

JOINT PLANNING LAW CONFERENCE

**MATERIAL CONSIDERATIONS
IN TOWN AND COUNTRY PLANNING DECISIONS**

**THE RESPONSE TO THE EXPERT - THE WEIGHT TO BE PLACED
BY LOCAL AUTHORITIES AND CENTRAL GOVERNMENT**

by

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THE RESPONSE TO THE EXPERT:

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1. INTRODUCTION

One of the features of a planning practice which has most attracted me over the years has been that one spends much of one's professional life examining and, more to the point, cross-examining expert witnesses. Not for us the bluff frontal attack required by the criminal or common-law advocate, when challenging a witness of fact. That usually goes along the lines of: "I must put it to you, Mr Bloggs, that you were there on the evening in question?"

"No I wasn't".

"And that you did strike the complainant with your fist, repeatedly?"

"No, I didn't"

"You then ran off, up the alleyway, didn't you?"

"No, I was never there".

"And what you have told the jury is a tissue of lies?"

"No, it ain't".

Something rather more subtle is usually required with the expert witness, intended to demonstrate not that he (or she) is failing to tell the truth, but rather that his ultimate conclusions are not soundly based. Perhaps he has failed to obtain the factual data necessary to arrive at a truly reliable judgment, or has ignored recent research into the subject, or has simply not handled the data in the right way. In short, one is concerned with the soundness or otherwise of the conclusions reached by the expert witnesses.

There can be no doubt that the expert witness, and for that matter the expert adviser, are central to our town planning system. Expert planners, highway engineers, architects and others advise developers; they advise the Planning Committees on applications before them; they give evidence at public inquiries; and normally those who act as inspectors and certainly those who act as technical assessors are themselves professionally qualified in some field regarded as of relevance.

But how is the expert regarded today at local and national level? Is there, as some have suggested, an "anti-expert" mood gripping the administrators? If there is a distrust of experts, what can be done about it? Indeed, should anything be done about it, or is it a healthy scepticism? And do we place enough weight or value on the judgments of the experts? I do not pretend to be able to provide answers to all these questions during the next few minutes, but I will try to provoke some debate.

2. THE TASK OF THE EXPERT

I suppose that the apogee of the expert, the pinnacle of society's use (if not regard) for him was reached at the time of the Roskill Inquiry into the Third London Airport. Not only was the Commission itself composed of experts in transportation, planning, engineering and economics - that last discipline being represented by a certain Professor Alan Walters; I have often wondered what happened to him - all presided over by a High Court judge, but hosts of expert witnesses gave evidence, and techniques were employed to try to reduce subjective judgments to a minimum. A Research Team of a score of professionals advised the Commission directly. And cost benefit analysis was used to the full, not only to put a value on travel time (a well-established area for such techniques) but also to do the same for noise, safety, the effect on agriculture, schools and recreation, and so on.

All this expertise led the Commission to recommend a site at Cublington, otherwise more appropriately known as Wing; though Professor Colin Buchanan dissented in favour of Foulness. Despite all the expert activity over two and a half years, the Government rejected the majority recommendation and plumped for Foulness - though perhaps not surprisingly they preferred to re-name it Maplin. As everyone here will know, in the end the Third London Airport turned out to be Stansted, and those who believed in the conspiracy theory of history had a field day.

I recount that familiar tale simply because at the time of Roskill, there seemed little doubt that at least in some administrative circles the expert was seen as having an enormous amount of help to offer in decision-making. The emphasis has diminished somewhat since then, and certainly one would recognise today that subjective judgments can rarely be eliminated in planning.

Of course, that in itself in no way reduces the role of the expert witness or adviser. It is because he or she brings to the making of the judgment both professional skill and experience that the expert is needed. The inability to quantify some consideration, such as the importance of a piece of landscape or the significance of a listed building, does not mean that one can dispense with the expert. Often, the inability to quantify may make the expert's judgment of even greater value, because it may be all or virtually all that one has to go on.

Therefore, though one often gets a higher degree of quantification possible in the evidence of, say, highway engineers than in that of planners, both have valid roles as experts. Some degree of personal judgment is probably inevitable with all expert evidence, even if only in the selection of facts and their presentation. It may, for example, be indisputable that there is traffic congestion at the signal-controlled junction near the appeal site during peak hours. But there may be many ways of analysing that situation - how long does the congestion last during the peak hour? How long does it take the individual motorist to get through the lights? Can he get through in one cycle ("in", not "on") of the lights?

