# JOINT PLANNING LAW CONFERENCE

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HOW PLANNING DECISIONS CAN BE CHALLENGED
- THE ROLE OF THE LOCAL OMBUDSMAN

by

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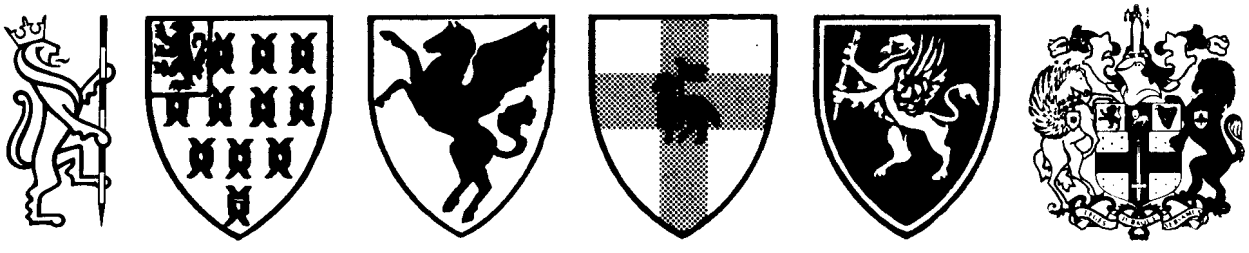

## INTRODUCTION

The office of Ombudsman is a relatively new addition to the institutions of government in the United Kingdom dating from the appointment of the Parliamentary Commissioner in 1968 after the Franks Commission and Justice reports which in turn followed the Crichel Down affair; that, in case you've forgotten, was about the Ministry of Agriculture's perceived error in not, (as they had undertaken to do,) offering back to the farmer the land taken from him, by exercise of compulsory powers, for military use in the War. Outside the United Kingdom the Ombudsman is not new; he was conceived by the Swedish sometime between Trafalgar and Waterloo and I think the word is pseudo-Swedish for "legal representative" though, as you know, he is in truth an examiner of complaints against central or, as in my case, local government.

England is divided into three areas with an Ombudsman assigned to each - one for the north in York and two in London for the south looking respectively east and west of London. Under the Local Government Act 1974, as amended in 1978, we hold a royal warrant issued on the recommendation of the Secretary of State for the Environment.

I have a large number of planning complaints, over 400 in 1984-5 and 43% of the total of all complaints I received in that year. Complaints increase by roughly 10% a year and yet the percentage of planning complaints remained roughly the same, although it has been as high as 49%.

## JURISDICTION

Having created us the legislators, wisely some say, restricted our powers so that we should'nt get too big for our boots. I think the most significant limitation, particularly relevant to planning issues, is that we cannot challenge the merits of a Council decision taken without maladministration unless it was so wayward that no reasonably fair-minded body could have so decided in the facts. Such findings are rare but there is a case on our files where a former Local Commissioner said in his published report; "In my opinion their (the Members') decision was so unreasonable in the circumstances as to be classed as one taken with maladministration".

Generally speaking therefore I am not able to help outraged citizens who simply don't like the look of the thing next door, its size, shape or smell or even whether it should be there at all unless it arrived as a result of some

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administrative error on the way. The principle from which that derives must be sound. Local planning authorities consist of elected representatives whose duty it is to apply commonsense and judgement, with the benefit of professional advice, to proposals put before them. The democratic process as presently practised would be seriously undermined, if my opinion could be substituted for theirs. Of course, the case is quite different if the decision was reached after some administrative error or omission - then I must point that out, and that can lead me to challenge the basis of a democratically-reached decision. Thus, if a planning officer failed to put to his Planning Committee a proper resume of the objections he had received to the application in question I could find that the members' decision was taken without considering all the material facts, provided of course the objections had a bearing on material planning issues.

