gathering - the person holding the inquiry does not make the decision - someone else does, who may well take into account material not gathered at the inquiry eg. planning appeals not transferred, Structure Plan examinations.
- c) Checking - the decision has already been made provisionally and the inquiry is intended to gather reasons why it should be a different decision, eg. the Minister's modifications to a Structure Plan.

In the context of major inquiries we do not need to worry about the probability of the inquiry itself taking the decision. Although I am quite sure many of the

people who feel that the present system is not performing adequately are actually trying to change one of the other two types of inquiries into a decision taking one (or as near to it as they can get), nevertheless it looks politically unreal. We do not have, and there seems to be no movement towards, a rigid legalistic system of planning like the land-use zoning that one finds in other countries and there is little chance of senior Ministers spending sufficient time to attend these types of inquiries, nor their delegating the decision to people who have.

There seems to be nothing more calculated to upset the average citizen of this country, than the sense that a decision has been taken with which he doesn't agree and upon which he has not been consulted. There is therefore extreme suspicion against any inquiry which is checking a decision already made. Indeed some of the criticism of what seemed to me to be straight forward information gathering inquiries, is that in practice they are white-washing, the decision already having been made. Whilst I believe that a great deal of this thinking is misplaced and misinformed it does indicate the depth of feeling that can be generated.

The overwhelming probability therefore seems to be that any major inquiry is likely to be of the information gathering variety, and the two crucial questions raised by the debate are:

- a) what is the question which the inquiry should be considering, and
- b) what material that was not gathered at the inquiry may the decision-maker take into account.

The Outer Circle Paper considering major inquiries (for which David Widdicombe is such an able advocate), would like the terms of reference or the question for the inquiry to be as wide as possible. Put in the way in which that Paper is argued, the case seems very plausible. But it is quite clear the group are seeking to widen the scope of a planning inquiry to deal with issues which are demonstrably not planning at all, although they undoubtedly do have a tenuous link with the environment. Indeed the very example which the Paper uses, the Fast Breeder Reactor Generating Station, indicates the degree to which they would wish the question to be widened outside planning as it has been known. They are seeking a forum for questioning whether there should be fast breeder reactors at all on any site. This raises the fundamental question as to where an elected government should consult on individual questions of policy before they come to a conclusion and where their mandate allows them to make the decision and to justify it afterwards in the Houses of Parliament. I will return to this question later.

So the stage is set. We are considering a project or proposal of at least regional significance under a system which is intended to gather information for a politician to make a decision taking into account policy considerations which will not be the subject of the inquiry or information gathering, and which therefore cannot be questioned at those proceedings. Squeezed in a corner of this picture is the individual, by definition low in resources, but believing that he is affected and wishing his voice to be heard.

You will have got the impression from the above that the individual is irrelevant to the inquiry and has very little opportunity of making his mark. I have

been putting it in this way because I believe that a very large number of individuals think that this is how the system works and that is all they can contribute. Before therefore looking at the alternatives, I believe it would be helpful to look first at what is possible under the present system.

The key to successful representation in respect of any inquiry is to look realistically at what is possible. That means comparing what the individual wishes to achieve with the possibilities for the project. In some cases there will only be one possible site that involves taking that particular owners land, in which case the choices open to him are black and white. Either the project is rejected or he loses his land. In other cases there may be intermediate positions and it will then be necessary to balance the cost to him of trying to achieve one of the intermediate results with the benefits that may flow and the chances of his succeeding.

When carrying out this analysis I believe it is also important to examine the actual interest of that client; in the case of an individual that poses no problem, if he doesn't like a particular proposal and believes that it will affect him adversely then it is a straight forward matter to analyse the effects on him and proceed as I have suggested above. However where the client is not an individual but some form of body it is often necessary to look at the purposes of that body. For example, I don't think that any system should go out of its way to assist a club putting forward a view for some individuals, if the club itself, its premises and its purposes are unaffected by the development proposal.