One hears of local authority members sometimes rejecting expert advice on the basis of "common-sense". That is their entitlement under our system, and I would be the last to eschew the use of common-sense in planning. Experts are often wrong - fortunately, they're usually the ones on the other side! But common-sense can be an unruly horse. The plea of common-sense can be a cover

for ignorance or prejudice or self-interest. The effect of food superstores on small corner shops was regularly judged by local authority members to be very harmful as a matter of common-sense: they saw the number of corner shops decreasing and the number of superstores growing and deduced that there was a causal connection. And it was very difficult to persuade them otherwise, until the D.O.E. committed itself in Circular 96/77 and summarised the existing research in the words:

"The larger food stores appear to have had very little effect on the trading position of the independent food retailers within 15 minutes drive time." (para.9)

No doubt there will always be some scepticism about experts - they should be on tap, not on top, as the saying has it. But what would be more worrying would be if that scepticism were to be based on a mistrust, not of the expertise but of the integrity of the professional person concerned. There is obviously potential for suspicion built into the system: the private consultant giving evidence is, after all, being paid by his side to do so and his evidence supports that side of the case - at least in chief! The local authority officer is an employee of that authority - in most cases he would not wish to prejudice his future employment with it. And inevitably when two experts disagree, each lending his support to his client's or employer's case, there will be those who see the expert merely as a gun for hire. As a politician once said, "These are my principles - but if you don't like them, I have others!"

It is important for public credibility and administrative trust that expert witnesses are seen as giving their own personal professional judgment. Some of the professional institutions require this of their members under a Code of Conduct or similar set of rules. Thus, the R.T.P.I.'s Code of Professional Conduct says in terms:

"A member must not undertake any duties or carry out any instructions of a public or other employer or a client or supervisor which involve making statements purporting to be his own but which are contrary to his bona fide professional opinion." (Article 3)

The R.T.P.I. Practice Advice Note no.4 expands on this in the context of giving evidence at public inquiries:

"The town planner as a witness at an inquiry is there to give evidence which must be true evidence, true to the best of his or her understanding and knowledge. If the evidence is of facts, they must be true facts and, if given in the form of a professional opinion, it must be the planner's own professional opinion if it is to carry weight as expert evidence." (section 2)

The qualified way in which that last sentence is put is intended to cover the situation where the witness is not giving evidence in the form of a professional opinion; that is to say, usually where a local authority officer is giving evidence about either the views of the Committee or about the opinion of a superior officer. In that case, he gives evidence of fact, not of his own professional opinion. And he must not dress it up as his own professional opinion.

So far as I have been able to discover, the R.I.C.S. does not spell out the duty to be true to one's own self quite so explicitly. Maybe it takes the view that chartered surveyors do not need to be told it so bluntly! All I can find is that under the Rules of Conduct, bye-law 24(1),

"No Member shall conduct himself in a manner unbecoming a Chartered Surveyor."

There are also prohibitions on misleading publicity.

I note that the obligation under the R.T.P.I. Practice Note is in effect to tell the truth on factual matters, somewhat more limited than the oath taken in court (and sometimes at enforcement notice inquiries) to tell the truth, the whole truth, and nothing but the truth; but perhaps that is implicit. Even so, what is the extent of the expert witness' duty when giving evidence at an inquiry? Is it analogous to that of a barrister in court, who has a duty to disclose

to the court cases which may be against his argument? Is there some obligation on the expert at a planning inquiry to put before the inspector, for example, previous Secretary of State decisions that may be of relevance?

My own view is that the expert's duty does not extend that far. Certainly the expert witness must not mislead by partial disclosure of the facts, and it would be a foolish witness who did so, since he would be likely to have his sins revealed in cross-examination. But the parallel with the barrister's duty in court is misleading. Relevant cases must be brought to a court's attention because precedent is at the root of the common-law. The planning system is not founded upon precedent as such; indeed, planning decisions will normally turn upon a balancing of many considerations, which will vary from site to site as, in the classic phrase, "a matter of fact and degree".

Thus I see no duty on expert witnesses to produce Secretary of State decisions contrary to their case, though it would be wise to do so if there is a particular decision which is highly apposite and spelling out a policy approach on the part of the Department. But I cannot think that inspectors would wish to be burdened with yet more voluminous sets of previous appeal decisions and inspectors' reports - rather the reverse. There have been one or two leading firms of consultants who have taken this approach sometimes to extremes, managing to present their own personal threat to the rain forests of the world.

But I come back to emphasise the importance of the integrity of expert witnesses. Those of us involved in planning, especially at the inquiry stage, constitute a fairly small world. It soon gets about if a particular consultant is willing to bend his views to suit his clients, and if that happens, the consultant should not be surprised if the Inspectorate and others do not attach the same weight to his judgments. I can think of one very good friend of mine, a distinguished planning consultant, who demonstrated the proper approach to be adopted in these matters at the inquiry into the

Waterdale Park proposals - that was the proposed regional shopping centre on the "golden triangle" site in Hertfordshire. He gave evidence in support of the developers on shopping need and impact, because that accorded with his professional views; but I happen to know that he refused to give evidence for them on the Green Belt issue, even though he was professionally qualified to do so, because he could not support their case on that aspect. That was very right and proper.