As well as guiding me on the scope of my findings the Act also limits, as I have said, what I may investigate. Thus I am precluded from investigating complaints where there is a statutory right of appeal or a remedy at law. Again, were this not so I would perhaps come into conflict with a Government Minister, a chairman of a tribunal or a judge; perish the thought. Consequently if a disappointed applicant for planning permission comes to me I must say - "I cannot help you - you must exercise your right of appeal." There is a qualification to this bar. If - in the words of S26 of the 1974 Act - I am satisfied that "in the particular circumstances it is not reasonable to expect the person aggrieved, to resort or have resorted to" the relevant right or remedy, then I may, and indeed do, from time to time investigate such a complaint.

For example, I frequently receive complaints where although the members may have refused planning permission on the merits an applicant was, beforehand, grossly misled by officers as to what the Committee would accept. The DoE inspector has no remit to pronounce on such matters, whereas I do, and it would be unreasonable to refuse to entertain the complaint on jurisdictional grounds simply because the action complained of is bound up with a merits decision to which there was a statutory right of appeal.

There are a number of other jurisdictional exclusions not especially relevant to planning matters. They are to be found in S26 and the 5th Schedule to the 1974 Act and one example is that I cannot investigate matters concerned with contractual or commercial transactions, but I can look at land transactions, and at the tendering process whether it involves land or not.

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PROCEDURE

A word about procedure - the beauty of the Ombudsman system is its informality and enquiries are inquisitorial and not, as in the courts, adversarial where the judges decide on the facts, law and arguments put in front of them. Subject to the statutory provision that investigations must take place in private, procedure is at my discretion and I have therefore to be on guard against becoming bureaucratic and rule-bound. Hence I try to keep bureaucratic or procedural rules to a minimum. However, there are some. For a start, a complaint must be submitted through a member of the local authority. Those with more experience than I say, and I can support the view, that it is an unfortunate rule which can deny us knowledge of some genuine grievance which a councillor will not pass on, in consequence of which the complainant is discouraged or obstructed. We have, I believe, quite properly endeavoured not to refuse help to complainants who come to us directly, we advise them and if need be ask the Mayor or Chairman of the local authority in question to "rectify" the procedure by formally endorsing the complaint back to us. We do have a proforma for complaints but we certainly do not insist on its use and take any written evidence which identifies a grievance.

THE STAGES IN CONSIDERING A COMPLAINT

When I receive a complaint it is screened for jurisdiction and prima facie evidence of a valid complaint. The second stage, if reached, is for the Local Ombudsman to ask the Council via the Chief Executive for their comments or first response to the complaint. If the matter is not thereby resolved we move on to the next stage which consists of a full investigation. The case is assigned to one of the Commission's full-time investigators who sees the complainant, interviews the Council members and staff who were involved in the matter under question, reads the files, looks at documents and visits the locality. All the information is then written up in a report, sent in draft for comment to the complainant and Council. As a result of which a factual account is agreed between the parties. Then I pass judgement, state my finding and publish my report. The report identifies the Council but otherwise does not identify the persons referred to. It is then up to the Council to respond to my report and for me to say whether or not I am satisfied.

I will deal later with the question of remedies, but at this stage I must emphasize that in planning matters it is not always practicable to undo what has been done, and the greater the error, the greater the difficulty. I ask Councils to consider revocation or modification as and when it is appropriate; more often than not the victim of the maladministration has to be compensated in cash or kind. In more trivial cases he will receive an apology. If my view is

not accepted by the Council and I am not satisfied, I am required to issue a further report which also must be published. In my short experience further reports have produced a more favourable response so perhaps the adverse publicity helps. My last chance, which to local authorities may seem rather vindictive, but in my view necessary, is to say in my published annual report why I was in disagreement with the Council in question. Happily these occasions are exceptional.

## EXAMPLES OF BAD ADMINISTRATION

### 1. Misinforming an applicant

Interested parties frequently seek the help of the planning office by asking for guidance. I would always urge planning officers to do their best to respond. If they do, the advice should be recorded on the relevant planning file and the enquirer should be warned that the Members determining an application will not necessarily follow their advice. In fact many of the complaints I receive are about cases where the members have "rebelled" for one reason or another. In one part of my area there is something of a problem because Members do not like the policies of the County Structure Plan and tend to ignore them.