Having decided what it is that the individual wishes to achieve and what is realistically possible, the next

step is clearly to establish who else is making representations concerning the proposal, and how closely the views which they intend to put forward coincide with those required for this particular individual. This doesn't mean that the individuals necessarily have to combine; I have frequently appeared at inquiries where individual cases have been carefully coordinated, but the individuals have remained quite separate. Obviously however if there are groups of people with similar interests and a desire to make their voice heard, it makes eminent sense for them to pool their resources.

Having established the objective of the individual, who else is appearing at the inquiry and how his case will be put forward, ie. in combination with others or coordinated with others. It is then necessary to see which areas of those available he should concentrate upon. This is always difficult because by definition there will be a main objector, whose interests are likely to be different and who may therefore make compromises or put a somewhat weak case when in the individuals' interest the matter could be put much stronger. As the individual is short of resources, the cardinal rule to my mind is to concentrate on the matters that are distinctively his, ie. those matters which particularly touch him, and ignore the general case. Although I am aware of the great difficulty of persuading an individual who feels passionately about a particular proposal of the truth of this approach, anyone who appears at a Public Inquiry, large or small, will know the force which an individual can have when putting a point of view which is based solidly on local knowledge and experience. The most expertly prepared and technically based case in favour of a development project, can so easily flounder on this type of objection.

Of course these views have not dealt with some of the more difficult decisions, which an individual or his advisor has to deal with when enmeshed in a major inquiry. For example, how does he get represented, does he need Counsel, an expert witness or can he do it all himself. How much of the inquiry does he attend. Individual circumstances are so varied that it is quite impossible to lay down any hard and fast guidance of even point in the right direction.

There are two additional comments I would make. If resources are limited they should be spent first on evidence and only second on advocacy. Time spent finding out what the promoters and other objectors intend to say in my experience is virtually never wasted. The more you know about what is likely to happen at any inquiry, the easier it is to decide how your limited resources should be deployed.

I do not believe the present system is anything like as inefficient for the individual as some claim. Many in fact make very adequate representations which do alter the decision. Much of the present criticism stems from a feeling of helplessness which is caused partly by "the facts of life" - eg. that there are motor cars which probably need roads, partly from the extraordinary lack of openness displayed by some promoting authorities and partly by pressure groups representing that a decision against their view point is caused by an unjust system rather than just a different opinion.

In short I do not believe the system is much worse for the "individual" than it is for the main parties, but it can be improved - what does he need?

Because the individual is comparatively poor he needs a system which provides him with a proposal which he can understand relatively easily without a great deal of outside advice, and about which he can put his own views:

- a) where they will be listened to intelligently and sympathetically
- b) without having to involve any elaborate and therefore expensive trappings by way of experts or advocates
- c) without being curtailed by procedures or a restricted question for the inquiry.

There are of course severe limitations as to how far any system can be adapted towards the individual given the nature of the projects or proposals which are under consideration. The implications of imposing a new international airport into a locality are likely to be complex, however well thought out and to whatever level of detail the proposal has reached.

Although the proposal may well be extremely complex the key to their being comprehensible to the individual is generally related to the extent to which the detailed implications have been worked out. For example if an airport proposal has only got as far as giving a general indication as to where the runways might run, but has not looked at the ground traffic implications, there will be a lot of people who could easily be affected but who are unable to make any coherent comment, because they cannot see whether the traffic will or will not pass their door.

In fact at a more fundamental level, it may be more significant than the main protagonist would have us believe, if they are primarily concerned with the "principles". So the essential for the individual is a precise proposal, as precise as possible, where the detail as it affects him can be looked at, can be understood by him and about which he can make comment.

In order that the individual can find out the effect on him, not only has the proposal to have been worked out in reasonable detail but he also has to have access to the information that indicates what any effects may be. In practice this means that it must be adequately documented. Because the individual is necessarily not particularly

skilled it will take time for him to absorb the proposals, work out their effects on him and produce a coherent view to put to the inquiry. Not only therefore must the proposal be well documented, but it must be done so sufficiently in advance of the hearing and be freely available.