I have to admit that I enjoyed teasing him in cross-examination about his reluctance to give evidence on the Green Belt issue, but in the event his reluctance told its own story!

So far I have been dealing with the expert and the response to him in fairly general terms. So long as an expert is seen as possessing skill, experience and integrity, one would normally expect central and local government to attach some weight to his advice or evidence. How much weight is to be attached must depend on those personal qualities of the expert in question and the thoroughness with which he has done his job in the particular case. If he has noticeably failed to do his homework, he cannot justifiably be surprised if his opinion is treated lightly. A planning officer supporting an objection on noise grounds to a D.I.Y. store who has failed to take any account of Circular 10/73 and its advice is getting perilously close to being a non-expert witness on that topic, if he can offer no more than the every-day experience of noise common to any adult.

But there is a distinction to be drawn between the way in which local government and the way in which central government treats the expert on planning matters. At local authority level, lay members are receiving and assessing expert advice and evidence as best they can, normally without planning expertise themselves. The vast majority of decisions made by or under the auspices of the Department of the Environment, however, are made nowadays by inspectors who are

themselves professionally qualified and experienced. Even those few members of the Inspectorate who have at times entered it without a professional qualification have undergone a considerable training process before starting to act as inspectors. Here therefore one comes upon a somewhat different relationship, where expert may speak to expert, or at least where an expert in some aspect of planning sits in judgment on evidence given by other experts. How does this relationship work in practice?

3. THE EXPERT AND THE INSPECTOR

It is, I believe, a strength of our system that we use professionally qualified inspectors and technical assessors. One can contrast it with other proceedings in which expert witnesses give evidence, such as the courts and arbitrations. Arbitrations will, of course, often involve the use of arbitrators who are professionally qualified in the discipline principally involved, and one also has the example of the Lands Tribunal with its unusual blend of surveyors and lawyers as the decision-maker.

But it is not always thus. In the courts, judges and sometimes lay jurymen and jurywomen have to arrive at judgments as to which expert evidence to prefer. And there are some arbitrations where the inexpert ends up trying to assess the expert. I still have vivid and somewhat depressing memories of an international arbitration concerning a major petro-chemical disaster and its causes. There was an immense amount of highly technical evidence on the behaviour of huge sheets of steel at below zero temperatures, on crack propagation in such material, on welding techniques, and on how large quantities of liquid chemicals behave in various circumstances. The arbitration panel consisted of three, one nominated by one side, the second by the other side, and the third member being the crucial "neutral" member. He was an elderly retired judge, not from this country; and his grasp of the very important technical evidence would be demonstrated by the question which he asked early on in the course of each week of the lengthy proceedings: "Tell me, Mr Keene, am I not right in thinking that there are 25.4 millimetres to the inch?" I would regularly reassure him on the point.

Despite this, or perhaps because of it, we won in the end. But it is an extreme example of the futility which can occur when expert evidence is being given before an inexpert tribunal. That is normally avoided under our planning inquiry system. Indeed, it is evident that the D.O.E. deliberately tries to ensure that the inspector has the necessary technical expertise for the particular case in question -hence the use of architects as inspectors for listed building inquiries. If the inspector lacks the necessary expertise for a particular technical matter, he is as we know often provided with a technical assessor.

This use of the "expert" as inspector or assessor can have disadvantages. For example, members of the public may feel excluded from the debate on certain technical issues when it is being conducted between an expert witness and an expert inspector. This is a particular danger under the Inquiries Procedure Rules where much technical evidence is taken as read, and the public hears only a summary. I can see no way of avoiding this limit on the involvement of the public. Major inquiries are highly technical, and it is bound to be difficult for ordinary members of the public to follow the detail of technical evidence on (for example) the chemical composition of dioxins and furans that would result from a proposed toxic waste plant. So this is a disadvantage inherent in the type of decisions to be made, and only slightly increased by the use of expert inspectors.

There may be certain procedural difficulties which can arise from the use of expert inspectors and assessors. This conference is concerned with "material considerations", but part of the experience of the inspector or assessor may have resulted in him possessing certain factual knowledge, quite extraneous to the inquiry proceedings. This may especially be so in a highly specialist field. To revert once more to the example of a toxic waste incinerator, the assessor may know that an existing plant being referred to in evidence for comparison purposes has a number of different features from the proposed plant. That factual information is possessed by him largely because he is technically qualified and expert. In my view, he should undoubtedly bring that information to

the attention of the parties during the proceedings, so that they have a chance to comment on it.