### 2. Inspections

Failure of an officer to inspect a site to be developed for the first time next to existing buildings can lead to disaster. It is perhaps not surprising to find instances where an officer has not visited a site because he feels he knows it well. But there is no substitute for studying the site at first hand with the deposited plans. There are few occasions when I could not regard a failure to make a site visit as maladministration.

### 3. Notification

Failure to notify those who might be adversely affected by development can amount to maladministration even though the law requires notification of planning applications only for particular classes of development. I think the Commission has achieved desirable improvement in the extent to which some local authorities have informal arrangements for this purpose. For the most part, voluntary notification is at the discretion of the Chief Planning Officer, often delegated to the case officer; and the most common means of notification are by formal letter or "carding". In the latter case the officer inspecting the site leaves a card at the houses of those he considers might be affected adversely. Where such notifications give a particular deadline for comment it is important to ensure that the application is not determined before that deadline.

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4. Amendments

A number of cases arise where neighbours are consulted about a submitted plan; they object; the plan is then substantially amended; and the amended plan is not revealed to neighbours, who are more adversely affected than at first. Members usually determine the application in the knowledge only of the objections made to the original plans and can obtain quite the wrong impression.

5. Failure to consider representations

Councils cannot afford to ignore objections, and summaries of objections need to be carefully prepared so that no material planning factor is omitted. Some local planning authorities rely entirely upon an oral presentation, but this is not good enough as many Members like to visit development sites knowing what the officers recommended before the relevant planning meeting.

6. Members' interests

There are a number of worrying cases where members intervene and have an interest which is not financial. These matters are dealt with in the National Code of Conduct for members. The advice ought to be read as a guide; to take it literally might be impossible in a small community or even in a large community - I am reminded of the 18th century Tory who remarked "Damn the Whigs, they're all cousins".

7. Policy

It is a source of complaint that in particular cases policy statements have been ignored. This is a difficult area but can be maladministration, as I indicated earlier. My predecessor found against a local authority where, in considering an application Members were wrongly advised on the meaning of a County Structure Plan.

8. Improper considerations

Cases still emerge where the planning authority seem to have taken account of non-planning issues in considering an application. In some small communities it is difficult to put on one side the particular circumstances of an applicant with which all the Members are familiar and in practice, planning is not only political but very personal.

9. Delay

This can of course cause injustice at all stages of the

process but particularly if enforcement action is involved.

10. Imposing unenforceable conditions

Conditions are often imposed which are irrelevant, imprecise or do not give effect to members' wishes. It frequently happens that conditions are attached stipulating that no house on a new estate shall be occupied until the estate roads are finished to base course. The difficulty arises when a house is occupied in breach of condition in that it is the new occupant who is in breach. This sort of unsatisfactory condition is much relied on in cases of a Section 38 Agreement or use of the Advance Payment Code.

11. Errors in setting out

These seem to some degree inevitable, and if the error is minor it doesn't matter. Cases arise however when the Building Regulations plan is quite different from the planning application plan because the two have not been married up and the resulting error is "gross". The Commission has persuaded many authorities to introduce a system to ensure that this does not happen.

12. Established Use Certificates

Cases arise where the planning authority have acted solely on evidence supplied by the applicant. This will be unavoidable in some cases but it is always prudent to seek independent confirmation from neighbours or others having knowledge of the site history.

REMEDIES

The results of some planning errors are retrievable others are not. The Commission certainly ask Councils to consider revocation or modification in appropriate cases. For example, where a local planning authority ignored County Council advice about imposing a condition about an access or where an established use determination was so inept that the so-called "established use" which had been certified had, in equity to be, removed.

In other circumstances the only reasonable remedy is an apology, costs and compensation. For example, if a Council allow a house to be sited contrary to the approved plan in a way which severely affects a neighbour's amenity, I would ask the Council to appoint an independent valuer and pay the neighbour an ex gratia sum to reflect the extent to which his property was devalued. The sort of settlements we have achieved in this category range from £500 to £2500 and on occasions was higher. One authority admitted that they had mistakenly given planning permission for the siting of oil

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storage tanks and agreed to have them moved at a cost of £20,000.