In theory a perfectly documented proposal which is presented in its documented form to the inquiry would require the individual to attend for the minimum amount of time because he will only have to appear to give his own view and ideally perhaps listen to the promoting authority's opening. In my experience however it is absolutely inevitable however well worked up a case may be in advance, that it will alter and adapt in presentation to the inquiry and more particularly under cross-examination. Witnesses, I understand, do not always say what their advocates expect (some it is sometimes alleged virtually never). Any individual therefore appearing late in proceedings is very likely to be dealing with out of date facts. As far as I can see this is inevitable. In accommodating an individual it seems to me also inevitable that there will be repetition if each is to be allowed to present his own case and is not required to attend when other cases are presented.

An important question perhaps to be considered is how far the individual can in fact put forward a coherent point of view without the use of a large amount of resources. The Outer Circle Policy Unit takes the view that there should be an equivalence in resource terms between the promoters and the objectors. I can find no compelling facts or argument supporting this assertion and my experience points the other way. I never cease to be amazed at the extent to which a proposal can be "taken to bits" by a suitable qualified advisor without using the large resources inherent in "an equivalence". Provided the advisor and the client have the energy and determination to come to

a coherent answer it is amazing what can be done in a short time and on a limited budget. Nevertheless having said that there is no doubt that a certain amount of resources are essential. It is quite impossible for the majority of laymen to understand and work out the full implications of a major proposal without professional help.

How do those random thoughts fit into the alternative possibilities being advocated by Mr. Justice Parker on the one hand and David Widdicombe on the other. Mr. Justice Parker appears broadly to support the single inquiry concept; Mr. Widdicombe on the other hand appears to prefer a two-level approach where the principles of the development are dealt with at the first hearing and detailed site factors at the second. For ease of reference I will call them the Windscale and the Roskill approaches respectively.

From our individuals point of view it is essential to have a form of inquiry which reduces his own and his advisors necessity to attend the inquiry. This means having a proposal as cut and dried as possible in advance of the actual hearing.

The Windscale approach has the advantage that it is possible (perhaps even probable) that the proposal under consideration will be reasonably precisely thought out and documented. Whilst I am aware of proposals where this certainly has not been the case, I think the chances are reasonable of this happening, particularly if it is borne in mind that a ill-thought out suggestion is likely to be rejected. However there will be only a single proposal on an identified site and in these circumstances the decision can be virtually only yes or no. It is said that it is difficult, if not impossible,

at this type of inquiry to examine adequately alternative sites or proposals. For example, the Swincom Reservoir proposal on Dartmoor was rejected by the House of Lords because they didn't like it. Whilst they may have believed that they knew what the alternatives were, the fact of the matter was that no alternatives were before them and in practice it was impossible for their Lordships to know whether there was in fact a less harmful possibility. I believe however that this difficulty is more apparent than real and I can see no inherent reason why an Inquiry shouldn't deal with more than one site and in fact my firm have been involved in cases where this has been so.

Looking forward one must also take into account the fact that it now seems probable that there will be an EEC Directive requiring an environmental impact assessment in respect of certain proposals. The British Government's attitude to these suggestions is at present uncertain. They have as I understand it been hoping that the British planning system would be deemed to satisfy the Directive's requirements. However this now looks unlikely. For this reason I think it is reasonable to suppose that proposals giving rise to a major inquiry will have been subjected to some form of environmental impact assessment, which in particular will require the promoter or developer to identify alternative sites for the proposal that have been considered and the reasons why they have been rejected.

The Roskill approach is likely to be much less precise about individual proposals because the alternatives will have been identified or at least worked out by the inquiry itself, and it seems to me extremely unlikely that in respect of each alternative the same degree of detail will have been obtained as is likely with the Winscale approach. On

the other hand it is demonstrably easier to look at alternative possibilities and it might be thought that the individual's time of attendance could be greatly reduced. This latter point I believe is a false one in many cases because if the individual concerned particularly with site specific considerations, does not appear at the first hearing in principal of the proposals, he is quite likely to turn up at the second site specific hearing to find that his case has already been substantially prejudiced by the discussion and at least preliminary decisions that have been made when the principal was being considered.