But reference to the inspector's expertise raises the issue of how far the evidence of an expert witness is itself a material consideration, one that must be taken into account. And how far the inspector is entitled to override the expert evidence on the basis of his own judgment and expertise. Questions such as these tend especially to arise when it seems that an inspector has taken little if any account of the evidence of a well-recognised expert in the field.

On the first of those questions, my own view is that there is a distinction to be drawn between a material consideration and the evidence given about it. Take the case of a listed building. The importance of the building in architectural terms would invariably be a material consideration that must be taken into account in the decision-making process. The expert opinion of the witness on that matter is not itself a material consideration, but it is almost certainly relevant evidence about that material consideration. Therefore if it can be shown that the inspector wholly ignored such relevant evidence, there may well be grounds for upsetting the decision.

On the other hand, it is for the inspector to evaluate the evidence and to decide on the weight to be attached to any particular piece of evidence. And it is here that the inspector's own expertise is of particular importance. He does have a judgment to exercise, using that expertise. Even if all the expert evidence is supporting one conclusion, the inspector is (I believe) entitled to arrive at a different conclusion by applying his own judgment to the facts.

If that sounds heretical, take the case of a proposal for a house in a rural location, where the planning authority objects that the house would be damaging in landscape terms and that its access would cause traffic hazards. At the inquiry, evidence in support of these propositions is given by the planning officer and an engineering officer. The Appellant appears in person and gives evidence on his

own behalf on these topics, albeit lay "non-expert" evidence. Is the inspector bound to suspend his own judgment and accept the opinion of the only "experts" called as witnesses? I believe not, and would suggest that he is entitled to conclude (if the facts are available to be so interpreted) that the house would cause neither significant landscape damage nor traffic hazard. His own expertise may not itself be a material consideration, but it may enable him to prefer the non-expert opinion to the expert.

He will, of course, have to beware the pitfalls of relying on facts observed only on the inspection of the site after the inquiry and not discussed during it: see Fairmount Investments Ltd v. Secretary of State for the Environment (1976) 1 WLR 1255. But subject to that precaution, the inspector can in appropriate cases decide not to accept the judgment of the expert witness, even though it may not be counterbalanced by that of some other expert. That may be galling to the advocate, not to say the expert witness and the client, but I believe it to be inherent in our system of professionally experienced inspectors.

There are those amongst us who believe that inspectors who are themselves "experts" may be more inclined to be influenced by their own personal tastes and even idiosyncrasies than a non-expert would be. No doubt there is a risk that an individual inspector may hold strong personal views and may allow them to distort his or her assessment of the evidence. One does come across the occasional inspector who, especially on inquiries involving the Green Belt,

begins the proceedings by announcing what he sees the real issues as being and what he wants to hear evidence about.

Clearly there is a danger in such cases that the inspector will have formed a view of what he should decide or recommend before hearing the evidence, and again in listed building cases it must be difficult for any inspector to allow his own personal assessment of the building's merits to be overcome by the evidence from the parties. Even so, do these dangers really require a change to the system? One cannot escape from human failings and personal judgments in any system concerned with resolving disputed issues. I certainly do not believe that the influence of personal taste and idiosyncratic views would be diminished by using lay rather than expert decision-makers. Nothing I have come across leads me to conclude that personal prejudices on planning or listed buildings are to be found less often or less rigorously embedded in the ordinary citizen than in the expert.

None of this should be taken to mean that an inspector can properly disregard a relevant piece of expert evidence from one of the parties. Moreover, the experience of the expert witness may very well be relevant to the weight which the inspector attaches to his evidence. But the assessment of weight is, as the courts have repeatedly emphasised, a matter for the inspector and his judgment.

4. CONCLUSION

I conclude as follows: strictly speaking, the opinion expressed by an expert at a public inquiry or at the earlier stage of the local planning authority's decision should not be regarded as a

material consideration in itself. But if it is relevant to a material consideration (which it ought to be, if it is to avoid being a waste of time and effort) then it is relevant evidence which the decision-maker should take into account, attaching such weight to it as he thinks fit.

For my part I have not observed the development of any more hostile or less receptive attitude towards the expert on the part of central or local government. Expert advice will not always be followed, of course, and expert evidence will not always be accepted - but why should it be otherwise? Planning history is littered with examples where the experts were subsequently proved wrong - population forecasting being one of the most notorious instances.

None of that is to belittle the role of the expert. We cannot operate the planning system without him (or her), and merely because he is not always right is no reason for dispensing with his services. Nor do I see any prospect of that happening: those here from the R.I.C.S. may therefore relax, and those of us who make our living from the testing of expert evidence may also take heart: the Day of the Expert is still with us. Glad confident morning it may no longer be, but there are still many golden hours to go before sunset.

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