As I said earlier the LO has no power in England to enforce his findings - whereas in Northern Ireland complainants can, and do, seek an order from the County Court compelling the Council to pay and the Court may increase the Commissioner's "award". The Court cannot challenge the Commissioner's finding.

On the other hand the UK Commissioners' rate of success by persuasion looks quite reasonable, at least as a statistic. Up to 31 March last 1619 reports had been issued, 1442 were settled satisfactorily; 85 cases were incomplete (because the Commission were awaiting the Council's response) and there were then 92 cases which resulted in an unsatisfactory outcome in whole or in part. You will I'm sure bear in mind that we have had in the period from 1974 to the end of March 1985 23,281 complaints, 80 per cent of which were rejected for want of cause or for reasons of jurisdiction. However, my personal view is that it is wrong that even one complainant whose complaint has been upheld should go without his remedy.

The future of the service

As a late practitioner and an object of investigation I had my doubts, or perhaps more accurately prejudices, about the Ombudsman service. But I was wrong: it is a valuable and effective check and preferable to an administrative court. I earlier referred to the "beauty of the system" and now I know about the Commission at first hand I conclude that there is much to be said for informality of the Ombudsman enquiry - it is cheap and indeed can cost the complainant virtually nothing - the inquisitorial approach is followed to reach, ideally, an agreed statement of facts. It is cynical but none the less tenable view that the adversarial approach traditional in our courts is not a sure course to determining the truth. In the nature of the complaints I examine it is helpful that I can ask questions and pursue lines that seem to me pertinent rather then preside over a debate between the parties. I think the statistics show that by and large the system is effective. If worries develop about our lack of sanctions then the Northern Ireland provisions could be invoked.

A little self criticism - our procedure is slow:- on average the Commission take 41 weeks to complete a full investigation. This time scale could be reduced with more staff resources but we are financed - to the extent of one and a quarter million pounds- by precept on local authorities and therefore suffer all the constraints that they do. I find this an oddity and it would be better if the service were funded by the Exchequer, providing there was a commitment to paying for an adequate standard of service as I

believe they do in the case of the Parliamentary Commisioner's office. This must be a job which takes the time it needs - short cuts will not do - with more staff the period can be shortened of course.

Is there really any issue from which the LO needs to be debarred? - commercial transactions, issues affecting all or most residents, education issues. Do we necessarily have to await a complaint? If knowledge of irregularities comes to the Commission why should we not as in other countries have the right to initiate an enquiry? One of the questions raised is against the system so I should deal with it. Why am I infallible and why shouldn't I be overruled. I have no Greek but I'll venture a little Latin with great trepidation in this seat of learning - Quis custodiet ipsos custodes - alternatively the doggerel about the infinite flea who bites 'em. If I exceed my powers I expect the courts to administer the appropriate rebuke and squash me flat. Otherwise do I need to be reviewed? I don't think so - I have explained how I try to agree the facts - I am employed to give my opinion on the facts found. If my opinions are consistently foolish then I should be rusticated, but I am an arbiter, a mediator and an umpire and it is futile and demeaning to quarrel with the referee on the sports field or anywhere else. I nonetheless recognise my failings and of course I can be wrong, but so can we all.

The scope and effectiveness of the Ombudsman service does seem to me sometimes to be a much too well kept secret. I have watched with a smile other interests like the banking and insurance industries embracing the idea and it would be a pity if the Ombudsman service developed in this fragmented way. Other situations needing recourse to challenge do arise and it would be better to build and improve this institution rather than create another separate office. The Ombudsman can, I feel, be given free rein to enquire into government and administrative activity to the benefit of all we are intended to protect.

F G LAWS

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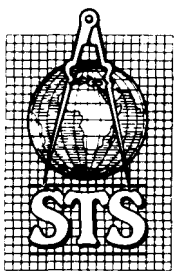


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