On balance I believe it is likely to be cheaper in the majority of cases for the individual to deal with a Windscale approach rather than a Roskill one. However I think the actual choice very much depends on the nature of the project. It seems to me extraordinarily unlikely that the actual Windscale proposal would have been suitable for a Roskill type of hearing because there probably was only one site which would be suitable. On the other hand the Third London Airport will always have alternatives and it is difficult to conceive a Windscale type of inquiry being able to cope with those alternatives. In my view both formats have their place.

I have been discussing the alternatives on the assumption that the Roskill approach is considering specific alternative sites. This is well short of the actual proposal of the Outer Circle Policy Unit. They would like to see the need for the proposal examined before any actual sites are considered. I entirely agree with them that "need" must always be able to be discussed at any Inquiry.

I take that categoric stance for two reasons:

- a) there are extremely few - if any, developments

which are absolutely necessary. In other words there is a "price" above which the development should not be permitted. It is impossible to weigh the objections or costs of a scheme, unless the need for it has also been examined at the same time and on the same assumptions.

- b) In practice its exclusion from the Inquiry has led to decisions which have been shown to be wrong solely because of this exclusion, eg. the M25 to Leatherhead.

This question however raises a very much more fundamental and difficult issue than the above thoughts would indicate. Need can very easily flow directly from a Government decision and it is therefore necessary to decide to what extent, if any, it should be possible to challenge the Government's decision at the form of Hearing or Inquiry which is ultimately chosen for the particular project. I am not a lawyer nor have I given any particular attention in the past to constitutional niceties, nevertheless it does seem to me dangerous to elect a Government on the one hand and to set up a second method by which legitimate decisions of that Government can be challenged by ordinary citizens in the country, if they are genuine policy decisions.

Ultimately no doubt it will be a matter of reaching the right balance. For me this would mean not being able to challenge policy decisions the country did want to reprocess nuclear fuel or that it did want to manufacture electricity from a second generation of nuclear power stations) but that a Government witness would have to explain the benefits of this type of course so that they could be set against any costs of using a particular site. In other words I would like to see legitimate

policy tested only when it became site specific, in exactly the same way as occurs with individual developers or entrepreneurs. Their commercial judgement is not subjected to investigation itself, but the advantages of a particular development on a particular site certainly are.

It has been inherent in my definition that the individual is short of resources and I have been looking at ways in which the amount of resources which he requires can be kept to the minimum. I would now like to look at the alternatives, that is of increasing resources available to him.

Three possibilities seem to have been suggested:

- 1) Direct State Subsidy, either like Legal Aid, ie. available only to those with inadequate means, or more generally for deserving causes.
- 2) By making the promoters pay, either by as is suggested by the Outer Circle involving the promoters in carrying out the objectors research for them or perhaps by way of award of costs.
- 3) By some form of expert assistance like a devils advocate.

In the context of major Inquiries any approach on the same sort of basis as Legal Aid, would seem irrelevant unless the cut off threshold was very substantially higher than has ever been contemplated for Legal Aid itself, nor is it easy to see how that approach would apply to parish councils or adhoc bodies.

You will be sorry to hear that I am as prejudiced as everyone else and personally have strong leadings

against a general largesse with public funds, even if in this instance it is just conceivable that I might actually benefit from it. I cannot see how the payment of objectors costs out of public funds as a general rule, would actually improve the quality of decisions taken or the ability of the individual to put his case succinctly at any inquiry that is held.

It is my experience that many individuals do manage to put their cases successfully and to bring out points not raised by others. It is not unknown for them to be assisted by experts some of whom certainly do reduce their fees in deserving cases.

I am also left with a sneaking suspicion that a lot of the discussion about the necessity for greater resources is generated because the views which the resources would be supporting have not yet been accepted and it is the lack of acceptance rather than the lack of resources, which is the problem.

I don't think it right or indeed very practical, to expect a promoter to go beyond a point in looking at alternatives which he does not prefer, for whilst any promoter of a scheme must clearly be aware of his alternatives and be able to explain why they have been rejected, I would be against a system that depended on the promoter doing so. I would rather leave that job to those who don't like his proposal in the first place, as they will look at it with much greater clarity and scepticism than most promoting authorities.

The area which I believe could be explored is the one of the devils advocate. Whilst I am attracted to the idea of the inquiry being able to carry out its own homework, I am not attracted by the

concept of an advisory body, ie. a fact gathering inquiry coming to basic propositions before it has heard all the evidence and in many cases before the proposals have been adequately worked out. In practice they are likely to become committed to an answer or to an approach.

The Outer Circle complain that the Roskill investigations went wrong because of the nature of the inquiry and the question asked. I personally believe that the major factor was their use of a mathematical technique which could only partially explain the answer and they became trapped in figures produced. If the cost benefit analysis in which they became enmeshed had not been produced by the inquiry itself, but had been produced by a promoting authority, it seems to me quite likely that the Commission with the "help" of the objectors would have seen the flaws in the argument and the weaknesses in the approach. This is why I am not keen on the inquiry itself carrying out its own investigations.

All my experience leads me to one simple conclusion, that to test a specific proposal thoroughly you need a promoter that is committed to it totally and who has properly worked it through and an adequately briefed opposition to take the proposal to pieces. By definition the individuals about whom I am concerned will be playing a secondary role. There will therefore be a main objector. Nevertheless I feel that it could significantly shorten the length of an Inquiry and probably improve the clarity of the evidence if there were a professional advisor who was available to the "individuals" to help them understand and present a case against the proposal. It won't surprise you to know that I believe that such a person should be in the nature of an expert witness rather than in the nature of a solicitor or advocate.

That is not because I think expert witnesses are less dispensible than advocates, merely that I think whoever is involved will need an expert (witness) to work up the case and the money therefore would be best spent there.

Details of my suggestion are set out in the annexe.

The advantages of making such a person available, who I believe would inevitably have to be paid by the State, is that he could encourage individual objectors to group together and would make the opposition considerably more coherent even if the individuals wished their cases to be put separately. Provided the "devil expert " worked within the right constraints I believe it is likely that major projects would be more efficiently and searchingly examined and the "individuals" affected would feel they had made a "better showing".

"DEVILS EXPERT"

The object of the "devils expert" would be to prepare a combined objection in respect all his "clients" to the particular proposal . Whilst he would be working for a number of separate individuals he would present a combined case, ie. by presenting the common issues and then individual points that applied to particular of his clients.

This expert would be employed by the Government and he would work for anyone who wished to oppose the particular proposal or any part of it and his services would be entirely free to the individuals, provided

- 1) they did not themselves employ either an advocate or any witness
- 2) they did not form part of any group which was employing any advisors

It will be seen that on this basis an individual would be free either to allow the "devils expert" to arrange for this individuals case to be presented as part of a generality, or the individual could present his own case, but he could not in that event call any expert evidence himself, but he could of course rely on the evidence being given by the "devils expert".

If an individual had instructed the "devils expert" and then decided, or was advised, that he should present expert evidence on his own, or should employ his own advocate, and then he would have to pay for the time spent on his particular case by the "devils expert", but not for any general work which was not specifically allocated to him.

I believe that the "devils expert" would have to be

able to refer to a committee rather in the same nature as the Legal Aid committee, because he would be responsible for deciding on the appropriate level of advocacy for the particular proposal and whether additional experts should be employed, but I believe that the decision would have to be made by this committee on his advice.

The "devils expert" would be able to give evidence himself, within his own expertise, and he would be subject to the normal rules, namely it must be his expert view that he is putting forward.

I would envisage that if he only had one or two individual clients with small issues relating to peripheral matters to the main proposal that he would probably be able to present such a case himself. However where the case was complicated and he needed to give extensive expert evidence it clearly would be necessary to employ a barrister.

I should emphasise that the above is only the sketchiest outline of an idea, which would be intended to help not only those who could not afford proper expert advice, but also to shorten and make more coherent, some of the major public inquiries.